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25TH ANNUAL ETHICS SYMPOSIUM IN CRIMINAL LAW

ARTICLES

COMMENT

TRANSCRIPTION

FOREWORD

CRAIG ESTLINBAUM[†]

South Texas Law Review's 25th Annual Ethics Symposium in Criminal Law arrives at a critically important time. Criminal law reform has become a major discussion point around the state and nation in recent years. The discussions frequently focus on issues such as wrongful convictions, over-incarceration, racial disparities, immigration matters and beyond. Elected officials, judges, attorneys and community advocates across the political spectrum have grown acutely attentive to criminal law concerns.

This symposium examined those issues, and others, and asked, "How does one create a criminal justice system that is more efficient, more fair and more just?" The articles in this issue attempt to answer this central question.

In *Choosing Choice: Empowering Indigent Criminal Defendants to Select Their Counsel*, Professor Catherine Burnett proposes a client based indigent defense model where indigent defendants may choose their attorney.[1] The various public defender systems that deliver criminal defense services to the indigent are frequently under attack. Public defender systems are frequently criticized for being under-staffed and under-funded.[2] These systems foster patronage allegations and raise questions about whether judges have conflicts of interest that prevent them from selecting the best lawyer in the case.[3] Burnett argues that a model incorporating client choice would invest indigent defendants with greater agency—they would, she argues, be more likely to actively participate in the process and accrue greater trust in the outcome. Burnett describes Texas experiments in client choice-centered test programs where results hold promise. She argues that, if the experiment's results can be replicated and refined, it may result in an indigent

† Judge, 130th Judicial District Court of Texas and Adjunct Professor of Law at South Texas College of Law Houston. J.D., South Texas College of Law Houston; B.A. and M.Agr., Texas A&M University.

1. *See infra* p. 275.

2. Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75, 92 (2017) (stating that public defenders in most states are "systematically overworked and underfunded").

defense system that is more efficient while producing fairer results and lower recidivism rates.

In *Providing Legal Service to Inmates*, Professor Bradford Colbert describes the history of incarceration in the United States and the modern trend toward mass incarceration.[4] Two snapshots in time frame the issue. First, in 1978, about 350,000 people were incarcerated in the United States[5]—in 2018, an estimated 2.3 million persons were incarcerated.[6] While the nation's population has increased by about one-third, incarceration has increased more than six-fold. Second, state incarceration expenditures have increased from $6.5 billion in 1985 to $51.9 billion in 2016—a more than eight-fold increase.[7] The cost of mass incarceration is staggering in both dollars and in human terms. Colbert addresses political and societal changes that have contributed to mass incarceration and proposes an inmate-centered approach to reverse current trends.

In *Brady v. Maryland*, the United States Supreme Court held that Due Process requires the government to provide exculpatory evidence in its possession to the defendant.[8] This decision sought to make trials fairer and to reinforce the prosecutor's ethical duty to pursue justice and not convictions alone. In practice, *Brady*'s promise fell short.[9] For example, the Michael Morton case in Texas revealed the terrible consequences that can result from unchecked Brady violations and police misconduct.[10] In 2013, Texas lawmakers passed the Michael Morton Act. The Act created statutory discovery and disclosure rules designed to ensure a fair trial and just results in Texas criminal proceedings. In *Pros and Cons of the Michael Morton Act*, Professor Kenneth Williams reviews progress in this area since the Act became law.[11] Williams addresses the Act, the evidence prosecutors are now required to disclose to defendants, procedural issues related to those disclosures, and whether the Act will be effective in combating prosecutorial misconduct and wrongful convictions.

A prosecutor's discretion to bring charges against a person is both plenary and unregulated. Professor Geoffrey Corn's *Standard of Certainty in*

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4. *See infra* p. 407.
5. *Id.*
6. *Id.*
7. *See infra* p. 411.
8. Brady v. Maryland, 373 U.S. 83, 86 (1963).
9. *See* Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1539–40 (2010).
10. For an account of the Michael Morton case, see Jonathan Silver, *How Michael Morton's Wrongful Conviction has Brought Others Justice*, TEX. TRIB. (Aug. 13, 2016), https://www.kut.org/post/how-michael-morton-s-wrongful-conviction-has-brought-others-justice [https://perma.cc/3WWE-72NM].
11. *See infra* p. 265.

Justifying a Criminal Charge examines ethical concerns created by this fact.[12] Corn posits that the current system is a "morally demanding" one because a prosecutor has plenary power to bring a charge under a slight probable cause standard, and that charge, most likely, will never be tested through cross-examination.[13] Corn recalls Justice Jackson's pre-Model Rules admonition that, "[t]he qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand anyway."[14] Corn suggests a reliance on rules have diminished true ethics—the "sense of moral value inside" a person.[15] Corn's tough questions cut to criminal justice reform's heart.

In *Incarcerating Migrants*, Professor César Cuauhtémoc García Hernández examines the developments in the law relating to incarcerating noncitizens for alleged immigration violations.[16] The trend line follows the mass incarceration trends in Colbert's presentation.[17] When the Immigration and Naturalization Service adopted conditional parole for noncitizens pending immigration determinations in 1954, the number of noncitizens incarcerated for immigration violations fell into the single digits.[18] By 1958, the Supreme Court observed that "[p]hysical detention of aliens is now the exception, not the rule. . . ."[19] Today, roughly half a million persons are detained per year.[20] García Hernández examines the cost mass immigration incarceration imposes upon the nation and the individuals and families involved and proposes an approach to redirect immigration laws toward mid 20th Century norms.

Expungement is a procedure where a court orders records relating to arrests and judicial files become generally unavailable to the public.[21] Expungement's purpose is to provide an opportunity for qualifying persons to avoid the stigma and costs associated with a prior criminal record. Heather Brewer's *Expungement in Texas* explains why this procedure is a necessary

12. *See infra* p. 415.
13. *See infra* p. 416.
14. *See infra* p. 421. (quoting Robert H. Jackson, Att'y Gen. of the U.S., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor 7 (Apr. 1, 1940) (transcript available in the Department of Justice archives online)).
15. *See infra* p. 421.
16. *See infra* p. 433.
17. *See infra* p. 407.
18. Ana Raquel Minian, *America Didn't Always Lock Up Immigrants*, N.Y. TIMES, (Dec. 1, 2018), https://www.nytimes.com/2018/12/01/opinion/sunday/border-detention-tear-gas-migrants.html [https://perma.cc/AW9D-U8WD].
19. Leng May Ma v. Barber, 357 U.S. 185, 190 (1958).
20. *How For-Profit Prison Corporations Shape Immigrant Detention and Deportation Policies*, AM. FRIENDS SERV. COMMITTEE (Dec. 10, 2015), https://www.afsc.org/resource/how-profit-prison-corporations-shape-immigrant-detention-and-deportation-policies [https://perma.cc/5P9B-DLD9].
21. *See infra* p. 225.

tool to promote justice and offers a comprehensive review of Texas expungement.[22]

To complete the symposium, attendees heard from Gerald Doyle of the Harris County District Attorney's Conviction Integrity Unit (CIU) and Mike Ware from the Innocence Project of Texas. Doyle's *Ethical Responsibilities of the Conviction Integrity Unit* explains how CIUs review convictions with a goal to correct wrongful ones and how they encourage best practices to prevent wrongful convictions going forward.[23] In *Innocence Project of Texas*, Ware told stories of false convictions remedied by subsequent DNA testing—but not before years or decades had passed until the wrong was undone.[24] One observation allows that in each case Ware discussed, some physical evidence remained behind that could be tested—evidence that exonerated the convicted.

Kim Ogg, Harris County District Attorney, gave the lunchtime keynote address. Ogg focused on prosecutors and ethics in the age of restorative justice. Recognizing that a prosecutor, like any attorney, cannot guarantee fair results (or any result, for that matter), Ogg's approach focused on ensuring a fair process.[25] In particular, Ogg highlighted her pretrial intervention program (PTI)—a plea bargain that does not include a conviction or probation.[26] Ogg has aggressively expanded PTI in non-violent cases, directing defendants into programs that might help them to a more productive path.[27] The PTI program also allows these offenders a chance to benefit from these programs while avoiding criminal convictions that can hinder future educational, employment, and housing opportunities.

District attorneys in Texas are elected through partisan elections, however, Ogg observed that at crime scenes no one asks which party you belong to or who you voted for.[28] Partisan interests do not rise to the forefront for crime victims or persons accused; there are just crimes. Ogg closed by asking, "Do you want justice?"[29] We all do, but the path there is often rocky and winding—the ultimate destination illusive. The *South Texas Law Review* editors, by collecting these accomplished presenters speaking, and now

22. *See infra* p. 223.
23. *See infra* p. 453.
24. *See infra* p. 458.
25. Kim Ogg, Harris County District Attorney, Keynote Address at the South Texas College of Law Houston Law Review Symposium: 25th Annual Ethics Symposium in Criminal Law (Feb. 8, 2019), *in* 60 S. TEX. L. REV. 443, 444–45 (2019); *see also infra* p. 443.
26. *Id.*
27. *See* PROGRAMS & DIVERSION, HARRIS COUNTY DISTRICT ATT'Y'S OFF., https://app.dao.hctx.net/about-hcdao/programs-diversion [https://perma.cc/NFF2-2NDW].
28. Ogg, *supra* note 26.
29. *Id.*

writing, on such important topics, have made that path and destination a little less so.

EXPUNGEMENT IN TEXAS

HANNAH BREWER†

† J.D. *magna cum laude*, Baylor Law School, 2017; B.A. *summa cum laude*, University of Alabama, 2014. The Author completed this Article as a fellow for The Innocence Project of Texas with the organization's assistance and encouragement. Currently, the author is an Assistant District Attorney for Dallas County.

I. INTRODUCTION

In the summer of 1994, Anna Vasquez's life was turned upside down—she was falsely accused of a crime. The crime is not easy to stomach. Anna was accused of having gang-raped two young girls along with the girls' aunt and two other women.[1] When informed of the accusation, Anna was bewildered and stated that she had never committed such a crime.[2] During the trial, the state's medical witness testified that the assault was part of a satanic ritual.[3] It was implied that Anna was prone to hurting children due to her sexual orientation.[4] Anna was sentenced to fifteen years of incarceration for each of two counts of aggravated sexual assault of a child and ten years of incarceration for each of two counts of indecency with a child.[5] Anna spent fifteen years in prison until she was released on parole in 2012.[6] She fought for twenty-two years to have the justice system recognize her innocence. In 2016, the Texas Court of Criminal Appeals declared that Anna and the three other accused women were actually innocent of the crimes for which they had been accused.[7] It seemed that after so much time and so much effort on behalf of so many people, including The Innocence Project of Texas,[8] Anna's fight was won. The highest criminal court in Texas had proclaimed that Anna was innocent.

In 2018, Anna's record was flagged at a school where she had gone to give a talk about wrongful imprisonment. This is because after her twenty-two-year battle with the court system, Anna still had a criminal record. If you had typed her name into a criminal history database, the results would have told you that she was a felon with four convictions on her record. In Texas, a person's criminal record is not automatically cleared after being declared actually innocent by a court, after being acquitted by a jury, or after being pardoned by the governor. To clear their criminal record, these individuals must go through a separate civil procedure called expungement. Despite the

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1. *Ex parte* Mayhugh, 512 S.W.3d 285, 288 (Tex. Crim. App. 2016).

2. *Id.* at 290.

3. Jim Forsyth, *Texas Prosecutor OKs Prisoner Release in Lesbian Sexual Assault Case*, REUTERS (Nov. 15, 2013, 6:10 PM), https://www.reuters.com/article/us-usa-texas-lesbians-idUSBRE9AF00620131116 [https://perma.cc/46LW-VCTZ].

4. *Ex parte Mayhugh*, 512 S.W.3d at 297.

5. *Id.* at 291.

6. Michelle Mondo, *The San Antonio 4 Declared Innocent and Exonerated*, TEX. MONTHLY (Nov. 24, 2016), https://www.texasmonthly.com/the-daily-post/san-antonio-4-declared-innocent-exonerated [https://perma.cc/6W3Q-CBMU].

7. *Ex parte Mayhugh*, 512 S.W.3d at 307.

8. The Innocence Project of Texas is a non-profit organization whose goal it is to exonerate wrongly convicted individuals and to reduce the frequency of wrongful convictions. The Innocence Project of Texas worked to exonerate Anna Vasquez. *Our Work*, INNOCENCE TEX., https://innocencetexas.org/our-work [https://perma.cc/P6FG-KE47].

fact that Anna has been declared actually innocent, she still had to go through this procedure before her criminal record was wiped clean. Having a criminal record meant that Anna was denied entry into schools and hospitals. It meant that she could have been denied housing, employment, federal aid, and admittance into a foreign country. While Anna's criminal record was finally expunged December 3 2018,[9] this issue is one still faced by many exonerees. Barriers to expungement include not knowing what your expungement rights are and why it is even important to get an expungement in the first place. This article will cover what expungement is, why expungement is necessary, who is entitled to expungement, how one goes about getting an expungement, how an expungement is different for an offense committed by a juvenile, what expungement doesn't change, and DNA expungement.

II. WHAT IS EXPUNGEMENT?

Expungement, also known as expunction,[10] generally refers to the removal of an arrest and/or conviction from a person's criminal record.[11] An individual may file a motion for expungement asking the court to destroy any records or files relating to an arrest, a conviction, or identifying information, and for the court to order any other governmental agency that may have these records or files to destroy them.[12] The goal of expungement is to prevent the public from being able to access any record of your arrest or conviction in order to allow you a fresh start.

The law relating to expungement in Texas is located in Chapter Fifty-Five of the Code of Criminal Procedure.[13] This chapter has changed significantly over the last decade, many of the changes occurring within the last year, so one should consult the statutory language before pursuing an expungement to ensure compliance.

III. WHY IS EXPUNGEMENT NECESSARY?

Many people don't realize that after they are acquitted, found actually innocent, pardoned, or even if they are never charged at all, they still have a criminal record of their arrest and their conviction if there was one. Expungement is a separate civil proceeding that must take place after the

9. *IPTX Celebrates Expungement of San Antonio 4 Convictions*, INNOCENCE TEX, https://innocencetexas.org/news/iptx-celebrates-expungement-of-san-antonio-4-convictions [https://perma.cc/XZ8Z-GH4Z].

10. Texas case law and codes refer to expungement as "expungement" and "expunction" interchangeably.

11. *Expungement*, BLACK'S LAW DICTIONARY 662 (9th ed. 2009).

12. TEX. CODE CRIM. PROC. ANN. art. 55.02.

13. *See id.* at art. 55.

criminal proceeding. In Texas, expungement does not happen automatically as soon as a person becomes entitled to an expungement. This results in individuals who have not been found guilty, people who have been pardoned, and peopled who have been exonerated having criminal records. Criminal background checks are incredibly common in our nation right now. There are many reasons for the frequency in criminal background checks: security concerns since 9/11, concerns for employee liability, and ease of access to documents and records made possible by the internet.[14] Criminal background checks are commonly performed for employment purposes, tenant screening, volunteer eligibility, and so much more.[15]

Texas law gives many entities a legal right to examine your criminal record. The State Board for Educator Certification is authorized to access the criminal record of anyone applying to be a certified teacher.[16] The Texas Education Agency is authorized to access the criminal record of anyone applying for a position in a public school district or anyone who is employed by a public school district.[17] The Department of Public Safety is authorized to access the criminal record of anyone holding a registration to work with controlled substances (like pharmacists) or an inspector certificate.[18] The State Board of Medical Examiners, State Board of Veterinary Medical Examiners, and the State Board of Law Examiners are all authorized to access the criminal records of anyone licensed or seeking license to practice medicine, veterinary medicine, or law.[19] The Texas Department of Licensing and Regulation is authorized to access the criminal record of anyone seeking a license, certificate, registration, title or permit issued by the department.[20] This includes licenses of cosmetologists, athletic trainers, midwives, electricians, speech pathologists, and so many more.[21] Several other state agencies are able to access criminal records kept by the state for anyone that they employ or license.[22]

However, it is not only government agencies that are able to view your criminal record. In Texas, criminal records are considered public information

14. Fred Dahr, *Clearing Criminal Records in Texas*, 69 TEX. B.J. 258, 259 (2006).

15. SEARCH, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION vi (2005), http://www.search.org/files/pdf/RNTFCSCJRI.pdf [https://perma.cc/L6Z2-J3L5].

16. TEX. GOV'T CODE ANN. § 411.090.

17. *Id.* § 411.0901.

18. *Id.* § 411.0891.

19. *See id.* §§ 411.099–00.

20. *Id.* § 411.093.

21. TEX. DEP'T OF LICENSING & REG., https://www.tdlr.texas.gov/licenses.htm [https://perma.cc/H4ZG-STPB].

22. *See* GOV'T § 411.

and can be accessed by any member of the public who requests them.[23] The Texas Department of Public Safety (TDPS) created the Conviction Database, which contains all convictions and deferred adjudications which have been reported to the department.[24] Any individual member of the public may request any individual's criminal convictions or deferred adjudications contained in the Conviction Database.[25] It takes less than five minutes to create an online account to access the Conviction Database and place an order for a person's criminal history. Each name search through the Conviction Database is $3.07.[26] Each search request offline through TDPS is $10.[27]

In addition to the services offered directly to the public from TDPS, many private companies purchase this criminal history information from TDPS and market that information to the public for even better rates and even faster results. A private company entitled "Public Data" offers subscription plans ranging from $14.86 a month for 600 "monthly look-ups" to $500 a year for 10,000 "yearly look-ups."[28] In addition, private companies usually offer the criminal background information for every state and the federal system. Due to the low cost of these searches, just about any member of the public may access anyone else's criminal record.

The public at large also has access to any information made public by the sex-offender registry.[29] On the website of the TDPS, any internet user may search the sex-offender registry by street address, name, or institute of higher education.[30] If someone searches by street address, they can access a map showing the residence of any sex offender around them.[31] The user can use the zoom feature on the map to show any mile radius they desire.[32] The information internet users can access includes: a picture of the offender, name, risk level, ending registration date, physical attributes (sex, race, height, hair color, etc.), birth date, aliases, when the offender registered,

23. *Id.* § 411.135(a)(2).

24. *Criminal History Search*, TEX. DEP'T OF PUB. SAFETY, https://records.txdps.state.tx.us/DpsWebsite/CriminalHistory [https://perma.cc/8DHZ-G57A].

25. *Id.* An individual member of the public may request this information without anyone besides the Department of Public Transportation knowing they have requested the information. *Id.* However, if a company requests this information, it will be reported to the public that this company is accessing the Conviction Database. *Id.*

26. *Id.*

27. *Frequently Asked Questions*, TEX. DEP'T OF PUB. SAFETY, https://www.dps.texas.gov/administration/crime_records/pages/faq.htm [https://perma.cc/RR9R-KEBD].

28. PUB. DATA, http://www.publicdata.com/prices.html [https://perma.cc/DG5J-6XSA].

29. TEX. GOV'T CODE ANN. § 411.135(a)(1).

30. *Sex Offender Registry*, TEX. DEP'T OF PUB. SAFETY, https://records.txdps.state.tx.us/SexOffenderRegistry/Search [https://perma.cc/ZB7H-K38M].

31. *Id.*

32. *Id.*

residential address, any institute of higher learning they attend (including which campus), statute violated, details about the offense (victim sex, victim age, offense date), and judgment rendered on the offense.[33] The registry also allows any internet user to set up an email subscription in order to receive alerts regarding updates to the sex offender registry of an offender moving within so many miles of any address, an offender moving within your zip code, an offender attending your institution of higher learning, or updates to the profile of a certain offender.[34] The TDPS also allows any internet user to download the sex offender registry to keep as a personal file.[35] The online sex offender registry is so easy to access and navigate that it is accessible to internet users of every level of experience.

A publicly known criminal history can create shame and social stigma that pervades nearly every aspect of an individual's life.

A. Employment

Employers use criminal history data in a variety of different ways. Many employers screen potential employees' criminal history as a means of preventing theft by employees.[36] Employers also perform background checks to limit their own liability: if the employee later commits a bad act, the employer could be liable for negligent hiring or negligent retention if the employer knew or should have known the employee posed a risk to coworkers, customers, or the general public.[37] Many employers run background checks on their employees to ensure that their clients feel safe and secure.[38] This can be a huge hurdle for individuals with criminal histories seeking unskilled entry-level positions due to the fact that retail and service jobs have largely replaced manufacturing jobs that were once available to convicts because of low interaction with the public.[39]

In 2012, in an effort to make it easier for individuals with a criminal background to find work, the Equal Employment Opportunity Commission (EEOC) issued a policy that employers could only conduct background checks on employees or potential employees when the checks were job-

33. *Id.*
34. *Id.*
35. *Id.*
36. SEARCH, *supra* note 15, at 35.
37. *Id.*
38. *Id.* at 32.
39. Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois*, 54 CRIMINOLOGY: AN INTERDISCIPLINARY J. 387, 389 (2016).

related or necessary for the business.[40] The State of Texas, which has a long history of categorically denying convicted felons government positions, sued the EEOC to challenge their policy concerning background checks and hiring individuals with a criminal history.[41] The court determined that Texas and Texan employers could not categorically deny all applicants with a criminal history, but that they did not have to limit their use of background checks in hiring per the EEOC policy.[42]

Survey data suggests that employers are more likely to hire individuals with little work experience or no prior work experience than ex-convicts.[43] In fact, individuals with criminal records experience more difficulty obtaining employment than any other disadvantaged group— including minorities, welfare recipients, and undocumented individuals.[44] Employers often ask about prior felony convictions even when they are not permitted to do so.[45] Denial of occupational and professional licenses due to criminal history can also result in difficulty gaining employment.[46]

The Fair Credit Reporting Act implicitly authorizes commercial vendors to collect criminal history information and distribute it to customers for the express purpose of making employment decisions by regulating how commercial vendors must handle and issue the information.[47] Employment decisions include adverse decisions such as termination, denial of promotion or job transfer, or denial of security clearance if the employer is a government contractor. Generally, a commercial vendor reporting criminal history information for employment purposes may not report a record of arrest, indictment, or conviction of a crime in which the date of disposition, release, or parole predates the report by more than seven years or the governing

40. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf [https://perma.cc/CL8C-YUXJ].

41. *See* Texas v. EEOC, No. 5:13-CV-255-C, 2018 U.S. Dist. LEXIS 30558, at *3 (N.D. Tex. Feb. 1, 2018).

42. *Id.* at *5–6.

43. Bruce Western, Jeffrey R. King & David F. Weiman, *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQUENCY 410, 412 (2001); *see also* Amy Shlosberg, Evan J. Mandery, Valerie West & Bennett Callaghan, *Expungement and Post-Exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353, 383 (2014).

44. Shlosberg et al, *supra* note 43, at 383.

45. *Id.* at 384; *see also* Amy Sholsberg, Evan Mandery & Valerie West, *The Expungement Myth*, 75 ALB. L. REV. 1229, 1239 (2011).

46. *Id.*; *see also* TEX. GOV'T CODE ANN. §§ 411.099–00, 411.093 (authorizing the Texas Board of Medical Examiners and the Texas Department of Licensing and Regulation to obtain criminal history record information maintained from the Texas Department of Public Safety for license applicants).

47. *See* Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681k (2016).

statute of limitations, whichever is longer.[48] However, if the annual salary of the employment position is, or may reasonably be expected to be, $75,000 or higher, the commercial vendor may provide a complete lifetime criminal history.[49]

In addition to the criminal background check employers run on applicants and new employees, an increasing number of employers are choosing to perform continuous checks— screening employees annually, semi-annually, or in real-time—to limit liability during the tenure of an employee.[50] Experts also recommend that employers screen before promotions.[51] So even if an individual holds down the same job through their arrest and or conviction, they are not insulated from adverse employment effects stemming from their criminal record.

B. Housing

Criminal records can also affect who will rent or sell housing to you. Landlords, especially large property management companies with a wealth of resources, order criminal background checks on potential tenants as a matter of routine.[52] Criminal background checks are actually required to qualify for certain federal housing programs.[53] Many individuals who have been convicted of a crime face "significant barriers" when securing housing—both in the private sector and in the pursuit of federally subsidized housing.[54] Even individuals who were arrested, but never convicted, face difficulty finding housing due to their prior arrest.[55]

Under the Fair Housing Act, housing providers may create criminal record-based restrictions on housing so long as the policy is necessary to serve a substantial, legitimate, nondiscriminatory interest.[56] In almost every circumstance, this substantial, legitimate, nondiscriminatory interest is resident safety and security. Federal law gives public housing authorities the

48. TEX. BUS. & COM. CODE ANN. § 20.05.

49. *Id.*

50. Roy Maurer, *Know Before You Hire: 2017 Employment Screening Trends*, SOC'Y FOR HUM. RESOURCE MGMT. (Jan. 25, 2017), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/2017-employment-screening-trends.aspx [https://perma.cc/7BUU-VH4A].

51. *Id.*

52. SEARCH, *supra* note 14, at 20.

53. *Id.*

54. U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS, 1–2 (April 4, 2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF [https://perma.cc/534T-LTNA].

55. *Id.* at 2.

56. *Id.*

right to receive criminal background check information on applicants for housing and tenants for the purpose of applicant screening, lease enforcement, and eviction.[57] Public housing authorities are prohibited from admitting any tenant who is subject to a lifetime registration requirement under a state sex offender registration program.[58] Public housing authorities are also prohibited from admitting a household member that has ever been convicted of a drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing.[59] The public housing authority has the discretion to bar any house member who has engaged in any of the following within a reasonable time period before admission: drug-related criminal activity; violent criminal activity; or other criminal activity which may threaten the health or safety of other residents, the owner, any employee of the owner, or a contractor involved in the housing operation.[60] Any institution of higher education is authorized to access the criminal record of an applicant or student who plans to reside in on-campus housing.[61]

C. *Government Benefits*

Having a criminal record can impact your ability to receive certain government benefits. Temporary Assistance for Needy Families (TANF) is a program, commonly referred to as welfare, in which Texas provides financial and medical assistance to needy children and the parents or relatives with whom they are living.[62] TANF benefits are dispensed monthly in the form of cash and Medicaid benefits.[63] In Texas, people who have been convicted of a felony offense that involves the possession, use, or distribution of a controlled substance are ineligible for TANF benefits.[64] Due to a change in the law in 2015, individuals in Texas who have been convicted of a felony offense that involves the possession, use, or distribution of a controlled substance are eligible for the Supplemental Nutrition Assistance Program (SNAP), also known as food stamps.[65] However, an individual convicted of a felony offense that involves the possession, use, or distribution of a

57. 42 U.S.C. § 1437d(q)(1)(A).
58. 24 C.F.R. § 882.518(a)(2).
59. *Id.* § 882.518(a)(1)(ii).
60. *Id.* § 882.518(b)(1).
61. TEX. GOV'T CODE ANN. § 411.0945(b).
62. *Texas Temporary Assistance for Needy Families (TANF)*, BENEFITS.GOV, https://www.benefits.gov/benefits/benefit-details/1679 [https://perma.cc/VGJ6-4EBD].
63. *Id.*
64. TEX. HEALTH AND HUMAN SERVS. COMM'N, TEXAS WORKS HANDBOOK § 1821.1, https://hhs.texas.gov/laws-regulations/handbooks/texas-works-handbook/part-a-determining-eligibility/section-1800-employment-services [https://perma.cc/CK76-WWVT].
65. TEX. HUM. RES. CODE ANN. § 33.018(b).

controlled substance can become ineligible for SNAP if they are convicted of any subsequent felony.[66] Individuals who have convictions and who are released from prison may still be eligible for Social Security and Medicare benefits if they meet the other requirements.[67]

D. Family Relations

More than half of all incarcerated men and women are parents.[68] A criminal record will play a part in the court's decision in determining custody and allowing access to the child. The primary consideration in any Texas custody decision is the best interest of the child.[69] It is also the policy of the state to "provide a safe, stable, and nonviolent environment for the child."[70] A parent's character and propensity towards crime as demonstrated by their criminal history are major factors that will play into the court's decision. A criminal history is not a bar to custody. The court may consider factors, such as: how long ago the conviction took place, the type of crime, the nature of the sentence, and whether there has been repeat offending.[71] The type of conviction will be important to the court's decision here. A crime against a child or a violent crime will likely lead the court to determine that the parent will be unable to provide a safe environment for a child.[72] Some crimes may not have much impact at all on the court's decision. While committing a crime can be a factor in whether the parent has endangered a child sufficient enough to justify terminating the parent-child relationship, endangerment may not be implied from a parent's conduct and must be proven with independent evidence.[73] However, courts disagree how heavily this factor should be weighted and when it should be considered.[74] A conviction for child abuse or family violence by a conservator of the child "is a material and substantial change of circumstances sufficient to justify a temporary order

66. *Id.* § 33.018(c).

67. *Benefits After Incarceration: What You Need to Know*, SOC. SECURITY ADMIN., https://www.ssa.gov/reentry/benefits.htm [https://perma.cc/H4YE-TWAK].

68. Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, 1893 (2015).

69. TEX. FAM. CODE ANN. § 153.002(a)(1).

70. *Id.* § 153.001(a)(2).

71. *See In re* V.V., 349 S.W.3d 548, 555–558 (Tex. App.—Houston [1st Dist.] 2010, pet. withdrawn).

72. *See* FAM. § 153.131(b) ("It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of the child removes the presumption . . . .").

73. Tex. Dep't of Human Servs. v. Boyd, 727 S.W.2d 531, 534 (Tex. 1987); *In re* D.T., 34 S.W.3d 625, 635 (Tex. App.—Fort Worth 2000, pet. denied).

74. *In re D.T.*, 34 S.W.3d at 636.

and modification of an existing court order" determining custody of the child.[75]

In any lawsuit where adoption is sought, the court will require that each person seeking to adopt obtain their criminal record and provide it to the court.[76] The Department of Family and Protective Services is authorized to access the criminal records of anyone seeking to adopt a child or become a foster parent and any other individual who will be living in the residence where the child will reside.[77] If one has an arrest or charge for certain crimes (even if a final disposition has not yet been rendered) it is an absolute bar to living in a home with an adoptive or foster child.[78] The department also conducts risk assessments for certain offenses that entails an investigation into an individual to determine if they are a risk to the adoptive or foster child.[79] For certain crimes, if anyone has an arrest or charge, it is a twenty year bar followed by a risk assessment to living in a home with an adoptive or foster child.[80] In the case of certain less serious crimes, if one has an arrest or charge, the department requires a risk assessment before being allowed to live in a home with an adoptive or foster child.[81] For certain crimes that are

75. FAM. § 156.104.

76. *Id.* § 162.0085.

77. TEX. GOV'T CODE ANN. § 411.114(a)(2)(G).

78. *See* 40 TEX. ADMIN. CODE § 745.661(a). These crimes include: criminal solicitation of a minor; murder; capital murder; manslaughter; criminally negligent homicide; aggravated kidnapping; trafficking of persons; continuous trafficking of persons; continuous sexual abuse of a young child; bestiality; indecency with a child; improper relationship between educator and student; voyeurism; sexual coercion; sexual assault; injury to a child, elderly individual, or disabled individual; abandoning or endangering a child; violation of court order in a family violence, child abuse or neglect, sexual assault, stalking, or trafficking case; sale or purchase of child; unregulated custody transfer of adopted child; continuous violence against the family; arson; online solicitation of a minor; compelling prostitution; sexual performance by a child; and possession or promotion of child pornography. TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., FOSTER OR ADOPTIVE HOMES: CRIMINAL HISTORY REQUIREMENTS (2018), https://hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/provider-portal/protective-services/ccl/criminal-history/lcco-chart.pdf [https://perma.cc/KM4Q-UGYS].

79. 40 ADMIN. § 745.661(c).

80. *Id.* These crimes include: unlawful restraint; kidnapping; improper photography or visual recording; invasive visual recording; felony assault; aggravated assault; deadly conduct; terroristic threat; felony aiding a suicide; tampering with a consumer product; harassment of a public servant; prohibited sexual conduct; interference with child custody; agreement to abduct from custody; enticing a child; violation of a protective order preventing offense caused by bias or prejudice; advertising for placement of child; interference with rights of a guardian of the person; robbery; obstruction or retaliation; prostitution; sale, distribution, or display of harmful material to a minor; employment harmful to children; and intoxication assault. TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., *supra* note 78.

81. ADMIN. § 745.661. These crimes include: bigamy; criminal nonsupport; criminal mischief; exploitation of child, elderly individual, or disabled individual; tampering with a witness or physical evidence; tampering with a governmental record; resisting arrest, search, or transportation; evading arrest; escape; abuse of corpse; cruelty to animals; possession or promotion of lewd visual material depicting child; firearm smuggling; organized crime; coercing, inducing, or

considered to pose even less of a danger, the department only requires a risk assessment if the offense occurred within the last ten years.[82] If the adoptive or foster home has a longstanding relationship with the child, the time bar may be shorter or just replaced with a risk evaluation.[83] A criminal attempt arrest or charge will be treated as an arrest or charge of the offense attempted.[84] These restrictions on who may live in a foster home have the potential to break up siblings. If one sibling commits a crime preventing them from residing in a foster residence with other children, they must be removed from a household where their minor siblings reside.[85]

The Department of Aging and Disability Services is authorized to access the criminal records of anyone seeking unsupervised visits of a ward in the custody of the department, including relatives of the ward.[86] So, a criminal record may prevent unsupervised visits with an elderly or disabled family member if that family member is in the custody of the state.

E. College Education

Growing numbers of colleges and universities are requiring applicants to disclose criminal history information.[87] Colleges and universities are also increasing the importance they place on arrests and criminal convictions in the decision of whether or not to admit an applicant.[88] It is common for these institutions to require a written explanation for an arrest or conviction, letters from correction officers, and additional interviews for applicants with a criminal record.[89] Although admissions officials have stated that there are no offenses which are automatic disqualifiers, felonies and violent crimes are concerning to admissions officials.[90] In addition to admission concerns,

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soliciting membership in a criminal street gang; hazing; making a false report of abuse or neglect; and failure to comply with sex offender registration requirements. TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., *supra* note 78.

82. ADMIN. § 745.661. These crimes include: theft; forgery; credit card or debit card abuse; telecommunications crimes; money laundering; insurance or Medicaid fraud; bribery; coercion of public servant; aggravated perjury; impersonating a public servant; bail jumping; failure to appear; improper contact with victim; and unauthorized practice of law. TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., *supra* note 78.

83. TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., *supra* note 78 (describing six types of background checks the department of Family and Protective Services is entitled to perform of members in foster or adoptive homes).

84. *Id.*

85. *Id.*

86. TEX. GOV'T CODE ANN. § 411.13861(a)(2).

87. Uggen & Stewart, *supra* note 68, at 1884.

88. Landa & Loeffler, *supra* note 39, at 390.

89. *Id.*

90. *See* Uggen & Stewart, *supra* note 68, at 1886.

certain offenses can also make one ineligible to receive federal student aid. Federal law states:

> A student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance under this subchapter shall not be eligible to receive [student financial aid for a certain period of time].[91]

First and second convictions of possession of a controlled substance earn a one and two-year bar respectively while a first conviction for sale of a controlled substance earns a two-year bar.[92] An indefinite bar results from a third conviction for possession of a controlled substance or a second conviction for sale of a controlled substance.[93] One can remove the bar to financial aid by either taking a drug rehabilitation program and passing two drug tests or having their conviction reversed.[94] For many, a lack of financial aid is a bar to higher education.

F. Volunteer Activities

A conviction on your criminal record may also prevent you from engaging in civic activities. A school district has authorization to access the criminal record of any person seeking to volunteer at a school.[95] Many school districts prevent anyone from volunteering who has any criminal record at all—regardless of what the offense is and how much time has passed since the offense.[96] A hospital has authorization to access the criminal record of any person seeking to volunteer with the hospital.[97] The hospital is expressly allowed by law to deny a volunteer a position or dismiss a volunteer if the volunteer fails to provide their information in order to run a criminal background check or if the volunteer's conviction "renders the person unqualified or unsuitable for . . . a volunteer position."[98] Any non-profit organization that regularly provides athletic, civic, or cultural events and has participants in these events who are younger than seventeen years of age is authorized to access the criminal background of its volunteers and volunteer applicants and may use that information "to determine the suitability of a

91. 20 U.S.C. § 1091(r)(1) (2015).
92. *Id.*
93. *Id.*
94. *Id.* § 1091(r)(2).
95. TEX. GOV'T CODE ANN. § 411.097(b).
96. *See* Uggen & Stewart, *supra* note 68, at 1893.
97. GOV'T § 411.136(b)(2).
98. *Id.* § 411.136(d).

person for a position as a volunteer."[99] Volunteer agencies frequently use commercial companies to run background checks on their volunteers—especially if the volunteers are going to come into contact with children, the elderly, or another vulnerable population.[100] For instance, the Boy Scouts of America runs background checks on all of their new adult volunteers.[101]

G. Travel to Foreign Countries

With accelerated globalization, there are so many reasons to travel abroad, but many countries bar the entry of foreigners based on criminal history. This is true of one of our closest neighbors, Canada. Entrance of a US citizen into Canada may be denied for an arrest on any criminal charge even if there was no subsequent criminal conviction.[102] The decision is entirely at the discretion of the immigration agent at the border.[103] Someone with a criminal history may still seek entry into Canada by getting a temporary resident permit or going through a process called criminal rehabilitation that erases entry inadmissibility.[104] One is eligible to apply for criminal rehabilitation if they have completed their sentence more than five years before entry.[105] One is deemed to have been rehabilitated if they have a single misdemeanor on their record for which they have completed their sentence ten years ago.[106] As of 2010, Canada's criminal database was synced with the criminal database of the FBI so that Canadian officials may quickly ascertain the criminal history of American citizens.[107] Since expungements in Texas require state agencies notify the FBI to clear the record from their database, an expungement would allow one to enter Canada without going through criminal rehabilitation. While the requirements for entering Mexico with a criminal record are less clear than Canada, Mexican immigration authorities may deny foreigners entry into Mexico if they have been charged with or convicted of a "serious crime."[108] Other countries around the globe

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99. *Id.* § 411.1401(b), (d).
100. SEARCH, *supra* note 15, at 19.
101. *Id.*
102. *Can I Travel to Canada With a Criminal Record?*, TEMPORARY RESIDENT PERMIT CAN., http://www.temporaryresidentpermitcanada.com/criminal-record.php [https://perma.cc/X8SP-BVKG] [hereinafter *Entering Canada*]; *see also* Marisa Feil, *Canadian Travel Restrictions Based on Criminal Record*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Jun. 18, 2015), http://ccresourcecenter.org/2015/06/18/traveling-to-canada-with-a-criminal-record [https://perma.cc/2B78-L7UB].
103. *Entering Canada*, *supra* note 102.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*; Feil, *supra* note 102.
108. *Mexico International Travel Information*, U.S. DEP'T OF ST.–BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/international-travel/International-Travel-

have a variety of different restrictions on permitting entry of foreigners with criminal records.[109]

H. Gun Ownership

A federal firearm's licensee (importer, manufacturer, or dealer) is required to conduct a criminal background check before transferring a firearm to a non-licensee.[110] Any person who has been convicted of any crime punishable by imprisonment for a term exceeding one year—even if that person was not actually sentenced to a prison term exceeding one year—is prohibited from purchasing or possessing a firearm or ammunition under federal law.[111] Any person who unlawfully uses or is addicted to a controlled substance is also barred from purchasing or owning a firearm under federal law.[112] While a controlled substance arrest or conviction on its own will not be enough to bar gun ownership, it could certainly be a factor in the analysis of whether one is an addict or an unlawful user. The State of Texas also prevents felons from being eligible for a license to carry a handgun.[113]

I. Future Interactions with the Justice System

A criminal record can also impact your future interactions with the criminal justice system. Since many officers consider criminal histories in making their decision on whether or not to make an arrest, having a record can increase your likelihood for being arrested for a future crime, even as minor as a traffic offense.[114] Having a criminal history can affect the plea bargaining process by impacting what prosecutors are willing to offer you.[115] If you were granted a pardon, you will still have legal consequences as a result of your criminal history unless that criminal history is expunged. A pardon is "forgiveness or remission of [a] penalty, a pardon implie[s] guilt; [but] it does not obliterate the fact of the commission of the crime and the conviction."[116] If you have been pardoned, but don't have evidence that your

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Country-Information-Pages/Mexico.html [https://perma.cc/Q8MA-PFQF]. Serious crimes include "all crimes that have a significant, negative effect on the fundamental values of society." *Entry Requirements*, GOBIERNO DE MÉXICO (Nov. 14, 2016), https://embamex.sre.gob.mx/canada/index.php/en/notices/11506-entryrequirements [https://perma.cc/34DF-CL3B].

109. *See* Uggen & Stewart, *supra* note 68, at 1900.

110. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 102(a) (1993).

111. *Id.* § 102(a)(3)(B); 18 U.S.C. § 922(g)(1).

112. *Id.* § 102(a)(3)(B).

113. TEX. GOV'T CODE ANN. § 411.172(a)(3).

114. *See* Shlosberg et al, *supra* note 45, at 1237.

115. *Id.* at 1240.

116. Vandyke v. State, 538 S.W.3d 561, 577 (Tex. Crim. App. 2017) (quoting Jones v. State, 147 S.W.2d 508, 510 (Tex. Crim. App. 1941)).

pardon was based on the Governor's finding of actual innocence, your previous conviction may still be used to deny bail for future arrests until you actually secure an expungement.[117] Likewise, if you have been pardoned, but that pardon does not declare actual innocence based on subsequent proof of innocence, that conviction can be used as a basis to deny probation for future convictions until you actually secure an expungement.[118]

J. Personal Interactions

While most commercial providers of criminal background history provide them for business purposes (such as employment screening, tenant screening, insurance eligibility, etc.), there are businesses that cater to individuals who wish to run background checks on the individuals they interact with on a daily basis. One of these companies is Instant Check Mate. On the video on its "About" page, Instant Check Mate states that, "Now it is more important than ever to know the truth about the people coming into your life."[119] Their FAQ page contains a suggested list of people to search: neighbors, family members, friends, parents of your children's friends, potential dates, social media friends, online buyers and sellers, and even study partners in case your study session runs late into the night.[120]

Due to the pervasiveness of information and the availability of public records, it may soon be custom to look at the criminal history of every person you interact with. Where before most people were unwilling to go to the courthouse and wait in line to order a background check on their new neighbor, those same people are now willing to sit on their couch, enter their credit card number, and have access to nation-wide criminal history information within seconds. Having a criminal history may mean that people may refuse to go on dates with you, your neighbor may miss you when handing out invitations for a Christmas party, or your child's best friend's parents won't allow their child to spend the night at your house. Having an arrest or conviction on your criminal record has the potential to affect every aspect of your life.

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117. *Id.* at 578; Runo v. State, 556 S.W.2d 808, 809–10 (Tex. Crim. App. 1977).

118. *Vandyke*, 538 S.W.3d at 578; Taylor v. State, 612 S.W.2d 566, 570–71 (Tex. Crim. App. 1981).

119. INSTANT CHECK MATE, http://www.instantcheckmate.com/about/ [https://perma.cc/8P3K-UYE9].

120. *Frequently Asked Questions*, INSTANT CHECK MATE, https://www.instantcheckmate.com/faqs [https://perma.cc/N6YM-AVCB].

IV. WHO CAN GET AN EXPUNGEMENT?

If you are pardoned, found actually innocent, or acquitted, you are entitled to an expungement of all records and files relating to the arrest.[121] A person is also entitled to have their record expunged if they have been released and the charge (if any) is no longer pending, has not resulted in a final conviction, and there was no court-ordered supervision for the offense.[122] Since deferred adjudication requires court-ordered supervision, a recipient of deferred adjudication may not secure an expungement of their records relating to the arrest that resulted in the deferred adjudication nor the deferred adjudication itself.[123] However, an individual may seek expungement of records if they receive a deferred adjudication for a fine-only misdemeanor that is ultimately dismissed.[124] The requirement that is consistent across all grounds for expungement is an arrest – this can be custodial or non-custodial.[125] Even if an official record results from a detention, one may not be awarded an expungement of that record if the detention did not amount to an arrest.[126]

If a person is pursuing expungement for an arrest that is expungable because it did not result in charges or a final conviction, a certain period of time must have passed since the date of the arrest before one may pursue expungement in order to give the prosecution opportunity to pursue changes.[127] If the offense sought to be expunged is a Class C misdemeanor and no felony charge arose out of the same transaction, 180 days must have elapsed from the date of the arrest.[128] If the offense sought to be expunged is a Class B or A misdemeanor and no felony charge arose out of the same transaction, one year must have elapsed from the date of the arrest.[129] If the offense sought to be expunged is a felony or a felony charge arose out of the same transaction, three years must have elapsed from the date of the arrest.[130] An individual may also seek expungement when prosecution of the offense is no longer possible because the statute of limitations bars it.[131] There are three instances where one may seek expungement without a waiting period.

121. TEX. CODE CRIM. PROC. ANN. arts. 55.01(a), (b).
122. *Id.* at art. 55.01(a)(2).
123. Tex. Dep't of Pub. Safety v. Jacobs, 250 S.W.3d 209, 211 (Tex. App.—Dallas 2008, no pet.); *see* CRIM. PROC. art. 42A.001(a)(1)(A).
124. CRIM. PROC. arts. 45.051(e), 45.053(d).
125. *Id.* at art. 55.01(a) (2017), *Ex Parte* Enger, 512 S.W.3d 912, 914 (Tex. App.—Houston [14th Dist.] 2016, no pet.).
126. *Ex Parte Enger*, 512 S.W.3d at 914.
127. CRIM. PROC. art. 55.01(a)(2)(A)(i).
128. *Id.* at art. 55.01(a)(2)(A)(i)(a).
129. *Id.* at art. 55.01(a)(2)(A)(i)(b).
130. *Id.* at art. 55.01(a)(2)(A)(i)(c).
131. *Id.* at art. 55.019(a)(2)(B).

One may immediately seek expungement if the attorney representing the State certifies that the arrest records and files sought to be expunged are not needed for use in any criminal investigation or prosecution, including an investigation or prosecution of another person.[132] You may also seek expungement as soon as charges are dismissed or quashed because you have completed a pretrial intervention program or you have completed a veterans treatment court program and have not previously expunged a record by completing a veterans treatment court program.[133] An individual may also seek expungement without a waiting period if there was an error on the part of the prosecution. This error may be because the presentment has been made due to a mistake, false information, or another reason indicating an absence of probable cause.[134] If the only evidence of probable cause at the time of dismissal is a guilty plea entered by the defendant, this is still an error indicating an absence of probable cause that allows for an expungement without a waiting period.[135] The error may also be that the indictment or information was void.[136]

An individual is also entitled to an expunction of any identifying information (including name, address, date of birth, driver's license number, and social security number) if that person was a victim of identity theft.[137] The need for expungement in cases of identity theft can arise when an arrested person gives law enforcement the identification of another individual.[138] A person is also entitled to an expunction of records pertaining to an arrest if they were arrested solely as a result of identifying information that was inaccurate due to a clerical error.[139]

However, there are also some disqualifiers for expungement. A person may not expunge any files relating to an arrest that occurs pursuant to a warrant issued for a violation of community supervision.[140] In addition, a person who flees the jurisdiction after being released on bail may not expunge

132. *Id.* at art. 55.01(a)(2)(A)(i)(d).

133. *Id.* at art. 55.01(a)(2)(A)(ii), (a-3). However, the veterans' treatment court program must be created under Chapter 124 of the Texas Government Code and the pretrial intervention program must be authorized under Section 76.011 of the Texas Government Code. *Id.*

134. *Id.* at art. 55.01(a)(2)(A)(ii)(c).

135. *Ex parte* Smirl, 514 S.W.3d 365, 369 (Tex. App.—Amarillo 2017, no pet.).

136. CRIM. PROC. art. 55.01(a)(2)(A)(ii)(d). In order to constitute an indictment, "the charging instrument must charge: (1) a person, and (2) the commission of an offense." Teal v. State, 230 S.W.3d 172, 179 (Tex. Crim. App. 2007) (quoting Cook v. State, 902 S.W.2d 471, 477 (Tex. Crim. App. 1995)). However, if the indictment merely omits an element of an offense, it is not void. *Cook*, 902 S.W.3d at 477.

137. CRIM. PROC. art. 55.01(d).

138. *See id.* at art. 55.01(d)(2)(A).

139. *Id.* at art. 55.01(d)(d)(1).

140. *Id.* at art. 55.01(a-1).

any files relating to the arrest for that offense.[141] If a person is charged with having participated in a criminal episode[142] and they are acquitted of one charge but convicted or still subject to prosecution of another charge, they may not expunge the records relating to the arrest for the criminal episode.[143] Alternatively, if someone is arrested for an offense for which they are acquitted and had an outstanding warrant at the time of the arrest that proceeds to court as a result of that arrest, a guilty plea or conviction on the outstanding warrant charge will not bar their expungement of the unrelated offense for which they were acquitted.[144] A single arrest that encompasses multiple unrelated offenses does not translate those offenses into a criminal episode.[145] Having "too many arrests" is not a disqualification for expungement.[146]

Notwithstanding all of the above, records relating to the suspension or revocation of a driver's license, permit, or privilege to operate a motor vehicle may only be expunged as allowed by the Texas Transportation Code.[147] A suspension of one's driver's license may not be imposed if one is acquitted of a charge of driving while intoxicated, driving while intoxicated with a child passenger, boating while intoxicated, intoxication assault, intoxication manslaughter, or driving or operating watercraft under the influence of alcohol by a minor.[148] If the suspension has already been put in place at the time of the acquittal, the department of transportation shall

141. *Id.* at art. 55.01(a-2).

142. A criminal episode is when a person commits two or more offenses and "(1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or (2) the offenses are the repeated commission of the same or similar offenses." TEX. PENAL CODE ANN. § 3.01.

143. CRIM. PROC. art. 55.01(c).

144. State v. T.S.N., 547 S.W.3d 617 (Tex. 2018). In the *T.S.N.* case, the petitioner was arrested for aggravated assault with a deadly weapon, police discovered she had a warrant out for an unrelated offense of theft by check from three years previous, and executed that arrest warrant at the same time they arrested her for the aggravated assault with a deadly weapon. *Id.* at 619. When the petitioner was acquitted of the aggravated assault with a deadly weapon, she petitioned to have it expunged despite having pled guilty to the unrelated theft. *Id.* The Supreme Court of Texas found that expungement is neither arrest-based nor offense-based, but rather requires a strict criminal episode analysis per the language of the statute. *Id.* at 621–23. The court acknowledges the difficulties posed by partial expungements in situations where a single arrest encompasses multiple unrelated offenses. *Id.* at 624–25. However, the Court stated that they were bound by the language of the statute that Congress set out. *Id.* at 625. Partial expungement is an issue that we can expect to be addressed in future updates to the expungement statute.

145. *See T.S.N.*, 523 S.W.3d at 176.

146. *In re* Expunction of K.G., 504 S.W.3d 911, 913, 915–16 (Tex. App.—El Paso 2016, no pet.) (Despite the fact that K.G. met all the statutory requirements for expungement, the trial court denied her petition for expungement due to concern that K.G. had been arrested ten times within seven years. The appellate court found that so long as the petitioner satisfies the grounds for expungement, the trial court has no discretion to deny the petition due to concerns about "justice".).

147. CRIM. PROC. art. 55.06.

148. TEX. TRANSP. CODE ANN. § 524.015(b).

rescind the suspension.[149] Otherwise, the disposition of a criminal charge does not affect driver's license suspension.[150]

Just because an individual is deceased does not mean they cannot have their records expunged. If an individual is entitled to an expungement but they are deceased, a close relative[151] may file for expungement on behalf of the deceased person.[152] While this kind of expungement may not help with employment and housing, it is often important to the family of the deceased individual that the legacy they leave behind is untarnished by an arrest record. Families may also free themselves of implications of criminality by association.

Expungement is a statutory privilege, not a constitutional or common law right.[153] The court has no ability to extend the right to expungement beyond the clear meaning of the statute as described above.[154] The cause of action created by the expungement statute is civil rather than criminal in nature, and the burden of proving compliance with the statutory requirements rests with the individual seeking expungement.[155] Since expungement is a civil privilege, any statutes releasing a person from the "penalties and disabilities" of a criminal offense do not entitle that person to expungement.[156] Although expungement is a civil action, it is not subject to a statute of limitations.[157] In *Heine*, the district attorney argued that the expungement action was barred by § 16.051 of the Civil Practice and Remedies Code which sets a four-year statute of limitations for every civil action for which there is no express limitations period.[158] However, an expungement action is not subject to the residual statute of limitations because the statute granting the right to expungement is mandatory and

149. *Id.*

150. *Id.* § 524.015(a); *see also id.* § 724.048.

151. For the purposes of expungement, close relatives include spouses, grandparents, parents, siblings, and children. CRIM. PROC. art. 55.011(a).

152. *Id.* at art. 55.011(b).

153. Travis Cty. Dist. Attorney v. M.M., 354 S.W.3d 920, 923 (Tex. App.—Austin 2011, no pet.); *Ex parte* S.C., 305 S.W.3d 258, 260 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

154. *Travis Cty. Dist. Attorney*, 354 S.W.3d at 923; Tex. Dep't of Pub. Safety v. J.H.J., 274 S.W.3d 803, 806 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

155. Hous. Police Dep't v. Berkowitz, 95 S.W.3d 457, 460 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); McCarroll v. Tex. Dep't of Pub. Safety, 86 S.W.3d 376, 378 (Tex. App.—Fort Worth 2002, no pet.); Heine v. Tex. Dep't of Pub. Safety, 92 S.W.3d 642, 646 (Tex. App.—Austin 2002, pet. denied); Kendall v. State, 997 S.W.2d 630, 631 (Tex. App.—Dallas 1998, pet. denied); *Ex parte* Scott, 818 S.W.2d 226, 227 (Tex. App.—Corpus Christi 1991, no writ).

156. *J.H.J.*, 274 S.W.3d at 809. The "penalties and disabilities" of a criminal offense that a person is released from when they receive a dismissal are "quite limited" and operate to restore civil rights such as the right to vote, serve on juries, and hold public office. *Id.* at 810. Only a select portion of people whose cases are dismissed are eligible to have their cases expunged. CRIM. PROC. art. 55.01.

157. *Heine*, 92 S.W.3d at 649.

158. *Id.* at 648.

exclusive and applying the statute of limitations to the expungement statute does not comport with the intent of the statute, which is remedial in nature.[159] The expungement statute was created to remedy the harmful consequences of wrongful arrest, not a cause of action against another who needs to be protected from stale claims.[160] Therefore, an expungement can be sought and granted at any time one meets all of the requirements.

V. HOW TO GET AN EXPUNGEMENT

Although anyone may represent themselves and may file a motion for expungement themselves, this process is usually done by the attorney representing the person entitled to expungement. As stated previously, an expungement proceeding is a civil proceeding.[161] Texas law requires that in certain civil proceedings the trial court must appoint counsel to represent indigent litigants. However, an expungement proceeding is not one of those civil proceedings. No automatic right to appointed counsel exists for an expungement hearing.[162] Although, a trial court may, in its discretion, appoint counsel to represent indigent litigants in a civil case.[163]

The process for expungement is a little different based on why you are entitled to expungement.[164]

A. Acquittal

When a person is acquitted by the trial court, the judge is required to inform that person they are entitled to have their records expunged.[165] If a person is entitled to expungement because they have been acquitted, they must file a request for expungement in the trial court that presided over the case in which they were acquitted.[166] If the person was not represented by

159. *Id.*
160. *Id.*
161. Hous. Police Dep't v. Berkowitz, 95 S.W.3d 457, 460 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); McCarroll v. Tex. Dep't of Pub. Safety, 86 S.W.3d 376, 378 (Tex. App.—Fort Worth 2002, no pet.); *Heine*, 92 S.W.3d at 646; Kendall v. State, 997 S.W.2d 630, 631 (Tex. App.—Dallas 1998, pet. denied); *Ex parte Scott*, 818 S.W.2d 226, 227 (Tex. App.—Corpus Christi 1991, no writ).
162. Pleasant v. Travis Cty. Dist. Attorney, No. 04-16-00210-CV, 2016 WL 4626225, at *3 (Tex. App.—San Antonio Sept. 7, 2016, pet. denied); Pitts v. State, 113 S.W.3d 393, 397 (Tex. App.—Houston [1st Dist.] 2003, no pet.).
163. TEX. GOV'T CODE ANN. § 24.016; Travelers Indem. Co. v. Mayfield, 923 S.W.2d 590, 594 (Tex. 1996) ("[I]n some exceptional cases, the public and private interests at stake [may be] such that the administration of justice may best be served by appointing a lawyer to represent an indigent civil litigant.").
164. *See* TEX. CODE CRIM. PROC. ANN. art. 55.02.
165. *Id.* at art. 55.02 § 1.
166. *See id.*

counsel in the trial in which they were acquitted or if the State's attorney requested the order of expungement, the attorney for the State will prepare the order of expungement for the court to sign.[167] Otherwise, the attorney who represented the acquitted person at the trial at which they were acquitted will prepare the order of expungement for the court to sign.[168] The court shall grant the motion for expungement not later than the thirtieth day after the date of the acquittal.[169]

If the acquitted individual does not request expungement within the thirty-day window after the date of the acquittal, the court does not lose its jurisdiction to expunge the records related to the acquittal and the individual has not waived his right to seek expungement.[170] The right to expungement granted by the legislature amounts to an entitlement to expungement.[171] The thirty-day requirement is to ensure that acquitted individuals are able to expeditiously clear their criminal records, not to bar acquitted individuals from relief.[172]

B. Found Actually Innocent

If a person is entitled to expungement because they have been found actually innocent, they must file a request for expungement in the trial court.[173] The attorney for the State will prepare the order of expungement for the court to sign.[174] If the person entitled to expungement is in the custody of the Texas Department of Criminal Justice, the attorney for the State will notify the department of the pardon or finding of actual innocence.[175] The court shall grant the motion for expungement not later than the 30th day after the court receives notice of the pardon or other grant of relief.[176] In the expungement order, "[t]he court shall include. . .a listing of each official, agency, or other entity of this state or political subdivision of this state and each private entity that there is reason to believe has any record or file that is subject to the order."[177] The expungement order will order the Texas Department of Criminal Justice to return to the court all files that it received when the individual was transferred to its custody.[178] The order will also

167. *Id.*
168. *Id.*
169. *Id.*
170. *See* Bargas v. State, 164 S.W.3d 763, 772–73 (Tex. App.—Corpus Christi 2005, no pet.).
171. *Id.* at 772.
172. *See id.* at 773.
173. CRIM. PROC. art. 55.02 § 1a(a).
174. *Id.* at art. 55.02 § 1a(b).
175. *Id.*
176. *Id.* at art. 55.02 § 1a(a).
177. *Id.* at art. 55.02 § 1a(c).
178. *Id.* at art. 55.02 § 1a(c)(1).

require the Texas Department of Criminal Justice and the Texas Department of Public Safety to "delete or redact, as appropriate, from their public records all index references to the records and files that are subject to the expunction order."[179] However, the court will retain a copy of the judgment entered, a copy of the victim impact statement, a copy of the indictment or information for each offense, a copy of pre-sentence or post-sentence report, and several other documents[180] until the statute of limitations has run for any civil case or proceeding related to the wrongful imprisonment of the person subject to the order of expungement.[181]

C. *Pardoned for a Reason Other than Actual Innocence, Has Been Released with No Pending Charges or Final Conviction, or Completion of Pretrial Diversion Program or Veterans Treatment Court Program*

If an individual is entitled to expungement due to being pardoned for a reason other than actual innocence, because their arrest has not resulted in

179. *Id.* at art. 55.02 § 1a(c)(2).

180. Full list of documents the court will retain:

(1) a copy of the judgment entered pursuant to Article 42.01, completed on a standardized felony judgment form described by Section 4 of that article;

(2) a copy of any order revoking community supervision and imposing sentence pursuant to Article 42A.755, including:

(A) any amounts owed for restitution, fines, and court costs, completed on a standardized felony judgment form described by Section 4, Article 42.01; and

(B) a copy of the client supervision plan prepared for the defendant by the community supervision and corrections department supervising the defendant, if such a plan was prepared;

(3) a written report that states the nature and the seriousness of each offense and that states the citation to the provision or provisions of the Penal Code or other law under which the defendant was convicted;

(4) a copy of the victim impact statement, if one has been prepared in the case under Article 56.03;

(5) a statement as to whether there was a change in venue in the case and, if so, the names of the county prosecuting the offense and the county in which the case was tried;

(6) if requested, information regarding the criminal history of the defendant, including the defendant's state identification number if the number has been issued;

(7) a copy of the indictment or information for each offense;

(8) a checklist sent by the department to the county and completed by the county in a manner indicating that the documents required by this subsection and Subsection (c) accompany the defendant;

(9) if prepared, a copy of a presentence or postsentence report prepared under Subchapter F, Chapter 42A;

(10) a copy of any detainer, issued by an agency of the federal government, that is in the possession of the county and that has been placed on the defendant;

(11) if prepared, a copy of the defendant's Texas Uniform Health Status Update Form; and

(12) a written description of a hold or warrant, issued by any other jurisdiction, that the county is aware of and that has been placed on or issued for the defendant.

Id. at art. 42.09 § 8.

181. *Id.* at art. 55.02 § 1a(d).

any pending charges or a final conviction without court-ordered community supervision, or because they have completed an approved pretrial diversion program or veterans treatment court program, they may file an ex parte petition for expungement in either the county in which the petitioner was arrested or the county in which the offense was alleged to have occurred.[182] A motion or request for expungement must include all of the following or an explanation why one or more of the following is missing:

> (1) the petitioner's: (A) full name; (B) sex; (C) race; (D) date of birth; (E) driver's license number; (F) social security number; and (G) address at the time of the arrest;
>
> (2) the offense charged against the petitioner;
>
> (3) the date the offense charged against the petitioner was alleged to have been committed;
>
> (4) the date the petitioner was arrested;
>
> (5) the name of the county where the petitioner was arrested and if the arrest occurred in a municipality, the name of the municipality;
>
> (6) the name of the agency that arrested the petitioner;
>
> (7) the case number and court of offense'
>
> (8) together with the applicable physical or e-mail addresses, a list of all:
>
> (A) law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, and other officials or agencies or other entities of this state or of any political subdivision of this state;
>
> (B) central federal depositories of criminal records that the petitioner has reason to believe have records or files that are subject to expungement; and
>
> (C) private entities that compile and disseminate for compensation criminal history record information that the petitioner has reason to believe have information related to records or files that are subject to expunction.[183]

The court will set a hearing on the request for expungement no sooner than thirty days from the filing of the petition.[184] The court will give each official or other governmental agency named in the petition reasonable notice of the hearing.[185] Each official or other governmental agency named in the petition has a right to be represented by an attorney at the hearing.[186] At the

182. *Id.* at art. 55.02 § 2(a).
183. *Id.* at art. 55.02 § 2(b).
184. *Id.* at art. 55.02 § 2(c).
185. *Id.*
186. *Id.* at art. 55.02 § 2(c-1).

hearing, the court will determine whether the petitioner is entitled to expungement. In some cases, a hearing may not take place. A trial court may rule on an expungement petition without either conducting a formal hearing or considering live testimony if it has all the information it needs to resolve the issues raised by the petition already at its disposal.[187] After considering the evidence, if the court determines that the petitioner is entitled to expungement, any records or files that are subject to the petition will be ordered to be expunged.[188]

The director of the Department of Public Safety, or the director's authorized representative, may file a request for expungement on behalf of an individual entitled to expungement for one of the reasons listed in this section.[189] However, the director is not required to take this action, so the safest course of action is always petitioning for expungement through your own attorney.

D. Identity Theft & Mistaken Identity

A person who is entitled to an expunction of their identifying information due to identity theft or a clerical error resulting in arrest may file an application for expungement with the attorney representing the State in the prosecution of felonies in the county in which the person resides.[190] The application must be verified and include fingerprint records of the applicant.[191] The application must include all of the following or an explanation why one or more of the following is missing:

(1) the applicant's full name, sex, race, date of birth, driver's license number, social security number, and address at the time of the applicable arrest;

(2) the following information regarding the arrest:

(A) the date of the arrest;

(B) the offense charged against the person arrested;

(C) the name of the county or municipality in which the arrest occurred;

(D) the name of the arresting agency;

(3) a statement, as appropriate, that the applicant:

187. Pleasant v. Travis Cty. Dist. Attorney, No. 04-16-00210-CV, 2016 WL 4626225, at *4 (Tex. App.—San Antonio Sept. 7, 2016, pet. denied); *Ex parte* Wilson, 224 S.W.3d 860, 863 (Tex. App.—Texarkana 2007, no pet.).

188. CRIM. PROC. art. 55.02 § 2(d).

189. *Id.* at art. 55.02 § 2(e).

190. *Id.* at art. 55.02 § 2a(a).

191. *Id.* at art. 55.02 § 2a(b).

(A) was arrested solely as a result of identifying information that was inaccurate due to a clerical error; or

(B) is not the person arrested and for whom the arrest records and files were created and did not give the arrested person to consent to falsely identify himself or herself as the applicant.[192]

After verifying the content of an application of expungement, the attorney representing the State shall add to the application any information regarding the arrest that was unknown by the applicant.[193] The attorney will then be responsible for forwarding a copy of the application to the district court for the county together with a list of all the law enforcement agencies, jails or other detention facilities, magistrates, courts, prosecuting attorneys, correctional facilities, central state depositories of criminal records, central federal depositories of criminal records, and private entities that compile and disseminate for compensation criminal history information that are reasonably likely to have records or files containing information that is subject to expungement.[194] The State's attorney will then request the court to enter an order of expungement based on the application.[195]

VI. WHAT HAPPENS WHEN YOU GET AN EXPUNGEMENT?

After the order of expungement is issued, both the subject of the expungement order and an agency protesting the expungement may appeal the court's decision the same way a person would appeal a civil case.[196] In an order of expungement, the court must require any state agency that sent information concerning the arrest to a central federal depository to request the depository to return all records and files subject to the order of expungement.[197] When the order of expungement is final, the clerk of the court sends a copy of the order to the Crime Records Service of the Department of Public Safety and to each official, agency, or governmental entity named in the order.[198] The Department of Public Safety then communicates to any central depository of criminal records an explanation of the expungement order and a request that the depository destroy or return to the court the records in its possession that are subject to the expungement order.[199] The Department of Public Safety shall also provide notice of the expungement order to any private entity that is named in the order and to any

192. *Id.*
193. *Id.* at art. 55.02 § 2a(c)(1).
194. *Id.* at art. 55.02 § 2a(c)(2)–(3).
195. *Id.* at art. 55.02 § 2a(c)(4).
196. *Id.* at art. 55.02 § 3(a).
197. *Id.*
198. *Id.* at art. 55.02 § 3(c).
199. *Id.* at art. 55.02 § 3(c-1).

private entity that purchases criminal history record information from the department.[200] The notice must explain the effect of the expungement order and a request to destroy any information in the possession of the entity that is subject to the order.[201]

When an employer or other entity runs a background check, it is generally done through a company whose business it is to run a background check.[202] The employer or entity does not generally check your criminal history with the court.[203] Even though the state is required to notify commercial companies, there can sometimes be a gap. If the background check companies are not notified of your expungement, your criminal history may remain in their system and will be incorrectly reported to inquiring parties long after your expungement has been granted.[204] Texas law only penalizes companies that disseminate criminal background information for profit for disseminating criminal records that contain convictions that have been expunged if the company had notice that an order of expungement was issued.[205] To avoid this issue, you may wish to have your own attorney notify these commercial companies of your expungement instead of relying entirely on the state.

Each official, agency, or other government entity named in the order shall return all records subject to the order to the court and delete from its public records all index records to the records subject to the order.[206] If removal of the records to the court is impracticable, the official, agency, or other governmental entity shall obliterate all portions of the record that identify the person who is the subject of the expungement order and then notify the court that they have done so.[207] If one is granted an expungement order on a basis other than acquittal, the court may give that person all the records and files subject to the expungement order that were returned to the court.[208] Unless the expungement order was granted on the basis of acquittal, the court clerk will destroy all records and files not earlier than the sixtieth day after the expungement order was issued, nor later than the first anniversary of when the court released all the records and files to the person subject to the order.[209] The clerk must give at least thirty days' notice to the

200. *Id.* at art. 55.02 § 3(c-2).
201. *Id.*
202. *Expungement and Expunction in Texas*, RECORDGONE: A DIVISION OF HIGBEE & ASSOCIATES, http://www.recordgone.com/expungement-in-texas [https://perma.cc/8VE6-YJEZ].
203. *Id.*
204. *Id.*
205. TEX. GOV'T CODE ANN. § 411.0851(a)(1).
206. CRIM. PROC. art. 55.02 § 5(a).
207. *Id.*
208. *Id.* at art. 55.02 § 5(b).
209. *Id.* at art. 55.02 § 5(d).

State's attorney that they are going to destroy the files.[210] If the State's attorney objects to the destruction within twenty days of receiving the notice, the clerk may not destroy the records and files until the first anniversary of the date the expungement order was issued.[211] Once the records and files are destroyed, the clerk will certify this to the court.[212] The court records concerning the expungement itself are not open to anyone except the subject of the order, unless records were retained due to the subject of the order still being subject to prosecution from an offense that led to the arrest and the subject is again arrested and charged with that offense.[213]

Even with the expungement order, there are situations in which the court will allow the law enforcement agency and the prosecuting attorney to retain files covered by the expungement order. If the State establishes that the person who is granted the order of expungement is still able to be charged and convicted for an offense arising out of the same transaction for which the person was arrested, meaning that the statute of limitations has not run and there is reasonable cause to believe that the State may proceed against the person for the offense, the court may provide in the expungement order that the law enforcement agency and prosecuting attorney responsible for investigating the offense that still may be charged may retain any records and files necessary to the investigation.[214] If a person is granted an expungement order because the prosecution did not bring charges against them based on their arrest and they have not received a certification from the State's attorney that the records sought to be expunged are not needed for use in any criminal investigation or prosecution, the court shall provide in the expungement order that the applicable law enforcement agency and prosecuting attorney may retain the arrest records and files.[215] If an individual is granted an expungement order on the basis of an acquittal, the court may allow the law enforcement agency and the prosecuting attorney to retain records and files if they are necessary for use in another case.[216] This could be a criminal case against another person—including prosecution, motion to adjudicate or revoke community supervision, parole revocation hearing, mandatory supervision revocation hearing, punishment hearing, or a bond hearing.[217] It could be a civil suit, including a suit for possession of or access to a child.[218]

210. *Id.* at art. 55.02 § 5(d-1).
211. *Id.*
212. *Id.* at art. 55.02 § 5(e).
213. *Id.* at art. 55.02 § 5(c).
214. *Id.* at art. 55.02 § 4(a).
215. *Id.* at art. 55.02 § 4(a-1).
216. *Id.* at art. 55.02 § 4(a-2).
217. *Id.*
218. *Id.* at art. 55.02 § 4(a-2)(2)(B).

This can also include disciplinary proceedings against an attorney who was involved in the case.[219]

In addition, the subject of an expungement may later waive his expungement rights for a certain purpose and allow the files to be used.[220] It has been established precedent that a person can waive their expungement rights when they put the expunged records at issue in a civil proceeding.[221] The ability of an individual to waive his expungement rights ensures that the expungement statutes are never at odds with the individual's interests should he file a civil suit based on material contained in the expunged records.[222] In more recent years, the courts have expanded the right to waive expungement rights beyond the need to succeed in civil proceedings. In *In re State Bar of Texas*, the subject of an expungement order waived his rights with regard to the trial court transcripts so that the Commission for Lawyer Discipline could prosecute the prosecutor in the case for prosecutorial misconduct.[223] The Texas Supreme Court reasoned that allowing the grievance proceeding to utilize the trial records was in the subject of the expungement order's best interest even though he would not directly benefit from the ruling.[224] It is likely that the courts will further expand the right to waive expungement rights in other situations where the bringing of expunged files to light will indirectly benefit the subject of the expungement order. The legislature created the expungement statutes to benefit individuals who are entitled to expungement, not to contravene their interests by keeping records private. It is certainly worth the effort of making the waiver argument should the issue arise in one of your cases.

Notwithstanding all of the above, an official, agency, or other government entity subject to the order may retain receipts, invoices, vouchers, or other records of financial transactions that arose from the expungement proceeding or the prosecution of the underlying cause in

219. *In re* State Bar of Tex., 440 S.W.3d 621, 624–627 (Tex. 2014) (Commission for Lawyer Discipline was allowed access to trial transcripts subject to an expungement order granted on the grounds of acquittal for the purpose of prosecuting the prosecutor in the case for prosecutorial misconduct).

220. *Id.* at 625–26; Thomas v. City of Selma, No. SA-06-CA-0119-XR, 2006 WL 2854405, at *3 (W.D. Tex. Oct. 4, 2006) (holding that subject of expungement order has un-expunged the record by filing a civil suit based on his arrest); W.V. v. State, 669 S.W.2d 376, 378–79 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (holding that retention of files was not necessary to afford District Attorney protection from potential civil action because records could be retrieved at any time by the subject of the expungement order should the subject wish to file subsequent proceedings).

221. *Thomas*, 2006 WL 2854405, at *3; *W.V.*, 669 S.W.2d at 378–79.

222. *In re State Bar of Tex.*, 440 S.W.3d at 626.

223. *Id.* at 624.

224. *Id.* at 626.

accordance with internal financial control procedures.[225] However, any records retained for this reason shall have obliterated all parts of the records that identify the person who is the subject of the expungement order.[226]

After the order of expungement is final, the release, maintenance, dissemination, or use of expunged records and files for any purpose is prohibited.[227] When any person is questioned under oath in a criminal proceeding about an arrest for which the records are expunged, that person may not deny the arrest, but may state that the matter in question has been expunged.[228] This means you cannot respond that the arrest did not happen when questioned in a criminal trial just because the record of the arrest has been expunged. In every other circumstance, the subject of the expungement order may deny that the arrest or the expungement ever occurred.[229]

Violation of an expungement order can result in prosecution. If an employee of the state acquires knowledge of an arrest while employed by the state, knows of an order expunging records and files related to that arrest, and knowingly releases, disseminates, or otherwise uses the records or files, that state employee has committed a Class B misdemeanor.[230] A person who knowingly fails to return or obliterate portions of a record subject to an expungement order has also committed a Class B misdemeanor.[231] An individual found guilty of a Class B misdemeanor shall be punished by a fine not to exceed $2,000, confinement in jail for a term not to exceed 180 days, or both a fine and confinement in jail.[232]

Businesses that commercially publish criminal history information and charge a fee to modify criminal record information open themselves up to civil liability for violations of an expungement order.[233] If a business entity has knowledge of or receives notice that an order of expungement has been issued, they may not publish any criminal record information to which the order of expungement applies.[234] In this context, "publish" means to "communicate or make information available to another person."[235] If a business has posted the criminal history information on its website and is available for searches, the business has published the information—even if

225. TEX. CODE CRIM. PROC. ANN. art. 55.02 § 5(g).
226. *Id.*
227. *Id.* at art. 55.03(1).
228. *Id.* at art. 55.03(3).
229. *Id.* at art. 55.03(2).
230. *Id.* at art. 55.04.
231. *Id.*
232. TEX. PENAL CODE ANN. § 12.22.
233. TEX. BUS. & COM. CODE ANN. § 109.005.
234. *Id.* § 109.005(a)(1).
235. BUS. & COM. § 109.001(4).

no one has accessed the information.[236] If a business entity does publish criminal record information in violation of the law, they are liable to the subject of the expungement order up to $500 for each separate violation.[237] If the violation is continuous, the business entity is liable up to $500 for each subsequent day on which the violation occurs.[238] The subject of the expungement order does not have to demonstrate any specific injury that resulted from the publication of their expunged criminal history information, only that the business entity published the information after notice of or with knowledge of the expungement order.[239] The subject of an expungement order may also be granted injunctive relief to prevent or restrain a business from publishing criminal record information that is subject to an expungement order.[240] The subject of an expungement order who prevails in a suit against a business entity for unlawfully publishing criminal record information may also recover court costs and reasonable attorney's fees.[241] However, there are many businesses that are exempt from civil liability for publishing criminal records information that has been expunged: magazines, periodical newspapers, periodical newsletters, publications of general circulation, internet websites publishing news or other information, radio or television stations that hold a license issued by the Federal Communications Commission, an entity that provides an information service or that is an interactive computer service, and telecommunications providers.[242]

The State of Texas bars convicted felons from being eligible for a license to carry a handgun.[243] An expungement also restores eligibility for a license to carry a handgun if it removes all felonies from the record.[244]

VII. HOW IS THE EXPUNGEMENT PROCESS DIFFERENT FOR A JUVENILE?

While some individuals believe that concealment of juvenile records is unwise,[245] society has recognized the differences between children and adults

236. D.K.W. v. Source for PublicData.com, 526 S.W.3d 619, 630 (Tex. App.—Dallas 2017, pet. denied). This is different than the definition of "publish" for the purposes of defamation where a third party needs to actually consume and understand the information being communicated. *Id.*

237. BUS. & COM. § 109.005(b).

238. *Id.*

239. *D.K.W.*, 526 S.W.3d at 626.

240. BUS. & COM. § 109.005(c).

241. *Id.* § 109.005(d).

242. *Id.* § 109.002(b).

243. TEX. GOV'T CODE ANN. § 411.172(a)(3).

244. *Id.* § 411.171(4)(A).

245. *See* Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer's Need to Know About Juvenile Misdeeds and an Employee's Need to Keep Them Secret*, 41 WASH. U. J. URB. & CONTEMP. L. 3, 3–15 (1992) (arguing that the ability of individuals to expunge their juvenile criminal records unfairly prejudices employers who blindly assume liability

and decided that we should allow juveniles to have a chance to put behind them bad decisions made while executive function and impulse control were not fully developed.[246] In the State of Texas, juvenile records and hearings are generally not open to the public so that the juvenile may focus on rehabilitation without the stigma that normally comes with being arrested or convicted.[247] Convictions and deferred adjudications of juveniles are not available on the Texas Department of Public Safety's database and therefore cannot be purchased by the public from the department like one could for the records of an adult.[248] Because juvenile records cannot be purchased by the public, commercial businesses that sell criminal record information may also not purchase juvenile records from the Texas Department of Public Safety for resale to the public.[249] However, sex offender registration records of juveniles are available to the public in order to serve the goal of the sex offender registry: informing the public of harmful offenders and their whereabouts.[250]

For the majority of offenses, expungement of juvenile records is subject to the same law as adult records.[251] Therefore, for most offenses, a juvenile may only expunge their records if they meet one of grounds enumerated above. However, there are some special expungement provisions for certain offenses committed by juveniles. The Texas Alcoholic Beverage Code provides that any person arrested for or convicted of only one violation of the code while a minor is entitled to have their conviction expunged once they reach the age of twenty one.[252] The Texas Health and Safety Code provides that if a person was convicted of possessing, purchasing, consuming, or accepting a cigarette, e-cigarette, or tobacco product as a minor, and they have satisfactorily completed the e-cigarette and tobacco awareness program or tobacco related community service ordered by the court, the court shall expunge the conviction record for that offense.[253] If a person was convicted of only one of the following infractions before the age of seventeen, they are entitled to have the conviction expunged on or after their seventeenth birthday: a misdemeanor punishable by fine only, a violation of a penal

for employees who may have committed crimes that indicate they will expose the employer to liability in the future).

246. *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

247. ROBERT O. DAWSON, TEXAS JUVENILE LAW 374 (Nydia D. Thomas ed., 9th ed. 2012). Juvenile boards and courts have authority to make hearings and records available to the public, but this is the exception to the general principle. *Id.*

248. *Id.*

249. *See id.* at 374–75.

250. TEX. GOV'T CODE ANN. § 411.135(a)(1).

251. DAWSON, *supra* note 247, at 401.

252. TEX. ALCO. BEV. CODE ANN. § 106.12.

253. TEX. HEALTH & SAFETY CODE ANN. § 161.255.

ordinance of a political subdivision, or electronic transmission of certain visual material depicting a minor (the practice of sexting as a minor would fall under this category).[254] An individual who has been convicted of a truancy offense or has had a complaint for truancy dismissed is entitled to have that conviction or complaint expunged.[255] The procedures for these expungements specific to juvenile records have procedures separate and distinct from the expungement procedure explained above that applies to adult records and all other juvenile records.[256]

In addition to expungement, juveniles have other legal avenues to conceal their records from the public. Texas law allows for you to seal your juvenile record so long as you do not have any pending charges as an adult for a felony or a misdemeanor punishable by confinement in jail.[257] The individual must be at least eighteen years of age or under eighteen years of age and at least two years have elapsed after the date of final discharge in each matter for which the person was referred to the juvenile probation department.[258] Regardless of whether the previous requirements are met, a court may not seal the records of a person who participated in habitual felony conduct or conducted one of the following serious crimes: murder; capital murder; manslaughter; aggravated kidnapping; sexual assault; aggravated assault; aggravated robbery; injury to a child, elderly individual, or disabled individual; felony deadly conduct involving discharge of a firearm; aggravated controlled substance felony; criminal solicitation; indecency with a child; criminal solicitation of a minor; arson resulting in bodily injury or death; intoxication manslaughter; or any crime that requires a person to register as a sex offender.[259]

The court is required to inform a child about the procedures for the sealing of that child's juvenile record at the conclusion of their dispositional hearing.[260] However, since the dispositional hearing generally takes place long before the record is eligible to be sealed, the effectiveness of this information is debatable.

Even if a juvenile record is sealed, a court may allow a prosecutor to review the records for use in a capital prosecution or for the purpose of sentencing enhancements for prior felonies, including felonies committed while a juvenile.[261] Unlike an expungement, sealing a juvenile record does

254. TEX. CODE CRIM. PROC. ANN. art. 45.0216.
255. *Id.* at art. 45.0541(b).
256. ALCO. BEV. § 106.12(f); CRIM. PROC. art. 45.0216(j); *see* HEALTH & SAFETY § 161.255; *see also* CRIM. PROC. art. 45.0541.
257. TEX. FAM. CODE ANN. § 58.256(c)(5).
258. *Id.* § 58.256(c)(1).
259. *Id.* § 58.256(d).
260. *Id.* § 54.04(h)(2).
261. *Id.* § 58.260(a)(2).

not result in its being destroyed.[262] A person who has had their juvenile record sealed is not required to state in any proceeding or in any application for employment, licensing, admission, housing, or other public or private benefit that the person has been the subject of a juvenile matter.[263] This differs from expungement, where the individual who has had their records expunged may deny that the arrest or expungement ever occurred in every situation, except a criminal proceeding where they must concede that the arrest occurred and that it was then expunged.[264]

VIII. WHY AN EXPUNGEMENT DOES NOT CHANGE

In an era where nearly everything is available on the internet, freedom of the press can hamper efforts to pretend arrests and convictions never happened, even when expungement is granted as a remedy. The First Amendment grants the media the right to freely and truthfully report on arrests, trials, convictions, and other events happening within the strictures of the criminal justice system.[265] With the advent of blogging and other forms of online expression, we also see individuals reporting and weighing in on the happenings of the criminal justice system. While expungement orders apply to documents held by government officials, government agencies, government entities, and companies who commercially disseminate criminal history, they do not apply to news stories.[266] Media entities such as newspapers, magazines, online news publications, radio stations, television stations, and telecommunications providers are not subject to the law imposing civil liability on business entities who publish criminal history information subject to an expungement order.[267] No news organization will be forced to remove its online article covering the arrest, and no individual will be required to surrender their newspaper or DVR recording of the evening news spot covering the conviction. One may easily pose the argument that expungement is insufficient to disassociate an individual with their arrest or conviction. Even if your criminal background check comes back clean, your employer may still discover your arrest with a simple Google search. An organization that reports your arrest or conviction is under no duty to report your subsequent acquittal, pardon, or expungement. As Justice Blackmun of the United States Supreme Court stated:

262. *See id.* §§ 58.261(c), 58.262(c)(7).
263. *Id.* § 58.261(a).
264. TEX. CODE CRIM. PROC. ANN. art. 55.03(2)–(3).
265. *See* Branzburg v. Hayes, 408 U.S. 665, 681–83 (1972).
266. *See* CRIM. PROC. art. 55.04(1).
267. TEX. BUS. & COM. CODE ANN. § 109.002(b)(2)–(5).

"[Expungement] under state law does not alter the historical fact of conviction."[268]

Once an expungement is granted "[the subject of the expungement order] *may* deny the occurrence of the arrest and the existence of the expunction order" except "when questioned under oath in a criminal proceeding."[269] This means that the subject of the expungement order may still talk about the arrest and or conviction if they wish to do so. One reason a subject of an expungement order may wish to talk about an arrest that has been expunged is to spread awareness about wrongful conviction, such as many people exonerated by the Innocence Project have chosen to do. The danger of talking to individuals about expunged arrests and convictions is that these individuals are not subject to the expungement order. Even government employees who learn of an expunged arrest or conviction from a source outside of their employment don't commit a crime or violate the expungement order by knowingly releasing or disseminating that information.[270] If individuals in your community know about your expunged offense, the fact that you were arrested may get communicated to your employer or other members of the community by word of mouth, even though it doesn't appear on your criminal record.

There also may be formal documents that will not be destroyed when granted an expungement. For instance, if you are granted an expungement following a gubernatorial pardon, the actual gubernatorial pardon proclamation itself is not subject to the expungement order.[271] The Secretary of State has a constitutionally imposed duty to keep a record of all the Governor's official acts.[272] A gubernatorial pardon is an official act of the Governor.[273] When the proposed application of a Texas statute would cause a violation of the Texas Constitution, that application of the statute must not be allowed.[274] Therefore, the statute applying expungement orders to all records and files in possession by all government officials and agencies cannot be construed to apply to gubernatorial pardons maintained by the Secretary of State.[275] In addition, applying the expungement order to the Secretary of State would be a violation of the separation of powers as it would involve the legislative branch interfering with the executive branch's ability

268. Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 114–15 (1983).
269. CRIM. PROC. art. 55.03(2)–(3) (emphasis added).
270. *Id.* at art. 55.04(1).
271. *In re* Expunction, 497 S.W.3d 505, 506 (Tex. App.—Houston [1st Dist.] 2016, no pet.).
272. TEX. CONST. art. IV, § 21.
273. *See id.* at art. IV, § 11(b). The power of the Governor to grant pardons is set forth in the Texas Constitution.
274. Weiner v. Wasson, 900 S.W.2d 316, 318–19 (Tex. 1995); *In re Expunction*, 497 S.W.3d at 509; Salomon v. Lesay, 369 S.W.3d 540, 556–57 (Tex. App.–Houston [1st Dist.] 2012, no pet.).
275. *In re Expunction*, 900 S.W.3d at 509.

to effectively exercise its constitutionally assigned powers.[276] The public has access to the content of these pardons in a multitude of ways. Recent pardons are listed on the Office of the Texas Governor's website.[277] The list of gubernatorial pardons granted within the last year can be accessed online through the Secretary of State's online archive.[278] The Secretary of State's website directs the reader that all records dating back to 1976 are available on "The Portal to Texas History" accessible through the University of North Texas Libraries website.[279] An even easier way members of the public may access information on who was pardoned is to search popular news media websites.[280]

Investigative files and records that don't refer to the arrest may also be retained by a law enforcement agency despite the grant of an expungement.[281] Any files or records that existed before the arrest or would exist independent of the actual arrest are not subject to an expungement order concerning the arrest.[282] This is true even if these investigative materials led directly to an arrest being made.[283] Although these investigative materials are not generally made available to the public, it could lead individuals in that law enforcement office to reference the materials and think of the person in the materials as a potential suspect for future crimes that may bear a resemblance to past acts or circumstances. In making the decision that these investigative files are not subject to an expungement order, the court mainly adopted this interpretation through a plain reading of the statutory language, but also reasoned that being subject to a government investigation does not bear the same life-long social

276. *Id.* at 509–10.

277. *Eg.*, *Governor Abbott Pardons Marvin Thompson*, OFF. OF THE TEX. GOVERNOR (Dec. 22, 2017), https://gov.texas.gov/news/post/governor-abbott-pardons-marvin-thompson [https://perma.cc/L74B-KV9L].

278. *See Back Issues of the Texas Register*, TEX. SECRETARY OF ST., https://www.sos.texas.gov/texreg/archive [https://perma.cc/4TKV-XFQH] (gubernatorial pardons are listed as proclamations contained inside the Texas Register covering the time period they were granted).

279. THE PORTAL TO TEX. HIST., https://texashistory.unt.edu/explore/collections/TR [https://perma.cc/3G9N-6N4U].

280. *Eg.*, Brandi Grissom, *Gov. Greg Abbott Pardons Five Texans*, DALL. MORNING NEWS (Dec. 22, 2016), https://www.dallasnews.com/news/texas-politics/2016/12/22/gov-greg-abbott-pardons-five [https://perma.cc/N3MH-G26V]; Jessica Hamel & Ryan Murphy, *Search: Pardons by Gov. Rick Perry*, TEX. TRIB. (Aug. 6, 2014), https://www.texastribune.org/library/data/search-texas-governor-rick-perry-pardons [https://perma.cc/6YPC-9ZEF]; Adam Liptak, *Texas Governor Pardons 35 Arrested in Tainted Sting*, N.Y. TIMES (Aug. 23, 2003), https://www.nytimes.com/2003/08/23/us/texas-governor-pardons-35-arrested-in-tainted-sting.html [https://perma.cc/27EM-VY5N]; Mike Ward, *Abbott Pardons Seven in Christmastime Clemency*, HOUS. CHRON. (Dec. 22, 2017), https://www.chron.com/news/politics/texas/article/Abbott-pardons-seven-in-Christmastime-commutations-12451194.php [https://perma.cc/3TJE-RH4V].

281. *Ex parte* S.C., 305 S.W.3d 258, 262–63 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

282. *Id.* at 263.

283. *Id.*

stigma as having been arrested or charged with a crime.[284] Although many individuals who have been under publicized government investigation may beg to differ.

An expungement does not insulate you from other consequences of the behavior that was the basis of your expunged arrest. Bustamante was an employee of the Bexar County Sheriff's Office when a drug raid yielded marijuana and drug paraphernalia in her home.[285] After the drug raid, Bustamante was charged with criminal possession of marijuana and drug paraphernalia.[286] Subsequently, Bustamante's criminal charges were dismissed and she secured an expungement of her arrest for possession.[287] After the expungement was granted, the civil service commission held a hearing to determine whether Bustamante should be terminated.[288] The hearing ultimately resulted in Bustamante's termination.[289] The justification given for the termination was that Bustamante refused to submit to a drug test, refused to cooperate with internal affairs, and violated the Sheriff's Civil Service Rules by possessing marijuana.[290] The commission based its decision on testimony from two members of internal affairs who had been present for the drug raid on Bustamante's home.[291] Bustamante argued that the expungement of the arrest for criminal possession prevented the commission from firing her based on the possession.[292] However, the court determined that an expungement does not have that kind of preclusive effect.[293] So long as expunged records are not used as the basis of the decision, your employer may still use the behavior that led to the expunged arrest as the justification for an employment decision.[294]

An expungement does not give you the ability to deny an expunged arrest or conviction during the application process to join the United States Armed Forces.[295] An agent of the United States Armed Forces, including a recruiter, is authorized to access the criminal records of anyone applying for enlistment in the U.S. Armed Forces.[296] In addition, the Armed Forces require

284. *Id.* at 264.
285. Bustamante v. Bexar Cty. Sheriff's Civil Serv. Comm'n, 27 S.W.3d 50, 50–53 (Tex. App.—San Antonio 2000, pet. denied).
286. *Id.* at 53.
287. *Id.*
288. *Id.* at 51.
289. *Id.*
290. *Id.* at 52–53.
291. *Id.* at 54.
292. *Id.* at 53.
293. *Id.* at 54.
294. *Id.*
295. *See* AR 601–201 § 4–30a (2016).
296. TEX. GOV'T CODE ANN. § 411.1410(b).

you to divulge all offenses, even if expunged.[297] The justification for this rule is that since different states have different requirements or allowances for expungement, disclosing expunged offenses puts all applicants nationwide on equal footing.[298] The Department of Defense declared:

> Persons entering the Armed Forces should be of good moral character . . . [the Armed Forces] minimize entrance of persons who are likely to become disciplinary cases or security risks or who disrupt good order, morale, and discipline. The Military Services also have a responsibility to parents who expect that their sons and daughters will not be placed into close association with persons who have committed serious offenses or whose records show ingrained delinquency behavior patterns. The Military Services are responsible for the defense of the nation and should not be viewed as a source of rehabilitation for those who have not subscribed to the legal and moral standards of society at large.[299]

Any individuals with "significant criminal records" are ineligible to enlist in the Armed Forces.[300] Persons with a felony conviction must apply for a waiver of a disqualifying condition in order to permit their enlistment, including individuals who have had their convictions expunged.[301] These waivers will either be granted or denied by Military Services after an investigation into the applicant's suitability for enlistment.[302] Even a record of misdemeanor convictions can disqualify an individual from enlistment if they are demonstrative of antisocial behavior or other traits of character that would render them unfit to associate with military personnel.[303] Failing to disclose an expunged offense on an application will constitute fraudulent enlistment and will subject an individual to a punishment that may include dishonorable discharge, forfeiture of all pay and allowances, and up to two years of confinement.[304] While the Military Services may be persuaded by a pardon or acquittal that accompanies an arrest or conviction when deciding whether to grant a waiver, the criminal record is not cleared in the same way it is for an employer or landlord.

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297. AR 601–201 § 4–30b(1)(b) (2016).

298. *See id.* § 4–30b (2016).

299. DEP'T OF DEF., DIRECTIVE NO. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION, § E1.2.7 (1993), https://biotech.law.lsu.edu/blaw/dodd/corres/pdf/d130426wch1_122193/d130426p.pdf [https://perma.cc/4VL9-F63F].

300. *Id.* § E1.2.7.2.

301. *Id.* § E1.2.7.2.1; *see also* 32 C.F.R. § 66.6(b)(8)(ii) (2016).

302. DEP'T OF DEF., *supra* note 299, § E1.2.7.2.2.

303. *Id.* § E1.2.7.4.

304. 10 U.S.C. § 904a(1) (2016).

IX. DNA EXPUNGEMENT

Since the first use of DNA for forensic identification in 1986, the use of DNA in solving crimes has become a staple of today's criminal justice system.[305] While DNA is often used as evidence to convict suspects, it has also been a means by which to exonerate the innocent.[306] Due to the importance of DNA to our criminal justice system, the federal government and all 50 states have begun to compile certain DNA records into databases for use by law enforcement and the courts.[307]

The Department of Public Safety for the State of Texas maintains a DNA database with the primary purpose of "assist[ing] a federal, state, or local criminal justice agency in the investigation or prosecution of sex-related offenses or other offenses in which biological evidence is recovered."[308] Since the legislature's purpose in creating the DNA database was to assist law enforcement, being compelled to provide a DNA sample for the DNA database is not considered a punishment.[309] An individual confined in a penal institution run by or under contract with the Texas Department of Criminal Justice is required to produce a DNA sample that will be added to the DNA database.[310] A court may also order an individual to provide a DNA sample that will be added to the DNA database even if that individual is not confined in a penal institution.[311] In Texas, juveniles can also be included in the DNA database. A juvenile who commits a sexual offense requiring registration as a sex offender shall be ordered by the court to provide a DNA sample for the

305. Dr. Alec Jeffreys, a scientist in Britain, used DNA to identify a rapist in 1986, making him the first forensic investigator to use DNA to identify the perpetrator of a crime. Debra A. Herlica, Note, *DNA Databanks: When Has a Good Thing Gone Too Far?*, 52 SYRACUSE L. REV. 951, 952 n.8 (2002); Heidi C. Schmitt, Note, *Post-Conviction Remedies Involving the Use of DNA Evidence to Exonerate Wrongfully Convicted Prisoners: Various Approaches Under Federal and State Law*, 70 UMKC L. REV. 1001, 1002 (2002); Jesika S. Wehunt, Note, *Drawing the Line: DNA Databasing at Arrest and Sample Expungement*, 29 GA. ST. U. L. REV. 1063, 1067 (2013).

306. As of March 12, 2018, there have been 354 DNA exonerations made nationwide. *New Jersey Appeals Court Upholds Lower Court Ruling Vacating 1996 Murder Convictions Based on DNA Identifying Another Suspect*, INNOCENCE PROJECT (Mar. 12, 2018, 2:52 PM), https://www.innocenceproject.org/new-jersey-appeals-court-upholds-lower-court-ruling-vacating-1996-murder-convictions-based-on-dna-identifying-another-suspect [https://perma.cc/E67S-S3GT].

307. Wehunt, *supra* note 305, at 1064; 34 U.S.C. § 40702a(a)(1)(A) (2018).

308. TEX. GOV'T CODE ANN. § 411.143(a). Other stated purposes of the DNA database are: assisting in the recovery or identification of human remains from a disaster or for humanitarian purposes, assisting in the identification of living or deceased missing persons, establishing a population statistics database, assisting in identification research and protocol development, and assisting in database or DNA laboratory quality control. *Id.* § 411.143(c).

309. *In re* D.L.C., 124 S.W.3d 354, 368 (Tex. App.—Fort Worth 2003, no pet.).

310. GOV'T § 411.148(b).

311. *Id.* § 411.148(a)(1)(A).

DNA database.[312] A juvenile will also be ordered to provide a DNA sample for the DNA database if they are adjudged to have committed one of a list of enumerated serious crimes.[313] Once a sample has been recorded in the database, new crime scene samples are searched against all of the records in the database. In the State of Texas, if an individual is acquitted, pardoned, or found to be actually innocent, their DNA record in the database is not automatically destroyed. To have their DNA record destroyed, these individuals need to file to have their DNA record expunged.[314]

The director of the database shall be required to expunge a DNA record from the database if a person notifies the director in writing that a court has ordered the DNA record to be expunged and provides the director with a certified copy of the court order.[315] A person may petition a court for a DNA record to be expunged only if the person is entitled to expungement of records related to the offense to which the DNA record is related.[316] However, the director is not required to expunge a DNA record if the director determines that the individual awarded the court order of DNA expungement is otherwise required to submit a sample of DNA for inclusion in the DNA database.[317] This can happen if the person is still subject to the database from a past qualifying offense or is obligated to provide a sample on a new or pending matter. If the DNA record was collected while the subject was a juvenile, the director shall expunge the DNA record from the database if the person provides the director with a certified copy of a court order that seals the juvenile record of the adjudication that resulted in the DNA record.[318]

The failure of the director to expunge a DNA record when ordered to do so by the court may not serve as the sole grounds for a court in a criminal proceeding to exclude evidence based on or derived from the contents of that DNA record.[319] This means that if the director fails to destroy a DNA sample in the database when ordered to do so and the sample implicates the subject of the expungement order in a future crime, the subject may not exclude the

312. TEX. FAM. CODE ANN. § 54.0405(a)(2)(B).

313. *Id.* § 54.0409. The list of serious crimes for which a juvenile will be ordered to provide a DNA sample to the DNA database includes: first degree felonies; murder; capital murder; aggravated kidnapping; trafficking of persons; indecency with a child; sexual assault; aggravated sexual assault; injury to a child if the offense is punishable as a first degree felony; aggravated robbery; burglary if the offense is punishable as a first degree felony; compelling prostitution; sexual performance by a child; or a felony for which it is shown that a deadly weapon was used or exhibited during the commission of the conduct or during immediate flight from the commission of the conduct. *Id.*

314. GOV'T § 411.151(a)(1).

315. *Id.*

316. *Id.* § 411.151(b).

317. *Id.* § 411.151(c).

318. *Id.* § 411.151(a)(2).

319. *Id.* § 411.151(e).

DNA evidence simply because it was supposed to have been destroyed before it implicated the subject in a crime.

The obvious danger of not having your DNA records expunged is that you risk any future DNA samples you leave behind being linked to you by law enforcement through your DNA record in the DNA database. However, in addition to giving law enforcement the power to identify your own samples, your DNA record in the database allows law enforcement to identify DNA samples of your family members. While familial DNA searches are not being conducted at the national level, Texas is one of ten states that permit familial DNA searches.[320] A familial DNA search is "a deliberate search of a DNA database conducted for the intended purpose of potentially identifying close biological relatives to the unknown forensic profile obtained from crime scene evidence."[321] Thus, expunging an individual's DNA record could potentially benefit anyone who is biologically linked to that person.

X. CONCLUSION

In one study of exonerees, forty-two percent of subjects still had evidence of their wrongful conviction on their record.[322] The study found that failure to expunge was a significant predictor of post-exoneration conviction.[323] Labels such as "ex-convict" can lead to depression, low self-esteem, and discrimination.[324] Although the process of getting an expungement can be time-consuming and difficult[325] and does not erase all the evidence of an arrest or conviction, the process of pursuing an expungement is a valuable tool to avoid the negative consequences of a criminal record. Knowing the status of one's own criminal record and

320. *See Combined DNA Index System (CODIS)*, FBI, https://www.fbi.gov/services/laboratory/biometric-analysis/codis [https://perma.cc/48VV-ZRH9] (identifying Arkansas, California, Colorado, Florida, Michigan, Texas, Utah, Virginia, Wisconsin, and Wyoming as the States that currently perform familial DNA searches).

321. *Id.*

322. Shlosberg et al., *supra* note 45, at 1229. The study's sample consisted of 117 individuals who were exonerated and released between 1999 and 2009 whose cases were documented by the Center on Wrongful Convictions. *Id.* at 1230. Eighteen of the cases were from Florida, thirty-one from Illinois, twenty-four from New York, and forty-six from Texas. *Id.* at 1231 n.7. Only 62% of the Texas exonerees had had their records successfully expunged. *Id.* at 1232.

323. Shlosberg et al., *supra* note 43, at 353 (citing to a continuation of the study referred to in footnote 44 that was conducted on the same sample of exonerees). Among offenders who had their records expunged, 31.6% were convicted of a post-exoneration offense. *Id.* at 355. For individuals who did not have their records expunged, 50% were convicted of a post-exoneration offense. *Id.* However, other factors such as compensation for wrongful conviction, age, time since release, prior number of convictions, race, access to healthcare, and family support also affected the likelihood that an exoneree will be convicted of a post-exoneration offense. *Id.* at 377–78, 385–86.

324. *Id.* at 381.

325. *Id.* at 354 (an examination of expungement procedures across the country found that securing expungement in Texas is "extremely difficult").

awareness of personal rights regarding expungement can be the key to a successful future.

THE PROS AND CONS OF TEXAS'S MICHAEL MORTON ACT

KENNETH WILLIAMS†

I. INTRODUCTION

Prosecutors are the most important actors in the criminal justice system. They wield an enormous amount of power. They decide whether to prosecute, whom to prosecute, which crimes to charge, and the number of charges to be brought. Prosecutors also decide whether to plea bargain with a defendant. They also make recommendations as to the sentence that should be meted out. Their power, however, is not unfettered. They face both legal and ethical restraints on their power. One of their more important obligations is to disclose favorable evidence to the defense.[1] However, we have learned through high-profile cases and studies that prosecutors often do not fulfill this duty. One of the primary causes of wrongful convictions, for instance, is prosecutorial misconduct.[2] After several high-profile exonerations in Texas cases that resulted from the failure of prosecutors to disclose evidence to the defense, the Texas Legislature enacted, and the governor signed into law, the Michael Morton Act (the Act) in 2013. The Act mandates that prosecutors go beyond their constitutional duty of disclosing favorable evidence and

† Professor of Law, South Texas College of Law, Houston, J.D. University of Virginia School of Law, B.A. University of San Fransisco.

1. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

2. The National Registry on Exonerations has found that official misconduct, which includes prosecutorial misconduct, is a leading cause of wrongful convictions. *See % Exonerations by Contributing Factor*, THE NAT'L REGISTRY OF EXONERATIONS (2019), https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [https://perma.cc/8BPP-XVWA] (last visited Mar. 5, 2019).

requires that they disclose to the defense most of the evidence that they have gathered during their investigation of a particular case.[3]

This Article will begin with a discussion of the problem of prosecutorial misconduct and then discuss the problem of wrongful convictions and how prosecutorial misconduct often leads to wrongful convictions. This Article will then fully discuss the Act, the evidence that prosecutors are required to disclose under the Act, the timing of the required disclosures, and the effectiveness of the Act in combating wrongful convictions.

II. PROSECUTORIAL MISCONDUCT

The prosecutor has a unique role in the American criminal justice system: "The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. . . . The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."[4] As the Supreme Court put it in *Brady v. Maryland:*

> Society 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. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in courts."[5]

As a result, the Supreme Court has imposed certain disclosure duties on prosecutors. In *Brady,* the Court held that the prosecution violates a criminal defendant's constitutional right to due process by failing to disclose exculpatory evidence.[6] Exculpatory evidence is any evidence tending to establish a criminal defendant's innocence.[7] The Court has also held that prosecutors have an affirmative obligation to turn over exculpatory evidence, even in the absence of a request for the defendant, if it clearly supports a claim of innocence.[8]

Prosecutors, like all lawyers, are governed by the code of ethics. In Texas, Section 3.09(d) of the Texas Disciplinary Rules of Professional Conduct requires that prosecutors:

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3. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14; *Towards More Transparent Justice: The Michael Morton Act's First Year,* TEX. DEF. SERV. ii-iii (2015), http://texasdefender.org/wp-content/uploads/Towards_More_Transparent_Justice.pdf [https://perma.cc/2D6C-M7SF].

4. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(a)–(b) (AM. BAR ASS'N 2015).

5. *Brady*, 373 U.S. at 87.

6. *Id.*

7. *Exculpatory Evidence*, BLACK'S LAW DICTIONARY (9th ed. 2009).

8. *See* United States v. Agurs, 427 U.S. 97, 107 (1976).

> [M]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[9]

Unfortunately, despite these clear standards, prosecutorial misconduct is far too common. The Center for Public Integrity, a nonpartisan organization that conducts investigative research on public policy issues, analyzed over 10,000 cases in which appellate court judges had reviewed charges of prosecutorial misconduct.[10] The Center found that in over 2000 of those cases, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions, or reducing sentences.[11] In over 500 additional cases, an appellate judge, in either a concurring or dissenting opinion, contended that prosecutorial misconduct had occurred.[12] The study also found that "[i]n thousands more cases, judges labeled prosecutorial behavior inappropriate, but allowed the trial to continue or upheld convictions using a doctrine called 'harmless error.'"[13] The Center further reported that some prosecutors had convicted innocent defendants in more than one case over the course of their careers and that some of these prosecutors were cited multiple times for misconduct in other cases as well.[14] It noted that "misconduct often occurs out of sight, especially in cases that never go to trial. Those cases by definition do not generate appellate opinions."[15] The Center also found that prosecutors who engage in misconduct are rarely disciplined, and when they are, the discipline is minor.[16]

Other studies by news organizations and universities have found that prosecutorial misconduct is a serious problem.[17] There have also been high-profile cases in which prosecutorial misconduct was exposed. For instance, in the Duke Lacrosse case, three Duke University lacrosse players were

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9. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09(d), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A.

10. *See* Steve Weinburg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), https://publicintegrity.org/accountability/breaking-the-rules/ [https://perma.cc/FXX4-KTUP].

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *See id.*

17. *See, e.g.*, Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB. (Jan. 10, 1999), https://www.chicagotribune.com/news/ct-xpm-1999-01-10-9901100269-story.html [https://perma.cc/RTA6-ZFLW].

charged with sexual assault by a prosecutor who withheld DNA evidence that exonerated them.[18]

III. THE PROBLEM OF WRONGFUL CONVICTIONS

In this Section, I will discuss cases in which wrongfully convicted inmates have been exonerated. However, all the evidence suggests that a larger number of individuals who have been wrongfully convicted have not been exonerated and that they served or continue to serve prison terms unjustly.[19] Inmates are being exonerated at alarming rates. According to the National Registry of Exonerations since 1989 there have been a total of 2401 exonerations in the United States.[20] The public perception is that the advent of DNA testing has largely rectified the problem of wrongful convictions. That has not been the case, however, because most of the exonerations since 1989 have been in non-DNA cases.[21] Of the 2401 exonerations, 1886 have occurred in non-DNA cases.[22] Most of the exonerated had been convicted of serious crimes such as murder and sexual assault.[23]

Most disturbing are the number of exonerations that have occurred in capital cases. According to the Death Penalty Information Center, since 1973, 164 death row inmates in 28 different states have been exonerated.[24] Most of these inmates were exonerated many years after they were convicted and several came close to being executed before evidence of their wrongful convictions emerged. The Death Penalty Information Center also estimates

18. *See* Evans v. Chalmers, 703 F.3d 636, 645 (4th Cir. 2012); William D. Cohan, *Remembering (and Misremembering) the Duke Lacrosse Case*, VANITY FAIR (Mar. 10, 2016, 5:18 PM), https://www.vanityfair.com/news/2016/03/duke-lacrosse-case-fantastic-lies-documentary [https://perma.cc/VFU4-9BGB].

19. *See* Emily Barone, *The Wrongly Convicted: Why More Falsely Accused People Are Being Exonerated Today Than Ever Before*, TIME (Feb. 17, 2017), http://time.com/wrongly-convicted/ [https://perma.cc/F8DD-SNNY].

20. *See Exonerations by Year of Conviction and Type of Crime*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/ExonerationConvictionYearCrimeType.aspx [https://perma.cc/MX8Q-FBFR] (last visited Mar. 5, 2019). This website is updated daily; from March 5th to March 19th there went from 2401 exonerations to 2409 exonerations. *Id.*

21. *See Exonerations by Year: DNA and Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx [https://perma.cc/UHR2-EUCB] (last visited Mar. 5, 2019).

22. *Id.*

23. *See Exonerations by Year and Type of Crime*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year-Crime-Type.aspx [https://perma.cc/S77U-USYJ] (last visited Mar. 5, 2019).

24. *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR. (Nov. 5, 2018), https://deathpenaltyinfo.org/innocence-and-death-penalty#inn-yr-rc [https://perma.cc/MU36-9F23].

that 15 inmates have been executed despite evidence of their possible innocence.[25]

Also disturbing is the racial disparity in wrongful convictions. African-Americans are much more likely to be wrongly convicted, and much less likely to be exonerated or are exonerated at a slower rate.[26] A study of race and wrongful convictions revealed the following:

- Innocent black people are about seven times more likely to be convicted of murder than innocent white people;
- African-Americans imprisoned for murder are more likely to be innocent if they were convicted of killing white victims;
- On average, black murder exonerees spent three years longer in prison before release than white murder exonerees;
- A black prisoner serving time for sexual assault is three-and-a-half times more likely to be innocent than a white sexual assault convict;
- Assaults on white women by African-American men are a small minority of all sexual assaults in the United States, but they constitute half of sexual assaults with eyewitness misidentifications that led to exonerations;
- African-American sexual assault exonerees received much longer prison sentences than white sexual assault exonerees, and they spent on average almost four-and-a-half years longer in prison before exoneration;
- In Harris County, Texas, there have been 133 exonerations in ordinary drug possession cases in the last few years. These are cases in which defendants pled guilty and were exonerated after routine lab tests showed they were not carrying illegal drugs. Sixty-two percent of the Harris County drug-crime guilty plea exonerees were African American in a county with 20% black residents.[27]

Why are wrongful convictions so prevalent? There are several factors that contribute to wrongful convictions, but one of the biggest contributing factors is prosecutorial misconduct. There are three types of crimes that produce the largest number of exonerations: murder, sexual assault, and drug crimes.[28] In murder cases, wrongful convictions occur due to the "combined difficulty of investigating without help from the victim, intense pressure to

25. *See Executed but Possibly Innocent,* DEATH PENALTY INFO. CTR. https://deathpenaltyinfo.org/executed-possibly-innocent [https://perma.cc/B352-QNET] (last visited Mar. 13, 2019).

26. *See* Samuel R. Gross et al., *Race and Wrongful Convictions in the United States*, NAT'L REGISTRY OF EXONERATIONS (Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/S87X-2RRQ].

27. *Id.* at ii–iii.

28. *Id.* at ii.

get convictions in homicide cases, and the corresponding incentive for the guilty to frame the innocent."[29] In sexual assault cases, most of the wrongful convictions are due to misidentifications by the victims.[30] This problem is especially acute when the victim is white and the alleged perpetrator is black due to the unreliability of cross-racial eyewitness identification.[31] In drug cases, wrongful convictions occur due to police enforcing drug laws more vigorously against African-Americans than against members of the white majority.[32] It is also easier for the police to frame an innocent defendant in drug cases than other cases.

How does prosecutorial misconduct contribute to wrongful convictions? In murder cases, there is intense pressure on prosecutors to solve the cases, which are often high-profile. The *Chicago Tribune's* study of misconduct found, for instance, that:

> With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases. They have prosecuted black men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs.[33]

The *Tribune* found that at least 381 defendants nationwide have had their homicide convictions thrown out because the prosecutors either concealed evidence suggesting innocence or presented evidence that they knew to be false.[34] Of these 381 defendants, 67 had been sentenced to death.[35] The newspaper concluded that these numbers "represent[] only a fraction of how often such cheating occurs."[36] In sexual assault cases, prosecutors might withhold lab results which exonerate the accused, as occurred in the Duke Lacrosse case, or which suggest another suspect. As a result of several high-profile exonerations in Texas, including Michael Morton, the Texas Legislature addressed the problem of wrongful convictions by enacting the Michael Morton Act.[37]

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29. Kansas v. Marsh, 548 U.S. 163, 210 (2006) (Souter, J., dissenting) (citing Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 532 (2005)).

30. *See* Gross, *supra* note 26, at 11.

31. *Id.* at iii.

32. *Id.*

33. Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB. (Jan. 10, 1999), https://www.chicagotribune.com/news/ct-xpm-1999-01-10-9901100269-story.html [https://perma.cc/RTA6-ZFLW?type=image].

34. *Id.*

35. *Id.*

36. *Id.*

37. *See Towards More Transparent Justice: The Michael Morton Act's First Year*, *supra* note 3, at ii.

IV. THE MICHAEL MORTON ACT

About 25% of wrongful convictions in Texas were attributable to prosecutorial misconduct.[38] Some of these wrongful convictions were highly publicized. Michael Morton was convicted of murdering his wife and served 25 years in prison as a result.[39] The prosecutor withheld evidence throughout Morton's trial.[40] Morton was exonerated after DNA testing revealed that he was not the perpetrator of the crime.[41] Morton's attorneys had to obtain a court order in order to have the evidence in his case tested.[42] Morton would have been exonerated much sooner, but the prosecution had withheld evidence and fought vociferously in court to prevent him from testing the evidence that ultimately exonerated him.[43] There were other highly publicized Texas exonerees such as Anthony Graves.[44] Graves was convicted and sentenced to death,[45] and thereafter spent twelve years on death row until it came to light that a key prosecution witness had repeatedly recanted his statements to the prosecutor and those statements were not disclosed to the defense.[46] In response to the Morton case and other high-profile exonerations such as Anthony Graves, in 2013 the Texas legislature passed and Governor Rick Perry signed into law the Michael Morton Act. The Act is designed to prevent future wrongful convictions and to restore public trust in the criminal justice system.

Prior to the enactment of the Michael Morton Act, Texas criminal defendants did not "have a general right to discover evidence in the State's possession."[47] Instead, in order to gain access to specific items of evidence, the defense had to show "good cause" for its disclosure, that it was material to the defense, and that it was in the possession of the State.[48] As a result of the Act, criminal defendants in Texas now have a statutory right to review the State's evidence against them without a court order.[49] The Act provides that all relevant, non-privileged material must be provided to the defense "as soon as practicable" after the prosecution receives a request from the

38. *See id.* at iii.
39. *Id.* at 5.
40. *Id.* at 6.
41. *Id.*
42. *See id.*
43. *Id.*
44. *Id.*
45. *See Ex parte* Graves, 853 S.W.2d 701 (Tex. App.—Houston [1st Dist.] 1993, writ ref'd).
46. *See Towards More Transparent Justice: The Michael Morton Act's First Year, supra* note 3, at 7.
47. Scaggs v. State, 18 S.W.3d 277, 294 (Tex. App.—Austin 2000, pet. ref'd).
48. *See* Hoffman v. State, 514 S.W.2d 248, 252 (Tex. Crim. App. 1974).
49. TEX. CODE CRIM. PROC. ANN. art. 39.14.

defense.[50] The Act also requires that the prosecution disclose any information favorable to the defense, whether the information is exculpatory (negates defendant's guilt), impeachment (grounds for challenging a witness's credibility), or mitigating (supporting a lesser punishment).[51] There are exceptions for the prosecutor's work product and communications between the prosecutor and other state agents.[52]

They key provisions of the Act concern the evidence that must be disclosed to the defense, how the disclosures occur, and the timing of the disclosures. The prosecution must produce and permit the defense to inspect and electronically duplicate, copy or photograph, any offense reports, any designated books, accounts, letters, photographs or other tangible things that constitute evidence or contain evidence material to any matter involved in the action that is in its possession, custody or control.[53] Thus, witness statements and crime lab reports would have to be disclosed. One court held that the Act entitled the defense to have its own expert test the methamphetamine which was the subject of his conviction.[54] The disclosure requirements under the Act are much more expansive than under *Brady*, in that the evidence must be disclosed regardless of whether it is exculpatory. Another huge difference, however, between *Brady* and the Act is the Act's requirement that the defense make a request for the evidence.[55] The prosecution has an affirmative duty to disclose *Brady* evidence to the defense.[56]

The Act provides that disclosure must occur "as soon as practicable" after the prosecution receives a timely request from the defendant.[57] However, the Texas Court of Criminal Appeals in an unpublished opinion indicated that the prosecution did not have to make any disclosures under the Act until after an indictment.[58] The Act imposes a continuing duty on prosecutors to disclose exculpatory evidence. If at any time before, during, or after trial the state discovers additional exculpatory, impeachment, or mitigating evidence, the state must *promptly* disclose the evidence to the defendant or to the court.[59]

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50. *Id.* at 39.14(a).
51. *Id.* at 39.14(h).
52. *See id.*
53. *Id.* at 39.14(a).
54. *See* Ehrke v. State, 459 S.W.3d 606, 611 (Tex. Crim. App. 2015).
55. TEX. CODE CRIM. PROC. ANN. art. 39.14(a).
56. *See* Banks v. Dretke, 540 U.S. 668, 697 (2004).
57. TEX. CODE CRIM. PROC. ANN. art. 39.14(a).
58. *See In re* Carrillo, No. WR-83345-01, 2015 WL 4776080, at *2 (Tex. Crim. App. June 24, 2015) (Alcala, J., concurring) (not designated for publication).
59. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14(k) (emphasis added).

In the event of a suspected violation before trial, the defendant should: 1) object and state with specificity the evidence withheld; 2) move for a continuance in order to adequately investigate the evidence; and 3) articulate the harm of the nondisclosure on the record. In the event that defendant learns of a violation after his conviction he can raise the issue on appeal. In order to prevail and obtain a new trial, however, he would have to prove that he suffered harm as a result of the nondisclosure.

V. CONCLUSION

The enactment of the Michael Morton Act is certainly an improvement over the situation that existed prior to the law's enactment. Criminal defendants in Texas will now have access to more information to assist them in preparing an adequate defense. However, from a criminal defense perspective, there are two serious concerns that I have. My first concern is over the timing of the required disclosures. The Act's requirement that disclosures be made "as soon as practicable" has been interpreted as requiring discovery only after formal charges (indictment or information) have been filed.[60] This will result in defendants being denied for weeks or even months key materials regarding their cases. My second concern is that the defendants who receive substandard representation will continue to be disadvantaged by attorneys who fail to request discovery under the Act, but I do acknowledge that is not a problem with the Act, but rather a problem with the Texas indigent defense system, which is badly in need of additional reforms.

60. *See Carrillo*, 2015 WL 4776080, at *2 (Alcala, J., concurring).

CHOOSING CHOICE: EMPOWERING INDIGENT CRIMINAL DEFENDANTS TO SELECT THEIR COUNSEL

CATHERINE BURNETT†

† Associate Dean of Clinical Studies, Professor of Law, South Texas College of Law Houston.
I wish to thank the clients to whose cases I have been appointed for sharing their frank and sometimes uncomfortable perceptions of the criminal justice system and my role in it. I also wish to thank the editors of the South Texas Law Review for devoting the annual ethics symposium to emerging trends and best practices in the delivery of criminal justice.

I. INTRODUCTION

Individual choice and personal autonomy[1] are hallmarks of the American ethos, constitutionally enshrined in the Bill of Rights.[2] Freedom of choice is central to life events marking the transition from childhood to adulthood:[3]

- Deciding where to live;[4]
- Selecting a life partner;[5]

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1. This Article focuses on "choice" as the desired good to be achieved rather than a validation of "autonomy". Although those terms often are used synonymously as shorthand to reference rejection of paternalism or commitment to self-determination, they are not totally interchangeable concepts. As Robert Toone observed:

> While autonomy has been said to have a "protean" nature, resisting easy definition, scholars generally agree that it is a far richer concept than 'free choice.' The etymology of the word indicates that it is the 'law' or 'rule' of oneself. Rather than simply the ability to choose from a fixed menu of options at a particular point in time, autonomy involves the determination or authorship of one's life.

Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 656 (2005) (citations omitted) [hereinafter Toone, *Incoherence*].

2. U.S. CONST. amends. I–X. The first ten constitutional amendments form the "Bill of Rights." They were authored by James Madison in response to concerns by several states that the Constitution needed greater protection to safeguard individual liberties. Opposition to the addition of these original amendments stemmed from the belief that the Constitution was not written to limit the people. THE FEDERALIST NO. 84 (Alexander Hamilton), *reprinted in* RETHINKING THE WESTERN TRADITION 433 (Ian Shapiro ed., 2009) ("I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?").

3. This Article considers individual choice and self-determination/autonomy to be hallmarks of American culture, recognizing that in other cultural settings, community needs may enjoy a greater hierarchal value than individual interests. Cultural anthropologists and social psychologists describe this foundational cultural divide in terms of collectivist and individualist societies. *See* HARRY C. TRIANDIS, INDIVIDUALISM AND COLLECTIVISM (Routledge ed., Westview Press 1995). Cultures in North America and Western Europe tend to be "individualistic", seeing people as independent and autonomous, and stressing the needs of the individual over the needs of the group as a whole. *Id.* In contrast, cultures in Asia, Central America, South America and Africa tend to lean more to the "collectivistic" model, emphasizing needs and goals of the group as a whole over the needs and desires of each individual. *Id.*

4. Shelley v. Kraemer, 334 U.S. 1, 4, 23 (1948) (holding that the Equal Protection Clause prohibits racially restrictive housing covenants). *See* DAVID L. KIRP, JOHN P. DWYER & LARRY A. ROSENTHAL, OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (Rutgers Univ. Press, 1995) for an analysis of the underlying legal battle in state and federal courts.

5. Loving v. Virginia, 388 U.S. 1, 2 (1967) (striking down state law banning interracial marriage and ending race-based legal restrictions on marriage in America); Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015) (holding that the fundamental right to marry is guaranteed to same-sex couples under the Due Process Clause and the Equal Protection Clause of the Fourteenth

- Choosing a career path;[6]
- Exercising the right to vote;[7]
- Following a religious tradition;[8]
- Directing the upbringing and education of one's children;[9]
- Pursuing educational and training options;[10]
- Making medical decisions;[11] and
- Hiring professional support or services.[12]

Amendment to the United States Constitution). As the *Obergefell* majority recognized, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy." *Id.* at 2599.

6. The connection between educational choice and career opportunity in American life was underscored in *United States v. Virginia*, holding that the Equal Protections Clause of the Fourteenth Amendment is violated when military training facilities segregate men from women without a compelling reason. 518 U.S. 515, 526, 547 (1996). Justice Ruth Bader Ginsburg's majority opinion striking down the Virginia Military Institute's long-standing policy of male-only admission stressed that sex-based classifications "may not be used [as they once were] to create or perpetuate the legal, social, and economic inferiority of women." *Id.* at 534. The linkage between education and future opportunity play an important role in the Court's framing of the consequences of admission and exclusion, including "prestige, alumni support and influence." *Id.* at 517, 553.

7. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (striking down a poll tax as unconstitutional and recognizing that "the right to vote is too precious, too fundamental to be so burdened or conditioned").

8. Braunfeld v. Brown, 366 U.S. 599, 600–01 (1961) (holding that state "blue law" did not violate Free Exercise Clause because it had a secular basis and did not make any religious practices unlawful); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (overturning convictions of several Jehovah's Witnesses for soliciting donations without a license). For a discussion of the role of economic theory on the Free Exercise Clause, *see* Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

9. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 530, 534–35 (1925) (striking down state statute compelling public-school education); Meyer v. Nebraska, 262 U.S. 390, 400, 403 (1923) (striking down state statute forbidding teachers from using non-English languages to provide instruction and also forbidding the instruction of any non-English languages before the student completes eighth grade).

10. *Brown v. Board of Education* struck down the concept of "separate but equal" in the field of public education. Brown v. Bd. of Educ. Of Topeka, 347 U.S. 483 (1954). In doing so, more than six decades ago, the majority stressed the career paths that education opens for a child when it observed:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493.

11. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding that state law forbidding contraceptive unconstitutionally intruded on the right of marital privacy).

12. For example, a single-payer health care paradigm continues to spark debate among government and private actors. *See* Lainey Newman, *The Pro-business Argument for Single-payer*

Societally, we celebrate choice and view attempts to curtail it with suspicion.[13] Poverty limits choice, or perhaps the range of choices in some of these categories, but it does not usually extinguish it. An exception is the provision of counsel to those who are poor and accused of criminal conduct, facing prosecution. There are few principled reasons to sustain a system that restricts client choice based only on the financial status of the person accused; it is, perhaps, a remnant of anachronistic and paternalistic systems. Now is the time to bring client choice in the selection of criminal defense counsel for the indigent into mainstream criminal justice reform. It is time to vindicate personal autonomy[14] interests inherent in freedom of choice for the vast majority of persons facing prosecution in America today.[15] For those policymakers struggling to bridge the divide between system-delivered counsel and client-selected counsel, this Article proposes another option, one that incorporates concepts of well-chosen defaults, principled choice options, and personal freedom in making those choices. It proposes that a pilot

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Healthcare, HARV. POL. REV. (Jan. 17, 2018), http://harvardpolitics.com/united-states/the-pro-business-argument-for-single-payer-healthcare [https://perma.cc/CEZ7-QGV9]; *see also* Jodi L. Lui & Robert H. Brook, *What is Single-Payer Health Care? A Review of Definitions and Proposals in the U.S.*, 32(7) J. GEN. INTERNAL MED. 822 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5481251 [https://perma.cc/4EHZ-GFGX].

13. *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 5 (2008). Richard Thaler and Cass Sunstein recognized this resistance when advancing choice architecture as a form of libertarian paternalism in their groundbreaking work, NUDGE. *Id.* They urged that people should be free to choose, hence the libertarian half of the label. *See id.* Simultaneously, they claimed legitimacy in efforts to positively influence behaviors in ways that make people's lives better, leading to the paternalism portion. *See id.* The crux of their argument was for "self-conscious efforts, by institutions in the private sector and also by government, to steer people's choices in directions that will improve their lives." *Id.*

14. In their article, *Client Autonomy and Choice of Counsel*, authors Peter Joy & Kevin McMunigal recognize the role of personal autonomy when serious decisions are being made. Peter A. Joy & Kevin C. McMunigal, *Client Autonomy and Choice of Counsel*, 21 CRIM. JUST. 57, 59 (2006) [hereinafter Joy & McMunigal, *Client Autonomy*]. In the criminal justice context, this ideal is manifested in the stark reality that the defendant will have to live with the results of defense counsel's strategic decisions. *See id.*

> Choice of counsel in some cases may be the most important decision the defendant makes. The division of authority between client and attorney vests final authority in making strategic "means" decisions with the lawyer. Because the defendant has to live with the results of such decisions by counsel, it may be argued that the defendant should be given an unfettered right to choose counsel on the basis of a right to personal autonomy, the idea that people deserve to make decisions that seriously impact their lives.

Id.

15. At the turn of this century, studies of the federal system estimated that by the end of their case, 66% of defendants were represented by public defenders or assigned counsel. *See* CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), https://www.bjs.gov/content/pub/pdf/dccc.pdf [https://perma.cc/7GUE-YFJJ]. Estimates for felony defendants in large state courts were even higher, at 82%. *See id.* Some estimates place that number up to 90% of all criminal cases. *See* Joy & McMunigal, *Client Autonomy*, *supra* note 14, at 57.

program be commissioned in a major American city with a strong public defender presence, building on the preliminary, groundbreaking work of the Texas Indigent Defense Commission in Comal County, Texas.[16]

Part II of this Article briefly outlines key constitutional basics of the Sixth Amendment[17] guarantee of counsel in criminal prosecutions in terms of the right to counsel, the requirement of effective counsel, and the right to choose counsel. Part III highlights delivery methods currently used to provide counsel for indigent defendants, together with the major advantages and challenges of each system. Part IV describes the two "choice" models currently under theoretical consideration. Part V dives more deeply into the competing arguments surrounding client choice paradigms by considering benefits and challenges of choice systems both systemically and for the individual defendant. Part VI examines the sole project in the nation to date to have examined the implications of a system where indigent defendants choose their own counsel. The Article concludes in Part VII with areas for further study and a recommendation that informed client choice finds its way into the mainstream of alternatives for providing counsel for the indigent criminal defendant.

II. CONSTITUTIONAL CONSIDERATIONS

There are two separate constitutional strands involved in client choice of counsel decisions—the strand that addresses retained counsel and the strand that addresses provided counsel. Although each is grounded in the Sixth Amendment, their paths are widely divergent in doctrinal underpinnings, societal expectations, and implementation. In only a few instances do the strands converge. Both recognize the right to counsel, and both require that counsel be competent. That is where the overlap ends.

To a large extent, criminal defendants with sufficient financial assets are free to hire the attorney of their choice with only carefully circumscribed

16. The results of this client-choice pilot, the first of its kind in the United States, have been summarized by M. Elaine Nugent-Borakove and Franklin Cruz. *See* M. ELAINE NUGENT-BORAKOVE & FRANKLIN CRUZ, JUST. MGMT. INST., THE POWER OF CHOICE: THE IMPLICATIONS OF A SYSTEM WHERE INDIGENT DEFENDANTS CHOOSE THEIR OWN COUNSEL i–iv (2017), http://www.tidc.texas.gov/media/55477/the-power-of-choice.pdf [https://perma.cc/T68N-REZ4] [hereinafter POWER OF CHOICE]. This pilot program is discussed in detail *infra* Part V.

17. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. CONST. amend. VI.

exceptions. The corollary is not true for indigent defendants. While the Constitution mandates that counsel be provided to indigent criminal defendants under most circumstances, it is silent on the mechanics for doing so. Providing counsel to defendants umbrellas a host of implementation issues, among them: quality control and, particularly, the gap inherent between performance guidelines and attorney practice; the personal autonomy issues of client choice as a front-line decision, including the role of self-representation in that equation; and the economic question of compensation's role both in terms of the quality of services and the "right to choose."

A. Right to Counsel for the Non-Indigent—Pay to Play

Criminal defendants possessing sufficient resources have a constitutionally protected right to hire counsel of their choice.[18] The Supreme Court recognizes this right as a fundamental component of the Sixth Amendment, regarding it as the root meaning of the Assistance of Counsel guarantee.[19] In the words of Justice Scalia, this reading of the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best."[20] Thus, rather than a focus on the fairness of the adversarial system that undergirds questions of counsel competency under *Strickland v. Washington*,[21] the counsel of choice emphasis in *United*

18. *See* Janet C. Hoeffel, Symposium, *Toward a More Robust Right to Counsel of Choice*, 44 SAN DIEGO L. REV. 525, 528 (2007). Professor Hoeffel cautions that "[t]he origins of the Sixth Amendment right to counsel of one's choosing [is] murky, at best." *Id.* Historically, it developed as a right inuring only to wealthy defendants. *Id.* at 529. *See also* Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705, 1745 (2016) [hereinafter Moore, *Sixth Amendment*]. Professor Janet Moore posits that "deeper excavation of the right's history reveals a complex tangle of root meanings" in an era in which "free-market choice commingled with overt denigration of the poor as well as with benevolence of some pro bono counsel and conscription of others . . . ." *Id.* She opines, however, that neither this tangled history nor the Court's originalism explanation undermine the view of *Gonzalez-Lopez*, that violation of the right to choose counsel alters the framework of litigation. *Id.*

19. United States v. Gonzalez-Lopez, 548 U.S. 140, 147–48 (2006); *see* Wheat v. United States, 486 U.S. 153, 159 (1988); *see also* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624–25 (1989). In *Wheat* and *Caplin & Drysdale*, the Court upheld a restriction on counsel-choice under the facts but highlighted the broader purposes served by recognition of the right. In *Wheat*, the defendant's counsel of choice was denied on conflict of interest grounds. 486 U.S. at 164. In *Caplin & Drysdale*, the Court rejected a challenge to the validity of a federal forfeiture statute to the extent it prevented the defendant from paying attorney's fees. 491 U.S. at 632–33.

20. *Gonzalez-Lopez*, 548 U.S. at 146.

21. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (crafting a unitary standard for determining whether counsel was ineffective for Sixth Amendment purposes, regardless of whether counsel was retained or provided).

States v. Gonzalez-Lopez centers on the very nature of a meaningful attorney-client relationship—"the right to be assisted by counsel of one's choice."[22]

Only within very narrow channels can this right to retained counsel of choice be curtailed.[23] Those restrictions typically involve either reasons of administrative efficiency and docket control[24] or disqualifications designed to promote process integrity.[25] How to review and remedy a violation of the right to retained counsel was the central issue in *United States v. Gonzales-Lopez*.[26] The prosecution conceded that the trial judge violated the defendant's choice of counsel, which, in turn, freed the defendant from the burden of meeting an abuse of discretion standard.[27] The trial court's decision denying counsel of choice was not accorded deference.[28] The majority in *Gonzalez-Lopez* rejected a harmless error test, holding instead that denial of the defendant's Sixth Amendment right to choose counsel was structural error, requiring no showing of prejudice.[29] Structural error, once found, requires automatic reversal; a powerful concept indeed.[30]

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22. *Gonzalez-Lopez*, 548 U.S. at 148.

23. *See* John Rappaport, *The Structural Function of the Sixth Amendment Right to Counsel of Choice*, 2016 SUP. CT. REV. 117, 124 (2016). Professor Rappaport's review of right to counsel of choice literature finds a common theme—selection of counsel is the most important decision a defendant makes in shaping his defense. *Id.*

24. *See* Moore, *Sixth Amendment*, *supra* note 18, at 1710–11. For example, counsel may have scheduling conflicts that make it impossible to go forward with the case in a timely manner consistent with the court's docket. *See id.*; *see also* Rappaport, *supra* note 23, at 125. Rappaport notes such inherent powers to control judicial administration nonetheless can result in denying a criminal defendant his first-choice of counsel. *See id.* He finds these outcomes "difficult to reconcile with the type of robust individual protection the Court's 'root meaning' language implies." *Id.* at 126.

25. *See* Moore, *Sixth Amendment*, *supra* note 18, at 1710–11. For example, counsel may be unqualified to practice before the court in question, counsel may have a conflict of interest that cannot be cured, or civil forfeiture provisions may have resulted in seizure of assets with which the defendant would have paid retained counsel. *Id.* Similarly, a defendant's chosen attorney may not choose the defendant as a client, and thus be unwilling to represent him. Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent*, 64 BROOK. L. REV. 181, 190 (1998).

26. *See Gonzalez-Lopez*, 548 U.S. at 140.

27. *See id.* at 152. In light of this concession, the defendant was not required to show counsel of choice was qualified, available and not conflicted. *See id.*

28. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 759–61 (1982). In abuse of discretion review, appellate courts exercise restraint in overturning a trial level decision, being sensitive to the "feel of the case" that occurs at the trial level, a perception which a cold transcript fails to capture. *Id.* Judge Friendly's lecture addressed the allocation of power between trial and appellate courts, noting that application of an abuse of discretion standard can come in many guises, and concluding that deference was the most sensible when the court's decision is dependent on direct contact with the litigation or first-hand observation. *Id.* at 783.

29. *Gonzalez-Lopez*, 548 U.S. at 150.

30. *See* Moore, *Sixth Amendment*, *supra* note 18, at 1711–12. As Professor Moore notes, from the criminal defendant's point of view, structural error is the friendliest standard of review. *Id.* It is found only in a small group of constitutional claims, those rare type of rights that when violated "infect the entire trial process." *Id.* at 1712 (quoting Glebe v. Frost, 574 U.S. 429, 430 (2014) (per

B. *Right to Counsel for the Indigent—Who Pays the Piper*[31]

Over sixty years since the landmark opinion in *Gideon v. Wainwright*, defendants charged with felony offenses are constitutionally entitled to legal representation if they are unable to afford defense counsel.[32] *Gideon* promised that every person would have the "guiding hand of counsel at every step in the proceedings against him."[33] The right to counsel is a "fundamental" constitutional guarantee[34] which requires either the provision of counsel or an indigent defendant's knowing, intelligent, and voluntary waiver.[35]

The impact of *Gideon* cannot be overstated:

> *Gideon* prompted a monumental shift in right to counsel jurisprudence in the United States. The case opened the floodgates for the extension of the right to counsel to cases involving less serious charges, as long as incarceration was a result of conviction, as well as to the early stages of the criminal justice process and to nondiscretionary appeals. *Gideon*

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curiam) (citation omitted) ("*Most* constitutional mistakes call for reversal only if the government cannot demonstrate harmlessness . . . and [it renders the trial] 'fundamentally unfair.'")).

31. Holly, *supra* note 25, at 230 ("[C]urrent law unjustifiably requires the indigent to pay the piper without extending any real authority to call the tune.").

32. *See* Gideon v. Wainwright, 372 U.S. 335, 335 (1963); Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972); *In re* Gault, 387 U.S. 1, 55 (1967) (holding that the constitutional right to counsel for indigent defendants extends to misdemeanor cases resulting in a loss of liberty and to juvenile court proceedings for youths charged with delinquency); *see also* Lewis v. State, 501 S.W.2d 88, 90 (Tex. Crim. App. 1973) (broadening the scope of this constitutional guarantee to include misdemeanor cases where imprisonment is *possible* not merely those cases where it was imposed).

33. *Gideon*, 372 U.S. at 350 (noting that trial courts, under certain circumstances, had a duty to assign counsel "as a necessary requisite of due process of law" because the court recognized the numerous benefits counselors provide to the criminal defendant, even three decades prior to *Gideon*) (Harlan, J., concurring) (citing Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with [a] crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge [to] adequately prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell, 287 U.S. at 69.

34. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986).

35. *See* Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

> and its progeny promised to revolutionize indigent defense in the United States . . . .[36]

What *Gideon* and its progeny did not do, however, is normalize the ability of criminal defendants to choose their own counsel regardless of economic status. As is seen in Part III, *Gideon* spawned a variety of delivery methods for the provision of counsel for the indigent, but none of the three dominant methods involve client choice. At the heart of each of these delivery methods is the assumption that because the government is responsible for providing (in today's criminal justice system, "providing" equates to "paying") counsel, it is the government, not the indigent defendant, with the power to decide who that counsel will be.[37]

C. *Right to Competent Counsel—Insufficient to Answer the Client Choice Question*

The substantive meaning of the Sixth Amendment's right to counsel is given dimension by *Strickland v. Washington*'s requirement that counsel be competent.[38] The same standard of "effectiveness" is applied regardless of whether counsel is client-retained or government- provided.[39] *Strickland*'s familiar two-part test requires the defendant to prove both that counsel acted unreasonably in light of prevailing professional norms (the deficient performance prong) and this substandard performance impacted the case outcome enough to call into question the verdict's reliability (the prejudice prong).[40] Cases will not be reviewed with 20-20 hindsight, and extreme deference is given to the wide range of strategic choices that might inform counsel's actions.[41] Scholars note that defendants have an extremely difficult burden in meeting *Strickland*'s test, with the result that, "[d]efendants not only are given bad lawyers, they are tethered to them."[42] This is particularly

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36. Charles J. Ogletree, Jr. & Yoav Sapir, *Keeping* Gideon*'s Promise: A Comparison of The American and Israeli Public Defender Experiences*, 29 N.Y.U. REV. L. & SOC. CHANGE 203, 208 (2004).

37. *See* Holly, *supra* note 25, at 221.

38. *See* Strickland v. Washington, 466 U.S. 668, 690 (1984).

39. *See id.* at 685.

40. *See id.* at 688.

41. *Id.* at 691. Unlike the structural error automatic reversal for denial of the right to retained counsel of choice, when the constitutional challenge is ineffective assistance of counsel, the defendant must show prejudice or harm in addition to showing deficient performance under prevailing norms. *Id.* at 687. This two-prong test has been "maligned for giving free passes to drunk, sleeping, lazy, and overworked lawyers." Moore, *Sixth Amendment*, *supra* note 18, at 1714.

42. Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 253–54 (2006).

> Meaningful implementation [of *Gideon*] still has not happened. The Supreme Court has never imposed on the states an obligation to create and fund indigent defense systems adequate to provide vigorous representation. Instead, states have been left free to provide counsel in any way they see fit. In *Strickland v. Washington*, despite holding decades

troublesome for the indigent defendant. As seen in the next section, the indigent defendant's choice for "untethering" means a return to the pre-*Gideon* world of the unrepresented.[43]

D. Right to Choose Counsel—Nonstarter for the Indigent

As commentators have noted, "[t]he notion that indigent criminal defendants might retain a Sixth Amendment right to counsel of choice has been, to the Court, a nonstarter."[44] A brief review of four of the leading cases provides context for contrasting the disparate treatment of "retained" and "provided" counsel.

In *Wheat v. United States*, the Court affirmed a restriction on the right to choose retained counsel.[45] However, in doing so it also embraced "no choice for the indigent" rhetoric in dicta:

> The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects . . . . [A] defendant *may not insist on representation by an attorney he cannot afford* or who for other reasons declines to represent the defendant.[46]

Wheat presents the classic "conflict" scenario[47] that invites consideration of the trial's "integrity" rather than issues of judicial

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earlier that counsel must be "effective" to meet constitutional mandates, the Court interpreted "effective" in a way that placed as light a burden as possible on the states. Attorneys in criminal cases only have to meet minimal standards of effectiveness, with due deference to any decisions that could even remotely be called "tactical" or "strategic," and with a strong emphasis on the need for finality in criminal convictions. In many states, the *Gideon* rule has resulted in a scandalously low level of representation.

Id. at 253.

43. *See infra* Section II.D. Indeed, "self-representation has become the only way indigent defendants can guarantee personal control over their defense strategies." Toone, *Incoherence*, *supra* note 1, at 664. Professor Toone condemns this result as "doubly perverse" since a defendant wanting to present his strongest defense must face the "all or nothing" dilemma of accepting representation and relinquishing control or waiving counsel and losing the benefit of professional representation. *Id.* at 664–65.

44. Rappaport, *supra* note 23, at 132.

45. Wheat v. United States, 486 U.S. 153, 153 (1988).

46. *Id.* at 486 U.S. at 159 (emphasis added).

47. As federal prosecutor and adjunct professor Veronica Finklestein warns, there is a second serious potential conflict of interest scenario of the "Breaking Bad" variety, one that does not flow from concurrent joint representation of co-defendants but, rather, one that stems from counsel's involvement in the client's criminal enterprise. In such cases she urges automatic disqualification:

> [A]n attorney who is a participant in a criminal conspiracy will, by nature of his own divided loyalties and interest in self-preservation, be unable to provide effective representation to his client . . . . Arguably, there can be no higher loyalty than to one's self. . . . [A]n attorney's inherent desire for self-preservation creates a conflict so serious that it justifies the adoption of an automatic reversal rule.

Veronica J. Finkelstein, *Better Not Call Saul: The Impact of Criminal Attorneys on Their Clients' Sixth Amendment Right to Effective Assistance of Counsel*, 83 U. CIN. L. REV. 1215, 1217–18 (2015).

administrative ease.[48] The defendant in *Wheat* was one of several co-defendants charged in a drug distribution conspiracy.[49] He sought to substitute counsel who was already representing two of his co-defendants who were at various stages of the plea process.[50] Each codefendant consented to counsel's joint representation by expressly waiving their right to conflict-free counsel.[51] The government objected to the substitution on conflict of interest grounds, the trial court agreed, and the Supreme Court upheld that decision.[52] The Court determined waiver by all three defendants was insufficient to cure the conflict, stressing that the balance was tipped in the government's favor by an "institutional interest" in "just verdicts" that would "appear fair to all who observe them."[53]

The year following *Wheat* brought another decision upholding limitations on a defendant's right to retain counsel of his choosing and included dicta on client choice for the indigent.[54] In *Caplin & Drysdale, Chartered v. United States*, the issue was not counsel conflict but the impact of federal asset forfeiture provisions.[55] *Caplin & Drysdale* once again recognized the role that counsel of choice plays in protecting the integrity of the judicial process: it fosters trust between lawyer and client which is needed if the attorney is to be a truly effective advocate, and it assures some "modicum of equality between the Government and those it chooses to prosecute."[56] As with *Wheat*, however, these principles were only applicable for retained counsel, "those who do not have the means to hire their own

48. Chief Justice Rehnquist noted, "[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat*, 486 U.S. at 159. As has been noted in other articles, the trial counsel that Wheat was attempting to retain was recognized as a "prominent and successful defense attorney." Pamela S. Kaplan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 687. Professor Kaplan invites consideration of whether wealthy defendants may be fundamentally different from other defendants, not merely in their ability to marshal greater resources, but also in the very nature of their criminal conduct—more complex crimes that occupy, and attempt to manipulate and exploit, gray areas in the law. *Id.* at 671.

49. *Wheat*, 486 U.S. at 154.

50. *Id.* at 155.

51. *Id.* at 156.

52. *Id.* at 157–58, 164.

53. *Wheat*, 486 U.S. at 160.

54. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).

55. *Id.* at 619.

56. *Id.* at 645–46 (Blackmun, J., dissenting). The trust between the person accused of a crime and facing prosecution and that person's lawyer is a recurring theme in the Supreme Court's "right to client choice" jurisprudence when counsel is retained but not when counsel is provided for the indigent. *Id.* at 645.

lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts."[57]

The third significant client choice decision—in *Morris v. Slappy*—involved a trial court's action in severing an ongoing attorney-client relationship when counsel was hospitalized for emergency surgery shortly prior to trial.[58] This time, the defendant was indigent, the attorney of choice was a public defender, new counsel was assigned, and the issue was treated not as one of the right to counsel of choice but rather a trial court's discretion to control its docket by denying a requested continuance.[59] Some commentators suggest that the unintended legacy of *Gideon* involves a quid pro quo balancing in which the indigent criminal defendant forfeits the full range of constitutional rights and protections as part of the bargain of receiving government-provided counsel.[60] Perhaps such a trade-off explains the result in *Morris v. Slappy*. Other commentators recognize all criminal defendant's interests in fairness and autonomy but view these interests as overcome by administrative realities of providing indigent defense counsel.[61] Under either explanation, the jurisprudential reality is that Slappy, because he was indigent, had no right to a "meaningful" relationship with a particular lawyer, had no right to a continued relationship with trusted counsel, and had no right to a lawyer with whom he had developed that trust considered the cornerstone of the adversary system.[62]

The fourth significant client choice case also involved an indigent defendant, this time one who elected self-representation when counsel choice was denied. In *Faretta v. California*, concepts of autonomy found in client

57. *Id.* at 624. The quality of indigent defense representation is often decried as inadequate. *See., e.g.*, Randy Uphoff, Foreword, *Broke and Broken: Can We Fix Our State Indigent Defense System?*, 75 MO. L. REV. 667, 670 (2010). Still, the Supreme Court continues to reject "any presumption that appointed counsel are categorically ineffective or less effective than retained counsel." Rappaport, *supra* note 23, at 133 (citing Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)).

58. Morris v. Slappy, 461 U.S. 1, 5 (1983).

59. *Id.*; *see* Hoeffel, *supra* note 18, at 532–40 (examining the facts of *Slappy* and contrasting them with the Court's view of Clarence Gideon: "Whereas Clarence Gideon is haled [sic] as a hero for fighting for the right to counsel all the way to the Supreme Court, Joseph Slappy's efforts toward recognition for his plight were treated . . . with disdain, if not contempt.").

60. Justin F. Marceau, Gideon*'s Shadow*, 122 YALE L.J. 2482, 2499 (2013) ("[T]here is a common if not ubiquitous strand of reasoning in judicial doctrine and academic commentary suggesting the existence of a doctrinal quid pro quo—in exchange for the grand right of *Gideon*, prisoners must forgo remedies for other constitutional harms."). Other scholars have characterized the "*Gideon* Tradeoff" as the defendant's waiver of any autonomy interest by accepting government-provided counsel. Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1179 (2010) (The defendant "is receiving a benefit from the government.").

61. Rappaport, *supra* note 23, at 141.

62. When a defendant trusts his counsel, two systemic benefits follow: first, the quality of representation increases; second, the defendant is more likely to follow his lawyer's advice and instincts. Hoeffel, *supra* note 18, at 541–42.

choice decisions also found in their mirror image—the client's choice of "no representation by counsel"—but with a different outcome.[63] Unlike the dichotomy between retained and provided counsel on the counsel choice side of the ledger, when the issue is a defendant's decision to go forward without counsel, the test is uniform.[64] A decision to force the defendant to accept unwanted counsel is reviewed under the structural error standard, with no requirement that the defendant show he could have done better without his attorney.[65]

While not using the word "autonomy" in recognizing a constitutional right to self-representation, the Supreme Court in *Faretta* based its decision on self-determination principles:

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."[66]

While seemingly celebrating "respect for the individual which is the lifeblood of the law,"[67] *Faretta* can also be read as a case study for the dark side of no-choice-for-the-indigent. Faretta's primary interest was not in going at it alone as much as it was in not being represented by a public defender he thought to be overworked, biased, and conflicted.[68] According to this reading,

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63. Faretta v. California, 422 U.S. 806 (1975).

64. *Compare Faretta*, 422 U.S. at 806, with Wheat v. United States, 486 U.S. 153, 153 (1988).

65. When a constitutional error "did not contribute to the verdict obtained" it is generally considered harmless. *See* Chapman v. California, 386 U.S. 18, 24 (1967). However, a structural error is one that "affect[s] the framework within which the trial proceeds," and thus defies harmless error analysis. Arizona v. Fulminate, 499 U.S. 279, 310 (1991). A variation occurs when structural error is raised as part of an ineffective assistance of counsel claim. In that scenario a showing of prejudice is required. *See* Weaver v. Massachusetts, 137 S. Ct. 1899 (2017) (involving a courtroom closure not objected to by trial counsel or raised on appeal).

66. *Faretta*, 422 U.S. at 834 (citations omitted). *Faretta* has been the subject of considerable scholarly debate, with some commentators predicting its demise on the near horizon. *See., e.g.*, Toone, *Incoherence*, *supra* note 1, at 622 ("Of all the constitutional rights recognized in American criminal procedure, the right to self-representation is surely the most likely to be eliminated by the Supreme Court in the foreseeable future—and deservedly so.").

67. *Faretta*, 422 U.S. at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970)). Robert Toone sees the idea of autonomy in the context of criminal procedure not as an affirmation of "free choice" and "dignity" but rather "a rhetorical flourish that sidesteps more difficult questions about inequality and injustice . . . and other structural problems." Toone, *Incoherence*, *supra* note 1, at 623.

68. *See Faretta*, 422 U.S. at 807. As Professor Moore writes, "Excavating *Faretta*'s subtext exposes an untold right-to-choose story that counters the traditional right-to-refuse case narrative." Moore, *Sixth Amendment*, *supra* note 18, at 1735; *see also* Mark C. Milton, Comment, *Why Fools Choose to Be Fools: A Look at What Compels Indigent Criminal Defendants to Choose Self-*

Faretta "gores indigent defendants on a sharp-horned dilemma."[69] When deprived of the ability to secure counsel of choice, the indigent defendant's alternatives become proceeding with unwanted counsel or unwanted pro se status.

III. CURRENT DELIVERY METHODS

There are three major methods for providing counsel to indigent criminal defendants: public defenders, assigned counsel, and contract counsel. Each has its adherents and detractors, and over the past six post-*Gideon* decades, scholars and policymakers have amassed an extensive library of reports, articles, and thought pieces focusing on the delivery of legal services to the poor in criminal matters.[70] This body of work varies from consideration of the advantages and challenges of each discrete delivery method, to how existing methods might be modified to achieve better outcomes, to a rigorous examination of individual programs, to consideration of systemic challenges infecting all indigent defense. This Article is not intended to replicate that often nuanced body of work; rather it seeks to provide broad-brush parameters describing the major components of each system as a backdrop for the question of client choice. Any attempt to do more than grossly generalize how the three primary models are structured, how they operate on a daily basis, and their efficacy, necessarily fails. The vast complexity of the American criminal justice system, a system largely locally financed and managed, renders wholesale descriptive efforts hollow.[71]

Representation, 54 ST. LOUIS U. L.J. 385, 390 (2009) (positing that the lack of choice breeds contempt, leading to an influx of self-representation decisions).

69. Moore, *Sixth Amendment*, *supra* note 18, at 1735.

70. *See, e.g.*, Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316 (2013); Cara H. Drinan, *Getting Real About* Gideon*: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309 (2013); THE CONSTITUTION PROJECT & THE NAT'L LEGAL AID & DEF. ASS'N, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), http://constitutionproject.org/pdf/139.pdf [https://perma.cc/E3JG-QM3J] [hereinafter JUSTICE DENIED]; AM. BAR ASS'N, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [https://perma.cc/EVL2-PZEG] [hereinafter *GIDEON*'S BROKEN PROMISE].

71. Understanding the mechanics of application, as well as its pros and cons, often requires that a particular type of delivery method be considered in real time and place context. Thus, studies conducting a deep dive may focus on a particular jurisdiction or program, and from that examination, attempt to formulate larger conclusions and recommendations. *See, e.g.*, AM. BAR ASS'N, STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS ET AL., THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014),

One generalization that can be confidently made, however, is that regardless of the dominant system in a particular jurisdiction, a blend of systems is almost uniformly required, whether driven by case conflicts, case overload, or case type.[72] One further, critical note is needed before turning to a general description of each delivery system. While commentators are careful to distinguish systemic shortcomings from individual attorney commitment, many recognize that *regardless* of the model employed, the system is one in crisis.[73] At the time *Gideon* was decided, 43% of felony defendants in state courts were indigent; in the intervening decades, that percentage has almost doubled.[74]

A. Public Defenders

Various public defender models exist across the country. Generically, they can be thought of as government-funded organizations that represent a percentage of indigent defendants in a jurisdiction. Typically, they are either an agency of the executive branch of state or county government, or a creature of the judicial branch.[75] The "defining characteristic" of defender

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https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.pdf [https://perma.cc/3MG6-5PS2].

72. Steven J. Schulhofer, *Client Choice For Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 512 n.27 (2015) ("Even in jurisdictions where the public defender handles nearly all indigent defense cases, however, a small assigned counsel program typically must be available as a gap-filler for cases in which the public defender is disqualified—by conflict of interest, for example."). Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 32 (1995) ("[T]o alleviate burdensome caseloads"). Case type may also require the use of a blended system, such as when a defendant presents with complex mental health issues or case facts require sophisticated scientific knowledge outside the expertise of office staff. These "special needs" cases also provide a justification for "jumping the queue" in managed assigned counsel systems.

73. *See, e.g.*, Schulhofer, *supra* note 72, at 506–07 ("None of these criticisms stand[ ] as a reproach to the integrity and professional commitment of the lawyers who serve the poor . . . . Yet even so, systemic shortcomings grievously weaken the capacity of an indigent defendant's attorney to render effective assistance."); Geoff Burkhart, *The Slow Justice Movement*, 30 CRIM. JUST. 38, 39 (2016) ("Like a drive-thru burger, American criminal justice is often fast, cheap, and unhealthy, while maintaining a nourishing guise."); JUSTICE DENIED, *supra* note 70, at 4 ("In most of the country, notwithstanding the dedication of lawyers and other committed staff, quality defense work is simply impossible because of inadequate funding, excessive caseloads, a lack of genuine independence, and insufficient availability of other essential resources.").

74. Hashimoto, *supra* note 60, at 1180.

75. *See, e.g.*, LYNN LANGTON & DONALD FAROLE, JR., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, SPECIAL REPORT: STATE PUBLIC DEFENDER PROGRAMS, 2007 (2010), https://www.bjs.gov/content/pub/pdf/spdp07.pdf [https://perma.cc/6RYS-59BS]. At the time of that report, twenty-two states had a state-based program in which all public defender officers in the state were funded and administered entirely under the direction of a central office. *Id.* at 1. In contrast, twenty-seven states followed a county-based approach, in which public defender officers are administered locally and primarily funded by county government or a combination of county and state funds. *Id.*

programs, one that is shared despite their myriad variations, is that attorneys providing indigent defense representation are full-time or part-time employees of the program.[76]

The typical paradigm is for the Chief Defender to be appointed by the financing entity, with the Chief Defender then hiring assistant defenders. In a few jurisdictions, the Chief Defender is elected.[77] Although the popular perception of a public defender office is a major law firm employing hundreds of attorneys, the majority are small offices with less than a dozen full-time attorneys.[78] Estimates are that public defender programs exist in virtually every county across the United States with a population exceeding 750,000.[79] Large or small, most defender offices also employ investigators; larger offices number social workers and paralegals among the full-time staff.[80]

Funding is always a key consideration regardless of the delivery system used. When the public defender system is funded primarily from local sources, the office may be more economically constrained than those offices for which funding comes from state-wide coffers.[81]

Scholars debate whether a professional public defender model produces better client results than other methods for delivering indigent defense.[82] The

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76. Spangenberg & Beeman, *supra* note 72, at 36.

77. Schulhofer, *supra* note 72, at 518, (citing ROBERT L. SPANGENBERG & PATRICIA SMITH, AN INTRODUCTION TO INDIGENT DEFENSE SYSTEMS 15 (1986), a 29-page study prepared for the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants (SCLAID), Bar Information Program, currently out of print).

78. *See* Schulhofer, *supra* note 72, at 517; Irene Oritseweyinmi Joe, *Systemizing Public Defender Rationing*, 93 DEN. L. REV. 389, 408 n.96 (2016).

79. Spangenberg & Beeman, *supra* note 72, at 36.

80. *See generally* MICHAEL S. WALD, U.S. DEP'T OF JUSTICE, THE USE OF SOCIAL WORKERS IN A PUBLIC DEFENDER OFFICE: AN EVALUATION OF THE OFFENDER REHABILITATION PROJECT OF THE PUBLIC DEFENDER OFFICE FOR SANTA CLARA COUNTY, CALIFORNIA (1972), https://www.ncjrs.gov/pdffiles1/Digitization/70138NCJRS.pdf [https://perma.cc/A9RH-S2T7] (discussing the impact of bringing in non-lawyers with social work backgrounds to work in a public defender's office). The Rand Corporation and U.S. Department of Justice sponsored a large-scale project evaluating the impact of holistic defense on case outcomes in Bronx, N.Y. over a ten-year span. James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 820–21 (2019). The holistic defense model involves public defenders working in interdisciplinary teams in efforts to address not only the pending case but underlying life circumstances. *Id.* at 820. While conviction rates were unaffected by holistic defense, expected sentence lengths and the likelihood of a custodial sentence were each reduced. *Id.*

81. Schulhofer, *supra* note 72, at 517. These phenomena are not unique to issues of indigent criminal defense. Estimates are that close to half of all public-school dollars in the United States are raised locally. EDBUILD, BUILDING EQUITY: FAIRNESS IN PROPERTY TAX EFFORT FOR EDUCATION 4 (2017), https://edbuild.org/content/building-equity [https://perma.cc/CK2J-2A4P]. Local funding rests largely on local property taxes. *Id.* County wealth can vary widely even within the same state. *See id.*

82. A Rand Corporation study released in December 2011 examined 3,173 murder cases in Philadelphia from 1994 to 2005. *See* Peter A. Joy & Kevin C. McMunigal, *Does the Lawyer Make*

reality may be that the answer varies by office. The general view is that a public defender model's major strength is in its professionalism. It makes available a reliable professional staff that is well-trained, well-supported, and well-supervised.[83] It creates institutional memory. It can serve an advocacy and policy-making role as a recognized stakeholder when innovation and reform efforts come under consideration. The principle drawback to public defender programs is that their "attorneys are often asked to carry caseloads that make it difficult, if not impossible, to provide effective representation."[84] There may be other drawbacks as well, such as the political realities of balancing a "preference for vigorous advocacy with the need to work within the available resources while also accommodating the case-management priorities of the court."[85] A related disadvantage is the potential that daily presence in the court operates to co-opt them into the administrative machinery of the court system, making them less adversarial than counsel who is not an institutional player.[86]

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a Difference? Public Defendant v. Appointed Counsel, 27 CRIM. JUST. 46, 46 (2012); James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012). The study concluded that the identity of the lawyer had a dramatic impact on both conviction rates and sentences. *See* Joy & McMunigal, *supra*. Indigent defendants with court-appointed private counsel were more often found guilty and sentenced to more time in prison than similarly situated defendants represented by public defenders. *Id.* Another study from that same time period found that defendants with assigned counsel received less favorable outcomes than their counterparts with public defenders; however, there were no significant outcome differences between private retained counsel and public defenders. Thomas H. Cohen, *Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 CRIM. JUST. POL'Y REV. 29, 54–55 (2014). Earlier studies found no significant difference in the probability of conviction or type of sentence. *See* Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?* 22 RUTGERS L.J. 361, 365–366 (1991).

83. Spangenberg & Beeman, *supra* note 72, at 36.

84. *Id.* at 37; Schulhofer, *supra* note 72, at 518 ("[T]he great majority of defender systems are underfunded, taxed with grossly excessive caseloads, and unable to provide their clients with even minimally adequate services.").

85. Schulhofer, *supra* note 72, at 518.

86. Feeney & Jackson, *surpa* note 82, at 401–02 (citing David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 272–74 (1965)). One pro se defendant's view was poignantly captured in three short sentences: "You don't have a name. You don't have a face. You're just another case." Milton, *supra* note 68, at 385. Professors Schulhofer and Friedman reprise the trope, "'Did you have a lawyer when you went to court?' 'No. I had a public defender.'" in their 2010 Cato Institute Policy Analysis, which was largely based on their 1993 article. *See* STEPHEN J. SCHULHOFER & DAVID D. FRIEDMAN, CATO INSTITUTE POLICY ANALYSIS NO. 666: REFORMING INDIGENT DEFENSE: HOW FREE MARKET PRINCIPLES CAN HELP TO FIX A BROKEN SYSTEM (2010), https://www.cato.org/publications/policy-analysis/reforming-indigent-defense-how-free-market-principles-can-help-fix-broken-system [https://perma.cc/PHY5-RTRG] [hereinafter SCHULHOFER & FRIEDMAN, REFORMING INDIGENT DEFENSE]; *see also* Stephen J. Schulhofer and David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation through Consumer*

B. *Contract Counsel*

Under this model, individual attorneys, private firms, bar associations, or non-profit organizations agree either to handle a specified volume of indigent defense cases for a specific fee[87] or to handle cases for a flat fee per case, independent of the effort a particular case requires.[88] Often the contract will include funds specifically for support services such as investigation and expert witnesses; regardless, contracting attorneys are usually responsible for those costs.[89] In some instances, contract attorneys maintain a substantial private practice and serve as a back-up for cases that the public defender cannot accept;[90] in other instances, this model may serve as contract counsel's full-time legal employment. Contract models as the *primary* means for delivering indigent defense services are in the minority, with only approximately 10% of all American counties employing this method;[91] however, the number of jurisdictions utilizing contract programs has substantially increased since the early 1990s.[92]

Contract systems are advantageous for small jurisdictions with low case volumes.[93] They provide "as needed" solutions rather than an "in case" operation. From a funder perspective, contract systems offer the advantage of predictability and the ability to project costs for the next budget cycle by capping the total amount of money contracted out.[94]

Sovereignty and Freedom of Choice for All Criminal Defendants, 31 AMER. CRIM. L. REV. 73, 86 (1993) [hereinafter Schulhofer & Friedman, *Rethinking Indigent Defense*].

87. In 2000, the U.S. Department of Justice released a Special Report, "Contracting for Indigent Defense Services," which considered the history of contracting these services, detailed the various types of contracts found across the country, addressed the few empirical students of contracting systems, listed characteristics of deficient and effective contract systems, and proposed four best practices as "lessons learned." ROBERT L. SPANGENBERG ET AL., U.S. DEPT. OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT (2000), https://www.ncjrs.gov/pdffiles1/bja/181160.pdf [https://perma.cc/W2CG-KQCR]. The Special Report was researched and prepared by The Spangenberg Group, a nationally recognized criminal justice research and consulting firm working to improve the delivery of indigent defense services. *Id.* In addition to private attorneys and small law firms, the contracting entity may also be a bar association, or a nonprofit and for-profit entity. Spangenberg & Beeman, *supra* note 72, at 32.

88. Schulhofer, *supra* note 72, at 521. According to Professor Schulhofer's research, a majority of contract defender agreements are framed in this way (as an individual fee per case rather than a global fee for services). *Id.*

89. Spangenberg & Beeman, *supra* note 72, at 34.

90. Schulhofer, *supra* note 72, at 520.

91. *Id.*

92. Spangenberg & Beeman, *supra* note 72, at 35. This increase has largely come about as an alternative to having court-appointed attorneys serve as the gap-filler for a public defender office. *Id.*

93. *See* Schulhofer, *supra* note 72, at 521 (noting their widespread use in some sparsely populated states, such as North Dakota).

94. Spangenberg & Beeman, *supra* note 72, at 35. With a contract program, the county is not subject to variables found in an assigned counsel program, such as the total number of cases, their

The disadvantages of this model include its distortion of attorney incentives,[95] its potential for a lack of quality control,[96] the specter that a "low bid" by less competent counsel might secure the contract,[97] and the potential for an unanticipated increase in demand for services.[98]

C. *Assigned Counsel*

The distinguishing characteristic of assigned counsel programs is that private attorneys represent indigent defendants. Within this larger label, two principle models are found: the ad hoc assigned counsel program and the coordinated assigned counsel program. Under either model representation is "one off"—one defendant, one case, one attorney, and no institutional backing.

1. *Ad Hoc Model*

The ad hoc model is the oldest, and for a time was the more common paradigm. In this system appointment of counsel typically is made by the court on a case by case basis, without the benefit of a formal list or rotation

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complexity, and the impact of local policing priority shifts. *See id.* For example, a single capital murder (death penalty) defense can have a major impact on the annual assigned counsel budget. *See Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (Dec. 7, 2016), https://www.supremecourt.gov/opinions/urls_cited/ot2016/16-5247/16-5247-2.pdf [https://perma.cc/7GG9-U38E] ("Defense costs for death penalty trials in Kansas averaged $400,000 per case, compared to $100,000 per case when the death penalty was not sought.").

95. Schulhofer, *supra* note 72, at 521–22 ("[B]ecause compensation per case is independent of the effort that the case requires . . . [and] the incentive structure strongly discourages pursuit of any time-consuming defense strategy . . . .").

96. Spangenberg & Beeman, *supra* note 72, at 35 ("The key to a successful contract program is to ensure that the attorneys have appropriate experience, training, and monitoring, and that the lawyers have access to the support and resources necessary for litigation.").

97. State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984) (finding a fixed-price contract system unconstitutional on four grounds, including the concern that an attorney, "especially one newly-admitted to the bar," could bid low, be awarded the contract, and be unable to deliver).

98. See AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT, ch. 1 *passim* (Macmillan 2009) for an in-depth look at the reality of a contract system in operation. Bach chronicles her observations in Greene County, Georgia over a five-year period. Local defense counsel, whose private practice work was not sufficiently lucrative, sought and received a fixed fee contract. *Id.* His initial bid was an offer to handle all routine cases for $15,000, plus $75/hour for serious cases such as murder. *Id.* During his first year, counsel represented forty defendants and maintained his private practice. Over the next fourteen years, his public caseload increased exponentially (in 2001, 1,359 people were arrested in Greene County, many of whom were indigent), while his salary rose to $42,150. *Id.* Some viewed him as the quintessential "meet 'em, greet 'em, and plead 'em" lawyer. *Id.* Over a four-year period, he took fourteen cases to trial out of 1,493. *Id.* The remaining cases—more than 99%—he plea-bargained. *Id.*

method, and often without specific attorney qualification requirements.[99] Compensation is usually made on an hourly or flat fee basis, and is generally "quite low," frequently with fee caps.[100]

This system is criticized for fostering patronage and for its lack of control over the appointed counsel's level of experience and qualifications.[101] It lacks independence by counsel from the appointing authority before whom counsel will be litigating the case, and judges might favor attorneys known for the "reasonableness" of their approach rather than attorneys seen as aggressively adversarial.[102] A positive aspect of this system is that the judge doing the appointing has often been in a good position to acquire information about specific attorneys, and thus theoretically could match skills with the special needs a particular case might present.[103] Additionally, the assignment of private counsel works to improve the overall quality of the defense bar by increasing number of available lawyers, particularly those who are more experienced; it replicates the more "normal" lawyer-client relationship which in turn operates to provide greater client satisfaction.[104]

2. *Managed Assigned Model*

The distinguishing characteristic of this model is the centrally administered selection of counsel from a list of pre-qualified attorneys.[105] As with ad hoc appointed counsel, attorneys in a managed assigned model are paid either by the hour or by a flat fee per case. The advantages of this system are its independence from both the judiciary and elected officials as well as its ability to maintain "tiered" lists based on areas of expertise, experience, and case complexity.[106] Its disadvantages echo many of those found in the

99. The appointment may be made on the basis of who is present in court when the need for counsel becomes known, such as at the defendant's first appearance or arraignment. Spangenberg & Beeman, *supra* note 72, at 33.

100. Schulhofer, *supra* note 72, at 514 (noting that typical rates are "inadequate even to meet the attorney's office overhead").

101. Spangenberg & Beeman, *supra* note 72, at 33 ("It is not uncommon for many of the appointments to be taken by recent law school graduates looking for experience, and by more 'experienced' but marginally competent attorneys who need the income.").

102. Schulhofer, *supra* note 72, at 515 (observing that judges have few incentives to use their knowledge of an individual attorney's skills "to pick the very best lawyer").

103. *See id.*

104. Feeney & Jackson, *supra* note 82, at 369–70.

105. *See* Spangenberg & Beeman, *supra* note 72, at 33–34.

106. Schulhofer, *supra* note 72, at 513 (noting that some jurisdictions have more detailed eligibility requirements or a system to screen attorneys seeking inclusion on the list); Spangenberg & Beeman, *supra* note 72, at 33. The eligibility criterion for felony appointments in Harris County, Texas (home to Houston, the nation's fourth largest city), for example, illustrates a tiered selection approach. To be included on the Courts' "Master List", the applicant must: (1) be licensed and in good standing with the State Bar of Texas; (2) have practiced in the area of criminal law for at least two years; (3) pass a certification test with a score of at *least* 75 unless already certified in criminal

contract attorney system—poor compensation rates, conflicts of interests between the time demands for appointed and retained clients, and distorted incentives.[107] Additionally, when counsel is randomly assigned from a neutral "eligibility wheel" any match of lawyer strength to client preferences is entirely accidental.[108]

IV. CLIENT CHOICE MODELS

The past decade has seen increased interest[109] in bringing free market principles to indigent defense delivery paradigms by advocating a system that would function similarly to the manner the market functions for affluent defendants able to retain their own counsel.[110] Central to the criticism of existing criminal defense systems is the premise that refusing freedom of choice creates conditions ripe for a "double disaster":

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law by the Texas Board of Legal Specialization; and (4) average ten hours a year of continuing legal education courses or training related to criminal law. *See Harris County District Courts Appointed Attorney Candidates Minimum Requirements*, HARRIS COUNTY DISTRICT CTS., https://www.justex.net/justexdocuments/0/FDAMS/2017/quickGuide.pdf [https://perma.cc/629K-7QHB] [hereinafter *Minimum Requirements*]. In addition to the Master List, the courts maintain a "Graduated List" with additional requirements for specific appointment levels. *Id.* To be appointed to the third-degree felony list, counsel must have tried to verdict at least three felony jury trials as lead counsel. *Id.* For the second-degree felony list, counsel must have practiced criminal law for at least four years and tried at least four felony jury trials as lead counsel. *Id.* The first-degree list requires the applicant to have practiced criminal law for at least five years, tried to verdict at least eight felony jury trials as lead counsel, and been accepted as competent by a majority of the district judges. *Id.*

107. Schulhofer, *supra* note 72, at 522–23 (noting that in the contract context, renewal [for Harris County, remaining on the list] "requires satisfying the county, not the client, and the county's goals are, of course, ambivalent.").

108. *Id.* at 534 (detailing the different expertise and personality attributes that might be relevant for a given client) ("[A] criminal defendant may prefer a lawyer renowned for trial skills or instead for bargaining process, one known for an aggressive, no-holds-barred style or instead for the ability to get along successfully with prosecutors and the court.").

109. The call for a client choice system began much earlier and has remained a quiet thread in criminal justice literature for decades. *See, e.g.*, Peter W. Teague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974) (detailing a California intermediate court decision, subsequently reversed by the state Supreme Court, which granted a writ of mandamus ordering the trial court to replace court-selected counsel with a willing attorney of the defendant's choice); Schulhofer & Friedman, *Rethinking Indigent Defense*, *supra* note 86, at 73; Holly, *supra* note 25, at 181; Kenneth P. Troccoli, *"I Want a Black Lawyer to Represent Me": Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer*, 20 L. & INEQ. 1 (2002) (suggesting that courts be more receptive to appointing substitute counsel when race issues impede developing a meaningful attorney-client relationship and proposing modifications to appointed attorney selection). Efforts through actual implementation and proof of concepts studies have been a more recent development. Professor Moore traces this movement and origins of the Comal County, Texas project. *See* Janet Moore, *Isonomy, Austerity, and the Right to Choose Counsel*, 51 IND. L. REV. 167, 168 (2018) [hereinafter Moore, *Isonomy*].

110. SCHULHOFER & FRIEDMAN, REFORMING INDIGENT DEFENSE, *supra* note 86, at 1.

> (1) "the person who has the most at stake is allowed no say in choosing the professional who will provide him one of the most important services he will ever need," and
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> (2) this refusal is "compounded by an acute conflict of interests: the official who selects his defense attorney is tied, directly or indirectly, to the same authority that is seeking to convict."[111]

Generally, one of two models are proposed for client choice systems: a "pure" voucher program or a mixed assigned counsel model; this section describes the operation of each.

A. Pure Voucher Models

In this model, the "voucher" would be a guarantee of state payment that the indigent criminal defendant could take to any provider of criminal defense services.[112] As Professors Schulhofer and Friedman envision this model, lawyers serving the poor would have freedom to organize their practice as individuals or firms and would compete for the business of indigent defense clients.[113] Freed from government control of the organizational structure, these providers would likely seek specialization in discrete areas of criminal practice and would serve both the poor and affluent.[114] Their model does not exclude the possibility of a government-run staff of public defenders similar to current models now financed by vouchers collected from clients.[115]

Funding a pure free market voucher system could involve either lump sum payments or some variation of an hourly-rate formula.[116] While the voucher model may tackle the divided loyalty conundrum (the independence trap) and enhance key aspects crucial for a meaningful attorney-client

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111. *Id.*

112. *Id.* at 12.

113. *Id.*

114. *See id.* at 12–13. The practice specialization examples cited are drunk-driving cases or major felonies. *Id.* It could as easily be punishment mitigation, forensic science expertise in cell tower triangulation, battered spouse defense, or post-conviction investigation and litigation. *Id.* The varieties are wide-ranging, and the suggestion from voucher proponents is that this new host of possibilities "would provide a much-needed spur for innovation." *Id.*

115. As long as indigent criminal defendants retain the power to reject the public option, and assuming there were sufficient private sector providers available, having a government-run office would not compromise the free-market voucher paradigm. *Id.*

116. *See id.* The lump sum payment option is far from ideal when a case's unusually complex nature is evident from the beginning. In that scenario, either the provider's preference to avoid the case altogether means it will be rejected, or the case will be accepted with the understanding that the provider would not try very hard to win. *Id.* Neither outcome is desirable. Both outcomes are already present to some degree in two of the current systems when lump sum/fixed fee compensation is used for assigned and contract counsel. *Id.* In more commonplace scenarios, however, the lump sum payment option confronts the conflict of loyalties inherent in the three dominant service delivery systems in which funder and selector are one and the same.

relationship (the confidence and trust bond), the question remains how effectively it will be able to do so at current funding levels. Commentators divide sharply on this issue. Proponents of free market choice posit that if funding levels remain low, the available pool will continue to contain three attorney cohorts: able, altruistic lawyers, minimally competent attorneys with limited practice options, and high skilled lawyers "adept at cutting corners so that they can limit the harm to their clients while maintaining a decent income for themselves."[117] Proponents go further and suggest that a choice model could bring greater resources into the indigent defense system, not fewer.[118] Others see an infusion of resources into the criminal justice system as the most critical need, regardless of delivery method or client choice.[119]

B. Mixed Assigned Counsel

This model blends managed assigned counsel concepts with limited client choice. Criminal defendants can select their counsel from among attorneys on an approved list, or they can opt to follow the traditional route of attorney assignment made by the court (or other appointing authority for that jurisdiction). Thus, this model sits at the intersection of several familiar models; in doing so, it incorporates features of each. It gives clients a choice of counsel, but a cabined choice. It is more restrictive than the free market voucher proposal in which the defendant has almost no restrictions on the attorney to whom the voucher will be paid.[120] And yet it is certainly broader

117. *Id.* at 15.

118. Schulhofer, *supra* note 72, at 538–39 (suggesting that jurisdictions faced with a shortage of attorneys willing to serve at prevailing rates would then need to increase them). Based on a premise that public defender offices offer economies of scale and hence lower cost per-case expenditures than assigned counsel, Professor Schulhofer predicts that "governments would have a strong incentive to ameliorate the public defender's shortage of resources" in order to make a public defender the preferred client choice. *Id.* at 539.

119. *See* JUSTICE DENIED, *supra* note 70, at 50–65. Inextricably tied to funding inadequacies is the increasingly prevalent phenomena of excessive caseloads. Norman Lefstein, *Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate?* 38 HASTINGS CONST. L.Q. 949, 949 (2011) (symposium roundtable discussion). Excessive caseload litigation has made its way off the pages of academia and into the court system. *See* Paige Masters, Note, *Caught Between a Rock and a Hard Place: A Missouri Court's Tough Choice and the Power to Change the Face of Indigent Defense*, 37 OKLAHOMA CITY U. L. REV. 97 (2012) (chronicling litigation in Missouri when a trial court appointed the public defender as assigned counsel in the face of the district defender's objection that his office had reached caseload capacity); *see also* Lefstein, *supra*, at 125 (describing the Miami-Dade litigation in the Florida Supreme Court). Resource allocation remains prominent in any examination of "problems in indigent defense," regardless of proposed solutions. *See, e.g.*, *GIDEON'S* BROKEN PROMISE, *supra* note 70, at 7–11 (highlighting indigent defense funding concerns and competing fiscal burdens of the government).

120. Defendant preference in this context would certainly be subject to the classic restrictions that have allowed courts to override defendant choice in retained counsel scenarios, such as lack of licensure or non-waivable conflicts of interests. These restrictions are discussed *supra* Part II.

than any of the three dominant models in all of which attorney selection is made by someone other than the defendant.

This was the model ultimately tested during a year-long project in Comal County, Texas.[121] It is a model found in U.S. military courts and various nations sharing our English common law heritage.[122]

The client's ability to choose somewhat alleviates the "independence/conflict of interest" concern since counsel would theoretically have more interest in client satisfaction than in pleasing an appointing entity.[123] However, it does not totally eradicate that concern; there remains the question of getting and staying in the appointment pool. On one hand, consideration of attorney qualifications as criteria for inclusion is laudatory—particularly in a tiered system. It works to match skill and experience and knowledge levels with gross categories of client needs.[124] On the other hand, selection implies discretion to exclude or remove, and those decisions can be animated by reasons other than qualifications. This is a persistent criticism of the assigned counsel system, particularly when courts are the appointing authority.[125]

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121. The project report deemed the year-long experiment a successful proof of concept, with cautions about study generalizations and suggestion for further study. POWER OF CHOICE, *supra* note 16, at 46. Part VII *infra* details considerations for a future pilot study including a longer study period, a jurisdiction with an active public defender presence, and a broader range of cohorts studied, including those criminal defendants who were able to hire counsel of choice and their attorneys.

122. Rappaport, *supra* note 23, at 142 (pointing out England, Scotland, Wales, and Ontario, Canada). Some of these procedures have operated successfully for years. *See id.* at 135. For a list of articles describing these programs, see Schulhofer, *supra* note 72, at 508 n.17.

123. Schulhofer, *supra* note 72, at 538, ("Client choice gives the less successful attorneys, who may place particularly high value on indigent defense assignments, a strong incentive to please their clients in order to continue to attract this much-appreciated source of business.").

124. Consider the tiered appointment qualification lists used in Harris County, Texas, outlined *supra* note 106. Attorneys must show doctrinal knowledge as well as litigation experience and must undergo annual criminal law or practice training that exceeds the requirements for licensure under State Bar of Texas requirements. *See Minimum Requirements*, *supra* note 106.

125. *See* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [https://perma.cc/7MNW-RMD5]. Political independence in the defense function is a first principle for effective defender systems. *Id.* The purpose of independence is to provide an atmosphere in which zealous advocacy can flourish; this is accomplished when a "firewall" is erected between lawyer and funding authority. Moore, *Sixth Amendment*, *supra* note 18, at 1719. Professor Moore describes the firewall as protecting lawyers "from inevitable pressure to please (or avoid irritating) people with ultimate power over their paychecks." *Id.* Greater neutrality may be achieved when appointments are randomly assigned through a court administrator, but that does not answer the larger concern of the judge's power to vote counsel off the island without assigning a reason for that decision. *Cf. id.* It would be naïve to assume that counsel is unaware of this nascent power in every court interaction. Indeed, in some jurisdictions attorney qualifications for certain lists require more than training, experience and demonstrated substantive knowledge; they may also include acceptance by a majority vote of judges

V. CONSEQUENCES OF CLIENT CHOICE MODELS

Advocates on each side of the client choice chasm offer both systemic and defendant-based arguments supporting their positions. This Section briefly highlights some of the major arguments in order to give context to the later examination of the Texas experiment and recommendations for next steps nationally. It is not intended as an exhaustive catalog, but rather a quick snapshot. While some of the arguments have constitutional underpinnings, many are prudential in nature.

A. System-Based "No Choice" Arguments

1. No Constitutional Basis

As detailed in Part II, claims that indigent criminal defendants have a constitutional right to choose their own lawyers have been routinely rejected by the courts.[126] At its most basic, the operating premise is that the Sixth Amendment's right to counsel is satisfied with the appointment of a competent lawyer—nothing further is required.[127]

2. Logistical Nightmare

A client choice model would be difficult to administer and could lead to time delays in ensuring *Gideon*'s mandate is fulfilled.[128] The resulting bottleneck would both clog court dockets and work disadvantages to individual defendants which in turn would degrade the overall administration of justice.[129]

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in that jurisdiction that counsel meets the undefined standard of "competent". *See generally supra* note 106.

126. *See supra* Part II.

127. See *supra* Part II for an overview of key cases and commentator reactions.

128. Some courts assume client choice would strain management of the criminal docket. *See* Schulhofer, *supra* note 72, at 528 (discussing several Seventh Circuit decisions reaching that conclusion). One example would be a need for frequent continuances.

129. The quick insertion of counsel into the criminal process is critical. Counsel can increase the likelihood of pre-trial release and address the "immediate need to interview witnesses and commence a defense." Douglas Colbert, *Connecting Theory and Reality: Teaching* Gideon *and Indigent Defendants' Non-Right to Counsel at Bail*, 4 OHIO ST. J. CRIM. L. 167, 172 (2006). In today's digital world with its short time fuses, evidence identification and preservation become particularly critical. Vincent F. Rabil, Officer of the Capital Defender, *Strategies for Discovery and Investigation in Defense of Felony Cases* 12 (Apr. 3, 2017), http://www.ncids.org/Defender%20Training/2017NewFelonyDefender/DiscoveryInvestigationStrategies.pdf [https://perma.cc/J74P-CJDH]. A delay in defense counsel deployment equates to a denial of justice. *See id.*

3. *Decorum and the Orderly Administration of Justice*

Political trials and the specter of disruptive attorneys and increased public scrutiny have led some courts in the past to exercise tight control on the selection of counsel. This was particularly true in the time of social unrest in the 1970s, fueled in part by Vietnam War protests and the civil rights struggles of the 1960s.[130] The concern typically arises with the trial court's decision, a variant of judicial veto power, to deny volunteer counsel for the indigent defendant. The decision to override the client's choice is less focused on the proposed counsel's skill than it is on a perception of counsel as an anticipated disruptive presence in the courtroom.

4. *Judicial Oversight/Veto Power*

Judicial veto power over a defendant's choice of counsel is needed so judges can remove lawyers whom they believe will not adequately represent their clients. In order for the criminal justice's adversary system to work in both its truth-finding and law enforcement capacity, good representation is key. The judicial veto has a corollary benefit of checking criminal defendants hoping to game the system through deliberate efforts to create ineffective assistance of counsel or conflicts grounds for subsequent appeals and post-conviction attacks.[131]

5. *Socialization of the Defense Bar*

The private-funded criminal defense bar, although representing only one in five criminal defendants, should be preserved because it creates positive externalities that benefit the entire criminal justice system.[132] Having a private criminal defense bar attracts talented lawyers.[133] There is cross-over in terms of personnel and knowledge capital from the private sector to the public side.[134] The well-funded private defense attorney may be able to develop innovative strategies and techniques that can be replicated.[135] When viewed as more formidable, the private defense bar operates to deter general

130. *See also* Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 91–92 nn.107–110 (detailing trial proceedings and attorney and demonstrator conduct in an array of cases tried in the early 1970s).

131. Joy & McMunigal, *Client Autonomy*, *supra* note 14, at 58.

132. Rappaport, *supra* note 23, at 149. Professor Rappaport queried: "If public defenders are good enough for the indigent . . . are there nevertheless reasons not to have all defendants use them?" *Id.* He advances at least four reasons to resist an affirmative response. *Id.* at 149–152.

133. *Id.*

134. *Id.*

135. *Id.*

police and prosecutorial misconduct and overreaching.[136] Lastly, the private defense bar may influence substantive law content in a defendant-friendly direction.[137]

6. Unfairness Among Attorneys

Some judges object that client-choice could produce unequal treatment between and among attorneys.[138]This view comes in two flavors. One is that attorneys view indigent defense assignments as either an ethical obligation or an annoyance.[139] They agree to representation because of their relationship with the appointing judge; not because these defense assignments are viewed as a desirable prize.[140] If these "good" lawyers are chosen with disproportionate frequency, they will be forced to shoulder an unfair burden.

The second view reflects the polar opposite position: indigent defense work can be sufficiently lucrative and thus is a "prize" that the State should award equitably.[141]

B. Defendant-Based "No Choice" Arguments

1. Defendants are Apt to Make Poor Selection Decisions

Typically, these "protectionist" arguments center around a fear that clients might make a poor choice, often because they lack experience and expertise with the system. The client is in a poor position to evaluate potential claims by counsel concerning experience, qualifications, training, and expertise.[142] Counsel hoping to solicit new business may provide an overly optimistic case assessment which the potential client is poorly equipped to evaluate.[143] Once selected, counsel has "great and often unmonitored power to make decisions and otherwise act" on the client's behalf.[144]

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136. *Id.*

137. *Id.* at 152.

138. *See* Schulhofer, *supra* note 72, at 528 (citing United States v. Davis, 604 F.2d 474, 478 (7th Cir. 1979)).

139. *Id.* at 530 (citing United States v. Ely, 719 F.2d 902, 905 (7th Cir. 1983) ("[S]ome criminal lawyers, indeed, only reluctantly agree to serve as appointed counsel, under pressure by district judges to whom they feel a sense of professional obligation.")).

140. *Id.*

141. *Id.* (proposing two attorney scenarios: the competent lawyer with a successful private practice who uses quick pleas as an income supplement, or the lawyer with an unsuccessful private practice who relies on appointments as his primary revenue stream because it is preferable to alternative opportunities).

142. Joy & McMunigal, *Client Autonomy*, *supra* note 14, at 58.

143. *Id.*

144. *Id.*

2. *Indigent Clients Can Insist on Frivolous Tactics with Impunity*

Lacking the restraint that a cost-conscious defendant retaining counsel would exercise, the indigent defendant has no "brake" on the nature and number of defenses he wages.[145]

3. *Unfair Advantage for Habitual Offenders*

Client-choice confers an unfair advantage to "less deserving" defendants, particularly habitual offenders.[146] As repeat players in the criminal justice system, "habitual offenders" might possess a better sense of the strengths and weaknesses of available counsel, some of whom may have represented them in the past—giving the habitual offender an unfair knowledge advantage.[147]

C. *System-Based "Choice" Advantages*

1. *Constitutionally Required*

Numerous scholars urge a re-examination of Sixth Amendment jurisprudence relating to indigent client choice.[148] In addition to arguments seeking a re-interpretation of the "root meaning" of the Sixth Amendment,[149] they challenge as dicta "no choice for the poor" language found in retained

145. *See generally* David A. Sadoff, Note, *The Public Defender As Private Offender: A Retreat From Evolving Malpractice Liability Standards For Public Defenders*, 32 AM. CRIM. L. REV. 883, 931 (1995) ("A public defender must be protected from liability when budgetary constraints prevent him from hiring a required outside expert, specialist, or translator.").

146. Schulhofer, *supra* note 72, at 532.

147. *Id.*

148. Professor Moore suggests that changes in the substantive meaning of the Sixth Amendment may occur "dialogically" over time, informed by current practice realities. Moore, *Sixth Amendment*, *supra* note 18, at 1717. She illustrates this with an example challenging the effectiveness of counsel at punishment in a death penalty prosecution. *Id.* at 1716 (citing Wiggins v. Smith, 539 U.S. 510 (2003)). The two-part definition of what having the "assistance of counsel" means—the right to competent counsel—was established in *Strickland v. Washington*. 466 U.S. 668 (1984). As discussed in Part I, *Strickland*'s first prong examines whether counsel's performance was deficient. *See supra* Part I.A. Moore views the Court's holding in *Wiggins* as an example of *Strickland*'s basing real-world, evolving performance standards into the substantive definition of the right to counsel. Moore, *Sixth Amendment*, *supra* note 18, at 1717. The Court vacated a death sentence after concluding that counsel's performance failed to meet national and local standards for capital defense representation because counsel's decision to truncate a mitigation investigation was not informed by an objectively reasonable investigation. *Id.* at 1716 (citing *Wiggins*, 539 U.S. at 524–25, 534, 538).

149. Hoeffel, *supra* note 18, at 532 ("Just as it has always been assumed since the adoption of the Sixth Amendment that a defendant has a right to retained counsel of his choice, it has also always been assumed that the indigent defendant has no correlative right to counsel of his choosing.").

selection cases,[150] or recast self-representation caselaw as either inclusive of attempts to secure *different* assigned counsel[151]or keep existing counsel,[152]or as poorly reasoned and historically inaccurate.[153] They include challenges based on both equal protection[154] and due process grounds.[155] And they assert that *Strickland* offers insufficient protection for the indigent to justify a "no-choice" regime.[156]

2. *Sound Policy*

While reluctant to cede the constitutional claim, scholars nonetheless pose variations of this query: "[E]ven if a client-choice system is not constitutionally required, why should the denial of client choice be considered a *desirable* feature of a sound system of criminal justice?"[157] The argument seeks to force a "why not" view of client choice that stands on its rhetorical head the assumptions negating client selection.

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150. Moore, *Sixth Amendment*, *supra* note 18, at 1713 ("The Court's 'no-choice-for-the-poor' statements are dicta, but lower courts and commentators misconstrue them as settled law.").

151. *Id.* at 1734 (reading *Faretta*'s statements to the trial court as a request for a different lawyer and, in the alternative, a request to represent himself).

152. *See generally* Hoeffel, *supra* note 18, at 545 (recharacterizing *Morris v. Slappy*, 461 U.S. 1 (1983), as a "right to sever an existing relationship" case and labeling as dicta the majority's view that indigent criminal defendants have no Sixth Amendment right to a meaningful attorney-client relationship).

153. Toone, *Incoherence*, *supra* note 1, at 625 (noting that commentators were quick to challenge *Faretta*'s historical account and that the Supreme Court repudiated it 25 years later when it held there is no Sixth Amendment right to self-representation on appeal in *Martinez v. Court of Appeal of California*) (citing Martinez v. Court of Appeal of Cal., 528 U.S. 152 (2000)).

154. Peter W. Tague, *supra* note 130, at 87-89 (arguing that strict scrutiny is the appropriate standard of review and should be used to evaluate the government's interest in denying client choice to the indigent). Some suggest that beginning with decisions in the late 1960s, the Court's emphasis subtly shifted "decisional control" over case handling from clients to their lawyers. Hashimoto, *supra* note 60, at 1149. The result is that the *Gideon*-mandated representation indigent clients receive comes with a unique cost—loss of control over most aspects of their defense. This is a loss not experienced by defendants who can retain their own counsel. Robert E. Toone, *The Absence of Agency in Indigent Defense*, 52 AM. CRIM. L. REV. 25, 25–27 (2015).

155. Rappaport, *supra* note 23, at 155 ("The discriminatory effects of wealth disparities are not unconstitutional . . . . But discrimination against indigents by name is another matter."). While acknowledging impracticalities that might impact a system of indigent defendants' right to counsel of choice, Professor Rappaport stresses that there are ways to structure delivery and "the Fourteenth Amendment would seem to impel us to do so." *Id.* at 156.

156. *See* Moore, *Sixth Amendment*, *supra* note 18, at 1715 ("There is wide agreement, however, that *Strickland* contributes to the indigent defense crisis with abysmally low constitutional standards for defense attorney performance.").

157. Schulhofer, *supra* note 72, at 527 (questioning whether as a matter of constitutional interpretation or an assessment of sensible policy there is any rational basis to deny the defendant his preferred option).

3. Benefits to Adversarial System

An often-cited rationale for client choice is its impact on maintaining a healthy adversarial system. The basic argument is that: (1) the system demands competent lawyers; (2) competence is built on trust; (3) trust requires that the person doing the selecting is the person with the most at risk.

In order for counsel to fulfill its role as an advocate, basic trust must exist between client and counsel.[158] Trust becomes an essential element of counsel's effectiveness.[159] Individual counsel effectiveness in any given case, in turn, functions as an essential element in a balanced adversarial system.[160] This bond of trust is so critical that some commentators suggest that counsel for the poor criminal defendant must be "unabashedly and unequivocally partisan" in order for the adversarial system to function properly, and that former prosecutors must be rigorously vetted before being allowed to undertake defense representation.[161]

A second rationale is the impact that a more informed indigent defendant population will have on increasing pressure to improve attorney performance standards over time.[162] A more competent, professional defense bar enhances the functioning of the adversarial system. This principle is captured by the aphorism "a rising tide floats all boats."

Third, if resource allocation is a leading cause of the crisis in indigent defense,[163] the press for additional funding needed to improve the quality or scope of defense representation will lead to an enhanced adversarial system.[164] The system operates at far less than the adversarial ideal when

158. Recognition of the importance of trust has been a centerpiece of the *right to retained counsel of choice* case law as discussed in Part I.

159. Holly, *supra* note 25, at 187–88.

160. *Id.*

161. Steven Zeidman, *Raising the Bar: Indigent Defense and the Right to a Partisan Lawyer*, 69 MERCER L. REV. 697, 698, 698 (2018).

162. Moore, *Isonomy*, *supra* note 109, at 175. In theory, clients selecting counsel (whether from the legal community at large or from a court-authorized eligibility list) would seek more information about their choices, including: the attorney's education, current training efforts, workload, philosophy about decision-making, and experience. This flow of information from existing public defense providers could provide the data needed for additional funding and resources.

163. Public defenders must employ a triage approach similar to that found in health service delivery. *See* Joe, *supra* note 78, at 394. It is a "make do" response, in which individual attorneys are largely responsible for picking which clients will receive comprehensive defense representation and which clients will not. *See id.* This is a function of out-of-control defender caseloads. Caseload levels in the nation's largest counties average more than 530 cases per year, per attorney. *Id.* This translates to an environment in which even the most devoted defender, willing to forego all weekends and holiday breaks, cannot devote even one full day to each case. *Id.*

164. Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1288 (2015) (providing an

snap decisions must be made on strategy, pretrial bond determinations cannot be staffed, factual investigations must be curtailed, experts must be rationed, and face-to-face communications with jailed clients is the exception.

4. Counter to Denigration of the Poor

People who can afford private attorneys have a right to choose whom those attorneys will be; the poor do not. A wealth-based de jure discrimination denigrates the agency of poor people; it plays into cultural stereotypes of the poor as dependent, childlike, irrational, and incapable.[165] It would appear that "judges know best" unless the defendant is paying.

In contrast to this paternalism, some commentators suggest that less wealthy communities may be well-positioned to assess defense performance because they have disproportionate contact with crime and the criminal legal system.[166]

5. Democracy Enhancement

Allowing poor people the right to choose their lawyers reallocates power over the defense function; it shifts that power "from judges to people who have the greatest need and incentive to mount a zealous defense."[167] This shift involves more than just aligning a defendant's liberty interests with defender's pecuniary interests; it has the potential to foster grassroots constitutionalism as these clients "increase pressure, incrementally over time, to improve attorney performance standards."[168]

The shift of power also dovetails with the grassroots constitutionalism found in burgeoning participatory defense efforts.[169] It goes beyond the individual attorney-client relationship and pulls in the community as

example where collaboration and policy advocacy result in more funding to the local defender in order to provide misdemeanor representation at arraignment).

165. Moore, *Isonomy*, *supra* note 109, at 171.

166. *See* Moore, *Sixth Amendment*, *supra* note 18, at 1729 (pointing to the sophistication shown by indigent defendants when empirical researchers ask what they think about their attorneys and focus group results); *See generally* Christopher Campbell, Janet Moore, Wesley Maier & Mike Gaffney, *Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of their Public Defenders*, 33 BEHAV. SCI. & L. 751, 761–64 (2015) (using mixed methodologies to assess client attitudes about their public defenders and identifying five factors that can be significant in that relationship).

167. Moore, *Isonomy*, *supra* note 109, at 173.

168. *Id.* at 173–75; *see generally* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 256 (2019) (proposing an alternative approach to thinking about popular participation, one that recognizes that "the People" appear on both sides of the docket).

169. "Participatory defense" is a social justice movement that use basic community organizations techniques in efforts to improve public defense. *See* Moore et al., *supra* note 164, at 1281.

strategies are developed that can raise the level of attorney performance and the range of services provided.[170]

6. Market Efficiencies

Clients able to exercise choice will drive "bad" lawyers out of the market.[171]

D. Defendant-Based "Choice" Advantages

1. Defendant as Rational Decision Makers

A criminal prosecution involves a host of competing interests for the person charged.[172] They might include consideration of the array of potential collateral consequences for employment, federal school loans, housing, and government benefits should a conviction occur. They might include the defendant's personal calculus of her chances for successfully completing a probated sentence. They might include concern for possible consequences of a guilty plea on immigration status. They might concern the need for quick resolution and a return to normalcy. They might concern religious and cultural imperatives. They might include the risks of going to trial. They might concern the impact of protracted litigation on a family. The list of possible concerns in any given case is potentially lengthy, and the list will be shaped by the needs and values of the person in the crosshairs of the State. The only person qualified to prioritize his own interests is the defendant.[173]

2. Promotion of Attorney-Client Trust

Counsel choice is important for enhancing trust between criminal defense lawyers and the individual who needs them.[174] American society values mutual rapport in chosen relationships.[175]

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170. *Id.* Examples might include community bail programs, increased use of community and family to develop sentencing evidence, and political activism to increase defense funding. *Id.* at 1281–83.

171. Schulhofer & Friedman, *Rethinking Indigent Defense*, *supra* note 86, at 110.

172. Hashimoto, *supra* note 60, at 1178–79.

173. *Id.*

174. Hoeffel, *supra* note 18, at 527 ("A client chooses a lawyer with whom he or she can develop the bedrock principle of trust. Without this trust, the relationship is indeed meaningless, and the client will choose another attorney.").

175. Schulhofer, *supra* note 72, at 532.

3. *Individual Autonomy* [176]

For many defendants, their interaction with the criminal justice system will be among the most important matters of their lifetime. By denying freedom of choice to the indigent defendant, "the current system represents a glaring breach of our ideals of personal autonomy and freedom from unwarranted government control."[177] Choosing defense counsel "may be the most important choice [a] defendant will make in the presentation of his defense."[178] "[L]awyers are not interchangeable"—they vary in style, the emphasis they place on specific legal issues, their strategy in combating the arrayed power of the State, the decision-making points they share with their clients, and the level of skill they bring to discrete lawyering tasks.[179]

At a minimum, individual autonomy in choice of counsel serves as protection against a lawyer's conflict of interest since, under all delivery systems currently used, it is some government entity which provides the funds to pay counsel.[180]

4. *Reimbursement and Recoupment Consequenses*

When cost reimbursement requirements and attorney fee recoupment practices are added to the equation, it is less clear who is actually "paying" for the representation.[181] The existence of these statutes "more closely align [the indigent criminal defendant] with his non-indigent counterpart who unquestionably retains a Sixth Amendment interest in counsel of choice."[182]

VI. TEXAS EXPERIMENT

This experimental project involved a joint exploration into Client Choice by the Texas Indigent Defense Commission (TIDC)[183] and the

176. Hashimoto, *supra* note 60, at 1153. "Autonomy" is a freighted concept. As Professor Hashimoto notes, legal scholars disagree over what the term entails. *Id.* at 1152. The philosophical community has similar divergence. *Id.* at 1152–53. For this section of the Article, "autonomy" will be used as Professor Hashimoto uses it: "to embody the concept of private space within which a person can make and act upon decisions free from government intervention." *Id.* at 1153.

177. SCHULHOFER & FRIEDMAN, REFORMING INDIGENT DEFENSE, *supra* note 86, at 18.

178. Hoeffel, *supra* note 18, at 544.

179. *Id.*

180. Hashimoto, *supra* note 60, at 1181 (recognizing that, as is true for all lawyers, court-appointed attorneys owe an ethical obligation to their clients, regardless who is paying for their services; however, a potential for inherent conflict arises when counsel is being paid by the state).

181. *See* Holly, *supra* note 25, at 221.

182. *Id.*

183. Moore, *Isonomy*, *supra* note 109, at 189. The Texas Indigent Defense Commission is a permanent standing committee of the Texas Judicial Council. TEX. INDIGENT DEF. COMM'N, http://www.tidc.texas.gov [https://perma.cc/QJS3-YTCF]. It is governed by a board consisting of five members appointed by the Governor and eight ex officio members. *Id.* The Commission

criminal courts of Comal County, Texas, a mid-size county of approximately 130,000 residents with four felony criminal courts and two misdemeanor county courts, with evaluation by the Justice Management Institute (JMI).[184] The study project lasted one year.[185] This Comal County Client Choice (Client Choice) pilot was the first of its kind in the United States despite decades of suggestions from the legal academy advocating for such a program.[186]

This Section briefly describes program design, study methodology, and implementation challenges in order to provide context for discussion of study results.

A. Background

Planning for this pilot project began in 2012 as TIDC began development with the Comal County District and County Criminal courts; its working team was comprised of academics, TIDC staffers, Comal County judges and private defense attorneys.[187] At the same time, it assembled a national advisory panel of legal scholars and defense attorneys to provide input on program design.[188] The following year JMI joined the project both as Client Choice evaluators and as "participant observers in the design process."[189]

The genesis for this pilot goes back further and has its roots in a 2010 Cato Institute Policy Analysis by Professors Schulhofer and Friedman[190] and a conservative Texas think tank, the Texas Public Policy Foundation,[191] and

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provides both financial and technical support to the state's 254 counties to "develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the Constitution and state law." *Mission*, TEX. INDIGENT DEF. COMM'N, http://www.tidc.texas.gov/commission/mission [https://perma.cc/4RQ3-G8DK]. It is the repository for annual reporting by all Texas counties on local indigent defense plans and expenditures, as well as by court-appointed counsel on caseloads and practice time reports. *See Welcome to the Texas Indigent Defense Commission*, TEX. INDIGENT DEF. COMM'N, http://tidc.texas.gov [https://perma.cc/QJS3-YTCF]. It offers what may be "the nation's most advanced system for reporting essential performance indicators related to public defense." Moore, *Isonomy*, *supra* note 109, at 189.

184. POWER OF CHOICE, *supra* note 16, at ii, 6.

185. *Id.* at ii.

186. *Id.* at 1.

187. *Id.*

188. *Id.*

189. *Id.*

190. *See* SCHULHOFER & FRIEDMAN, REFORMING INDIGENT DEFENSE, *supra* note 86. That paper was a shortened, updated version of the authors' 1993 law review article urging the use of vouchers to "privatize" public defense. Schulhofer & Friedman, *Rethinking Indigent Defense*, *supra* note 86.

191. Professor Moore details communications between these groups, growth of the concept, and theoretical commitments shaping the project. *See* Moore, *Isonomy*, *supra* note 109, at 181–85.

the research of Dean Norm Lefstein on counsel choice in other common law countries such as Canada, England, and Scotland.[192] The TIDC's Executive Director, Jim Bethke, was intrigued by the concept and looked to find the right test venue, ultimately identifying Comal County as suitable.[193] Comal County is located between two major Texas cities, San Antonio and Austin (which are themselves approximately eighty miles apart on a major interstate highway),[194] and is considered a mid-sized county, with 129,048 residents at the time of the project.[195] Its size and location made a pilot study relatively manageable.[196]

Observers laud the "success of project proponents in putting counsel choice on the radar" given the numerous obstacles the project faced.[197] These ranged from broad-brush issues such as limited national legal scholarship on client choice to more localized issues of disinterest or hostility from the public defense bar.[198] Local economic conditions in Comal County also presented obstacles with fee schedules and mandatory spending caps.[199] However, Comal County offered advantages: the county was already using a managed assigned counsel system and had much of the needed infrastructure in place.[200]

Her focus is on the role played by libertarian theory and commitment to government spending austerity in shaping the project. *Id.* at 168. She examines how these commitments "constrained the measure and meaning of counsel choice that was offered, the data generated, and the ability of those data to support generalizable conclusions." *Id.* at 181.

192. Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 915–20 (2004).

193. Schulhofer, *supra* note 72, at 544.

194. *Distance Between San Antonio, TX and Austin, TX*, DISTANCE BETWEEN CITIES, https://www.distance-cities.com/distance-san-antonio-tx-to-austin-tx [https://perma.cc/D9FU-V459].

195. POWER OF CHOICE, *supra* note 16, at ii. Population estimates for Comal County in 2018 show a growth rate exceeding 10%, for a size of 144,033. *See Quick Stats FY 2018, Indigent Defense Data for Texas*, TEX. INDIGENT DEF. COMM'N, https://tidc.tamu.edu/public.net [https://perma.cc/DCZ6-BL87] (enter or select "Comal" as the county in the search engine).

196. Moore, *Isonomy*, *supra* note 109, at 190. The County's size also suggests that because of the "relatively small pool of lawyers from whom defendants could chose," their access to information about those lawyers would be more readily available. *Id.* at 192–93.

197. *Id.* at 185. Professor Moore considers it an important contribution to empirical research on public defense while also presenting a cautionary tale for proponents of client choice. *Id.* at 189. It is "difficult to overstate TIDC's contributions to data-driven analysis of public defense." *Id.*

198. *Id.* at 185.

199. *Id.* (estimating that attorneys performing what should be done in a felony case before entering a guilty plea were receiving a maximum of $22 to $40 per hour). Professor Moore chronicles unsuccessful efforts by TIDC to increase its funding from the Texas Legislature or receive new funding from the U.S. Department of Justice for this project. *Id.* at 187, 191. The "fact that TIDC earmarked scarce resources for this project" illustrates the high priority TIDC assigned to this pilot. *Id.* at 190–91.

200. Schulhofer, *supra* note 72, at 544.

B. *Program Description*

The Comal County Client Choice project was a modified *select from an approved list of providers* program rather than a *free market voucher* program.[201] The program launched in February 2015 and the pilot study covered a one-year span. At its conclusion, county officials decided to continue the model, permitting indigent defendants either to select a lawyer from an appointment list of approved attorneys or have an attorney appointed from a public appointment list using a system of rotation.[202]

1. *Courts*

Felony cases in Comal County are handled by four District Court judges; misdemeanors by two judges in County Courts at Law. All six courts agreed to participate in the program.[203]

2. *Attorney/Client Pools*

The 2013 indigent docket contained 1,496 defendants which were handled by assigned counsel, who were selected by rotation from one of three eligibility lists.[204] The lists were divided by case types the lawyers were deemed qualified to handle: serious felonies, lower-level felonies, and misdemeanors.[205] It appears that between thirty-five to fifty-five private

201. POWER OF CHOICE, *supra* note 16, at 3–4. Current Texas law does not permit lump sum voucher payments that defendants could use to hire the lawyer of their choice. *See* TEX. CODE CRIM. PROC. ANN. art. 26.05. Compensation of assigned counsel is controlled by statute and requires that each jurisdiction establish and publish a fee schedule. *Id.* art. 26.05(c). As is the case with most Texas fee schedules, compensation rates are tied to case disposition. *See* Comal, Caldwell & Hays County, Tex. District Courts, Local Rules for Appointment of Counsel in Criminal Cases and Schedule of Fees for Payment of Compensation to Appointed Counsel (Oct. 18, 2017), http://tidc.tamu.edu/IDPlanDocuments/Comal/Comal%20District%20Court%20Attorney%20Fee%20Schedule.pdf [https://perma.cc/AF8K-ERUR]. For example, a plea of guilty, including out of court time, is paid $500 to $650. *Id.* Trials lasting more than a half day are paid $400 to $750 per day, with additional out-of-court time compensated at $50 to $80 per hour. *Id.*

202. *Comal County Court Client Choice Implementation Plan*, TEX. INDIGENT DEF. COMM'N, http://tidc.tamu.edu/IDPlanDocuments/Comal/Comal%20District%20Court%20Client%20Choice%20Implementation%20Plan.pdf [https://perma.cc/8Q7U-C8EP].

203. *See id.*

204. Schulhofer, *supra* note 72, at 545. Texas law requires that counsel be appointed by the trial courts, although the delivery system used can vary from public defender, to assigned counsel, to contract counsel. TEX. CODE CRIM. PROC. ANN. arts. 26.04–.047.

205. Moore, *Isonomy*, *supra* note 109, at 194.

attorneys were on the assigned-counsel lists at the time of the pilot project.[206] There is no Public Defender in Comal County.[207]

Once Client Choice was implemented, the indigent criminal defendant could choose whether to select their own attorney from an eligibility list or use the standard rotation assignment.[208] Seventy-two percent opted to participate in Client Choice and select their lawyers; 38% had their lawyers appointed by the courts under the rotation system.[209] Of those defendants participating in Client Choice, 53% were charged with misdemeanors, and 47% with felonies. Twenty-two attorneys were interviewed at the pilot's conclusion; their average estimate for being selected was twenty times over an eleven-month period.[210]

3. Case Types

Of the 1,496 cases on the 2013 indigent docket, 523 were non-capital felonies, 860 misdemeanors, 111 juvenile cases, and one appeal.[211] During Client Choice, 1,104 defendants' cases were handled: 485 felonies in District Courts and 619 misdemeanors in County Courts of Law.[212]

4. Attorney Selection Process

At the time of a defendant's first appearance, Texas law requires that they be advised of their rights and informed of the right to request appointment of counsel if indigent.[213] Most of these first interactions at a magistrate's hearing take place in the jail, usually within twenty-four to forty-eight hours of arrest.[214]

When Client Choice was implemented, participating indigent defendants could select attorneys from among the already established eligibility lists, indicating their top three choices.[215] However, in a substantial

206. *Id.* at 194; POWER OF CHOICE, *supra* note 16, at 11. The lawyers were generally solo practitioners who had practiced in the area for three or more years. *Id.*

207. POWER OF CHOICE, *supra* note 16, at 6.

208. *See id.* at 4.

209. *Id.* at 11.

210. *Id.*

211. Schulhofer, *supra* note 72, at 545.

212. From 2014 to 2018, the felony appointed counsel rate averaged in the 60% to 75% range while misdemeanor appointments hovered in the 40% range. *Comal County Data Sheet*, TEX. INDIGENT DEF. COMM'N, http://tidc.tamu.edu/public.net/Reports/DataSheet.aspx?cid=46 [https://perma.cc/3BJU-JHCB]. To put those percentages in context, assigned counsel case counts averaged around 1,500 for the period of 2014 through 2017, jumping to 2,284 in 2018. *Id.*

213. TEX. CODE CRIM. PROC. ANN. art. 15.17.

214. POWER OF CHOICE, *supra* note 16, at 14.

215. *Id.* at 15.

deviation from the program design,[216] they had to do so after only a fifteen-minute period to review a binder of "Lawyer Information Forms".[217]

5. Compensation

There was universal agreement among Comal County attorneys that the fees paid were far below what the private market could demand.[218] TIDC data indicates an upward trend in fees paid to attorneys beginning in 2012; for example, the average felony fee rose from $739.71 per case to $756.98.[219] JMI was not able to test for a direct causal relationship between Client Choice and costs; a potential anomaly in 2015 might have been attributable to a particularly high profile, complex and prolonged case in felony court, while misdemeanor lawyer fee costs remained relatively stable.[220]

6. Evaluation Protocols

JMI used both process and outcome evaluations to test the concept model. The process evaluation consisted primarily of qualitative approaches. These included structured interviews, observation and focus groups. Areas covered included timing of appointment, determination of indigence, the appointment process, communication of appointments to stakeholders, and accountability for the quality of representation.[221] The goal was to assess how well Client Choice was implemented, together with challenges and barriers to that implementation. In October 2013, JMI conducted a week-long site-visit to establish a baseline for the process evaluation. Field staff documented

216. *Id.* at 14.

217. *Id.* at 15. The Lawyer Information Forms are notable for what they included and what they did not. The forms did not provide attorney phone numbers. *Id.* Additionally, the forms of lawyers fluent in Spanish were not translated into Spanish. *Id.* The basic information that was provided: lawyer name (and firm name, if applicable); lawyer address, including email and internet site; law school attended and graduation year; year licensed in Texas; types of cases handled; approximate portion of practice spent on indigent criminal cases during the prior 12 months; approximate number of defendants represented in all criminal cases during the prior 12 months; whether the lawyer was ever publicly disciplined (and a brief explanation); and languages spoken in addition to English. *Id.* at 15. The original Implementation Plan stipulated that defendants would have up to 48 hours to review this lawyer information, but this did not happen for in-custody defendants. *Id.*

218. *Id.* at 20.

219. *Id.* at 42.

220. *Id.* (discussing a substantial uptick in year 2018 in the number of indigent defense cases (from the 1,500 range to 2,284) and a corresponding increase in total indigent defense costs (from $771,322 to $1,075,821)); *see Comal County Data Sheet*, TEX. INDIGENT DEF. COMM'N, http://tidc.tamu.edu/public.net/Reports/DataSheet.aspx?cid=46 [https://perma.cc/4KM7-DRKC]; *see also Quick Stats FY 2018, Indigent Defense Data for Texas*, TEX. INDIGENT DEF. COMM'N, https://tidc.tamu.edu/public.net [https://perma.cc/DCZ6-BL87] (showing a population increase estimate of 144,033 for 2018).

221. POWER OF CHOICE, *supra* note 16, at 7.

the mechanics of defendant identification, attorney assignment, and attorney compensation. Additionally, seventeen interviews were conducted with "representatives from all of the major stakeholder groups," which were defined as district and county court at law judges and administrators, the magistrate, the district attorneys, and three lawyers on the appointed counsel list.[222] Ten months after the February 2015 launch, JMI conducted another site visit and began a round of interviews with key stakeholders, including a sample of twenty-two lawyers accepting indigent defense cases.[223]

For outcome evaluation, JMI used a pre/post-design. Comparison groups were used to analyze differences between attorney-selected defendants and attorney-assigned defendants over a wide range of topics, including costs, case outcomes, quality, procedural justice, and case processing efficiency.[224] The evaluation was designed to consider client choice efficacy at three different levels—the individual defendant, the case, the system.[225] The primary data collection instrument was a survey of defendants.[226] However, additional information such as case type, disposition, and sentencing was collected from online court records. The total sample size was 119 pre-test participants and 68 post-test participants.[227] "The post-test survey duplicated the questions administered to the defendants prior to the launch of Client Choice, with only the addition of a few items regarding their knowledge of and experience with Client Choice."[228]

C. *Implementation Challenges*

There were three major implementation challenges: a drastic reduction in the time in-custody indigent defendants had to review lawyer information and indicate their top three choices,[229] an initial disproportionate selection of a small group of available attorneys,[230] and an almost 50% decrease in the post-test defendant sample size.[231]

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222. *Id.* at 9.
223. *Id.*
224. *Id.* at 7.
225. *Id.* at 9–10.
226. *Id.* at 9.
227. *Id.*
228. *Id.* at 11–12.
229. *Id.* at 15 (demonstrating that the change in implementation protocol was driven by concerns of the principal magistrate and jail officials).
230. *Id.* at 19 (explaining that there were consistently small number of lawyers (between three and five) who represented approximately a third of all Client Choice cases).
231. *Id.* at 12 (illustrating that this decrease from 119 to 68 participates was driven in part by confusion among system actors about who was responsible for collecting post-data and logistical issues involved in tracking defendants following disposition of their cases).

D. *Findings*

1. *Research Questions*

The project evaluation considered four fundamental questions centering on the impact on the quality of representation, participant satisfaction, case outcomes, and costs and efficiencies.[232]

2. *Illustrative Key Findings*

Overall JMI concluded Client Choice was successful as "proof of concept":

This report is not a wholesale affirmation that Client Choice will resolve all of the limitations and criticisms of indigent defense systems in the United States, but it does present enough evidence to justify its replication, refinement, and further study as one mechanism to address many of these concerns.[233]

a. *Disposition Types*

The majority of cases were pled guilty as charged; however, significantly more Client Choice defendants pled guilty to a *lesser* charge.[234] And, more Client Choice cases went to trial than assigned counsel cases.[235] JMI rated the strength of the relationship between Client Choice and disposition as "moderately strong" (statistically significant).[236]

b. *Sentencing*

JMI's evaluation explored the types of sentences received by defendants. The majority of defendants, both Client Choice and not, received sentences of incarceration or community supervision.[237] "Defendants who selected their lawyer were 2.65 times more likely than non-Client Choice defendants to receive a sentence of community supervision than incarceration."[238] Taken together with dispositions, JMI concluded there was strong support that a choice model produces "better case outcomes for defendants."[239]

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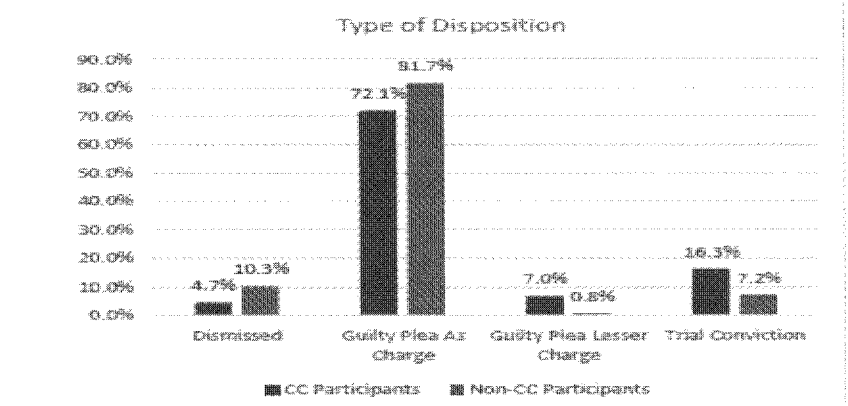
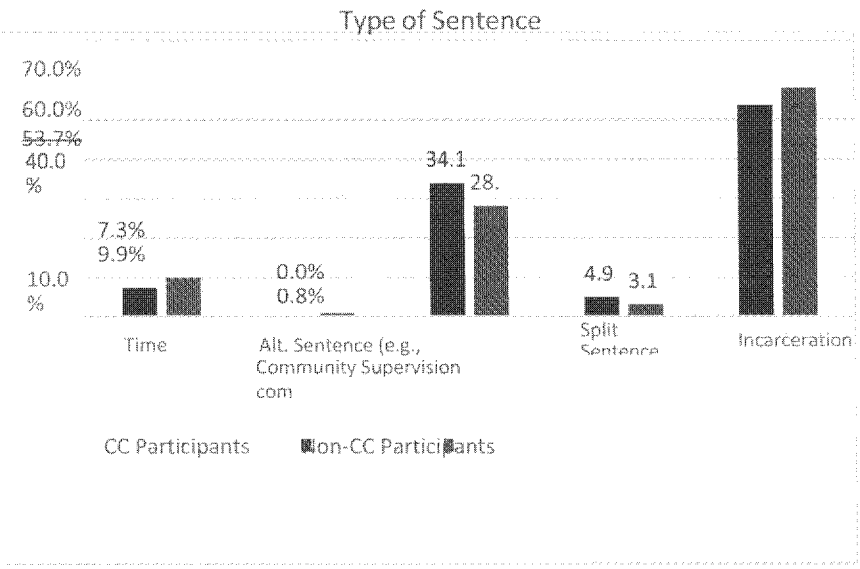
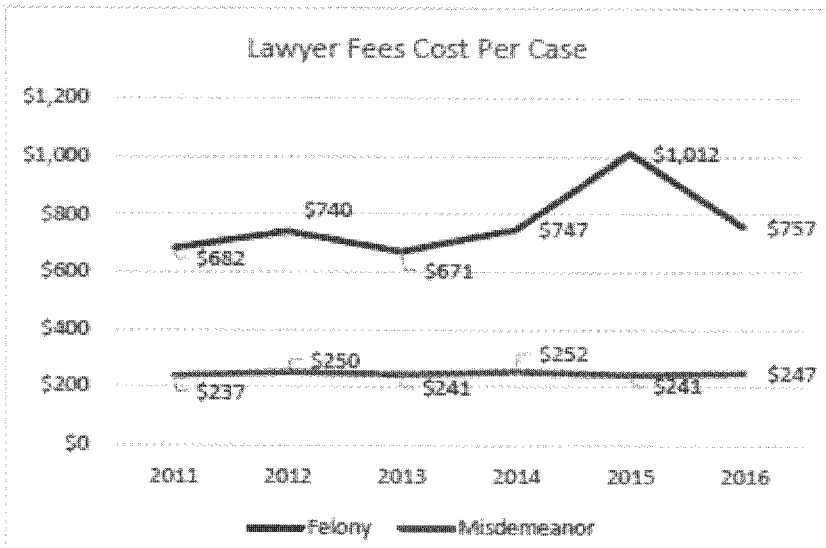
232. *See id.* at ii, 26.
233. *Id.* at iii.
234. *Id.* at 32.
235. *Id.*
236. *Id.* at 32.
237. *Id.*
238. *Id.*
239. *Id.* at 33.


Type of Disposition
90.0%
80.0%
70.0%
60.0%
50.0%
40.0%
30.0%
20.0%
10.0%
0.0%
4.7%
10.3%
72.1%
81.7%
7.0%
0.8%
16.3%
7.2%
Dismissed
Guilty Plea As Charge
Guilty Plea Lesser Charge
Trial Conviction
CC Participants
Non-CC Participants


Type of Sentence
70.0%
60.0%
53.7%
40.0%
10.0%
7.3%
9.9%
0.0%
0.8%
34.1
28.
4.9
3.1
Time
Alt. Sentence (e.g., Community Supervision com
Split Sentence
Incarceration
CC Participants
Non-CC Participants

c. Cost

JMI did not find the cost of the pilot program to be a significant factor.[240] However, it was "not able to test for a direct causal relationship between Client Choice and costs . . . ."[241]



d. Illustrative Defendant Perceptions

JMI did illustrate a number of defendant perceptions, including:

- Client Choice had little impact on the timeliness of first client meeting or meeting frequency[242]

240. *Id.* at 42.

241. *Id.*

242. "In overburdened state courts, it is not uncommon for a defendant to meet his public defender, hear about the deal, and decide what to do—all in the span of less than an hour and within the confines of a court lock-up or hallway while waiting to go into court." Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1462 (2005). The Comal Client Choice project found little support for the hypothesis that a choice model positively impacted the timeliness of the first client meeting or the frequency of attorney-client meetings. POWER OF CHOICE, *supra* note 16, at 28.

- A large number of defendants, regardless of selection method [client choice or court assigned], felt lawyers never met with them when asked[243]
- Client Choice did not impact defendants' view of the strength of advocacy their lawyers provided[244]
- There was no statistical significance in perceptions about whether the defendant was treated the same as the lawyer's other (paying) clients[245]
- Age and gender were significantly related to perceptions about treatment[246]
- Majority of all defendants strongly disagreed that they were treated with respect[247]
- Although among "agree" group, Client Choice defendants were twice as likely as Non-Client Choice to agree[248]
- Regardless of how lawyers were obtained, most defendants disagreed that lawyers took the time to get to know more about them[249]
- Defendants were fairly evenly split on whether they agreed their lawyers showed concern for them[250]
- More Client Choice Defendants felt their lawyers worked hard for them (41%) than Non-Client Choice (33%)[251]
- Fewer Client Choice defendants felt their lawyers took time to listen to them[252]

243. POWER OF CHOICE, *supra* note 16, at 29. Defendants charged with misdemeanors were statistically more likely to agree that their lawyers met with them when asked. *Id.*

244. *Id.* at 31. JMI did collect data about whether a defendant had previously been represented by either a public defender or court-appointed lawyer. *Id.* The working hypothesis is that this prior experience might serve as a proxy measure for defendants' expectations. *Id.* However, adding this variable into the model did not change the findings. *Id.*

245. *Id.* at 34.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at 35.

250. *Id.* at 36. As JMI considered variables that might influence the perception that their attorneys showed concern for them only case, type, and gender had an impact. *Id.* Defendants facing felony charges and female defendants in general were statistically less likely to feel their attorneys showed concern for them. *Id.*

251. *Id.* When defendants who neither agreed nor disagreed were removed, the odds that a Client Choice defendant felt their lawyer worked hard for them were 1.53 times that of an assigned counsel defendant. *Id.* As JMI considered variables that might influence the perception that their attorneys worked hard on their behalf only case type and gender had an impact. *Id.*

252. *Id.* at 38.

- Majority of all defendants felt their lawyers clearly explained what was happening in the case, with non-Client Choice participants edging out Client Choice (61% vs. 52%)[253]

3. Reactions to the Report

The primary criticisms of Client Choice center on the impact of funding and compensation rates,[254] the abbreviated time defendants had to select counsel,[255] sample size,[256] and inappropriately blended sample pools.[257]

On the issue of fiscal resources, the critique is that the Client Choice's operating principles of austerity and cost containment had a strong influence on every phase of the program's conception, design, implementation, and results.[258]

The small sample size is seen as the study's most serious flaw.[259] Of the sixty-eight post-implementation respondents, fifty-one were Client Choice defendants, leaving only seventeen people in the cohort that elected for court-assigned counsel.[260] Commentators deemed this is an inadequate number to support comparative analysis, while recognizing that the study report itself concedes that generalizations should be "cautiously" made from many of the findings as a result of the small size.[261] It lead to the second serious critique: inappropriately blended sample pools.[262] The small sample size necessitated altering the project design: researchers merged survey responses of these seventeen people with the 119 respondents who were surveyed *prior to* the implementation of Client Choice; this then created a new category of "Non-Counsel Choice Participants."[263] As a result, the key variable (how a criminal defendant would respond when given the chance to choose counsel) was no

253. *Id.* at 38–39.

254. Moore, *Isonomy*, *supra* note 109, at 188. Professor Schulhofer also notes that average attorney fees per case in Comal County are "quite low" causing this setting to differ "in potentially significant ways from that of many other American jurisdictions." Schulhofer, *supra* note 72, at 557. He predicts that "whatever benefits for clients ultimately result from Comal's client-choice regime," even greater benefits could be expected from places where public defense lawyers are more generously compensated. *Id.*

255. Schulhofer, *supra* note 72, at 555 (suggesting that limitations on time available for attorney selection might foster resentment and "undercut some of the promise" of a client-choice regime).

256. Moore, *Isonomy*, *supra* note 109, at 199.

257. *Id.* at 200.

258. *Id.* at 188.

259. *Id.* at 199.

260. *Id.*

261. *Id.* at 199–200.

262. *Id.* at 200.

263. *Id.*

longer key because a majority of the "non-counsel choice" group never had that opportunity.[264]

The final critique from the legal academy is that the report tends to highlight advantages of counsel choice without a critical acknowledgment concerning how the same data indicate important systemic problems.[265]

Criminal defenders reviewing the report had a somewhat different set of concerns. One was that some findings were based on lawyer and judge perceptions and impressions of client satisfaction rather than on input directly from clients themselves.[266] The data void faced by indigent defendants was a second major concern—attorney selection/choice was made largely on reputation, not data, and under very constrained time limitations. The fiscal implications of this pilot was an additional area of disquiet: if client choice is mistakenly viewed as a panacea for an underfunded system, then, in reality, it is "no choice." Nonetheless, practitioners agreed that Client Choice is a viable model that could be replicated in another jurisdiction and further studied, perhaps to determine if it is workable and feasible in a more blended environment.[267]

VII. CONCLUSIONS AND RECOMMENDATIONS

TIDC, JMI, and all the Comal County participants—from defendants, to judges, to attorneys, to court staff, to jailers—are to be commended for undertaking this monumental effort. They brought to life and reality tested a concept that has been debated for decades.

The modified Client Choice plan they implemented incorporates concepts of well-chosen defaults, principled choice options, and personal freedom in making those choices.

That increased funding is needed is a given. The Comal County pilot showed that client choice need not result in exponential indigent defense cost. Fine. But that does not address the larger issues facing the American criminal justice system: while there will never be resource parity between the wealthy and the indigent criminal defendant in terms of the services they can access, the current system is woefully underfunded and suffering serious resource constraints that challenge *Gideon*'s promise of the assistance of competent counsel. Abundant literature documents the extreme caseloads of front-line

264. *Id.* ("Instead of comparing two groups of people based on that variable, the study compares one group for whom the variable was present with a hybrid group for about 90% of whom the variable was absent. It is as if the research switched from an apples-to-apples comparison by substituting plums-to-pluots mid-study.").

265. *See id.* (suggesting the report was drafted with policymakers as its target audience).

266. *Id.*

267. Interviews with counsel practicing in the public defense space were conducted on February 4, 2019 and February 8, 2019. Interview notes are with the author.

service providers, regardless of the delivery method used or the involvement of defendant counsel selection.

That there should be some oversight of attorney qualifications and eligibility to be chosen is also a given. It is possible to honor the autonomy values of client choice in a "regulated market" context. While those favoring freedom of choice typically reject any kind of paternalism, the issue of attorney competence is one that benefits from some professional curating. It is not true that "almost all people, almost all of the time, make choices that are in their best interest or at the very least are better than the choices that would be made by someone else."[268] People do less well making good choices "in contexts in which they are inexperienced and poorly informed."[269]

Building on the preliminary, groundbreaking work of the TIDC in Comal County, Texas, a second pilot program should be commissioned, this time in a major American city with a strong public defender presence. Once again, the model should incorporate the option of "choice from a list of qualified" attorneys, this time including both private attorneys willing to accept assignments and the public defender, and a well-chosen default of assignment of counsel under the jurisdiction's traditional delivery method.

To make allowing a choice between private counsel and the public defender a meaningful exercise, two modifications to the Client Choice model used in Comal County are necessary. First, clients need more time in which to make their selections before being defaulted to the standard appointment process. Second, clients need a bit more information about their choice options. Imagine an indigent defendant in the Bronx; information about the holistic approach of the Bronx Defender might prove the tipping point, or information that private counsel has recent experience with a relevant type of forensic science might be the deciding factor. In either scenario, choice is enhanced when relevant information is increased.

The project should run for a longer time, if possible, to provide sufficient longitudinal data that could smooth out possible "blips" such as were seen with fluctuating compensation statistics from Comal County that may have been a one case anomaly.

Sample sizes need to be larger, as the Client Choice evaluators and critics both agree. However, in addition to more bodies, different bodies need to be added to the mix. One new cohort should include criminal defendants who retain counsel. Their perspectives about why they selected particular counsel, their expectations, and the quality of representation they received could prove relevant comparison data. While quantitative data on case outcomes and length of sentence for retained counsel and provided counsel

268. THALER & SUNSTEIN, *supra* note 13, at 9.
269. *Id.*

can be gathered from court records, the qualitative information that can be gleaned from focus groups, interviews, and surveys of this cohort have been a missing component.

Additional attention should be paid to the roles of age and gender in setting client expectations and reactions. The preliminary data from Comal County suggests disparities from both groups in terms of their treatment by counsel. Were these results a consequence of a small size pool, or do they reflect generational and gender divides? And if the latter, what do they suggest for public defense training and cultural competence?

A final area for further study could include the concept hinted at in the Comal County Report, that defendants opting for client choice have higher expectations about the level of advocacy they would receive.

Although client choice may not be viewed by courts as constitutionally mandated at this moment in history, it is worth pursuing by policymakers as a prudential matter. It leads to better outcomes and increased personal autonomy on an individual basis, and it has the potential to increase the overall quality of defense representation.

PROSECUTORIAL MISCONDUCT: SHOULDN'T THE PUNISHMENT FIT THE CRIME?

MILDRED SCOTT†

† Global Real Estate Department, Hewlett Packard Enterprise., J.D. cum laude, South Texas College of Law-Houston, B.A., Political Science and Journalism, summa cum laude, University of Houston, and currently pursuing an MBA at Bauer College of Business, University of Houston. I wish to thank my husband, Warwrick S. Scott, the motivating force behind all my accomplishments. He inspires me every day and taught me that it is not where you start in life, but the distance you travel.

I. INTRODUCTION

Our criminal justice system functions under the premise and purpose of punishing those who commit illegal acts to deter this type of behavior and rehabilitate those who have committed these acts. What has become ironic within our justice system is the belief that punishment corrects and deters unwanted behavior, while at the same time granting prosecutors absolute immunity, regardless of the egregious or illegal nature of their acts.

Prosecutorial misconduct is not a new topic and not one that is misunderstood at all. Extensive studies and scholarship exist on the resulting problems when unethical prosecutors have unchecked authority, coupled with no consequences for their actions. Again, this problem and the far-

reaching damage that results, are not new and are not even debated. What is debated is whether prosecutors should continue to enjoy the privilege of immunity from any liability for their actions.

To fully understand the scope of the problem and the sense of urgency we all should have in correcting it, we must look to history. We must examine the historical origins of a system that can breed such bad actors, who act with an entitlement and confidence that their misconduct and biased application of the law is accepted and condoned. Next, we must look at the magnitude of the harm caused by these rogue prosecutors being able to act with impunity, and the reality that this conduct has gone on for far too long and nothing done to date has worked as a deterrent. With this understanding, there should be no hesitation in finally implementing civil and criminal punishment for prosecutors who intentionally and willfully commit misconduct.

This Article will discuss the purpose and aims of the criminal justice system and role of the prosecutor, examine the historical reality of laws that were unequal when written and as applied, examine what conduct is considered prosecutorial misconduct and the prevalence of these behaviors, outline the physical and financial manifestations of the harm caused by this misconduct, explain the law as it currently applies to prosecutors and the immunity they enjoy and finally propose solutions to finally hold rogue prosecutors accountable.

II. CRIMINAL JUSTICE SYSTEM AND THE ROLE OF THE PROSECUTOR

A. Purpose of the Criminal Justice System

A variety of purposes or goals have been stated over the years for the criminal justice system and the individual state departments of correction. Although the specifics may vary slightly, the overarching purpose and mission has been to function as a mechanism of deterrence and "to promote the correction and rehabilitation of offenders."[1] Further, there is a secondary

1. MODEL PENAL CODE §1.02 (AM. LAW INST. 1985) ("The general purposes of the provisions governing the sentencing and treatment of offenders are: (a) to prevent the commission of offenses; (b) to promote the correction and rehabilitation of offenders; (c) to safeguard offenders against excessive, disproportionate or arbitrary punishment; (d) to give fair warning of the nature of the sentences that may be imposed on conviction of an offense; (e) to differentiate among offenders with a view to a just individualization in their treatment; (f) to define, coordinate and harmonize the powers, duties and functions of the courts and of administrative officers and agencies responsible for dealing with offenders; (g) to advance the use of generally accepted scientific methods and knowledge in the sentencing and treatment of offenders; (h) to integrate responsibility for the administration of the correctional system in a state department of correction [or other single department or agency].").

goal to "promote the correction and rehabilitation of offenders, within a scheme that safeguards them against excessive, disproportionate or arbitrary punishment."[2] The emphasis, at least as expressed in the Model Penal Code, has not been on sheer punishment, but to use punishment primarily as a tool to rehabilitate.[3] To further express this mission to all involved, the inscription on the wall inside the Department of Justice building reads, "The United States wins its point whenever justice is done its citizens in the courts."[4] Winning at all costs is not the goal. This objective to rehabilitate citizens in a fair and equitable manner has been expressed as far back as Thomas Jefferson.[5] Jefferson wrote, "The most sacred of the duties of government [is] to do equal and impartial justice to all its citizens."[6] In seeking to do equal and impartial justice, the individual with the most autonomous power to do justice, or injustice, is the prosecutor.[7]

B. Prosecutor: Role and Responsibilities

The prosecutor's role, as defined by the American Bar Association Standards for Criminal Justice, is that of "an administrator of justice, a zealous advocate, and an officer of the court."[8] They go on to describe the prosecutor as one who is to "seek justice within the bounds of the law, not merely to convict."[9] Their overarching objective is articulated as "promoting an accurate result through a fair process" as outlined in the Model Rules of Professional Conduct (MRPC).[10]

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2. *Id.* note on purpose of section. Prior to the 1962 Model Penal Code, there was no uniform statement of purpose for the penal system.

3. *See* §1.02.

4. R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 3 (2d ed. 2013). The United States Department of Justice building in Washington D.C. has an inscription on the rotunda wall that reads, "The United States wins its point whenever justice is done its citizens in the courts." *Id.*

5. *See About DOJ*, U.S. DEP'T OF JUST., https://www.justice.gov/about [https://perma.cc/6NZK-YB4G].

6. *Id.*

7. *See* discussion *infra* Section II.B.

8. *See* CRIMINAL JUSTICE STANDARDS FOR PROSECUTION FUNCTION §3-1.2(a) (AM. BAR ASS'N 2015).

9. *Id.* at 3-1.2(b) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.").

10. CASSIDY, *supra* note 4 ("[T]he prosecutor's obligation is not to convict at all costs, but rather to take steps to help promote an accurate result through a fair process . . . .").

It is important to note that the prosecutor is said to serve the public.[11] The general public and public interest are the prosecutor's client, not government agencies, law enforcement bodies or personnel, or even the victims of crimes.[12] In addition, the prosecutor is to function as a problem-solver and community advocate, with a duty to remedy inadequacies or injustices in the system once they are identified.[13]

Since the prosecutor's client, to whom they owe a duty, is the general public, they must be able to function in this role in an impartial manner, so that they truly represent the interests of their entire constituency. To do so, the prosecutor must be free from implicit bias, overt bias, and prejudice of all manners (racial, gender, sexual orientation, disability, age, religion and even socioeconomic status).[14] They must also "strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority."[15] Still, they must go one step further and work to eliminate historically persistent biases.[16]

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11. *Id.* at 1 ("The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.") (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). Cassidy goes on to explain that "[t]he office of the prosecutor is a public trust, and the duty to represent the public interest imposes special obligations of fairness and impartiality on the prosecuting attorney. . . . [A] prosecutor is thus both a principal and an agent." *Id.* at 2.

12. CRIMINAL JUSTICE STANDARDS § 3-1.3 ("The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor's clients. The public's interests and views are [sic] should be determined by the chief prosecutor and designated assistants in the jurisdiction.").

13. *Id.* § 3-1.2(f) ("The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action. The prosecutor should provide service to the community, including involvement in public service and Bar activities, public education, community service activities, and Bar leadership positions. A prosecutorial office should support such activities, and the office's budget should include funding and paid release time for such activities.").

14. *Id.* § 3-1.6(a).

15. *Id.*

16. *Id.* ("(a) The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion. A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority[;] (b) A prosecutor's office should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work. A prosecutor's office should regularly assess the potential for biased or unfairly disparate impacts of its policies on communities within the prosecutor's jurisdiction, and eliminate those impacts that

However, these rules of professional conduct are merely aspirational.[17] It is clearly stated in the rules that they are not intended to be used as a "basis for the imposition of professional discipline," or "to create a standard of care for civil liability."[18] Since these rules do not subject the prosecutor to any penalties if violated, they essentially function in practice as merely suggestions.

III. HISTORICAL REALITY

A. *To Understand Current Issues, We Must Look at Historical Events and Practices*

It is impossible to correctly examine the current epidemic of prosecutorial misconduct, without looking back at the history of the nation that bred this disease. Currently, we see instances of prosecutors and district attorneys' offices where bad actors commit a variety of illegal acts, which implicate the wrong individual and result in wrongful convictions.[19] This practice of convicting the innocent disproportionately impacts minorities, particularly Black Americans. Only looking at the problem within the current practice is like treating a health symptom but ignoring the root disease. For multiple centuries, the country enacted and enforced laws that were unequal as written and as applied.[20] The passage of the Thirteenth, Fourteenth and Fifteenth Amendments (the Reconstruction Amendments), were aimed at eliminating slavery, protecting all citizens' right to life, liberty and property, and eliminating voting discrimination against minorities. In theory, if followed as written, this should have eliminated race-based bias in criminal convictions as well. However, states immediately began to enact race-based laws, like the Black Codes and Jim Crow laws aimed at depriving minorities, particularly Black Americans, of their basic rights.[21]

If a jurisdiction is allowed to enact and enforce laws that are biased and target a portion of their citizenry, they signal to everyone involved in that process (legislature, judiciary, prosecutors, and even citizens) that this discriminatory practice is not only accepted but condoned. Below I will

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cannot be properly justified.").

17. *See id.* § 3-1.1(b).

18. *Id.* ("These Standards are . . . not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.").

19. *See* discussion *infra* Part IV.

20. *See* discussion *infra* Section III.B.

21. *See* Karla M. McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163, 166 (2010).

discuss the series of bias laws and practices that permeated the country over roughly the past one hundred and fifty years, and how their remnants are a contributing factor in present day prosecutorial misconduct.

B. Bias Laws and Unequal Application of the Law

1. Jim Crow

Even in light of the mandate from the federal government via the Reconstruction Amendments,[22] states, primarily southern states, still refused to tame their bigotry. That deep-rooted shame manifested itself in what we know as the Jim Crow era and Jim Crow laws.

The history of Jim Crow was a formalized practice where states enacted laws specifically geared to deprive a targeted portion of the population of their constitutional rights.[23] The federal government bent to the will of the states, cowering at the yell of "States Rights". By allowing the states to enact these targeted laws, the federal government sanctioned discrimination. This empowered the states and left them essentially free to infringe on Black citizens' rights at will.

This era was fraught with beatings, lynchings, and targeted punishment. By allowing these practices to go unpunished, the "law . . . sends a message to society about what types of behaviors are socially acceptable."[24] This effectively codified discrimination and created a "legal underclass."[25]

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22. U.S. CONST. amends. XIII, XIV, XV.

23. McKanders, *supra* note 21.

24. *Id.* at 166. McKanders went on to explain: "Jim Crow specifically refers to the segregation of African Americans and whites that occurred during the post-Reconstruction era, between the mid-1870s and the 1960s. The Reconstruction Amendments were essentially the first attempt by the United States government to recognize the personhood of African Americans. First, the Thirteenth Amendment, passed in 1865, officially abolished slavery. Next, in 1868, the Fourteenth Amendment was passed and essentially overturned *Dred Scott* [referring to Dred Scott v. Sanford, 60 U.S. 393 (1857)]. Last, in 1870, the Fifteenth Amendment was passed and prohibited state and local governments from preventing a citizen from voting based on the citizen's race, color, or previous condition of servitude. Congress, based on its newfound authority under the Reconstruction Amendments, also passed the Congressional Civil Rights Acts to ensure enforcement of the amendments. However, many states, especially in the South, viewed the amendments as an effort by the federal government to infringe on states' rights to determine state citizenship rights. Jim Crow laws arose in reaction, and allowed states to circumvent the restrictions of the Reconstruction Amendments. Although Jim Crow laws seemed to clearly violate the newly enacted constitutional amendments and the laws that accompanied them, post-Reconstruction the federal courts narrowly construed the Reconstruction Amendments and allowed states and localities to pass Jim Crow laws. After the Reconstruction Amendments were passed, Congress was not able to enforce the amendments through legislation, as the Southern states viewed congressional action as an infringement on their rights as states." *Id.* at 178.

25. *Id.* at 166 ("During the Jim Crow era, approximately 2,522 African Americans were lynched. . . . In addition, there were numerous beatings, race riots, and unjustified uses of capital punishment towards African Americans. . . . Jim Crow laws codified discrimination and second-

Further, judicial decisions condoned the discriminatory behavior and chipped away at the constitutional protections of the Reconstruction Amendments.[26]

Examples are plentiful and equally disgusting. Common industries with significant labor needs at the time were cotton, sugar, turpentine and coal.[27] There was an unspoken, but all too common practice at the time, called a recruitment process.[28]

> [T]he [county sheriff] and the [turpentine operators] made up a list of some 80 Negroes known to both as good husky fellows, capable of a fair day's work. Promised five dollars for each one he landed, the sheriff got them all on various petty charges—gambling, disorderly conduct, assault, and the like.[29]

They were then taken "to the local justice, who was in [on] the game."[30] This practice was a coordinated effort between law enforcement, the prosecutor, and the judge, to commit misconduct and effectively incarcerate countless people for no legitimate reason. However, there was a purpose—monetary gain.

2. *Convict Leasing*

In the mid-1800s land owners in the south were looking for a slavery substitute, and the state accommodated them with convict leasing.[31] Prisons

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class status for African Americans, thus giving authority and formal recognition to the irrational hatred and prejudice felt by many Americans. This, in turn, generated new norms and extra-legal discrimination and subjugation. This is evidence that the law does more than proscribe certain behaviors; by performing that basic function, it necessarily sends a message to society about what types of behaviors are socially acceptable. The ratification of the underlying attitudes, the creation of a legal underclass, and the promise that the law would not protect (and in fact would aggressively deny) the rights of African Americans all came together to fuel the creation of the Jim Crow atmosphere of legal and extra-legal subjugation.").

26. *See* Eugene Gressman, *Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1337–41 (1952); *see also* McKanders, *supra* note 21, at 184 ("It is evident that judicial opinions and laws impeded the intended advances for African Americans under the Reconstruction Amendments.").

27. David M. Oshinsky, *Forced Labor in the 19th Century South: The Story of Parchman Farm*, GILDER LEHRMAN CTR. FOR STUDY OF SLAVERY, RESISTANCE & ABOLITION (Oct. 23, 2004), https://glc.yale.edu/sites/default/files/files/events/cbss/Oshinsky.pdf [https://perma.cc/4YPY-M9ZZ].

28. *Id.*

29. *Id.*

30. *Id.*

31. DAVID M. OSHINSKY, "WORSE THAN SLAVERY" PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 20–21 (1996) [hereinafter WORSE THAN SLAVERY]. Shortly after the end of the Civil War, the Governor of Mississippi gave a speech stating, "[u]nder the pressure of federal bayonets . . . the people of Mississippi have abolished the institution of slavery. . . . The Negro is free, whether we like it or not; we must realize that fact now and forever." *Id.* However, Governor Humphreys went on to say that although they may be protected in their "person and property," they were not guaranteed "political or social equality with whites." *Id.* The Mississippi Legislature swiftly enacted Black Codes. *See id.* Enforcement of these laws were targeted specifically at Black

throughout the country—primarily the south—made agreements with local landowners to "lease" prisoners to them, for whatever purpose, and in turn the landowner paid the state for this labor.[32] The prisoners of course were not paid for this work, all of the profits went to the prison and ultimately the state.[33] This steady stream of additional income was a financial incentive for the state to incarcerate as many people as possible, by any means necessary.

Once convicts were leased to a landowner they did a variety of tasks including building levees, plowing fields, clearing swampland and even picking cotton.[34] They were moved to and from their worksites in a "rolling iron cage, which also served as their living quarters during jobs."[35] Convict leasing was often more brutal than slavery because the inmates were viewed as expendable.[36] If a landowner killed an inmate, or worked them to death, they just called the penitentiary and had another one sent over.[37] Because of this allowed brutality, "[n]ot a single leased convict ever lived long enough to serve a sentence of ten or more years" in Mississippi.[38] And, this cruelty was not just for adults. The Mississippi penal code did not differentiate

citizens and were often for trivial or vague offenses like "mischief" or "insulting gestures" and they went so far as to prohibit any Black resident from owning a firearm. *Id.* at 21. Further, the penalty for what was classified as "intermarriage" was "confinement in the State penitentiary for life." *Id.* "At the heart of these codes were the vagrancy and enticement laws, designed to drive ex-slaves back to their home plantations. The Vagrancy Act provided that 'all free negroes and mulattoes over the age of eighteen' must have written proof of a job at the beginning of every year. Those found with 'no lawful employment . . . shall be deemed vagrants.'" *Id.* This was a means to fill the prisons and then "lease" the inmates to land owners. *Id.*

32. *See id.* at 21.

33. *See id.* ("If the vagrant did not have fifty dollars to pay his fine—a safe bet—he could be hired out to any white man willing to pay it for him. Naturally, a preference would be given to the vagrant's old master, who was allowed 'to deduct and retain the amount so paid from the wages of such freedman.'").

34. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1190–91 (2015).

35. *Id.* ("By contrast to this sort of peonage and criminal surety operation, the convict lease operated through a bidding system wherein companies would offer a set amount of money per day per convict, and the highest bidder would win custody of the group of convicts and be entitled to their labor. Leased convicts worked on farms, constructed levees, plowed fields, cleared swampland, and built train tracks across the South. They moved from work site to work site, usually in a rolling iron cage, which also served as their living quarters during jobs. Convict lessors justified their use of convict labor because they claimed free labor was prohibitively costly; but as bidding expanded, the daily price of a convict's labor increased and free labor began to compete. Eventually, it was this trend toward parity in the cost of free and convict labor, more than any outrage at the brutal exploitation of the convict lease, which led to the abolition of the lease and its replacement by the chain gang. Chain gangs, unlike the convict lease, worked on maintaining public roads and performed other hard labor in the public rather than private sector.").

36. Oshinsky, *supra* note 27, at 2.

37. *See id.* at 2–3.

38. *Id.* at 9.

between juvenile or adult offenders,[39] "[b]y 1880, at least one convict in four was an adolescent or a child[,]"[40] with the youngest being only six years old.[41]

3. *Prison Profit Motive*

Across the country, prisons used inmate labor as a source of revenue.[42] There was, to varying degrees, a significant prison profit motive to incarcerate citizens. For example, in Mississippi in 1917, prison labor generated almost one million dollars in revenue for the state, through the production and sale of cotton, solely by inmate labor.[43] This accounted for roughly half of the state's education budget for that year.[44]

This abhorrent practice provided an endless supply of free labor for states. As many have called it, modern day slavery. Even the federal government used inmate labor for their projects until 1905.[45] Contextually, we must remain cognizant of the reality that this profit machine for the state would not have functioned without the cooperation of the local prosecutors and judges.

4. *Prison Statistics*

For the reasons discussed above, the prison population was disproportionately made up of minority prisoners. Even with the abolishment of convict leasing in the mid-1900s and the enactment of Civil Rights laws, the prison population remains disproportionately composed of Black Americans, particularly Black men.[46] In a study examining ninety years of

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39. *See* WORSE THAN SLAVERY, *supra* note 31, at 46.

40. *Id.* at 46–47.

41. *Id.* at 47.

42. *See, e.g.*, *id.* at 155.

43. *Id.*

44. *Id.* There were horrendous weather conditions in Mississippi that year; crops were wiped out and inmates were forced to re-plant over 5,000 acres in just twelve days. *Id.* at 154. The state focused on their profit margins from cotton sales, rather than the lives of the inmates that were literally worked to death in the cotton fields. *See id.* at 155. The image of Black Americans being forced to work in cotton fields under the supervision of white "trustys" with rifles, to generate income for the land owners and ultimately the state, was proof that the prison system was nothing more than a slavery substitution. *Id.*

45. Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL OF RTS. J. 213, 229 (2009). Convict leasing was such a common and condoned practice, inmate labor was used on federal government projects up until 1905 when Theodore Roosevelt issued an executive order preventing federal agencies from using inmate labor on government projects. *Id.*

46. Morgan Waterman, *Race, Segregation, and Incarceration in the States, 1920–2010*, DARTMOUTH: TOPICS IN DIGITAL HIST. (Oct. 31, 2016), http://sites.dartmouth.edu/censushistory/2016/10/31/rough-draft-race-segregation-and-incarceration-in-the-states-1920-2010 [https://perma.cc/9LSB-2FJJ] ("In 1920, 35.2% of male prisoners were [B]lack, although they only made up 9.2% of the male population. In 2010, 53.6%

prison data, Black male prisoners were overrepresented four to five times their representation in the entire male population and were found to be "six times as likely to be incarcerated" as their white counterparts.[47] Since there is no data indicating a heightened rate of crime among minorities, the only explanation is to point back to systemic bias in policing, charging and convicting. This disproportionate impact is a reality of the combined efforts of multiple layers of the judicial system.[48] "Sentencing policies, implicit bias, and socioeconomic inequity contribute to racial disparities at every level of the criminal justice system."[49]

5. *Wrongful Convictions*

There are varied reasons wrongful convictions occur, including genuine mistakes, and more often than realized, prosecutorial misconduct. Before we look at the impact prosecutorial misconduct has had on the imprisonment of innocent citizens, we need to understand the gravity of the harm. To date, there have been 2,460 exonerations, resulting in more than 21,645 years lost.[50] Bear in mind, this staggering number of nearly 2,200 Americans whose lives have been unimaginably altered, is just the number of exonerations tracked since 1989.[51] Further, a rough calculation of the number of years these exonerees were wrongly sentenced to serve is 73,585 years, including 121 people sentenced to death.[52] It is impossible to know the exact impact because we're only able to examine the wrongful convictions that have been

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of male prisoners were [B]lack, although they only made up 10.4% of the male population. The overrepresentation of [B]lack men in America's prisons suggests that the [U.S.] criminal justice system has a history of discriminating against this subset of the population.").

47. *Criminal Justice Facts*, SENT'G PROJECT, http://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/WUY4-D626].

48. *See* CAMBRIDGE UNIV. PRESS, IMPLICIT RACIAL BIAS ACROSS THE LAW 59 (Justin D. Levinson & Roger J. Smith eds., 2012) ("A reasonable interpretation of the mounting implicit bias literature, read in light of the profound racial disparities that define our criminal justice system, should put to rest any claims that we have arrived at a 'post-racial' or 'color-blind' justice system.").

49. *Criminal Justice Facts*, *supra* note 47 ("Today, people of color make up 37% of the U.S. population but 67% of the prison population. Overall, African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences. Black men are six times as likely to be incarcerated as white men and Hispanic men are more than twice as likely to be incarcerated as non-Hispanic white men.").

50. *Exonerations in the United States Map*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited June 9, 2019) (featuring an interactive map of up-to-date information of U.S. exonerations).

51. *Id.*

52. *Id.* This is a conservative estimate. It adds the actual years sentenced, then factors in only 50 years for each life sentence and also 50 years per death sentence. Knowing that some timeframes, like a life sentence, cannot be accurately estimated ahead of time, this is just a ballpark estimate to demonstrate the severity of the actual sentences, not just the years served.

discovered and made public.[53] Further, most exoneration statistics only track the past three or four decades.[54] However, it is conceivable when considering the history of biased laws, bigoted application and intentional targeting of racial minorities, and the lack of willingness to consider claims in previous decades, or even centuries, to conclude that this is only the tip of the iceberg.

In a system purportedly focused on justice, not only are the wrongful conviction figures staggering, but equally as disturbing is the disproportionate rate of wrongful convictions of Black Americans.[55] The racial disparity is across the board, but most prevalent in three particular crimes.[56] When comparing innocent black and white citizens and their rates of wrongful conviction, Black Americans are seven times more likely to be convicted of murder,[57] three-and-a-half times more likely to be innocent of sexual assault,[58] and twelve times more likely to be convicted of drug crimes.[59]

To give this a local context, a recent review in Harris County looked at 133 drug possession exonerations over the past few years.[60] They discovered that sixty-two percent of the exonerations were of Black Americans, in a county were Black residents comprise only twenty percent of the population.[61] Two things have been discovered in relation to the exoneration rates in Harris County. First, there is an obvious problem of profiling Black residents and this profiling and implicit bias issue begins with law

53. Emily Barone, *The Wrongfully Convicted: Why More Falsely Accused People Are Being Exonerated Today Than Ever Before*, TIME, Feb. 17, 2017, http://time.com/wrongly-convicted [https://perma.cc/8MUQ-UMT5] (estimating that "4.1% of people on death row are innocent while only 1.8% of them have been exonerated."). This estimate is a result of research and mathematical model generated by Samuel Gross. *Id.*

54. *See Exonerations in the United States Map*, *supra* note 50.

55. SAMUEL R. GROSS ET AL., RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/U3MP-TCRK] ("As of October 15, 2016, the National Registry of Exonerations listed 1,900 defendants who were convicted of crimes and later exonerated because they were innocent; 47% of them were African Americans, three times their rate in the population (presently 13% of the population). About 1,900 additional innocent defendants who had been framed and convicted of crimes in 15 large-scale police scandals were cleared in 'group exonerations'; the great majority of those defendants were also [B]lack.").

56. *Id.* at ii ("We see this racial disparity for all major crime categories, but we examine it in this report in the context of the three types of crime that produce the largest numbers of exonerations in the Registry: murder, sexual assault, and drug crimes.").

57. *See id.* at 4.

58. *Id.* at 11.

59. *See id.* at 16–20. This study further discussed the rate of drug possession charges and correlated it to drug use in the community. The researchers found that white and black drug use is roughly equal, yet Black Americans "are about five times as likely to go to prison for drug possession as whites." *Id.*

60. *Id.* at ii, 17.

61. *Id.* at 18.

enforcement officers,[62] but carries through to the prosecutors who choose the charges to bring against which citizens.[63] If profiling were not a factor, the disparate impact of convictions on one community over all others would be impossible. Second, it is suggested that the exoneration rate in Harris County is an indication of the proactive approach the District Attorney's office has taken to conduct post-conviction reviews and their active Conviction Review Unit.[64] These steps have resulted in 128 exonerations, which total 15% of all exonerations in the U.S. since 2010.[65]

6. Benefit to the Prosecutor

For a prosecutor to intentionally and knowingly commit misconduct to secure a wrongful conviction, we must look at their possible motivations. Conviction rates could be used as a performance measuring tool and could determine future advancement within the prosecutor's office.[66] The office culture often feeds the "win at all costs" mentality.[67] This has been called the

62. Barone, *supra* note 53. Samuel Gross, who was interviewed in this article, pointed to the concern of bias policing. "There are issues in the law enforcement and criminal justice system, aside from conviction rates . . . ." One must ask of a particular defendant, "[W]hy were you stopped in the first place? Why were you asked to step out of the car? And why were you searched?" *Id.* He cites this racial bias in policing as a root cause of the racial disparity in wrongful convictions. "[A]lmost half of the exonerations in the national database are [B]lack defendants, compared with 39% who are white." *Id.* That statistic must be viewed in light of the fact that Black Americans only make up 13% of the population with whites making up 77%. He went on to point out that Black Americans "are more likely to be targets of police misconduct. They receive harsher sentences than whites for the same crimes. And, for violent crimes like murder and sexual assault, they spend several years longer in prison before exoneration." *Id.*

63. Samuel R. Gross, *The Staggering Number of Wrongful Convictions in America*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a_story.html?noredirect=on&utm_term=.0c923996d16f [https://perma.cc/ZH3P-BVWS]. Most of the defendants who were exonerated after pleading guilty to drug charges in Harris County were still held in jail because they could not make bail and the prosecutor offered them a "take-it-or-leave-it" plea deal, which they chose over remaining in jail for months or even a year, awaiting trial. *Id.*

64. Barone, *supra* note 53. Many of the drug convictions that were overturned were possession charges where the defendant pled guilty. *Id.* In all the exoneration cases, the actual substances the defendants possessed were not illegal. *Id.* Often they were over-the-counter medications that failed the test administered via a field drug test kit. *Id.* The TIME article goes on to discuss how it is common for these tests to produce a false positive. *Id.* The Harris County District Attorney's Office went back and re-tested the substances in these cases, resulting in a significant number of exonerations. *Id.* Further, they have changed their plea regulations so they will "no longer accept guilty pleas in drug cases until the substance has been tested in a lab." *Id.*

65. *Id.*

66. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–35 (2004).

67. *See* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 543 (1996) ("A prosecutor protective of a 'win-loss' record has an incentive to cut constitutional and ethical corners to secure a guilty

"conviction psychology," where securing convictions is the paramount goal.[68] Frequently, offices calculate the attorney's "batting average" and some even have a bulletin board where they post wins and losses.[69] Aside from just career advancement, conviction rates may be used by district attorneys to negotiate budget increases or resource allocations.[70]

Further, prosecutors with political aspirations often want to be viewed as being tough-on-crime, and their conviction rate could be seen as evidence of this toughness, making the priority, again, convictions not justice.[71] The career advancement potential for prosecutors, even those who commit misconduct, is significant:

> Prosecutors who have committed misconduct, in the pursuit for additional "notches" of conviction on their record, have been promoted or have seen their careers advance. Some have become supervisors for the state's attorney office, circuit court judges, appellate court judges, inspector generals, congressmen, and even chief disciplinary counsel presiding over other lawyers for misconduct.[72]

IV. PROCSECUTORIAL MISCONDUCT?

A. What is Prosecutorial Misconduct?

In *Berger v. United States*, Justice Sutherland described prosecutorial misconduct as "overstepp[ing] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[73] Examples of prosecutorial misconduct are plentiful and varied.[74] What is undeniable, regardless of the form of misconduct, is the

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verdict in a weak case—to win at all costs."); *see also* Evan Moore, *"Win At All Costs" is Smith County's Rule, Critics Claim*, HOUS. CHRON. (June 11, 2000), https://www.chron.com/news/article/Win-at-all-costs-is-Smith-County-s-rule-1632942.php [https://perma.cc/823A-VHQA] (reporting that, in Harris County, Texas, assistant district attorneys must file a written report if they lose a case).

68. George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 109–10 (1975); *see* Medwed, *supra* note 66, at 139.

69. Medwed, *supra* note 66, at 137.

70. *Id.* at 135.

71. *Id.* at 153–54.

72. Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors*?, 38 CAL. W. L. REV. 283, 294–95 (2001).

73. Berger v. United States, 295 U.S. 78, 84 (1935); *see Prosecutorial Misconduct*, CALIF. INNOCENCE PROJECT, https://californiainnocenceproject.org/issues-we-face/prosecutorial-misconduct [https://perma.cc/R9SK-9AFU].

74. Maurice Possley & Ken Armstrong, *Part 2: The Flip Side of a Fair Trial*, CHI. TRIB. (Jan. 11, 1999), https://www.chicagotribune.com/news/watchdog/chi-020103trial2-story.html [https://perma.cc/UX9R-MZBL]; *see also* Ferguson-Gilbert, *supra* note 72, at 291–92. Documented by Maurice Possley & Ken Armstrong: "With impunity, prosecutors across the country have

impact it has on achieving a just result. Since, "[p]rosecutorial discretion has become a tool for adversarial gamesmanship. The result is that prosecutorial misconduct is one of the leading causes of wrongful convictions."[75]

Some states use a multi-factored balancing test to determine misconduct, which is: "(1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct."[76]

Further, the Model Rules of Professional Conduct (MPRC) clearly outline what is considered lawyer misconduct in Rule 8.4—"Maintaining the Integrity of the Profession."[77] Misconduct includes violating the Rules of Professional Conduct, knowingly assisting someone in violating these rules, committing a criminal act that reflects on the lawyer's fitness, dishonesty, fraud, deceit, misrepresentation, "engag[ing] in conduct that is prejudicial to the administration of justice[,]" harassment and discrimination.[78] Below I discuss the most common forms of lawyer misconduct, all of which violate this rule.

1. Failure to Disclose Exculpatory Evidence

One of the most prevalent areas of misconduct involves the prosecutor refusing to turn over exculpatory evidence. After *Brady v. Maryland*, prosecutors are now required to turn over to the defense all exculpatory evidence, which is evidence that tends to show the defendant is either not guilty, or is deserving of a lesser sentence.[79] The *Brady* court held that the "suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or

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violated their oaths and the law, committing the worst kinds of deception in the most serious cases. They have prosecuted [B]lack men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs. They do it to win. They do it because they won't get punished." *Id.*

75. Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J. L. & PUB. POL'Y 53, 56 (2012).

76. McGinn v. State, 2015 WY 140, ¶ 16, 361 P.3d 295, 299–300 (Wyo. 2015) (quoting Barnes v. State, 2011 WY 62, ¶ 11, 249 P.3d 726, 730 (Wyo. 2011)).

77. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2018).

78. *Id.*

79. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963). Brady confessed at trial that he was guilty of murder, but that Boblit, his accomplice, was the person who actually did the killing. *Id.* at 84. Since he was not the actual killer, Brady's attorneys were seeking to have him spared the death penalty. *Id.* His counsel asked the prosecutor to allow them to review all of Boblit's statements. *Id.* The prosecutors knowingly withheld Boblit's statement where he admitted he had been the one to kill the victim. *Id.* Brady was convicted and sentenced to death. *Id.*

to punishment."[80] Aside from their common law duty, a current area of debate relates to a prosecutor's ethical obligation related to turning over exculpatory evidence to the grand jury that would be favorable to the defendant.[81] This is not currently a common law or statutory requirement, but should be considered an ethical obligation under the MPRC.

An example of how detrimental intentionally withholding exculpatory evidence can be is the Michael Morton case. Morton was wrongfully convicted of murdering his wife and served nearly twenty-five years in prison before he was exonerated.[82] It was discovered that there were multiple pieces of evidence the prosecutors were obligated to turn over to Morton's attorney, which they chose to intentionally withhold. [83] These included a bloody bandana found near the Morton home, proof that his wife's credit card was used in another city after her death and an officer could identify the user, statements from neighbors about a man behind their home who went into the woods.[84] But, likely the most damaging item was the statement from Morton's three-year-old son, who was present during the murder, testifying that "[d]addy was not home" and that the murderer was not Michael but a "monster."[85]

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80. *Id.* at 87.

81. *See* CASSIDY, *supra* note 4, at 31 ("A controversial issue in the area of prosecutorial ethics is whether a government lawyer should inform the grand jury of evidence favorable to the target of the investigation. Prior inconsistent statements made by police officers and eyewitnesses; scientific test results that suggest that someone other than the target may have committed the crime; and, testimony from alibi witnesses placing the target at a location other than the crime scene on the date and time in question are all examples of 'exculpatory evidence' the grand jury might find useful in deciding whether to indict a prospective defendant. . . . [I]f the prosecutor's overriding duty is to insure [sic] that 'justice' is done, he should take reasonable steps to insure [sic] that the grand jury does not indict an innocent person or overcharge a suspect.").

82. *Michael Morton*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/michael-morton [https://perma.cc/8TKS-4UMF].

83. *Id.*

84. *Id.*

85. *Id.* Michael Morton's wife, Christine Morton, was brutally murdered and Michael was convicted for the murder due to exculpatory evidence withheld by the prosecutors, including: (1) The Mortons' three-year-old son, who was present during the murder, told his grandmother that his "[d]addy was not home" when the murder occurred and said that his mother was killed by a "monster." *Id.* The grandmother told the police about this statement. *Id.* (2) A bloody bandana was discovered 100 yards from the Morton home. *Id.* (3) The Mortons' neighbors told police they had repeatedly seen a green van on the street behind the Mortons' home and the man driving the van would go into the nearby wooded area. *Id.* (4) Records indicated that Christine Morton's credit card had possibly been recovered in San Antonio and an officer in San Antonio said he could "identify the woman who attempted to use the card." *Id.* Prior to trial, Morton's attorney suspected there was exculpatory evidence being withheld, so they brought this concern to the judge, who ordered the prosecutor to turn over all reports to the defense. *Id.* Even after receiving the trial judge's order, the prosecution still withheld each piece of exculpatory evidence listed above from the file the prosecutor gave Morton's attorney. *Id.* DNA testing of the bandana found Mrs. Morton's DNA and the DNA of a convicted felon from California who was living in Texas at the time. *Id.* Later, this

The MRPC require fairness to opposing counsel, specifically citing a duty to disclose evidence and not conceal or destroy relevant material,[86] as well as timely disclosure of all evidence "known by the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[87]

In the case of Ralph Armstrong, he spent over 24 years in jail for the rape and murder of a fellow college student, all due to the prosecutor hiding and destroying evidence.[88] Fourteen years into Armstrong's sentence, the prosecutor received a call from a witness telling them that Armstrong's brother had confessed to the killing.[89] The prosecutor did nothing.[90] They did not notify the defense attorney, the court, or follow up on the lead.[91] Subsequently, Armstrong's brother died, and the prosecutor then performed illegal DNA tests, which destroyed the remaining biological evidence that could be used to exonerate Armstrong.[92] Under the MRPC, the prosecutor had a duty to disclose the contact by the witness and was restricted from testing and ultimately destroying the DNA evidence.[93]

2. *Introduction of False Evidence*

The MRPC prohibit a lawyer from introducing false testimony or evidence.[94] Further, if they represent a client who "engage[s] in . . . fraudulent conduct related to the proceeding[,]" the lawyer is obligated to disclose this falsity to the tribunal.[95] In *Napue v. Illinois*, the prosecutor's witness testified that the witness had not been promised any consideration for their cooperation in testifying against the defendant, when in fact he had.[96] The prosecutor knew this testimony was false and did not bring the error to the court's attention.[97] Further, under the duty of fairness to opposing counsel, this false testimony by the witness should have been disclosed to the defense counsel.[98] Even if the witness does not testify regarding any consideration or immunity they have arranged with the prosecutor, the

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same person was linked to a similarly styled murder that occurred two years after Christine's murder. *Id.*

86. MODEL RULES OF PROF'L CONDUCT r. 3.4 (AM. BAR ASS'N 2018).
87. *Id.* r. 3.8(d).
88. *Ralph Armstrong*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/ralph-armstrong [https://perma.cc/JLV3-S6YX].
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. MODEL RULES OF PROF'L CONDUCT r. 3.8(g) (AM. BAR ASS'N 2018).
94. *Id.* r. 3.3(a)(3).
95. *Id.* r. 3.3(b).
96. Napue v. Illinois, 360 U.S. 264, 265 (1959).
97. *Id.*
98. MODEL RULES, r. 3.4 cmt. 2.

prosecutor has a duty to disclose these arrangements to the defense.[99] In *United States v. Schlei* the prosecutors did not disclose to the defense counsel that their government witness had been promised immunity in exchange for their testimony, in clear violation of the MRPC.[100]

3. Improper Argument

Improper argument is a form of misconduct that can occur at any stage in the trial.[101] It is when a prosecutor misstates facts, misstates the law, asserts facts that have not been introduced into evidence, or criticizes the defendant for not testifying even though it is their constitutional right.[102] These are all violations of MRPC rules 3.3 and 3.4.

4. Use of Perjured Testimony and Witness Tampering

Witness tampering and use of perjured testimony can come in multiple forms. Often, witness tampering occurs when prosecutors have coached witnesses on how they should testify, essentially telling them what to say rather than allowing them to answer truthfully based on their knowledge.[103] This often occurs when prosecutors feed details of a crime to a witness who is going to claim the defendant confessed to them. By the witness having such detailed information about the crime, in the jury's eyes, the witness has more credibility and the belief is that only the person who committed the crime could have described it to a witness with such clear details.

Use of perjured testimony is using testimony the prosecutor knows to be false.[104] In *Mooney v. Holohan*, the prosecutors knowingly used perjured testimony and suppressed evidence that would have impeached this testimony.[105] In *United States v. Bagley*, the misconduct scheme was more elaborate.[106] The prosecutor paid the witnesses for their testimony.[107] Suspecting this was occurring, the defense filed a discovery motion requesting this information, which the prosecution intentionally withheld.[108]

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99. *See* United States v. Schlei, 122 F.3d 944, 991–92 (11th Cir. 1997).
100. *See id.* at 992.
101. MODEL RULES, r. 3.4(e).
102. *Id.* r. 3.3–3.4.
103. *See* Gaia Envtl., Inc. v. Galbraith, 451 S.W.3d 398, 408 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (discussing the elements of witness tampering).
104. *See* Mooney v. Holohan, 294 U.S. 103, 110 (1935) (per curiam).
105. *Id.*
106. United States v. Bagley, 473 U.S. 667, 683–85 (1985).
107. *Id.* at 683.
108. *Id.*

The court held this was a violation of the defendant's due process rights and a violation of the Confrontation Clause of the Constitution.[109]

The use of perjured testimony can also trigger other rule violations.[110] In *United States v. Cuffie*, the prosecutors knew their witness lied in prior proceedings involving this same crime, but did not disclose that to the defense counsel.[111] The court held this lack of disclosure also was a *Brady* violation, because as discussed under *Brady*, prosecutors must disclose impeachment evidence as well as exculpatory evidence.[112]

5. Discriminatory Jury Selection

Another form of prosecutorial misconduct is discriminatory jury selection.[113] This occurs when prospective jurors are excluded specifically for a particular characteristic such as race, gender, ethnicity, or religion.[114] Discriminatory actions in jury selection are a Constitutional due process violation, as well as a violation of the criminal code.[115]

6. Abuse of Prosecutorial Discretion

Prosecutors have an immense amount of power and control. They decide who to charge, what charges to bring, what punishment to seek and their trial strategy.[116] They also have the authority to drop cases that they find to be without merit, even up to the trial date.[117] And, they have the authority to offer immunity to a defendant who agrees to testify against another defendant, which can easily be abused.[118] Along with these broad powers, the prosecutor also has an obligation not to knowingly charge or pursue charges against a person who is innocent.[119] Justice Robert Jackson correctly commented that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America."[120]

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109. *See id.* at 672, 685.
110. *See* United States v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996).
111. *Id.* at 515.
112. *See id.* at 517.
113. Batson v. Kentucky, 476 U.S. 79, 84 (1986).
114. *See id.* at 83 ("The prosecutor [intentionally] used his preemptory challenges to strike all four [B]lack persons on the venire, and a jury composed only of white persons was selected.").
115. 18 U.S.C. § 243 (2019); *see* TEX. CODE CRIM. PROC. ANN. art 35.261(b).
116. *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1414–15 (2010).
117. *See id.*
118. H. Lloyd Jr. King, *Why Prosecutors Are Permitted to Offer Witness Inducements: A Matter of Constitutional Authority*, 29 STETSON L. REV. 155, 156–57 (1999).
119. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (AM. BAR ASS'N 2018).
120. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 259 (2011).

An example of abuse of this discretion, which is particularly disturbing, is the case of Cedric Willis in Mississippi.[121] The prosecutor charged him with assault, rape, robbery, and murder.[122] Prior to the trial, DNA testing conclusively proved Willis was innocent.[123] Nevertheless, the prosecutor continued to pursue the false charges against Willis, secured a conviction, and Willis spent twelve years in Parchman, often called one of the most brutal prisons in the country.[124] The prosecutor used this conviction as a stepping stone and went on to become a Mississippi circuit court judge.[125] Further, Willis was epileptic.[126] Without medication he suffered frequent seizures in jail.[127]

B. The Prevalence of Prosecutorial Misconduct

To give an indication of the widespread problem of prosecutorial misconduct that goes unpunished and undeterred, we can look at California as an example. A 2010 study showed, "more than 700 California cases of prosecutorial misconduct from 1997 to 2009 — and only six prosecutors in those cases were ever disciplined."[128] Let's look at that carefully. There were seven hundred known cases of misconduct over a twenty-two-year period, in one state alone.[129] It appears California is not an anomaly, which means a cumulative figure of all cases of misconduct throughout the country would be staggering. And, we must note the absolutely minuscule number of cases (six) where prosecutors were disciplined. Just as it is impossible to know the exact number of those wrongfully convicted, it is equally difficult to correctly calculate statistics for prosecutorial misconduct, since we can only account for what has come to light. What we see throughout all the studies, reports, and internal investigations is that prosecutorial conduct is a reoccurring problem that is not new and has not been deterred.

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121. Brian Johnson, *Deepest Midnight: Cedric Willis and the Failure of Mississippi Justice*, JACKSON FREE PRESS (July 26, 2006, 4:34 PM), http://www.jacksonfreepress.com/news/2006/jul/26/deepest-midnight-cedric-willis-and-the-failure-of [https://perma.cc/75G7-Q2JC].

122. *Id.*

123. *Id.*

124. *Id.*

125. *See id.*

126. *Id.*

127. *Id.*

128. Matt Ferner, *Cheating California Prosecutors Face Prison Under New Law*, HUFFINGTON POST (Oct. 1, 2016, 7:15 PM), https://www.huffingtonpost.com/entry/california-prosecutor-misconduct-felony_us_57eff9b7e4b024a52d2f4d65# [https://perma.cc/HC6G-LZEH].

129. *Id.*

1. *Laws Have Changed, But Are Still Unequally Applied*

Even with the changes in the laws over the past few decades, which emphasize the rights of the defendant, the prosecutor still holds an enormous amount of control. The *Ruiz* court held that an incarcerated prisoner had no due process right under *Brady* to post-conviction discovery of DNA material."[130] This means an innocent defendant who is trying to use DNA testing to clear his name and overturn his conviction is at the mercy of the prosecutor. The prosecutor can oppose the post-conviction testing of DNA, or just stall.[131] They are the ultimate authority unless the defendant sues to get the court to order the testing.[132]

A number of writers have theorized that once a wrongful conviction has been identified, it may be difficult to pursue due to the prosecutor becoming intransigent once a conviction has been secured.[133] Prosecutors may believe that questioning a conviction, or possibly having one overturned, will negatively reflect on their work and may impact their job security.[134] This is a clear conflict of interest. Their interest in their own livelihood and career success is not paramount to the integrity of the office and the life and liberty of a person who was potentially wrongfully convicted.

Also, beyond just work performance, prosecutors may have a financial incentive to "resist post-conviction innocence claims given the trend toward the adoption of state legislation providing compensation for the wrongfully-convicted."[135] There is no direct correlation between wrongful conviction payments and the budgets of the district attorneys' offices.[136] However, "the impact of these payouts on state coffers could conceivably have an indirect effect on the amount of money allocated to prosecutors partially dependent on state funding."[137]

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130. *See* United States v. Ruiz, 536 U.S. 622, 630 (2002); United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009); *see also* United States v. Mathur, 624 F.3d 498, 507 (1st Cir. 2010) (refusing to extend *Brady's* prejudice component to pretrial plea negotiations); United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010); CASSIDY, *supra* note 4, at 61 n.45 ("Some circuits after *Ruiz* have ruled that *Brady* is purely a trial right, and even evidence that supports factual innocence need not be disclosed under the due process clause prior to a guilty plea.").

131. Medwed, *supra* note 66, at 125, 127–28.

132. *Id.* at 127–28 n.10 ("For example, prosecutors in Pennsylvania spent seven years fighting Bruce Godschalk's request for DNA tests on the evidence related to his conviction for two rapes. Ultimately, Godschalk sued in federal court to force the release of the evidence that was uncovered during the investigation of the crime, and DNA tests eventually exonerated him.") (citation omitted).

133. *Id.* at 129–30.

134. *Id.* at 136.

135. *Id.* at 157.

136. *See id.*

137. *Id.*

V. THE EFFECT OF THIS SYSTEM SANCTIONED HARM

Being victimized by a system that is founded on the premise of justice, has a lasting effect. A New York Times study of 115 exonerees found that they face a wide range of challenges once they are released and in their attempt to re-acclimate to life and freedom.[138] Many went to prison when they were either in their teens or twenties and most did not have significant education.[139] Depending on the number of years they have been away, many have had their family dynamics change considerably.[140] Exonerees "struggled to keep jobs, pay for health care, rebuild family ties and shed the psychological effects of the years of questionable or wrongful imprisonment."[141]

A person who has been exonerated may be eligible for compensation,[142] but it varies by state. In addition, some states require a finding of "actual innocence" or "factual innocence," otherwise the compensation requirement is not triggered.[143] Texas allows $80,000 per year of incarceration;[144] Florida allows $50,000 per year, up to $2 million; Nebraska allows $25,000 per year, up to $500,000; Wisconsin provides only $5,000 per year, up to $25,000; and

138. Janet Roberts & Elizabeth Stanton, *A Long Road Back After Exoneration, and Justice Is Slow to Make Amends*, N.Y. TIMES (Nov. 25, 2007), https://www.nytimes.com/2007/11/25/us/25dna.html [https://perma.cc/TS4D-RGNJ].

139. *Id.*

140. *Id.*

141. *Id.*

142. *See* Brandi Grissom, *Comptroller Pays Anthony Graves $1.4 Million*, TEX. TRIB. (June 30, 2011, 3:00 PM), https://www.texastribune.org/2011/06/30/comptroller-pays-anthony-graves-14-million [https://perma.cc/H2WD-5QEB]. When Anthony Graves was exonerated, he was not declared "actually innocent," so the state would not pay him the $1.45 million he was owed to compensate for his eighteen years in prison. *Id.* To resolve this error, the Texas legislature had to pass a law that would allow him to be compensated under the Timothy Cole Compensation Act, even though he had not been declared actually innocent. *Id.* This is an unbelievable hurdle a person who is finally released from prison would have to endure in order to receive the restitution they are owed.

143. *See* Tennison v. Calif. Victim Comp. & Gov't Claims Bd., 152 Cal.App.4th 1164, 1191 (Cal. Ct. App. 2007). In *Tennison*, John Tennison was imprisoned for thirteen years before the court acknowledged five *Brady* violations and vacated his sentence. *See id.* at 1171. After his sentence was vacated and he was released from prison, he filed a claim with the state for his due compensation. *See id.* at 1172. It was denied, because when the judge vacated his sentence, they did not declare that he was factually innocent, just that his sentence was reversed, and he was not going to be retried. *See id.* The appellate court upheld the board decision. *Id.* at 1192. For the thirteen years he spent in prison, Tennison receive nothing.

144. TEX. CIV. PRAC. & REM. CODE ANN. § 103.052(a)(1).

New Hampshire pays a flat fee of $20,000 regardless of the length of incarceration.[145] Twenty-three states offer zero compensation.[146]

The sensationalism that periodically swirls around media reports when a person who has spent decades of their life in prison is awarded a seven-figure compensation award, is taken out of context. Since they compensate at the highest rate, let's look at Texas. If a person is wrongfully convicted and imprisoned for twenty years, at a rate of $80,000 per year, they would be entitled to restitution of $1,600,000. The rhetoric can foolishly turn to talk about that person becoming a millionaire and that amount of money should compensate them for anything. But, broken down, twenty years in prison is 7,300 days. An award of $1.6 million divided by 7,300 days is roughly $220 per day, or a little over $9 per hour of incarceration. That is not even minimum wage in some states,[147] and they are receiving this mere $9 per hour to compensate for everything they lost as well as the brutality, harm, and fear they endured. Now, contrast that with a state like New Hampshire where for the same 20-year period they would receive a total of $20,000. That equates to compensation of $0.11 per hour of incarceration. As ridiculously low as the New Hampshire compensation is, again, we must remember that in 23 states they would receive absolutely nothing.

Here we must acknowledge the disparity between the value the state places on the life of a person who was wrongfully convicted versus the life of the average citizen who has not gone through that trauma. What has really occurred could be viewed as a combination of multiple torts. If wrongful conviction was viewed as a negligent tort claim where a person is injured, they would be entitled to pursue the offending party for physical injuries (including current and future medical expenses), lost wages (past and future), pain and suffering, loss of consortium, and I am sure, various other causes of actions. These cases are common and insurance companies have standard

145. *81% of Exonerated People Who Have Been Compensated Under State Laws Received Less Than the Federal Standard*, INNOCENCE PROJECT (Dec. 2, 2009), https://www.innocenceproject.org/81-of-exonerated-people-who-have-been-compensated-under-state-laws-received-less-than-the-federal-standard-new-innocence-project-report-shows [https://perma.cc/ZYH5-NVUD].

146. *Id.*

147. 29 U.S.C. § 206 (2016). This low compensation also raises the question, are states violating the wage and hour regulations of the Fair Labor Standards Act? Section 206 of the FLSA requires that all employees are paid a minimum of $7.25 per hour, and if they work more than forty hours in a week, the hours over forty must be paid at one and a half times the regular rate. *Id.* § 206–207. Using the New Hampshire example (above), a person incarcerated for twenty years who receives the flat fee reimbursement of $20,000, equates to only $0.11 per hour for a forty-hour workweek. Depending on the prison, many have contracts with commercial entities to supply labor to make clothing or handcrafts, for example, but they are not required to comply with minimum wage standards.

values they place on loss of life, limb or even impairment.[148] If a person suffers mental impairment that prevents them from working in the future or functioning in society, their lost earning potential can be calculated up to their expected life span.[149] Contrast this with the approach for compensating exonerees. Their compensation in most states is not based on a formula that accounts for the harm they've experienced. Rather, they are just given flat fees set by the state legislatures. This disparity in calculating harm is not explainable. What really is the difference? If you are in an accident, not of your own doing, you did nothing wrong and the harm was inflicted upon you. Similarly, if you are wrongfully convicted due to prosecutorial misconduct, you likewise did nothing wrong and the harm was inflicted upon you.

In the next section, I will discuss the potential magnitude of the physical and financial harm wrongful convictions have on the victim, as well as how calculating this harm in the same manner as a tort claim gets closer to putting a justified value on the injury, rather than an arbitrary number. I believe the best way to examine this is to look at the *Baba-Ali*[150] case in New York, and how the state has instituted a tort and common law approach, codified in §8-b of their Court of Claims Act.[151]

Amine Baba-Ali was wrongfully convicted of sexually assaulting and sodomizing his four-year-old daughter.[152] There were multiple instances of prosecutorial misconduct involved, and in the end, it was discovered that his daughter had not even been assaulted.[153] Ali spent roughly twenty-six months in prison.[154] Upon release, he sought recovery under the state statute.[155]

In their decision, the court discussed the various ways that a person wrongfully imprisoned is harmed and the potential extent of that harm.[156]

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148. *See* Victor E. Schwartz & Cary Silverman, *Hedonic Damages: The Rapidly Bubbling Cauldron*, 69 BROOK. L. REV. 1037, 1069 (2004) (discussing the deferential standard evaluated to pain and suffering awards).

149. *Id.* at 1063–64.

150. Baba-Ali v. State, 878 N.Y.S.2d 555 (N.Y. Ct. Cl. 2009), *rev'd in part*, 907 N.Y.S.2d 432, 432 (N.Y. App. Div. 3d Dep't 2010).

151. *See id.* at 558 ("An individual who has been wrongfully convicted and incarcerated and who meets the requirements of the statute is entitled to an award of damages, the amount of which is determined in accordance with 'traditional tort and other common-law principles.'") (quoting Carter v. State, 528 N.Y.S.2d 292, 295 (N.Y. Ct. Cl. 1988), *aff'd* 546 N.Y.S. 2d 648 (N.Y. App. Div. 1989)); *see* N.Y. CT. CL. ACT § 8-b (McKinney 2019).

152. *Baba-Ali*, 878 N.Y.S.2d at 555.

153. *Id.* at 557.

154. *See id.*

155. *Id.*

156. *Id.* at 558 (stating the purpose of the award is " to provide compensation for lost wages, physical or mental problems caused by the incarceration, and pain and suffering, which can encompass the conditions of incarceration (discomfort, fear, lack of privacy), loss of freedom while imprisoned, separation from children, humiliation, interference with personal relationships and damage to reputation.").

A. Physical Manifestations

Enduring this manner of unjustified loss of liberty can trigger continuous feelings of fear, continued danger and the overwhelming belief that one is never safe, because if it can happen once, who is to say it will not occur again. Innocent people who are wrongfully convicted are victims of a systemic failure. Further, if their wrongful conviction is attributed to prosecutorial misconduct, which we've seen many are, they have been intentionally harmed by the very government and government representative who is charged with protecting their rights.

1. Psychological and Sociological Impact

The Canadian Journal of Criminology and Criminal Justice surveyed exonerees to determine the effect their wrongful incarceration had on them psychologically.[157] The results were varied in their severity, but consistent in the commonality of harm.[158] Those studied reported issues with personality deterioration, PTSD, severe depression, panic disorder, and paranoid symptoms.[159] They also developed patterns of isolation, unintentionally alienated themselves from their families, and most were never able to regain the same closeness with their families.[160]

The journal also discussed many exonerees' inability to cope with basic day-to-day tasks once released and feeling, psychologically, the same age they were when they were sent to prison.[161] This also posed significant challenges in trying to relate to their children, who were now much older, and adapt to a life where those around them had learned to manage without them.[162]

After his release, Ali suffered from post-traumatic stress disorder and severe clinical depression.[163] His treating doctor cited the constant fear for his life during his period of incarceration and how it impacted his behavior.[164] He "changed from a socially well adjusted, outgoing person to one who for the first six months after he was released from prison did not even leave his apartment and became isolated and afraid of crowded places."[165]

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157. Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. OF CRIMINOLOGY & CRIM. JUST. 165, 167 (2004).
158. *Id.*
159. *Id.* at 169.
160. *Id.* at 171.
161. *Id.* at 171–72.
162. *Id.* at 172.
163. Baba-Ali v. State, 878 N.Y.S.2d 555, 563–64 (N.Y. Ct. Cl. 2009), *rev'd in part*, 907 N.Y.S.2d 432, 432 (N.Y. App. Div. 3d Dep't 2010).
164. *Id.* at 563.
165. *Id.*

2. *Health Implications Resulting from Remaining in a Constant State of Fear*

It has been argued that this constant state of fear and state of trauma stays with the person for years after their release, some for their entire lives. An article published by the European Molecular Biology Organization (EMBO)[166] cited:

> Psychoneuroimmunological testing in laboratory animals and a range of human epidemiological findings associate stress with a weakened immune system, increased cardiovascular damage, gastrointestinal problems such as ulcers and irritable bowel syndrome, decreased fertility, impaired formation of long-term memories and damage to certain parts of the brain, such as the hippocampus. Other symptoms include fatigue, an increased likelihood of osteoporosis and type 2 diabetes, and aggravated clinical depression, accelerated ageing and even premature death.[167]

In addition to PTSD and clinical depression, the court in *Baba-Ali* also considered the mental anguish associated with being accused of such a heinous crime.[168] This also included public humiliation, humiliation and exposure to danger within the prison, and the mental impact of being falsely incarcerated.[169] Factored into the mental anguish was the constant state of fear during his entire period of incarceration.[170]

3. *Familial Loss*

As discussed above, when a person is sent to prison for any period of time it impacts their familial relationships. The court factored into the damages calculation the loss of Ali's daughter.[171] They had a very close relationship from the time she was born until he was falsely arrested when she was four years old.[172] There was a ripple effect from the impact of this conviction, including a family court judgment against him.[173] Ultimately, he never was able to regain the relationship he had with his daughter.[174] Most

166. David Ropeik, *The Consequences of Fear*, 5 EMBO REPS. (SPECIAL ISSUE) S56 (2004), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1299209/pdf/5-7400228.pdf [https://perma.cc/9DCL-4PS9].

167. *Id.* at S59 (citing ROBERT M. SAPOLSKY, WHY ZEBRAS DON'T GET ULCERS (2d ed. 1998)).

168. *Baba-Ali*, 878 N.Y.S.2d at 560–61.

169. *Id.*

170. *Id.* at 561.

171. *Id.*

172. *Id.*

173. *Id.* at 562.

174. *Id.* at 561–62.

exonerees, upon release, are never able to repair those relationships, whether with a spouse, child, girlfriend/boyfriend. They also suffer the loss of having close family members, often parents and grandparents, die while they are in prison, never seeing their loved one set free.

To add to the already mounting injury, another unexpected harm some exonerees suffer who were wrongfully convicted when they had young children is the claim of child support.[175] Upon release, as they are trying to adjust and put their life back together, they can be subject to penalties for not paying child support while they were in prison, and even required to pay the state back for any welfare funds paid to support the child.[176] The irony, of course, is that the state is the very actor who took this parent away from their children and imprisoned them so they could not work and pay child support, but then later they are the very entity blaming the exoneree for the situation and their lack of financial means.[177]

4. Multigenerational impact

As discussed throughout this entire paper, the practice of biased application of justice at the hands of prosecutors is not new. This is a practice that has been systematically carried out for multiple generations with an incalculable impact on citizens who are guaranteed equal protection and life, liberty, and the pursuit of happiness. But the impact is not just on the person who was wrongfully imprisoned. There is also a potential ripple effect for family members, friends, and those in the same communities as a person who has been wrongfully charged and convicted due to prosecutorial misconduct. It is feasible that the same harm could befall anyone in the community. This could lead to baseline tension and fear, which would come along with some of the same health implications as cited in the report by EMBO.

B. Financial Impact to the Victim of a Wrongful Conviction

1. Lost Wages and Lost Earning Potential

Another measure of harm to an exoneree is the loss of wages during the time they were incarcerated. This is not just a one to one calculation. You

175. BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT, 295 (2003). David Shephard was wrongfully convicted of kidnapping and rape and sent to prison when his son was young. *Id.* Upon release and after getting a job, his wages were garnished. *Id.* When he questioned the deduction, he learned he was classified as a "deadbeat dad" for not paying child support during the years he was in prison. *Id.* The State of New Jersey claimed he owed a total of $18,000 for welfare support. *Id.*

176. *Id.*

177. *See id.*

must account for the wage rate they were making at the time they were imprisoned, plus the potential for increased earnings and promotions over time. In addition, there is future lost earning potential, even after their release. If they had been able to work and advance in their career during their period of incarceration, they would be at a higher salary level and career position than they will be at the time of their release. Further, due to societal bias and misunderstanding, their future career opportunities may be significantly hampered due to their period of incarceration, regardless of the fact that they were exonerated.

The court in *Baba-Ali* awarded past lost earnings which covered the entire period he was incarcerated, as well as an extended period after his release when he was suffering from severe depression and unable to work.[178] The court attributed this physical manifestation of harm to his false imprisonment and awarded total lost wages of $343,428.[179] It should be noted that this figure does not consider future lost earning potential. In Ali's case, he was only in prison for twenty-six months.[180] The lost earning potential for someone who was incarcerated for 20–30 years and been incarcerated since they were eighteen or twenty years old, would be substantial.

2. Legal Expenses

Exonerees face significant legal costs, even after their release. To prevent their conviction from impacting their future prospects, they will need to have it expunged from their record. This will require legal assistance and, depending on the state, can take some time. Further, they must bear the cost of pursuing their wrongful conviction claim with the state. On average this can take upwards of three years for the exoneree to receive any funding from the state.

3. Future Medical Expenses

Given the nature of the prison environment, it is conceivable that most defendants would leave prison, particularly after an extended period, with various health issues. These are likely attributable to the trauma they have endured or could be related to poor nutrition while in prison, or even physical harm they suffered at the hands of another prisoner. Regardless, once they are released, the cost of their current and future medical care becomes their burden.

178. *Baba-Ali*, 878 N.Y.S.2d at 559.
179. *Id.*
180. *Id.*

4. Lack of Opportunity

When a person is wrongfully convicted, the entire trajectory of that person's life has been altered in a way that is irreversible. They experience a lack of opportunity that is difficult to quantify, but painfully evident. Even taking into account the examples of exonerees who have gone on to become successful, some pursue law degrees, others have set up foundations to help fight prosecutorial misconduct and wrongful convictions, we know that those are the exception, not the norm. Monetary compensation cannot put the person back at the age they were, with their undamaged aspirations, the support of family and friends, their future goals and dreams and the plan they began to formulate for their lives.

5. Loss of Liberty

Aside from an exoneree's actual monetary damages, one of their greatest losses is the loss of liberty.[181] For instance, the court in *Baba-Ali* discussed how the loss of liberty is an "incalculable loss" and how false imprisonment is the "most serious deprivation of individual liberty that a society may impose."[182] In trying to arrive at this figure, the court in *Baba-Ali* considered the physical abuse Ali suffered, the constant fear of gang rape, the impact of seeing an inmate next to him stabbed 50 times and the feeling that he would never get of prison alive.[183]

The court awarded Ali damages broken down as follows: for Ali's mental anguish and degradation of being labeled a child molester, the irretrievable loss of his relationship with his daughter, loss of liberty, and psychological damage sustained from the time of conviction to present, the court awarded him $1.75 million; for his past and future lost wages the court awarded him $343,428.[184] The result was an award of $2,093,428 for his 26-month confinement.[185] As we see, using this tort-based method of calculating the harm gives a more just result. As encouraging as the court's holding in *Baba-Ali* is, the reality is that was the first time in the twenty-five years, this

181. *See id.* at 564.

182. *Id.* ("The Law Revision Commission, in recommending the enactment of section 8-b, stated in its report to the Governor that imprisonment resulting from the unjust conviction of an innocent person is 'the most serious deprivation of individual liberty that a society may impose'") (quoting Joseph M. Livermore et al., *On the Justifications for Civil Confinement*, 117 U. PA. L. REV. 75, 75 (1968)).

183. *Id.* at 565.

184. *Id.* at 570.

185. *See id.* On appeal, the non-pecuniary award was reduced from $1.75 million to $1 million. Baba-Ali v. State, 907 N.Y.S.2d 432, 432 (N.Y. App. Div. 3d Dep't 2010). The lost earnings amount was upheld. *Id.*

law has been on the books that an exoneree was able to meet all of the requirements in order to sustain his claim and recover under this law.

VI. THE LAW AS IT APLLIES TO PROSECUTORS

A. Prosecutorial Discretion

The prosecutor has broad powers with minimal limitations or oversight. They have essentially, full discretion to choose the charges they bring and the defendants they pursue.[186] This full discretion with limited oversight can easily be abused at any time throughout the life of a case. One particularly key point in which this power can be abused is during the grand jury process. The work of a grand jury is all done without a judge or even the defense counsel present.[187] The prosecutor presents their case to the grand jury, and it is only the prosecutor's side of the story that the jurors hear.[188] Further, the rules of evidence do not apply, which means the prosecutor can introduce hearsay evidence and even evidence that was obtained through unconstitutional means.[189] I believe the common phrase is, with great power comes great responsibility. True, but in the case of a prosecutor that does not also come with great accountability or liability.

B. Prosecutorial Immunity

1. Civil Liability

When the Civil Rights Act of 1871 (§ 1983) was enacted, it provided a means for state officials to be sued "if their conduct 'under color of state law' deprives the defendant of constitutional or statutory rights."[190] In theory, this provided a basis for a civil action for damages. However, in subsequent cases

186. *See* discussion *supra* Section IV.A.6.

187. CASSIDY, *supra* note 4, at 27.

188. *Id.* ("The grand jury's work happens in secret—outside of the presence of the presiding judge, and beyond the scrutiny of either the defendant's attorney or the public. Counsel for the defendant plays no role in the grand jury inquiry and is not even allowed to be physically present inside the grand jury room. Defense counsel is not allowed to cross examine the government's witnesses before the grand jury, to call witnesses on his own behalf, or to make a closing argument summarizing evidence and urging the grand jury not to indict his client.").

189. *Id.* ("The rules of evidence do not apply to grand jury proceedings, except those pertaining to testimonial privileges. Hearsay evidence is admissible, as is evidence seized pursuant to an unconstitutional search and seizure.").

190. *Id.* at 114 ("Under the Civil Rights Act of 1871, commonly referred to as a §1983 action, state officials may be sued if their conduct 'under color of state law' deprives the defendant of constitutional or statutory rights. A common claim under §1983 is that a prosecutor's misconduct in the investigation or trial of a criminal case deprived the defendant of his right to due process of law under the Fifth and Fourteenth Amendments.").

the Supreme Court has clearly granted prosecutors absolute immunity, removing that potential remedy for the wrongfully accused.[191] The Court even went so far as to say prosecutors were immune from liability even for their intentional acts, knowingly withholding evidence and using perjured testimony.[192]

The Supreme Court in *Imbler* outlined prosecutorial immunity in broad strokes.[193] The Court held: (1) a state prosecutor who acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case was absolutely immune from a civil suit for damages for alleged deprivations of the defendant's constitutional rights under 42 U.S.C. § 1983,[194] and (2) such absolute immunity from liability was applicable even where the prosecutor knowingly used perjured testimony, deliberately withheld exculpatory information, or failed to make full disclosure of all facts casting doubt upon the state's testimony.[195]

In *Imbler*, the defendant was convicted of murder and sentenced to death.[196] Later, it was determined that the prosecutor knowingly suppressed evidence that would have been favorable to the defense and had knowingly used false testimony.[197] Again, the Court granted Imbler no recovery and limited the ability for future victims of prosecutorial misconduct to recover.[198]

Under *Imbler*, the Court held that public policy requires prosecutors enjoy the same absolute immunity from civil liability under §1983 that they had at common law in malicious prosecution suits when initiating a prosecution and in presenting the state's case.[199] This decision solidified the popular opinion that a prosecutor has "absolute immunity from §1983 suits for damages when he acts within the scope of his prosecutorial duties."[200]

The Court went on to outline a distinction between absolute and qualified immunity.[201] Absolute immunity applies to conduct intimately associated with the judicial phase of the criminal process, where qualified immunity only applies to conduct administrative or investigative in nature.[202]

191. *See* Imbler v. Pachtman, 424 U.S. 409, 430 (1976).
192. *See id.* at 426–27, 431 n.34.
193. *See id.* at 426–31.
194. *Id.* at 410.
195. *Id.* at 431, n.34.
196. *Id.* at 411–12.
197. *See id.* at 412–13.
198. *See id.* at 431.
199. *See id.* at 427.
200. *See id.* at 420.
201. *See id.* at 418–21.
202. *See id.* at 431; CASSIDY, *supra* note 4, at 114 ("The Supreme Court in *Imbler* thus took a functional approach to prosecutorial immunity, stating that prosecutorial conduct 'intimately associated with the judicial phase of the criminal process' is absolutely immune from suit under

In practice, essentially all of the primary tasks where prosecutorial misconduct has been identified fell under absolute immunity. Even though this idea of varying levels of immunity sounds like it holds the prosecutor to a higher standard, functionally it does not. In virtually every case, absolute immunity applies. The *Imbler* Court listed various policy reasons for this grant of absolute immunity, all centering around not impinging on the prosecutor's ability to effectively perform his or her duties.[203] However, they did not discuss the reality of how this blanket immunity can empower a rogue prosecutor to violate the law with impunity.[204]

To further expand the blanket immunity afforded to prosecutors, the Court in *Van de Kamp v. Goldstein*, found that immunity extended to supervisors.[205] That is, a supervisor who is responsible for overseeing the work of a fellow attorney is granted absolute immunity and cannot be held liable for any prosecutorial misconduct.[206] The Court in *Van de Kamp* reasoned that supervisors deserve absolute immunity because any work performed in a supervisory capacity directly relates to the prosecutor's basic trial advocacy duties.[207]

2. *Criminal Liability*

Although prosecutors have absolute immunity from civil suits for prosecutorial misconduct, the *Imbler* Court stressed that "the immunity of prosecutors from liability in suits under § 1983 does not leave the public

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§1983, but that conduct administrative or investigative in nature may be subject only to qualified immunity. The policy reasons the court cited in *Imbler* for applying absolute immunity to quasi-judicial aspects of a prosecutor's responsibilities were threefold: 1) a concern that the threat of possible lawsuits might cause prosecutors to be less vigilant in close or difficult cases; 2) a concern that defending unfounded litigation might deflect the prosecutor's energies from other important public duties; and 3) a concern that appellate courts reviewing criminal convictions to determine whether the defendant received a fair trial might be unduly affected by the prospect of civil liability against the prosecutor if they ruled in the defendant's favor.").

203. *See Imbler*, 424 U.S. at 424–25.

204. CASSIDY, *supra* note 4, at 114–15 ("The differences between absolute and qualified immunity have important substantive and procedural implications. If absolute immunity applies to the prosecutor's alleged misconduct, he is immune from suit even if the deprivation of rights was willful or malicious. If only qualified immunity applies to the prosecutor's alleged misconduct, he is immune from liability so long as his actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known,' which is essentially an objective standard of good faith.").

205. *See* Van de Kamp v. Goldstein, 555 U.S. 335, 347–48 (2009).

206. *Id.*

207. *Id.* at 346; CASSIDY, *supra* note 4, at 116 ("In *Van de Kamp v. Goldstein*, the Court ruled that absolute immunity, rather than qualified immunity, applies to claims against supervisors in their individual capacities with respect to failure to disclose exculpatory evidence, because 'the management tasks at issue, insofar as they are relevant, concern how and when to make impeachment information available at trial. They are thereby directly connected with the prosecutor's basic trial advocacy duties.'").

powerless to deter misconduct or to punish that which occurs."[208] The Court reasoned that the underlying policy behind civil immunity was never intended to place prosecutors and other public officials beyond the reach of the criminal law.[209] *Imbler* suggests looking to 18 U.S.C. § 242 and pursuing criminal sanctions as a means of deterring and punishing prosecutorial misconduct.[210] The challenge with this approach is whether or not the burden of proof to demonstrate willful conduct could be met and whether a judge or jury would be willing to pursue criminal sanctions against a prosecutor.[211]

The historical reluctance to use the criminal code against prosecutors who commit misconduct is evident in the statistics. In an examination of the reversal of 381 homicide convictions, which were secured through prosecutorial misconduct, zero were brought to trial.[212] So, effectively, this functions as absolute immunity.

C. *Ethical Rules*

The Model Rules of Professional Conduct outline, in great detail, the ethical guidelines all attorneys should operate within. The rules reiterate the responsibility of a prosecutor to be "a minister of justice" and "see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence"[213]

The American Bar Association Standards for Criminal Justice also requires prosecutors to take "actions that are consistent with applicable law, rules, and the duty to pursue justice,"[214] when new evidence is discovered, even referring them to Model Rule 3.8 of the MRPC.[215] A prosecutor who receives newly discovered evidence must take affirmative action under Model Rule 3.8, but that obligation is just an ethical obligation under the Model Rules.[216] The *Brady* doctrine does not require post-conviction

208. *Imbler*, 424 U.S. at 428–29.

209. *Id.* at 429.

210. *See id.* (alluding to 18 U.S.C. § 242 as the "criminal analog" of § 1983).

211. *See* Shelby A.D. Moore, *Who Is Keeping the Gate – What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold*, 47 S. TEX. L. REV. 801, 827 (2006).

212. Ferguson-Gilbert, *supra* note 72, at 303.

213. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2018) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice [and] that guilt is decided upon the basis of sufficient evidence . . . .").

214. CRIM. JUST. STANDARDS FOR PROSECUTION FUNCTION §3-8.3 (AM. BAR ASS'N 2015). The duty of the prosecutor is to seek justice, not merely to convict. *See id.* §3-1.2(b).

215. *Id.* §3-8.3.

216. CASSIDY, *supra* note 4, at 117 ("Under Model Rule 3.8(g), a prosecutor who receives 'new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense' must take affirmative action. If the conviction occurred *outside* the

disclosure of newly discovered evidence, that is, a prosecutor is not under a constitutional obligation to disclose this new information to the defendant.[217]

Another rule under the MRPC provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[218] Further, a prosecutor cannot counsel or assist a witness to testify falsely.[219]

As discussed previously, one of the most often found areas of misconduct is not turning over exculpatory evidence. Under the MRPC, it is always required to be turned over to the defense, whether the other party requested it or not.[220]

These requirements sound effective in the thoroughness of what is required of a prosecutor and the ultimate goal of fairness in a judicial proceeding. However, as we have seen in the cases of prosecutors who commit misconduct, rules without consequences are ignored. If an attorney violates a rule of professional conduct, he or she can be subject to a written reprimand from the State Bar, or at the very worst, disbarred.[221] However, astonishingly, even if the lawyer is disbarred, often, they are able to reapply for their license a few years later.[222] As a result, have these lawyers truly been punished?

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prosecutor's jurisdiction, the prosecutor's sole responsibility is to notify 'an appropriate court or authority,' which Comment 7 [of Rule 3.8(g)] defines to include the chief prosecutor in the jurisdiction where the conviction occurred. If the conviction occurred *inside* the prosecutor's jurisdiction, the prosecutor must: 1) disclose that evidence to the court; 2) disclose that evidence to counsel for that defendant, unless the court authorizes a delay of disclosure; and 3) undertake a further investigation to determine whether the defendant may be innocent.").

217. *Id.* at 116. ("The doctrine of *Brady v. Maryland* does not extend to the post-conviction process, and prosecutors have no constitutional duty under *Brady* to share with the defendant newly discovered evidence that may support innocence.").

218. MODEL RULES, r. 8.4(c).

219. *See id.* r. 3.4(b) ("A lawyer shall not . . . counsel or assist a witness to testify falsely. . . .").

220. R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1434 n.18 (2011) ("Although the Court's decision in *Brady* referenced the prosecutor's constitutional duty to turn over exculpatory evidence 'on request' of the defendant, subsequent cases recognized that this constitutional duty of disclosure exists whether or not the defendant specifically requested the withheld material, only generally requested exculpatory information, or files no discovery requests at all. In other words, the prosecutor's duty to turn over evidence favorable to the accused is *self-executing*; it does not depend on the presence or precision of discovery requests filed by defense counsel.").

221. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT r. 10 (AM. BAR ASS'N 2018).

222. *Id.* r. 25.

D. *Prosecutorial Punishment (or the lack thereof)*

Multiple studies, some spanning over 30 years, have reviewed roughly 2,000 cases where prosecutorial misconduct was found and was "material to the conviction and overturned it."[223] Among those, only two prosecutors were disbarred and zero were subject to any criminal or civil penalty.[224] Further, a report by the Center for Prosecutor Integrity found that "43% of wrongful convictions [were] attributable to official misconduct."[225] Below are three specific instances of significant prosecutorial misconduct.

Michael Morton

1. Michael Morton

The Michael Morton case received significant publicity after he served almost twenty-five years in prison for the murder of his wife, when he was innocent.[226] There are varying theories as to why this particular case received so much attention, which we will not delve into. This case was heralded as somewhat of a turning point where those seeking justice could sigh with relief and exclaim, "finally!' because the prosecutor who intentionally withheld evidence resulting in Michael Morton's wrongful conviction, was held accountable.[227] Well, that is actually a stretch. Rather, he was the first to receive more than just a slap on the wrist or disbarment.[228] Ken Anderson was the prosecutor in the Morton case.[229] After Morton's conviction, he went on to become a judge.[230] After his prosecutorial misconduct came to light, the punishment he received was disbarment, five hundred hours of community service, and a ten-day jail sentence, making him the first prosecutor to receive criminal punishment.[231] However, this punishment needs to be carefully looked at through the lens of equity. Ken Anderson intentionally caused a

223. *See* Radley Balko, *Another Study Finds Few Consequences for Prosecutor Misconduct,* WASH. POST (Mar. 8, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/03/08/another-study-finds-few-consequences-for-prosecutor-misconduct/?noredirect=on&utm_term=.e2901c39888f [https://perma.cc/4GYV-NCHA].

224. *See id.*

225. CENTER FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT (2013). http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf [http://perma.cc/59FH-3HBP].

226. *Michael Morton*, *supra* note 83.

227. Mark Godsey, *For the First Time Ever, a Prosecutor Will Go to Jail for Wrongfully Convicting an Innocent Man*, HUFFINGTON POST, (Nov. 8, 2013, 4:12 PM) https://www.huffingtonpost.com/mark-godsey/for-the-first-time-ever-a_b_4221000.html [https://perma.cc/2AAD-D99P].

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

man to lose almost twenty-five years of his life, and for that, he was sentenced to ten days in jail.[232] Michael Morton was innocent, and he spent 8,995 days in prison.[233] This is unjustifiable. To make this gross injustice even worse, Ken Anderson was released from jail after serving only five days due to good behavior and was allowed to reapply for his law license after five years.[234] Considering the gravity of harm Anderson caused, the reciprocal harm he suffered is infinitesimal.

The ripple effect of bad actors like Ken Anderson is often incalculable and could take years to be discovered if at all. Take the case of Troy Mansfield for example.[235] He too was a victim of Ken Anderson withholding exculpatory evidence that was required to be turned over to the defense.[236] Anderson charged Mansfield with molestation of a child, even though he had contradictory evidence indicating Mansfield was innocent.[237] Knowing he faced life in prison if convicted, Mansfield took a plea deal, only serving 120 days in prison and agreeing to ten years of probation.[238] This conviction, forcing him to register as a sex offender, irreparably harmed Mansfield, another result of Ken Anderson's misconduct.[239] However, in this case, Anderson received no punishment.[240]

2. *Anthony Graves*

Anthony Graves was charged with six murders in a home that been set on fire.[241] He was implicated in this crime by Robert Carter, his co-defendant.[242] Anthony Graves was convicted and sentenced to death, and after eighteen years, he was finally exonerated.[243] What is equally as

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232. *Id.*
233. *See id.*
234. Claire Osborn, *How Ken Anderson Was Released After Only Five Days in Jail*, STATESMAN (Sep. 26. 2018, 9:33 AM), https://www.statesman.com/news/local/how-ken-anderson-was-released-after-only-five-days-jail/UGpWcPAITgVFvW2R2S32xK [https://perma.cc/M3YW-8D96].
235. Connor Brown, *Exonerated Man Sues Williamson County for Not Disclosing Evidence*, STATESMAN (Sep. 22, 2018, 4:47 AM), https://www.statesman.com/NEWS/20180124/Exonerated-man-sues-Williamson-County-for-not-disclosing-evidence [https://perma.cc/Y59V-6SZY].
236. *Id.*
237. *Id.*
238. *Troy Mansfield*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5268 [https://perma.cc/232P-UDMX.
239. *Id.*
240. *Id.*
241. *See Anthony Graves*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3253 [https://perma.cc/B6PK-D6HK].
242. *See id.*
243. *See id.*

troubling, as the reality that this man was wrongfully convicted and spent almost two decades in prison, is that the prosecutor received exculpatory evidence indicating Graves' innocence within days of his original arrest.[244] Three days after Carter was arrested he recanted, telling a grand jury that Graves was not involved.[245] Two years later, right before Graves' trial, Carter met with Charles Sebesta, the prosecutor, and told him Graves was not involved in the murders.[246] Neither of these pieces of evidence was turned over to the defense.[247] Carter was executed in 2000.[248] One of his final statements in the execution chamber was that Graves is innocent and he had lied.[249] It still took another ten years for Graves to be exonerated and released.[250]

Prior to the trial, Carter made statements to Sebesta indicating Graves' innocence.[251] Regardless, Sebesta withheld this information from the defense, continued to pursue the charges against Graves, and used the false testimony of Carter during trial.[252] More than two decades after Sebesta's illegal conduct that resulted in Graves' conviction, he was finally disbarred.[253] It is easy to feel this is some semblance of justice, but it must be put in perspective. Sebesta, from the time of Graves' conviction until he was disbarred, had an immensely successful career. He was called "the most powerful elected official in Burleson and Washington counties."[254] Contrast his record of success with what Graves endured during the same time period. Graves spent eighteen years in prison; sixteen of these years spent in solitary confinement and twelve years on death row.[255]

3. *Cameron Todd Willingham*

In the case of Cameron Todd Willingham, he was charged with arson of his home, which killed his three daughters.[256] He was convicted and

244. *Id.*
245. *Id.*
246. *Id.*
247. *See id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. Pamela Colloff, *Ex-DA Who Sent Exoneree Anthony Graves to Death Row is Disbarred*, TEX. MONTHLY (June 12, 2015), https://www.texasmonthly.com/the-daily-post/ex-da-who-sent-exoneree-anthony-graves-to-death-row-is-disbarred [https://perma.cc/RR9S-A3JA].
255. *Texas Prosecutor Disbarred Following Misconduct in Anthony Graves Case*, INNOCENCE PROJECT (June 6, 2015), https://www.innocenceproject.org/texas-prosecutor-disbarred-following-misconduct-in-anthony-graves-case [https://perma.cc/A6V9-C9KF].
256. *See* Willingham v. State, 897 S.W.2d 351, 354 (Tex. Crim. App. 1995, writ denied).

sentenced to death.[257] Willingham always maintained his innocence, even at his execution in 2004.[258] A decade long investigation was conducted after Willingham's execution, and multiple arson investigators and experts concluded that the fire was not intentionally set, meaning Willingham was innocent.[259] Further, the State Bar of Texas brought claims against the state prosecutor at the time, John Jackson, that he "made false statements, concealed evidence favorable to Willingham's defense and obstructed justice."[260] One item that was withheld was the agreement between Jackson and a jailhouse snitch that he would get favorable treatment on his conviction for testifying that Willingham confessed to him (in 2014 the snitch recanted, admitting he lied to get the leniency Jackson promised).[261]The snitch, Johnny Webb, recalls that Jackson threatened that he would "get a life sentence" for the robbery he committed if he did not testify against Willingham. [262] In 1996, Webb wrote a letter to the lead prosecutor in Willingham's case, threatening to go public with this information if Jackson did not downgrade his conviction as promised.[263] Within days, Jackson had the judge that handled the Willingham case change Webb's conviction, and he was immediately released on parole.[264]

Following the same pattern we have already seen, Jackson went on to become a judge.[265] The State Bar felt the evidence of misconduct was compelling enough to pursue him and seek to have him disbarred.[266] To compare the harm to both parties as a result of this intentional wrongful conviction: John Jackson has not received any punishment at all and still has his law license; Cameron Todd Willingham was executed.[267]

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257. *Id.*

258. *See* Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics*, CHI. TRIB. (Dec. 9, 2004), https://www.chicagotribune.com/news/nationworld/chi-0412090169dec09-story.html [https://perma.cc/FS5C-MNXC].

259. *See* Maurice Possley, *Jury Clears the Prosecutor Who Sent Cameron Todd Willingham to Death Row*, MARSHALL PROJECT (May 11, 2017), https://www.themarshallproject.org/2017/05/11/jury-clears-the-prosecutor-who-sent-cameron-todd-willingham-to-death-row [https://perma.cc/2TE3-EWNX].

260. *Id.*

261. *Id.*

262. Maurice Possley, *A Dad Was Executed for Deaths of His 3 Girls. Now a Letter Casts More Doubt*, WASH. POST (Mar. 9, 2015), https://www.washingtonpost.com/politics/letter-from-witness-casts-further-doubt-on-2004-texas-execution/2015/03/09/d9ebdab8-c451-11e4-ad5c-3b8ce89f1b89_story.html?utm_term=.3c442c5afe91 [https://perma.cc/8MGN-W43Q].

263. *Id.*

264. *Id.*

265. *See* Maurice Possley, *Jury Clears the Prosecutor Who Sent Cameron Todd Willingham to Death Row*, MARSHALL PROJECT (May 11, 2017), https://www.themarshallproject.org/2017/05/11/jury-clears-the-prosecutor-who-sent-cameron-todd-willingham-to-death-row [https://perma.cc/2TE3-EWNX].

266. *Id.*

267. *See id.*

E. *Paying Damages*

In all instances of prosecutorial misconduct where the exoneree is able to collect any amount of restitution, those damages are currently paid by the state, which ultimately means the taxpayers.[268] It is important to give this some scale and understand the amount of taxpayer funds that are being diverted from other areas to pay for prosecutorial misconduct. Let us just look at one state as an example. A fairly recent report estimates the cost of wrongful convictions, just in the state of California, to have cost the state $221 million.[269] This figure includes: "cost of incarceration for wrongfully convicted individuals in the state was $80 million, while lawsuit settlements in wrongful conviction cases cost the state $68 million with an additional $68 million spent on trials and appeals."[270] If we add in the cost to the other forty-nine states, the amount would be staggering. There is absolutely no justifiable reason that rogue prosecutors should have such an absolute right to inflict this amount of harm on citizens who are wrongfully imprisoned, and then magnify that harm by making the citizens of the state pay for the prosecutor's harm. It is time to level the playing field and hold these very prosecutors accountable. The burden of remedying the harm they cause needs to be shifted to them.

VII. EQUAL JUSTICE UNDER LAW—PROPOSED SOLUTIONS

A. *Comparative Reality: If Prosecutors Were Considered Equal to the Rest of the Country*

If prosecutors were not viewed as operating on a separate plane, where they are exempt from all personal responsibility and liability for their actions, including causing intentional harm, how would that reality differ? Well, let us look at average prison sentences that would apply to every other citizen in the country for a variety of crimes. Being convicted of murder results in an average sentence approaching 19 years,[271] manslaughter runs on average 5–6

268. *See* UNIV. CALIF. BERKELEY SCH. OF LAW, CRIMINAL INJUSTICE: A COST ANALYSIS OF WRONGFUL CONVICTIONS, ERRORS, AND FAILED PROSECUTIONS IN CALIFORNIA'S CRIMINAL JUSTICE SYSTEM 6 (2015), https://static1.squarespace.com/static/55f70367e4b0974cf2b82009/t/56a95c112399a3a5c87c1a7b/1453939730318/WI_Criminal_InJustice_booklet_FINAL2.pdf [https://perma.cc/TL2T-M45A].

269. *Id.*

270. *Id.* at 60.

271. This data reflects the 2017 fiscal year. *See* U.S. SENTENCING COMM'N, UNITED STATES SENTENCING COMMISSION QUARTERLY DATA REPORT 9 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2017_Quarterly_Report_Final.pdf [https://perma.cc/ETL6-ZG7A].

years,[272] a robbery conviction is between 6–7 years,[273] assault and/or battery is 2–3 years,[274] fraud is 2–3 years[275] and bribery is 1–2 years.[276] Next, we can correlate these offenses with specific acts of intentional prosecutorial misconduct. Intentionally pursuing a death sentence against someone whom the prosecutor knows is innocent results in murder, at the very least manslaughter. Sending an innocent person to prison results in a form of robbery. They are robbed of their current and future wages, the cost of their defense, any assets they must forfeit to fight the charges brought against them, and many other instances of tangible and intangible valuables taken from the victim. Intentionally targeting an innocent person for conviction also can be correlated to assault and battery. There is undeniably an intent to physically harm the individual and physical harm does result, as well as non-physical harm such as invoking fear and the intentional infliction of emotional distress. Lastly, bargaining with witnesses to falsify their testimony to frame an innocent person is bribery. All of these instances of intentional prosecutorial misconduct fit the crimes stated above. The only difference is they are not subject to any punishment at all. This disparity in punishment, that permits prosecutors to inflict this harm undeterred, must end.

As discussed throughout this Article, it is imperative that we understand the history and historical attitudes which codified a systemic practice of bias and wrongful convictions. From that perspective we can see how laws changed, practices changed, and discrimination, to a degree, was suppressed. But at the same time, we must understand that the current practice of prosecutors feeling entitled and emboldened to blatantly commit instances of misconduct, particularly when targeting minority Americans, is an offshoot of that learned behavior. We must further admit that this learned behavior was for many decades, condoned and rewarded. That can contribute to an unethical prosecutor feeling entitled and validated in committing misconduct. The reality that this behavior will go unpunished, is a further signal of validation. These bad actors are a final bastion of historical shame that must be rooted out. As very poignantly stated by Justice Thurgood Marshall, "We remain imprisoned by the past as long as we deny its influence in the present."[277]

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272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. JIM DWYER ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 264–65 (2001).

B. *Punishment as a Detterent*

Going back to the early portions of this article, we looked at the stated purpose of the criminal justice system and how it uses punishment as a method to deter undesirable behavior.[278] Put simply, unless prosecutorial misconduct is acceptable and the practice is condoned, why would the same practice of punishment as a deterrent not be sought against prosecutors?

This is a hotly debated subject. The revered Judge Learned Hand weighed in on whether prosecutors should be subject to punishment for misconduct.[279] He stated:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.[280]

History has proven Learned Hand wrong. In too many instances, the balance between these evils has been perilously weighted against the innocent.

I am very aware that the standard reaction has always been not to pursue prosecutorial accountability and punishment, due to the fear of punishing a prosecutor who did not deserve that fate. This Article has discussed several instances of a prosecutor's intentional misconduct being the driving force behind thousands of innocent citizens receiving punishment of which they were undeserving. So far, nothing has deterred this culture of misconduct. So, we are obligated to try another tact.

In always concerning ourselves so much with the fate of a rogue prosecutor, there has been a gross lack of concern for the lost lives that were a result of this very misconduct. We cannot be overcome with concern at the highly unlikely chance that one undeserving prosecutor will be subject to punishment. What is more likely is that the reality of consequences will serve as a significant deterrent and finally stop the gross abuse of those prosecutors who do not seek justice, but rather inflict harm for their own gain or to feed their own bias.

My proposition is simple, remove the immunity shield for prosecutorial misconduct. We need multiple versions of punishment for prosecutors who knowingly commit misconduct, which should include criminal punishment, civil liability, the ability to hold their employers liable under the doctrine of respondeat superior, and disbarment.

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278. *See* discussion *supra* note 1 and accompanying text.

279. *See* ALTON LOGAN & BERL FALBAUM, JUSTICE FAILED: HOW "LEGAL ETHICS" KEPT ME IN PRISON FOR 26 YEARS xxvii (2016).

280. *Id.*

1. *Subject to Criminal Prosecution*

The first step that needs to be taken is the absolute immunity prosecutors enjoy must be abolished and they should be subject to criminal penalties for intentionally or knowingly engaging in misconduct. As every statistical report generated has demonstrated, current methods to deter prosecutorial misconduct have failed miserably.

Some jurisdictions understand that the integrity of their district attorney's office is significantly harmed when rogue prosecutors commit misconduct and go unpunished. Last year, the Governor of California signed a bill into law allowing prosecutors to be charged with a felony and subject to three years in prison if they "intentionally and in bad faith alter, modify, or withhold any information knowing that it is relevant and material to the outcome of the case."[281] This is a great step in the right direction. But we should go further. The punishment should be weighted based on the gravity of the harm. Not that a three-year prison stint is minor, but if the misconduct, for example, caused four defendants to spend twenty years behind bars when they were innocent, then three years would not be sufficient. Criminal punishment for prosecutors needs to be instituted, but the levels set by offense should be proportional to the harm their misconduct caused.

2. *Subject to Civil Liability*

The next step, strip prosecutors of their immunity related to civil liability and hold them civilly liable for intentionally or knowingly engaging in misconduct. Presently, the financial burden for all of the damages caused by rogue prosecutors either falls to the state and taxpayers, or to the victims themselves and their families.[282] The state bears the cost of the trial, appeals, prison costs, re-trial or exoneration proceedings, media relations surrounding the wrongful conviction, and restitution payments. On the victims' side, they bear their legal costs from the time they are arrested, through all of their appeals and exoneration and even years past release as they fight to have their record cleared and pursue restitution from the state. For an individual or their family, this is a significant expense, particularly when viewed in light of the truth that as an innocent person they should not have been subjected to any of these problems.

The prosecutor is not required to contribute one dime to this enormous expense. To make matters worse, throughout the entire ordeal, which in some

281. Matt Ferner, *Cheating California Prosecutors Face Prison Under New Law*, HUFFINGTON POST (Oct 1, 2016, 7:15 PM), https://www.huffingtonpost.com/entry/california-prosecutor-misconduct-felony_us_57eff9b7e4b024a52d2f4d65# [https://perma.cc/2ZTK-SZ3Q].

282. *See* discussion *supra* Section VI.E.

cases goes on for decades, the prosecutor is allowed to enjoy their full benefits in the district attorney's office and receive their full salary. As we've seen, more often than not, many prosecutors are actually elevated in their career and end up in higher positions with greater salary and benefits. Again, at no point have they been ordered to repay any of the restitution paid to the victim or reimburse the state for the immense expense. That is unjustifiable to all involved. Rogue prosecutors should be held financially liable for their misconduct and all of their assets should be at risk.

3. Respondeat Superior

The third step relates to the liability of the district attorney's office. The doctrine of respondeat superior holds "an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency."[283] In the instance of prosecutorial misconduct, it is ultimately the county who employs the offending attorney. For a standard respondeat superior claim, the only determinations that need to be made are whether the person is an employee (rather than an independent contractor) and if they were acting within the scope of their employment.[284] A prosecutor is never an independent contractor, and the process from deciding who to charge, to trial strategy, to turning over *Brady* material to the other side, lining up witnesses, offering plea bargains and trying the case, all fall within the scope of a prosecutor's scope of employment. Since the elements of respondeat superior are met, the protective cloak of immunity should be removed, and victims of prosecutorial misconduct should be able to pursue the employer under the doctrine of respondeat superior.

In addition to the employer being held liable, due to the history of prosecutorial misconduct going unpunished, more oversight is needed. In an article by Judge Alex Kozinski, he suggested multiple reforms, including adding additional conviction integrity units (CIUs) and establishing an independent prosecutorial integrity unit.[285] So far, there are almost three dozen conviction integrity units throughout the country.[286] CIUs are independent and comprised of attorneys with "no track record to defend," so these units are able to thoroughly examine a case and help identify those who are wrongfully convicted.[287] Kozinski's recommendation to establish

283. *Respondeat Superior*, BLACK'S LAW DICTIONARY 1505 (10th ed. 2014).

284. *See* Greene v. Amritsar Auto Servs. Co., 206 F. Supp. 2d 4, 7–8 (D.D.C. 2002).

285. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., 31–32 (2015).

286. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017 2 (2018), https://www.law.umich.edu/special/exoneration/documents/exonerationsin2017.pdf [https://perma.cc/8VTW-JAAK].

287. Kozinski, *supra* note 286, at 31.

independent prosecutorial integrity units includes moving them under the authority of the Department of Agriculture so that they are wholly independent of the Department of Justice.[288] He stated that "[p]rosecutors need to know that someone is watching over their shoulders — someone who doesn't share their values and eat lunch in the same cafeteria."[289]

Conviction integrity units have existed for roughly fifteen years, but during the first decade there were only a few.[290] They have grown in popularity over the past four or five years, currently totaling thirty-three units throughout the country.[291] CIUs have been involved in 269 exonerations through 2017.[292] To give this scale, there are 2,300 prosecutors' offices throughout the United States.[293] With 33 active CIUs, that accounts for only 1.5% of these offices. However, "[t]he three most populous counties all have CIUs (Los Angeles, Cook, and Harris)," and the "top 20 of the top 50" most populous counties have CIUs.[294]

A clear benefit of CIUs is their ability to act quickly.[295] Harris County has been discussed as a model for the effectiveness and efficiency of a CIU.[296] The Harris County CIU learned about hundreds of drug convictions where the defendants pled guilty when in fact they were not even in possession of illegal drugs.[297] Overturning these convictions have resulted in 138 exonerations, most occurring within the past three years.[298] In contrast to Harris County's success, there are a few CIUs that have operated for three to four years and have yet to overturn a conviction. The concern is that a county could use a CIU as mere window dressing, rather than for its stated purpose.

CIUs have multiple missions. Most units primarily investigate claims of innocence, but they also look for "recurrent themes in wrongful convictions, such as faulty eyewitness identification, false confessions, incentivized informants (snitches), prosecutorial misconduct (*Brady* violations), and invalidated forensic science."[299]

CIUs appear to be a potentially impactful method of ensuring that justice was done, and in the event it was not, a tool to correct the injustice. How effective each CIU chooses to be, is left to be seen. To aid in this endeavor

288. *See id.* at 32.
289. *Id.*
290. *See* NAT'L REGISTRY OF EXONERATIONS, *supra* note 287, at 11.
291. *Id.*
292. *Id.* at 2.
293. *Id.* at 12.
294. *Id.*
295. *Id.* at 20.
296. *See id.*
297. *Id.*
298. *Id.* at app. tbls.A & B.
299. Inger H. Chandler, *Conviction Integrity Review Units: Owning the Past, Changing the Future*, 31 A.B.A. SEC. CRIM. JUST. 14, 15 (2016).

there are significant resources available. For example, the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School published an extensive study and survey outlining current CIU practices, recommendations, checklists, statistical data, and a proposed unit structure.[300] Further, Barry Scheck, co-founder of the Innocence Project, published an article, discussing in great detail, the potential sources for cases, criteria for selecting cases for review, investigatory methods and processes, and procedures necessary to conduct a root cause analysis to identify case errors.[301]

4. Ethical Penalties

Finally, we must put more "teeth" in either the Model Rules of Professional Conduct, or the manner in which they are applied. Presently, there are numerous rules which speak to the various forms of misconduct as discussed throughout this Article.[302] However, what is missing are the examples of how these rules were applied and how they held rogue prosecutors liable. Penalties such as written reprimands to a prosecutor who commits blatant misconduct are laughable and would never deter that type of person. The most severe punishment the State Bar can effect is disbarment, which sounds serious enough that it should be impactful, but it is not. Out of the thousands of wrongful convictions studied we can count the attorneys who were disbarred on one hand. What is equally egregious is that when rogue prosecutors are disbarred, they are typically eligible to re-apply for their law license within a few years. Why would the State Bar want these individuals to practice law? We owe a duty to the integrity of our profession to identify these bad actors and root them out for good. This is not where they belong, and they have been welcome for far too long.

VIII. CONCLUSION

It has been argued that the uptick in exonerations over the past decade or so is a direct result of a greater level of accountability in prosecutorial offices across the country.[303] Some have instituted post-conviction or "second-look" procedures and even "special review units" that review

300. *See generally* JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE (2016).

301. *See* Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705 (2017).

302. *See supra* Section IV.A, Part VI.

303. Barone, *supra* note 53.

"questionable convictions."[304] If this causal connection is true, great. But it is not enough.

First, the prosecutor's office should hold themselves to a higher standard and continue to pursue these secondary review processes. However, a reactionary process of only going back and looking over the prosecutor's shoulder does not solve the problem. It can help unwind some of the harm and right the wrongs, but it does not stop the prosecutorial predatory behavior. The second prong is punishment. A prosecutor who intentionally and willfully commits misconduct must be subject to punishment. The solution is as simple as the basic premise behind the justice system. You, first, stop the harm. Then, make the perpetrator pay restitution. Lastly, prevent future harm. If punishment is believed to be an effective deterrent, then prosecutors should not be immune to punishment.

A remark made by Senator Trumbull during the 39th Congress is as true today as it was when it was made over a hundred and fifty years ago:[305]

> Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprived any human being in the land of those great rights of liberty will be in defiance of the Constitution; and if the states and local authorities, by legislation or otherwise, deny those rights, it is incumbent on us to see that they are secured.[306]

The impact of Trumbull's comment is two-fold. First, it is unjustifiable to say that every person must be fully protected in all his rights, but then give a prosecutor full immunity and authority to violate the rights of any person they choose. Next, if turning a blind eye to prosecutorial misconduct and gross constitutional rights abuses is the path a jurisdiction chooses to take, the federal government has an obligation to step in and correct the problem. Each state, every city, every small town and municipality, has an obligation to root out those among them who deprive citizens of their rights. But, if these jurisdictions choose complacency or denial and do not correct the systemic problem of prosecutorial misconduct, the federal government has not only the authority, but the obligation, to once again, correct the problem of state-sanctioned discrimination.

As James Baldwin stated so clearly, "not everything that is faced can be changed, but nothing can be changed until it is faced."[307] We owe a

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304. *Id.*

305. *See* Eugene Gressman, *Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1327 (1952).

306. *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 77 (1866) (statement of Sen. Trumbull)).

307. I AM NOT YOUR NEGRO (Magnolia Pictures 2016).

responsibility to our profession to correct this horrendous wrong and root out this historical remnant, which is embedded like a cancer in the justice system.

REAL TRANSPARENCY: INCREASED PUBLIC ACCESS TO POLICE BODY-CAMERA FOOTAGE IN TEXAS

DAVID TRAUSCH†

I. INTRODUCTION

"The transparency that police body cameras were supposed to bring and that the Houston Police Department promised when launching the $8 million

† J.D. Candidate, December 2018, South Texas College of Law Houston. I want to thank my wife, Lauren, for encouraging and supporting me throughout law school, Professor Amanda Harmon-Cooley for guidance and advice in developing this paper, and Emily Nasir, my Comment Editor, for assisting in the editing process.

program more than a year ago has been more rhetoric than reality."[1] This issue is not unique to the Houston Police Department.[2] In fact, police body cameras have not produced increased transparency because the public has little, if any, access to the footage under Texas's laws.[3] Police body cameras cannot provide real transparency because Texas's laws regulating public access to police body-camera footage are too restrictive.[4] "Transparency is crucial in order for body cameras to truly be effective."[5] In addition, transparency is a very important component of building and maintaining trust between police and the communities they serve, safe and secure communities, and a functional criminal justice system.[6] In fact, the promise of transparency was a very important and influential reason for implementing and using police body cameras.[7] Consequently, Texas's laws should be amended to allow for increased public access to police body-camera footage.

Texas's laws regulating public access to police body-camera footage should be amended in three ways. First, public access to police body-camera footage should be regulated by the Public Information Act (PIA) in Texas. Next, the PIA's exception for law enforcement and prosecutorial information

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1. Jeremy Rogalski, *Houston Police Fail to Follow Body-Camera Policy*, KHOU (May 24, 2017, 10:25 PM), http://www.khou.com/mobile/article/news/investigations/transparency/houston-police-fail-to-follow-body-camera-policy/285-442607367 [https://perma.cc/C7B8-LGFK].

2. *See* Malkia Cyril & Harlan Yu, *The Benefits of Police Body Cams Are a Myth*, TECH CRUNCH (Dec. 20, 2017), https://techcrunch.com/2017/12/20/the-benefits-of-police-body-cams-are-a-myth/ [https://perma.cc/CYD7-VY58] ("In most major U.S. departments, there's no easy way for the public to obtain body-worn camera footage . . . .").

3. *See* TEX. OCC. CODE ANN. § 1701.661 (Supp.) (detailing the requirements for requesting "information recorded by a body worn camera" while providing broad exemptions from disclosure).

4. *See* Zoe Wolkowitz, *Will Arizona Follow the National Trend in Banning Police Body Worn Camera Footage?*, ARIZ. CAP. TIMES (Feb. 28, 2017, 2:38 PM), https://azcapitoltimes.com/news/2017/02/28/will-arizona-follow-the-national-trend-in-banning-police-body-worn-camera-footage/ [https://perma.cc/5FN4-8UZB] ("If footage . . . can easily be exempted from public view, . . . then the fundamental benefits of trust, objectivity, transparency, and accountability are threatened . . . .").

5. Danielle Evans, Note, *Police Body Cameras: Mending Fences and How Pittsburgh is a Leading Example*, 16 PITT. J. TECH. L. & POL'Y 76, 90 (2015).

6. *See* Office of the Press Secretary, *Fact Sheet: Strengthening Community Policing*, WHITE HOUSE (Dec. 1, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing [https://perma.cc/8SYS-RHKK] ("[T]rust between law enforcement agencies and the people they protect and serve is essential to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services."); Wolkowitz, *supra* note 4 ("Trust is built through transparency . . . and there's no better way to show the public what is going on than by using body cameras." (quoting Tucson Police Department Lieutenant Tim Gilder)).

7. Niraj Chokshi, *These Are the States That Want to Regulate Police Body Camera Videos*, WASH. POST (Feb. 25, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/02/25/these-are-the-states-that-want-to-regulate-police-body-camera-videos/?utm_term=.3e2df5c1b0ec [https://perma.cc/SQ2L-DUA5] ("[T]he main purpose of body cameras is to enhance transparency." (quoting Nancy G. La Vigne)).

should be amended to balance the competing policy interests of protecting law enforcement efforts while providing public access to government information. Finally, public disclosure exceptions under the PIA should be specific and narrowly written in order to properly balance the policy interests of public disclosure of police body-camera footage and individual privacy. Consequently, accountability and real transparency can be realized because the public would have more access to police body-camera footage in Texas without compromising other important policy interests.

This Comment will present the arguments for increasing public access to police body-camera footage in Texas without compromising other important public policy interests such as protecting the safety of law enforcement and individual privacy. First, Part II will briefly review the history and importance of public access to government records. Next, Part III will briefly review the history of and purposes for implementing police body cameras. Part IV explains Texas's current laws regulating requests for public access to police body-camera footage. Part V sets forth the arguments for increased public access to body-camera footage and addresses opposing policy concerns. Finally, Part VI concludes with a summary of the arguments and some comparable statutes from other states that can be used as a model for amending Texas's laws to provide increased access to police body-camera footage.

II. HISTORY AND IMPORTANCE OF PUBLIC ACCESS TO GOVERNMENT RECORDS

In order to fully understand the importance of transparency and accountability of the police as government officials, a brief review of the history and importance of public access to governmental records is required. Although laws providing for public access to government records are relatively recent, the purpose of such laws can be traced to fundamental principles of the American form of government.[8] In fact, one of the founding principles of the United States recognizes that "governments are instituted among men, deriving their just powers from the consent of the governed."[9] Therefore, it follows that the people must be aware of government functions and actions, which requires a level of transparency that can be best achieved through public access to government records.[10] Consequently, it is

8. *See* TEX. GOV'T CODE ANN. § 552.001(a) ("[T]he fundamental philosophy of the American constitutional form of representative government . . . adheres to the principle that government is the servant and not the master of the people . . . .").

9. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

10. *See* GOV'T § 552.001(a) ("The people . . . do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people

unsurprising that every state has some form of open records or freedom of information laws that provide public access to government information and records.[11]

Nevertheless, citizens do not have a constitutional right to access government information or records under the United States Constitution.[12] Therefore, reasonable limits can be placed on what government information or records are disclosed to the public. Accordingly, individual states have passed open records laws modeled after the federal Freedom of Information Act.[13] However, states have broad discretion in drafting laws regulating public access to government information and records. Consequently, states have different levels of public access to government information and records.

In Texas, government was largely based on a healthy distrust of government with power being vested in the people.[14] The Texas Legislature passed the Texas Open Records Act in 1973.[15] Today, the law is codified in Chapter 552 of the Texas Government Code and is known as the Public Information Act (PIA).[16] The PIA acknowledges the strong public policy interest that people have regarding access to government information and records and provides public access to government information and records so that the people can monitor government activities.[17] However, the PIA has many statutory exceptions restricting public access to government information and records.[18] As a result, not all information collected or created by the government is available to the public through the PIA in Texas.

Even though the PIA provides for liberal construction "in favor of granting a request for information[,]"[19] not all government records are

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insist on remaining informed so that they may retain control over the instruments they have created.").

11. The Media Freedom & Info. Access Clinic, *Police Body Cam Footage: Just Another Public Record*, ABRAMS INST. at 6 (Dec. 2015), https://isp.yale.edu/sites/default/files/publications/police_body_camera_footage-_just_another_public_record.pdf [https://perma.cc/SS67-NPD2].

12. *See* Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978) ("There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information.").

13. The Media Freedom & Info. Access Clinic, *supra* note 11, at 6.

14. *See* TEX. CONST. art. I, § 2 ("All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit.").

15. Freedom of Info. Found. of Tex., *Texas Public Information Act*, https://foift.org/resources/texas-public-information-act/ [https://perma.cc/8CS4-NAHX].

16. *See* TEX. GOV'T CODE ANN. Title 5, Subchapter C.

17. *See id.* § 552.001(a) ("[I]t is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees."); *id.* § 552.006 ("This chapter does not authorize the withholding of public information or limit the availability of public information to the public, except as expressly provided by this chapter.").

18. *See* TEX. GOV'T CODE ANN. Title 5, Subchapter C.

19. *Id.* § 552.001(b).

accessible to the public.[20] There is no statutory authority to withhold "public information . . . except as expressly provided" by the PIA.[21] As a result, most restrictions on public disclosure are statutory exceptions, which are codified in Subchapter C of the PIA.[22] However, the Texas Supreme Court has ruled that common law rights—such as privacy—can also restrict public disclosure.[23] Moreover, some restrictions on disclosure—such as when there is a threat of harm to a person—have both a statutory and common law basis.[24] Consequently, the public interest in disclosure of government information and records is sometimes overridden by judicial decision or statute because another policy interest outweighs the public interest in disclosure.

III. INTENDED BENEFITS AND PURPOSES OF USING POLICE BODY CAMERAS

Recently, an increasing number of police agencies across the country have been adopting body-camera programs for officers in response to public demands for police reforms.[25] This is, in part, because "footage from body-worn cameras . . . offer[s] an objective look at interactions between officers and the public."[26] In addition, body cameras presented an opportunity for increased transparency and accountability of police agencies.[27] Such

20. *See* Tex. Dep't of Criminal Justice v. Levin, 520 S.W.3d 225, 227 (Tex. App.—Austin 2017, pet. granted) ("'[L]iberal construction' under the PIA 'is not tantamount to boundless reach' . . . ." (quoting Greater Hous. P'ship. v. Paxton, 468 S.W.3d 51, 67 (Tex. 2015))).

21. GOV'T § 552.006.

22. TEX. GOV'T CODE ANN. Title 5, Subchapter C.

23. *See* Indust. Found. of the S. v. Tex. Indust. Accident Bd., 540 S.W.2d 668, 682–83 (Tex. 1976) (applying a tort standard for protecting common law privacy interests).

24. *Compare* GOV'T § 552.152 (creating an exception to disclosure for "information [that] would subject the employee or officer to a substantial threat of physical harm"), *with* Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P., 343 S.W.3d 112, 116 (Tex. 2011) (concluding that "the common law right to be free from physical harm" can be the basis for exempting "documents from disclosure under the PIA").

25. *See* Cyril & Yu, *supra* note 2 ("Departments nationwide have flocked to body-worn cameras as a fashionable and almost reflexive reform."); The Media Freedom & Info. Access Clinic, *supra* note 11, at 3 ("In many cities and towns, demands for police reform have led to the implementation of police body worn camera ('body cam') programs.").

26. Chuck Lindell, *Clarification Sought on Release of Police Body Cam Videos in Texas*, MYSTATESMAN (Sept. 19, 2017, 6:07 PM), http://www.mystatesman.com/news/clarification-sought-release-police-body-cam-videos-texas/mcThG4YLuNRi9H8Rijh26L/ [https://perma.cc/9WS6-M97U].

27. *See* The Media Freedom & Info. Access Clinic, *supra* note 11, at 6 ("Legislatures and police departments have created body cam programs to promote transparency, enable accountability, and improve relationships between police and communities."); Davey Alba, *Should Body-Cam Footage Always Go Public? It's Complicated*, WIRED (July 31, 2015, 7:00 AM), https://www.wired.com/2015/07/body-cam-videos-always-go-public-complicated/

transparency and accountability of police would be beneficial in exposing and resolving allegations of police misconduct, which the U.S. Supreme Court has recognized as an important public interest.[28] Furthermore, citizens have requested police body cameras in order to see "[w]hat's happening to the public in the administration of law enforcement."[29] In fact, police agencies hoarding and guarding police body-camera footage from public disclosure was not part of the discussion when public support and funding for body cameras was originally sought.[30] Consequently, the intended benefits and purposes of using police body cameras are important considerations when analyzing laws restricting public access to the footage.

Many alleged benefits and purposes have been used to justify equipping police with body cameras. For instance, an alleged benefit of using police body cameras was to de-escalate police encounters with respect to the conduct of both police officers and civilians.[31] In addition, some alleged purposes supporting the implementation of police body cameras included reducing complaints about officers,[32] ensuring police compliance with

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[https://perma.cc/J8EW-QFTN] ("[C]ivil rights leaders and activists have called for the adoption of body cameras for law enforcement officers to promote transparency and increase public trust.").

28. *See* Waller v. Georgia, 467 U.S. 39, 47 (1984) ("The public in general also has a strong interest in exposing substantial allegations of police misconduct . . . .").

29. Dave Dewitt, *NC Body Cam Law Complicates Charlotte PD Decision to Release Footage*, WUNC 91.5 (Sept. 22, 2016) (quoting North Carolina State Representative Joe Queen), http://wunc.org/post/nc-body-cam-law-complicates-charlotte-pd-decision-release-footage#stream/0 [https://perma.cc/VL6Q-PQTQ].

30. *See* Matt Stroud, *Police Body Camera Footage is Becoming a State Secret*, THE VERGE (June 12, 2017, 11:47 AM), https://www.theverge.com/2017/6/12/15768920/police-body-camera-state-secret [https://perma.cc/AZ4E-2YD3] ("This opaque state of affairs was not how body cameras were originally pitched.").

31. *See* Evans, *supra* note 5, at 81–82 (discussing Rialto study finding a "decline in use-of-force" attributed to the use of police body cameras); Mark Berman, *Justice Dept. Will Spend $20 Million on Police Body Cameras Nationwide*, WASH. POST (May 1, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/05/01/justice-dept-to-help-police-agencies-across-the-country-get-body-cameras [https://perma.cc/P9XW-5XSS] ("Police departments using these cameras say their presence 'often improves the performance of officers as well as the conduct of the community members who are recorded' . . . ."). *But see* Cyril & Yu, *supra* note 2 ("A landmark study recently released by the D.C. Metropolitan Police found that officers who wore cameras behaved in essentially the same ways as officers who did not."), *and* Arlington Police Dep't, *Police Body-Worn Cameras*, http://www.arlington-tx.gov/police/police-body-worn-cameras/ [https://perma.cc/LC98-EDZS] (discussing a Police Executive Research Forum pilot where responses to interactions with Arlington Police Department officers wearing body cameras "concluded that body worn cameras cannot build trust with citizens because they can never replace dialogue and relationships").

32. *See Body Camera Grants for Police in 2017*, SAFETY VISION (Dec. 14, 2016), http://www.safetyvision.com/body-camera-grants-police-2017 [https://perma.cc/E8FB-BUQZ] ("The use of body-worn cameras facilitates a decrease in complaints filed against officers on allegations that may range from sexual harassment to alleged racial bias."); The Media Freedom & Info. Access Clinic, *supra* note 11, at 7 ("Body cams also have the potential to . . . reduce the

individual agency policies,[33] and "enabl[ing] public oversight."[34] Clearly, several of the alleged purposes of using police body cameras were related to transparency and public accountability. In fact, this inference was explicitly recognized by the Department of Justice when it announced funding for body-camera programs in 2015.[35] Specifically, the Obama Administration proposed investing seventy-five million dollars to "help purchase 50,000 body worn cameras" because of the anticipated effects it would have on transparency and public accountability.[36] Thus, transparency and public accountability were two of the most important purposes used to garner support for implementing and using police body cameras.

Police body cameras have been purchased using taxpayer funding after promising community members that body cameras will result in transparency and public accountability.[37] In fact, many police body cameras are purchased using state taxpayer funded grant money.[38] As a result, Texas has additional statutory economic accountability requirements.[39] However, the grants do not have requirements regarding public access to police body-camera footage.[40] Specifically, there are no requirements that the public or an external review board have access to police body-camera footage for accountability purposes. Furthermore, there are no statutory requirements or incentives for police agencies to use body cameras to enhance transparency of officer actions for the community to see what is going on. In fact, it is questionable whether the purposes of the police body-camera grants are met when the public does not

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frequency of frivolous complaints because those complainants will know that officers have good information with which to exonerate themselves.").

33. *See Body Camera Grants for Police in 2017*, *supra* note 32 ("The practices of the police officers get monitored on a daily basis and thus inform supervisors who is using correct practices while operating.").

34. The Media Freedom & Info. Access Clinic, *supra* note 11, at 28.

35. *See* Berman, *supra* note 31 ("Body-worn cameras hold tremendous promise for enhancing transparency, promoting accountability, and advancing public safety for law enforcement officers and the communities they serve[.]" (quoting Attorney General Loretta Lynch)).

36. Office of the Press Secretary, *supra* note 6.

37. *See id.* (announcing federal grant money for police body cameras "in order to build and sustain trust between communities and those who serve and protect these communities").

38. *See* TEX. OCC. CODE ANN. § 1701.652(a) (Supp.) (setting forth requirements for "grant[s] to defray the cost . . . to equip peace officers with body worn cameras.").

39. *See id.* § 1701.653 ("[A] law enforcement agency annually shall report to the commission regarding the costs of implementing a body worn camera program, including all known equipment costs and costs for data storage.").

40. *See* Miranda S. Spivack, *Cop Camera Footage: Public Record or Police Property?*, REVEAL NEWS (Dec. 21, 2016), https://www.revealnews.org/article/cop-camera-footage-public-record-or-police-property/ [https://perma.cc/VN5R-FV36] ("But the grant money came with little guidance about how localities should handle the resulting requests for the public release of hundreds of hours of video footage.").

have meaningful access to the footage.[41] Consequently, there has not been any real increase in transparency or accountability resulting from the implementation and use of police body cameras despite using taxpayer funding after making promises to the contrary.

IV. TEXAS'S LAWS REGULATING PUBLIC ACCESS TO POLICE BODY-CAMERA FOOTAGE

Police body-camera footage is regulated separately from other government records under Texas's current laws.[42] This is unique because public access to government information and records other than police body-camera footage is regulated by PIA.[43] As a result, Texas's law provides police agencies many ways to deny public disclosure requests for police body-camera footage. First, the statute purports to generally exempt police body-camera footage from the PIA,[44] except when it "could be used as evidence in a criminal prosecution."[45] Next, police agencies are given three options for responding to a request for body-camera footage.[46] The first two of these options are methods of denying public access to the footage, and the third option is to release the footage after redacting confidential information.[47] Finally, the exception for law enforcement and prosecutorial information is so broad that it can be used to withhold most police body-camera footage.[48] Therefore, police agencies can usually deny public access to police body-camera footage if they do not want to release it.[49] Consequently, public requests for police body-camera footage are routinely denied in Texas

41. *See id.* ("And with restrictions on disclosure coinciding with the use of the body cameras, questions have arisen about what police will do with all the footage and whether retaining it solely for investigations meets the goals of the grants.").

42. *See* OCC. § 1701.661 (regulating public release of police body camera footage).

43. *See* TEX. GOV'T CODE ANN. § 552.002(a) (Supp.) (defining public information for the purposes of the PIA).

44. *See* OCC. § 1701.661(c) (exempting body camera footage from "the requirements of" the statute under the PIA requiring availability of information).

45. *Id.* § 1701.661(c)–(d).

46. *Id.* § 1701.661(e).

47. *Id.*

48. *See* GOV'T § 552.108(a)(1)–(2) (excepting from disclosure any information that "would interfere with the detection, investigation, or prosecution of crime" or information related to "the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication ").

49. *See* Julian Gill, *Denton Police Adjust to Body Cameras*, N. TEX. DAILY (June 28, 2015, 12:10 PM), https://www.ntdaily.com/denton-police-adjust-to-body-cameras/ [https://perma.cc/XH5R-9N7A] ("[T]he department will release video to the public based on its own discretion." (citing Denton Police Lieutenant Chris Summit)).

because there is little, if any, public access to police body-camera footage under Texas's current laws.[50]

There is little, if any, public access to police body-camera footage under Texas's current laws because there are many ways that disclosure can be denied. First, a request for disclosure of police body-camera footage can be denied if all of the specific information required is not included in the request.[51] Specifically, a person requesting police body-camera footage must comply with strict statutory requirements by providing specific details about the footage requested.[52] However, "failure to provide all of the information required . . . does not preclude . . . a future request for the same recorded information."[53] Next, even when the statutorily required information is provided with a disclosure request, police agencies can use any PIA exception to deny public access to body-camera footage.[54] In fact, the law enforcement exception provides very broad restrictions that will apply to most police body-camera footage, at least until a conviction or deferred adjudication is obtained.[55] Furthermore, it is a misdemeanor criminal offense for police officers to release body-camera footage without authorization from their agency.[56] As a result, only police agency administrators can decide to voluntarily allow public disclosure of body-camera footage. Finally, police body-camera footage may not be available because the footage may have been destroyed before a request for public disclosure can be successfully made.[57] In fact, instances where police body-camera footage cannot be

50. This Comment focuses only on public access to police body-camera footage. A criminal defendant has other rights under the U.S. and Texas Constitutions that may provide access to such footage based on due process or mandatory discovery requirements. *See* KHOU Staff, *FAQ: Houston's Body-Camera Program*, KHOU 11 (Nov. 14, 2016, 12:58 PM), http://www.khou.com/article/news/investigations/transparency/faq-houstons-body-camera-program/350521949 [https://perma.cc/N4LC-KVS5] [hereinafter KHOU Staff, *FAQ*] ("If you are a defendant in a criminal case, your attorney can obtain the video from the Harris County District Attorney's Office at a pretrial hearing."); *see also* TEX. CODE CRIM. PROC. ANN. § 39.14 (Supp.) (providing specific rules regarding a criminal defendant's rights in Texas to access or view information held by the government); Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

51. *See* OCC. § 1701.661(a) ("A member of the public is required to provide . . . (1) the date and approximate time of the recording; (2) the specific location where the recording occurred; and (3) the name of one or more persons known to be a subject of the recording.").

52. *See id.*

53. *Id.* § 1701.661(b).

54. *See id.* § 1701.661(e)(1) & (2).

55. *See* TEX. GOV'T CODE ANN. § 552.108(a).

56. OCC. § 1701.659.

57. Texas law requires law enforcement agencies to promulgate a policy for body cameras that includes "a minimum period of 90 days" for retention of recorded videos. *Id.* § 1701.655(b)(2).

produced upon request are alarmingly frequent.[58] Consequently, there is very little, if any public access to police body-camera footage under the current laws in Texas.

Nevertheless, Texas law provides some options for a quasi-appeal process when a request for information is denied based on a PIA exception. For example, there is a review process through which the Attorney General provides a decision whether the information requested is excepted from disclosure by law.[59] In fact, a decision from the Attorney General is required in order for an agency to deny a request for public disclosure or else the information "will be presumed to be public information."[60] However, an agency does not necessarily need to obtain a decision from the Attorney General for every public request for disclosure.[61] This is a reasonably quick review process because there are strict statutory deadlines for the governmental entity to request a decision and send the Attorney General the required information to make a determination.[62] Also, the Attorney General should provide a written decision within forty-five days, subject to a possible ten day extension after providing the reason for the delay.[63] On the other hand, a lawsuit for a writ of mandamus may be brought by the Attorney General or the person requesting the information.[64] However, the writ of mandamus may only be sought when the agency "refuses to request an attorney general's decision" or refuses to provide information that is

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See Gill, *supra* note 49 (describing Denton Police body camera retention policy defaults to ninety days unless it will "be used as evidence in a criminal case" and then the retention period is changed "based on the charge").

58. *See, e.g.*, KHOU Staff, *New Houston Police Chief Hopes to Make Changes to Body-Camera Program*, KHOU 11 (Dec. 1, 2016, 5:55 PM), http://www.khou.com/mobile/article/news/investigations/transparency/new-houston-police-chief-hopes-to-make-changes-to-body-camera-program/361185226 [https://perma.cc/CJ8B-NG3Q] ("The Harris County District Attorney's office identified more than 700 cases with missing or unaccounted body-camera video."); *see also* Anthony L. Schumann et al., *Body-Worn or Dash Camera Footage: When Must Law Enforcement Agencies Release Video Footage?*, 59 No. 6 DRI FOR DEF. 14 (June 2017) ("[S]ome law enforcement agencies may not adequately preserve the footage to begin with.").

59. *See* GOV'T § 552.301.

60. City of Houston v. Hous. Chronicle Publ'g Co., 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no pet.) ("Where the custodian thinks that information is not public, and there has been no previous applicable decision it must be submitted to the Attorney General for a decision or it will be presumed to be public information."); *see also* Freedom of Info. Found. of Tex., *supra* note 15 ("If a governmental body fails to seek an attorney general decision in time, the information is presumed to be public.").

61. *See* GOV'T § 552.301(a) ("A governmental body . . . must ask for a decision from the attorney general . . . if there has not been a previous determination about whether the information falls within one of the exceptions.").

62. *See id.* § 552.301(e).

63. *Id.* § 552.306.

64. *See id.* § 552.321(a).

determined by the Attorney General "not excepted from disclosure."[65] Finally, there are some other statutory provisions under the PIA that provide for further review by the courts.[66] However, other than review by the Attorney General,[67] it is not clear that the statutory provisions for quasi-appeals apply to requests for police body-camera footage that is purported to be exempt from the PIA.[68] As a result, there is limited recourse, if any, when a request for public disclosure of police body-camera footage is denied.

V. THE PUBLIC SHOULD HAVE MORE ACCESS TO POLICE BODY-CAMERA FOOTAGE IN TEXAS

Texas's laws restricting public access to police body-camera footage should be amended to provide increased public access to police body-camera footage in order to achieve the goals of transparency and accountability. If the public does not have access to police body-camera footage, "then the fundamental benefits of trust, objectivity, transparency, and accountability are threatened."[69] In addition, it has been recognized almost unanimously that police body cameras will only be successful if police agencies release the footage.[70] However, there is disagreement on what footage should be released, the manner of release, and the timeframe in which it should be released. Much of this disagreement revolves around concerns regarding interference with law enforcement techniques, the costs of providing public access, threats to law enforcement, and privacy issues. Currently, Texas's laws address these public policy concerns by disregarding the transparency and accountability goals of using police body cameras. Consequently, Texas's laws should be amended to provide increased public access to police body-camera footage.

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65. *Id.*

66. *See id.* § 552.3215(b) (providing for declaratory judgment or injunctive relief for violations of the PIA); *id.* § 552.3221(a) (providing for in-camera inspection of information); *id.* § 552.325(a) (allowing a requestor to intervene in a lawsuit between the attorney general and the government agency seeking to withhold information); *see also* Freedom of Info. Found. of Tex., *supra* note 15 ("When the attorney general's office agrees with a governmental body that information can be withheld from the public, the person making the original request has the option of filing a lawsuit in state district court to attempt to have the information released.").

67. *See* TEX. OCC. CODE ANN. § 1701.661(e)(1) (Supp.) (providing police agencies the option to use the statutory provision for obtaining an attorney general decision).

68. *See id.* § 1701.661(c) (exempting body camera footage from "the requirements of" the statute under the PIA requiring availability of information).

69. Wolkowitz, *supra* note 4.

70. *See* The Media Freedom & Info. Access Clinic, *supra* note 11, at 8 ("Public officials have recognized that body cam programs will work only if police departments release the content they collect.").

Texas's laws should be amended to provide increased public access to police body-camera footage for several reasons. First, the public should have more access to police body-camera footage in Texas in order to promote transparency. Second, accountability of police officers would increase if the public had more access to police body-camera footage. Third, voluntary release of police body-camera footage is an ineffective method of achieving the intended purposes of transparency and accountability. Fourth, the courts cannot make the necessary adjustments to the law through judicial review. Finally, the lack of transparency and accountability resulting from little, if any, public access to police body-camera footage effectively nullifies the intended benefit that body cameras would deter police misconduct. Consequently, the Texas Legislature should amend the laws to provide increased public access to police body cameras in Texas.

First, the public should have more access to police body-camera footage in Texas in order to promote transparency. Transparency was one of the intended purposes of implementing police body cameras.[71] In fact, transparency "is particularly important to maintain public confidence."[72] Public confidence and trust in police officers must be maintained in an orderly and civilized society.[73] Public access to police body-camera footage would provide such transparency by providing an "objective look at interactions between officers and the public."[74] In fact, the public supported the idea of implementing police body cameras based on a promise of increased transparency.[75] Furthermore, in order "to create an environment of citizen engagement," police agencies should be focusing on providing transparency in order to gain public trust and cooperation.[76] However, police body cameras contribute little, if anything, to police transparency if the public does not have meaningful access to the body-camera footage.[77] As a result,

71. *See* Berman, *supra* note 31 ("Body-worn cameras hold tremendous promise for enhancing transparency, promoting accountability, and advancing public safety for law enforcement officers and the communities they serve." (quoting Attorney General Loretta Lynch)).

72. The Media Freedom & Info. Access Clinic, *supra* note 11, at 6.

73. *See* Office of the Press Secretary, *supra* note 6 ("[T]rust between law enforcement agencies and the people they protect and serve is essential to the stability of our communities, the integrity of our criminal justice system, and the safe and effective delivery of policing services.").

74. Lindell, *supra* note 26.

75. *See* Kate Wheeling, *Should Police Body Camera Footage Be Public Record?*, PAC. STANDARD (June 13, 2016), https://psmag.com/news/should-police-body-camera-footage-be-public-record [https://perma.cc/BL27-ADQY] ("Public support for body cameras is based in large part on the idea that they will provide transparency by allowing the public to see for itself whether officers behaved appropriately in controversial incidents . . . .").

76. Chris Weller, *You Could Soon Look up Body Cam Footage from Your Local Police Online*, BUS. INSIDER (Oct. 18, 2016, 3:04 PM), http://www.businessinsider.com/motorola-solutions-body-cam-footage-public-2016-10 [https://perma.cc/9XG6-9WUA].

77. *See* Wolkowitz, *supra* note 4 ("[T]here's no better way to show the public what is going on than by using body cameras." (quoting Tucson Police Department Lieutenant Tim Gilder)).

police body cameras are not very helpful in building or maintaining public confidence and trust in police officers because of the lack of transparency by restricting public access to the footage.

Similarly, the public should have more access to police body-camera footage in Texas in order to promote accountability. First, there is no public accountability when police agencies "own and control the recorded footage" of their own body cameras and the public has very limited access to such footage.[78] In addition, there is little, if any, evidence that body cameras have increased internal accountability. In fact, Houston Police Department's policy requires supervisors "to conduct monthly audits" based on a computer generated random selection of police body-camera videos.[79] However, when a local media source requested copies of the required audits, the Houston Police Department responded "there are no responsive documents."[80] In addition, there is a significant amount of lobbying from police unions suggesting "that supervisors should restrict reviewing of footage to training purposes, a documented pattern of abuse or misconduct, or in response to citizen complaints or other precipitating acts."[81] Therefore, if the body-camera footage cannot be reviewed for internal accountability purposes until there issues or complaints are already documented, then the footage provides minimal internal accountability. In addition, police body cameras contribute very little to public accountability of police because there is no meaningful public access to police body-camera footage in Texas. In other words, public accountability of officers with a repeated complaints or allegations of misconduct cannot be achieved through public review of police body-camera footage. Accordingly, the lack of public access to police body-camera footage fails to promote any accountability—one of the original purposes of implementing a body-camera program—even when internal policies exist for accountability purposes. As a result, police body cameras are not helping to increase or maintain public confidence and trust in police officers because of the lack of accountability.

Moreover, Texas's laws should be amended to provide increased public access to police body-camera footage because voluntary release of police body-camera footage is ineffective at achieving the intended purposes of transparency and accountability. The voluntary release of footage usually only results from a public outcry or "intense public pressure" regarding a

78. Cyril & Yu, *supra* note 2.
79. KHOU Staff, *FAQ*, *supra* note 50.
80. *Id.*
81. Nancy La Vigne, Opinion, *Five Myths About Body Cameras*, TWIN CITIES PIONEER PRESS (May 31, 2015, 11:01 PM), https://www.twincities.com/2015/05/31/nancy-la-vigne-five-myths-about-body-cameras/ [https://perma.cc/2LTW-DW4P].

"high-profile incident."[82] In today's world, social media provides a platform where it is very quick and easy to circulate information,[83] thereby increasing the likelihood and frequency of public pressure to release controversial footage. However, even with the assistance of social media, "intense public pressure" to release body-camera footage usually only occurs in conjunction with a "high-profile incident."[84] In fact, police agencies are less likely to voluntarily release police body-camera footage unless it is in their interest to do so because there is no real public access to obtain it anyway.[85] Therefore, no meaningful public access to police body-camera footage exists in Texas for transparency or public accountability purposes. Moreover, the decision to voluntarily release footage in Texas must be made by the police agency, not by individual officers.[86]

Generally, police agencies are allowed to voluntarily release body-camera footage as long as confidential information is redacted.[87] However, police agencies are prohibited from releasing certain recordings. For example, police cannot release footage related to an investigation of "a misdemeanor punishable by fine only and does not result in arrest" unless the individual consents in writing.[88] In other words, the majority of traffic stops and other police-citizen interactions occurring in a public place are restricted from public disclosure unless the individual appearing in the video consents to the disclosure. In addition, police cannot release "any portion of a recording made in a private space."[89] Therefore, there is not much footage that police agencies are allowed to release even if they were willing to be more transparent with their body-camera footage. Consequently, Texas's laws should be amended to allow increased public access to police body-camera footage because the intended benefits of transparency and accountability are not being achieved through voluntary release of the footage.

Similarly, an increase in public access to police body-camera footage is not likely to occur through judicial review in Texas courts. Although Texas

82. Spivack, *supra* note 40.

83. *See* Alba, *supra* note 27 ("Social media, for better or worse, has made it much easier to disseminate information and have communities affected by these incidents describe developments on the ground.").

84. Spivack, *supra* note 40.

85. The Media Freedom & Info. Access Clinic, *supra* note 11, at 7 ("Without an affirmative right of public access, police would have a strong incentive to only release footage in which they appear sympathetic . . . .").

86. *See* TEX. OCC. CODE ANN. § 1701.659(a) (Supp.) (criminalizing the unauthorized release of body camera footage by "[a] peace officer or other employee of a law enforcement agency").

87. *Id.* § 1701.661(e)(3).

88. *Id.* § 1701.661(f).

89. *Id.*

courts are supposed to consider "the entire act, its nature and object, and the consequences that would follow from each construction,"[90] Texas courts have not given much, if any, weight to the PIA's liberal construction policy when applying exceptions. In fact, the Texas Supreme Court has acknowledged the PIA's "liberal-construction mandate" indicates that "[t]ransparency is a real concern," but the court held that such "liberal construction is not tantamount to boundless reach."[91] In addition, Texas courts have ruled that the PIA exceptions asserted by police agencies are clear and not ambiguous.[92] This means that the rules of statutory construction that courts use to interpret statutes cannot be used to interpret the PIA exceptions and courts apply the plain meaning of the statute.[93] Therefore, the courts effectively restrict their ability to construe the PIA exceptions more narrowly in order to provide greater public access to government information and records. As a result, the Texas's laws should be amended to provide greater public access to police body -amera footage because Texas courts are not likely to interpret the PIA exceptions narrowly in order to provide transparency through increased public access.

Lastly, the lack of transparency and accountability in Texas regarding police body-camera footage effectively nullifies the premise shown by studies that using body cameras will deter police misconduct.[94] The studies showing that using police body cameras will deter police misconduct relies on the premise that officers wearing body cameras will act appropriately because the footage "will impose responsibility for their actions."[95] However, this premise is nullified in Texas because the public has no meaningful access to police body-camera footage in order to hold officers accountable. In addition, review of police body-camera footage by supervisory officials for disciplinary purposes can also be restricted.[96] In fact, police agencies in Texas can use statutory language from other states to write restrictive policies

90. Albertson's, Inc. v. Sinclair, 984 S.W.2d 958, 961 (Tex. 1999).

91. Greater Hous. P'ship v. Paxton, 468 S.W.3d 51, 67 (Tex. 2015).

92. Despite the Attorney General's opinion that the law enforcement exception should be interpreted more narrowly, the Texas Supreme Court ruled that the applicable statute's "clear and unambiguous language" did not support such a narrow interpretation. Holmes v. Morales, 924 S.W.2d 920, 924 (Tex. 1996).

93. *See* Fitzgerald v. Advanced Spine Fixation Sys., Inc., 996 S.W.2d 864, 865–66 (Tex. 1999) ("[I]f a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create and ambiguity.").

94. *See* Evans, *supra* note 5, at 81 ("The decline in use-of-force suggests that when officers are aware they are being filmed, and such film will impose responsibility for their actions, they are more likely to exhibit desirable behaviors . . . .").

95. *Id.*

96. Police agencies are free to make their own policy regarding "procedures for supervisory or internal review" in Texas. TEX. OCC. CODE ANN. § 1701.655(b)(6) (Supp.).

regarding supervisory review.[97] Therefore, even if police agency policies allow for supervisory review for disciplinary purposes, there would be no meaningful internal accountability because supervisors would not ordinarily be required to review a certain amount or percentage of body-camera footage. Similarly, when a police policy expressly requires review of body-camera footage and it was not completed, there is no internal accountability.[98] In other words, it is unlikely that police misconduct is deterred by the use of police body cameras in Texas because the conditions required to produce such results do not exist under the current laws. In fact, a negative inference can be implied that there will be little, if any, deterrence on police misconduct by using body cameras under the current laws in Texas. Consequently, Texas's laws should be amended to provide increased public access to police body-camera footage.

A. The PIA Should Regulate Public Access to Police Body-Camera Footage in Texas

Police body-camera footage should be public information that is subject to the public disclosure regulations under the PIA in Texas. It is illogical and impractical that public access to police body-camera footage in Texas is not regulated by the PIA.[99] The PIA already regulates disclosure of public information by governmental bodies in Texas,[100] including police dash-camera footage.[101] The PIA has exceptions intended to protect public policy concerns or interests, which sufficiently protect policy interests that may be threatened by the public's interest in disclosure of government information and records, particularly increased public access to police body-camera

97. *See, e.g.*, 50 ILL. COMP. STAT. 706/10-20(a)(9) (West Supp. 2017) (requiring all police written policies to restrict the use of recordings for disciplinary purposes to be limited to (1) when a complaint of misconduct has been made; (2) an incident involving the use of force; (3) a formal investigation could result from the recorded encounter; and (4) to corroborate "other evidence of misconduct").

98. *See* Rogalski, *supra* note 1 (describing the failure of the Houston Police Department to follow its own written policy requiring "three separate audits of body-camera video that are supposed to include: a monthly supervisor review; a semi-annual review from an independent police oversight board for misconduct and mistakes; and a video quality review from HPD's technology department").

99. *See* Wheeling, *supra* note 75 ("[I]f there's video footage of an incident, that's not the only record of that incident. There are other records that . . . are dealt with under public record laws . . . . So it just doesn't follow for me why body-worn camera footage should be treated differently . . . ." (quoting Michael Rich, a law professor at North Carolina's Elon University)).

100. *See* TEX. GOV'T CODE ANN. § 552.002(a) (Suppp.) (defining "public information"); *id.* § 552.003(1) (defining "governmental body").

101. No separate statute exists regulating public access to dash camera footage from law enforcement agencies in the Texas Occupations Code, Title 10, Chapter 1701 and police dash camera footage falls within the definition of "public information." *See id.* § 552.002(a).

footage.[102] In fact, police body-camera footage in Texas can be withheld from public disclosure by using a PIA exception.[103] Therefore, it is redundant and unnecessary to have a separate statute that regulates public disclosure of police body-camera footage when the PIA would be effective.[104] However, many states have passed similar laws or amended their respective open records laws to restrict public access to police body-camera footage more than other government records.[105] Such restrictions defeat the purposes of providing increased transparency and accountability through the use of police body cameras.[106] Consequently, Texas should take the lead among the states and provide increased public access to police body-camera footage by regulating public disclosure exclusively under the PIA.

State laws regulating public access to police body-camera footage vary. For instance, some states have recently passed laws restricting public access to police body-camera footage.[107] In fact, some states restrict public access by expressly excluding police body-camera footage from classification as a government record that would be subject to disclosure.[108] In contrast, some states allow significant public access to police body-camera footage by providing public access under their public information laws.[109] However, many states, including Texas, impose more restrictions on public access to police body-camera footage by using separate laws to regulate public disclosure, but purport not to completely eliminate such footage from public disclosure laws.[110] These variances are not likely representative of

102. *See* The Media Freedom & Info. Access Clinic, *supra* note 11, at 4 ("Current concepts embedded in most freedom of information laws are fully capable of addressing the concerns raised by access to body cam footage.").

103. TEX. OCC. CODE ANN. § 1701.661(e)(2) (Supp.).

104. *See* The Media Freedom & Info. Access Clinic, *supra* note 11, at 5 ("Body cam footage should be treated the same as other public records.").

105. *See, e.g.*, Spivack, *supra* note 40 ("More than 60 jurisdictions in over half the states and the District of Columbia have adopted body cameras, but many almost immediately restricted public access to the footage.").

106. *See* The Media Freedom & Info. Access Clinic, *supra* note 11, at 6 ("Legislatures and police departments have created body cam programs to promote transparency, enable accountability, and improve relationships between police and communities."); Alba, *supra* note 27 ("[C]ivil rights leaders and activists have called for the adoption of body cameras for law enforcement officers to promote transparency and increase public trust.").

107. *See, e.g.*, Nathan Smith, *Body Camera Laws Raise Questions About Access to Footage*, THE CURRENT STATE, July/Aug. 2017, http://www.csg.org/pubs/capitolideas/enews/cs72_1.aspx [https://perma.cc/9EFJ-FZFS] (passing a law in North Carolina in 2016 that restricted public access to police body camera footage without a court order).

108. *See, e.g.*, S.C. CODE ANN. § 23-1-240(G)(1) (2018) ("Data recorded by a body-worn camera is not a public record subject to disclosure under the Freedom of Information Act.").

109. *See* OKLA. STAT. ANN. tit. 51, § 24A.8(A)(9)–(10) (West 2019) (allowing "public inspection and copying" of police body camera footage).

110. *See, e.g.*, TEX. OCC. CODE ANN. § 1701.661 (Supp.) (regulating the release of police body camera footage).

differences in public policy or political viewpoints among the states, but rather that the use of police body cameras is still a relatively recent addition to police agencies.[111] In fact, state legislatures quickly passed laws regulating public access without much data or consideration of the effects of such laws because of the speed with which police began using body cameras.[112] Consequently, police body-camera footage should only be regulated exclusively by the PIA in Texas like other government information and records.

B. Agency Costs Associated with Public Disclosure Should Not Prevent Public Access

Greater public access to police body-camera footage will likely increase agency costs for archival and storage, reviewing and processing requests for the footage, and redacting footage.[113] In fact, redacting police body-camera footage can require a significant amount of time and costs.[114] Increased agency costs are a concern because most grant money does not include "federal funding for data storage,"[115] or processing public requests for disclosure. However, there are solutions that minimize, if not eliminate, the increased agency cost concerns related to greater public access to police body-camera footage. First, there are several options available for auto-blurring or over-redacting software that can be used to reduce the need for manpower.[116] Second, Texas already has a fee-shifting provision that—excluding some limitations—allows an agency to charge "an amount that reasonably includes all costs related to reproducing public information."[117]

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111. *See* Spivack, *supra* note 40 ("David McClure of the Urban Institute in Washington, D.C., said the speed at which police agencies have acquired cameras has complicated efforts for greater transparency in policing.").

112. *See* Wheeling, *supra* note 75 ("Police departments across the United States are equipping their officers with body cameras, but few have laws on the books to control who can access the footage."); Wolkowitz, *supra* note 4 ("The technology is ahead of the policy at this point." (quoting Chuck Wagner, deputy director of public affairs at the U.S. Department of Justice)).

113. Philip Marcelo, *Police Around the Country Are 'Woefully Short' on Body Cameras*, BUSINESS INSIDER (May 4, 2016, 12:51 AM), http://www.businessinsider.com/ap-police-begin-wider-body-camera-use-after-months-of-testing-2016-5 [https://perma.cc/3EA7-9SYJ] ("Police have warned that processing, reviewing and storing huge amounts of digital footage will require more manpower and entail significant costs.").

114. *See* Spivack, *supra* note 40 ("To redact faces in a five-minute clip could take two hours, ... You have to go frame by frame." (quoting Sara McDonald, a civilian police employee in Ventura California)); La Vigne, *supra* note 81, ("D.C. police chief Cathy Lanier says it takes 17 hours to prep just four minutes of footage.").

115. Berman, *supra* note 31.

116. For a discussion on individual privacy concerns with public release of police body camera footage and any possible need for redaction, see *infra* Section V.E and accompanying notes.

117. TEX. GOV'T CODE ANN. § 552.261 (Supp.).

Consequently, public access to police body-camera footage in Texas should not be restricted based on concerns regarding increased agency costs for disclosure requests.

Agency costs associated with public disclosure can be reduced by providing public access to police body-camera footage that has been through an automatic blurring or over-redacting tool.[118] For instance, Seattle Police Department used "experimental code that heavily blurred people's faces and addresses" beginning in 2015.[119] This allowed the department to provide an "'over-redacted' catalog" for people to browse through body-camera footage.[120] In addition, CrimeReports is a commercial service that provides police agencies with an online catalog where the public can view over-redacted videos.[121] In this way, agency costs are reduced because the person seeking public disclosure performs the searching for the video and is able to locate the exact footage sought.[122] In fact, this will likely reduce the number of public requests because sometimes people realize that the body-camera footage does not show what they expected or even just seeing the videos is sufficient. Alternatively, YouTube has offered a feature for automatically blurring faces that has been available since 2012.[123] The YouTube face-blurring tool is simple to use and allows the user to preview the video to see how the redacted video will appear before it is uploaded.[124] Even though YouTube's facial-blurring feature initially had some "difficulty detecting faces,"[125] it "has become increasingly well-tuned over time."[126] Therefore, advancements in technology can be used to diminish the concerns regarding agency costs associated with public disclosure of police body-camera footage.[127] Consequently, agencies can use technological advancements to provide public access to police body-camera footage in order to avoid excessive agency costs.

Nevertheless, current laws regulating agency costs for processing PIA requests in Texas can mitigate the increased agency costs associated with

118. For a discussion on individual privacy concerns with public release of police body camera footage and possible uses for redaction, see *infra* Section V.E and accompanying notes.

119. Weller, *supra* note 76.

120. *Id.*

121. *Id.*

122. *See id.* ("[M]aking footage available up front also saves agencies time, since it cuts down the amount of footage police department staff have to gather, redact, and send. Instead of combing through hours of video, they can easily select a two-minute clip.").

123. The Media Freedom & Info. Access Clinic, *supra* note 11, at 23.

124. *Face Blurring: When Footage Requires Anonymity*, YOUTUBE: OFFICIAL BLOG (July 18, 2012), http://youtube-global.blogspot.com/2012/07/face-blurring-when-footage-requires.html [https://perma.cc/A8X6-2DGU].

125. *Id.*

126. The Media Freedom & Info. Access Clinic, *supra* note 11, at 23.

127. Spivack, *supra* note 40.

public access to police body-camera footage. For instance, agencies are required to avoid "excessive reproduction costs" by "reasonably efficient use of supplies and other resources."[128] In other words, a police agency cannot be wasteful or inefficient in processing and reviewing PIA requests. In addition, the PIA allows an agency to "charge . . . an amount that reasonably includes all costs related to reproducing the public information."[129] At the same time, the PIA provides specific rights for requestors,[130] and requirements for agencies,[131] regarding charges for copies of public information. Therefore, the current laws in Texas sufficiently provide for agencies to charge fees to cover the costs of PIA requests.[132] On the other hand, the fees that can be charged by agencies for PIA requests will not prevent public access to the footage for people unwilling or unable to pay such fees. For example, it may be possible to review the footage without paying any fees.[133] Furthermore, agencies can "provide a copy of public information without charge or at a reduced charge" or "waive the charge."[134] Therefore, any increased costs associated with public access to police body-camera footage do not justify denying public access because such costs can be mitigated under the PIA.

C. *The Existing PIA Exception Sufficiently Protects Against Threats of Physical Harm*

The concern that police officers would be subjected to increased threats of physical harm if the public had more access to police body-camera footage is misplaced because an existing PIA exception already restricts disclosure under such circumstances.[135] However, "vague assertions of risk" will be

128. TEX. GOV'T CODE ANN. § 552.268.

129. *Id.* § 552.261(a).

130. *See id.* § 552.261(b) ("If the charge for providing a copy of public information includes the costs of labor, the requestor may require . . . a written statement as to the amount of time that was required to produce and provide the copy."); *id.* § 552.2615(a) & (d) (requiring "a written itemized statement" for charges exceeding forty dollars and limiting the amount of costs that can be charged based on the statement).

131. *See id.* § 552.2615(a) ("If a request . . . will result in the imposition of a charge . . . that exceeds $40, . . . the governmental body shall provide the requestor with a written itemized statement that details all estimated charges that will be imposed.").

132. *See id.* § 552.262(a) ("The attorney general shall adopt rules . . . for providing copies of public information . . . .").

133. *Id.* § 552.272(a) ("In response to a request to inspect information that exists in an electronic medium and that is not available directly on-line to the requestor, a charge may not be imposed for access to the information, unless complying with the request will require programming or manipulation of data.").

134. *Id.* § 552.267.

135. *See id.* § 552.152 ("Information . . . is excepted . . . if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.").

insufficient to overcome "the public's right to 'complete information.'"[136] In other words, courts require some "detailed evidence or expert testimony," but the courts will defer to "law enforcement experts about the probability of harm."[137] In fact, courts do not balance competing policy interests when analyzing the threat of physical harm exception to disclosure.[138] Therefore, since police agencies have the body-camera footage,[139] they are in the best position to prove whether the exception for "a substantial threat of physical harm" should restrict public disclosure.[140] Consequently, there is no need to restrict public access to police body-camera footage based on a perceived increase in threats of physical harm to police officers because the existing PIA exception sufficiently protects against disclosure when such threats are substantiated.

D. The PIA Exception for Law Enforcement and Prosecutorial Information is Overbroad

Most states provide exceptions from public disclosure for purposes of protecting the public policy interest in promoting effective law enforcement and prosecutions of criminal violations.[141] However, these exceptions to disclosure for law enforcement purposes can destroy transparency and accountability of police agencies.[142] Therefore, these exceptions should be applied cautiously and meticulously in order to properly balance the public interest in disclosure with the interest in promoting effective law enforcement. This can be accomplished by allocating the burden of proving a risk of substantial harm to law enforcement abilities or interests to an

136. Tex. Dep't of Pub. Safety v. Cox Tex. Newspapers, L.P., 343 S.W.3d 112, 119 (Tex. 2011).

137. *Id.*

138. *Cf.* Indust. Found. of the S. v. Tex. Indust. Accident Bd., 540 S.W.2d 668, 681–82 (Tex. 1976) ("[W]e do not believe that a court is free to balance the public's interest in disclosure against the harm resulting to an individual by reason of such disclosure.").

139. *See* Cyril & Yu, *supra* note 2 ("It's officers who wear and operate body-worn cameras, and it's the departments who own and control the recorded footage.").

140. GOV'T § 552.152.

141. *See* Schumann et al., *supra* note 58 ("Most states have carved out exceptions from release during ongoing investigations, exceptions related to public safety, and exceptions related to the best interest of the state.").

142. *See* Steve Zansberg, *As Body-Worn Cameras Proliferate, States' Access Restrictions Defeat Their Purpose*, COMM. LAW., Fall 2016, at 12, 14 ("[B]ody-worn camera video footage should be made available to the public upon request . . . because doing so enables police departments to demonstrate transparency and openness in their interactions with members of the community." (quoting Chuck Wexler, the Executive Director of the Police Executive Research Forum)).

agency that is seeking to withhold information under this exception.[143] In other words, there should be a presumption in favor of public disclosure and the agency seeking to deny public disclosure should have to prove that the interests protected by the exception outweigh the public's interest in disclosure. Indeed, presuming that the information requested should be disclosed and allocating the burden of proving that the exception should apply is simply an ordinary application of judicial approaches used in other similar circumstances.[144] In fact, one of the purposes of using presumptions is when one party has exclusive control of the decisive evidence and the other party has no adequate method of proving a fact otherwise.[145] Consequently, the law enforcement exception to disclosure under open records laws should be narrow and require the agency to prove the exception should apply because the law enforcement interest outweighs the public interest in disclosure.

In Texas, the PIA exception for law enforcement and prosecutorial information is overbroad because an agency can use it to deny a request for information regardless of the likelihood of harm to the investigation or prosecution. Specifically, "information that deals with the detection, investigation, or prosecution of [a] crime" can be denied under the law enforcement exception if there was no "conviction or deferred adjudication."[146] In other words, government officials can assert this exception to deny PIA requests for information related to a criminal investigation even though there was a full trial and the defendant was found not guilty. In addition, the law enforcement exception can be asserted for almost all information related to a criminal investigation and prosecution unless it resulted in a conviction or deferred adjudication.[147] In other words, agencies can assert this exception and deny public requests for information even in circumstances where there is little, if any, threat of interference or harm to a criminal investigation or prosecution. Furthermore, police agencies

143. *See* Tex. Dep't of Criminal Justice v. Levin, 520 S.W.3d 225, 227 (Tex. App.—Austin 2017, pet. filed) (discussing the policies of the PIA and concluding that "the governmental body has the burden of proving that information is not subject to disclosure").

144. *See, e.g.*, First Nat'l Bank v. Thomas, 402 S.W.2d 890, 893 (Tex. 1965) (ruling that the presumption disappears when the opponent provides sufficient evidence to justify a finding against the presumption).

145. *See* Hunsucker v. Omega Indus., 659 S.W.2d 692, 695 (Tex. App.—Dallas 1983, no writ) ("The presumption grows out of the fact that not infrequently the evidence . . . is exclusively within the possession of the defendant." (quoting Henderson Drilling Corp. v. Perez, 304 S.W.2d 172, 174 (Tex. App.—San Antonio 1957, no writ))).

146. TEX. GOV'T CODE ANN. § 552.108(a)(2).

147. *See* Holmes v. Morales, 924 S.W.2d 920, 925 (Tex. 1996) (explaining that the law enforcement exception under the Texas Open Records Act, the predecessor to the Public Information Act, was much broader than the similar exception under the Freedom of Information Act).

are not required to prove that releasing the information requested under the PIA will actually interfere with or harm the investigation or prosecution of a crime.[148] Therefore, the governmental agency can invoke the law enforcement exception and that invocation cannot be successfully challenged as long as the information is somehow related to a criminal investigation that did not result in conviction or deferred adjudication. Lastly, challenging a denial of access to information under this exception does not require a factual inquiry regarding the information requested and a balancing of the competing policy interests of public access to government records with protecting law enforcement efforts.[149] Therefore, this exception effectively acts as a police or prosecutorial veto to a PIA request for most information related to investigations and prosecutions.[150] Consequently, the law enforcement exception should be amended to require that agencies prove public disclosure will interfere with an investigation or prosecution and that the law enforcement interest to be protected outweighs the public interest in disclosure.

The law enforcement exception is overbroad because not all police body-camera footage related to an investigation will violate the purpose of the law enforcement exception and interfere with an investigation.[151] The purpose of the law enforcement exception is to protect investigations in order to be able to effectively prosecute any crimes committed and to prevent criminals from discovering police methodology and strategies in order to

148. The purpose of the law enforcement exception is to promote agency effectiveness in enforcing the law, not to prevent actual interference or harm. *See, e.g.*, Tex. Appleseed v. Spring Branch Indep. Sch. Dist., 388 S.W.3d 775, 778–79 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("The purpose of the statute is to prevent disclosure of information that, 'if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.'" (quoting City of Fort Worth v. Cornyn, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.))).

149. Challenges to a governmental invocation of other PIA exceptions involve a balancing of the policy interests of public access to government records and the policy interests protected by the PIA exception. *See, e.g.*, Morales v. Ellen, 840 S.W.2d 519, 522 (Tex. App.—El Paso 1992, writ denied) ("This case requires us to accomplish the delicate task of balancing the public's entitlement to 'full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees' against the privacy rights of harassment victims . . . .").

150. *See* Nat'l Pub. Radio, *State Laws Restrict Release of Police Body Cam Footage*, NPR (July 13, 2016, 4:35 PM), https://www.npr.org/2016/07/13/485895793/state-laws-restrict-release-of-police-body-cam-footage [https://perma.cc/3SU2-VVGD] ("[I]n most states, even when footage is a public record, there's a loophole that enables law enforcement to decide whether they want to share in the first place.").

151. *Cf.* City of San Antonio v. San Antonio Express-News, 47 S.W.3d 556, 563 (Tex. App.—San Antonio 2000, pet. denied) (ruling that an automatic and categorial exception under the PIA for all documents placed in personnel files was improper and that some information may be subject to disclosure despite being labeled in such a manner as to indicate exception).

avoid detection.[152] However, the statutory exception is much broader than this contemplates because it excepts information "relat[ed] to an investigation that did not result in conviction or deferred adjudication."[153] For instance, most public interactions with police occur in public places, such as traffic stops. In the majority of these interactions, police officers have either issued a citation or warning, executed an arrest, or decided not to take any further action at that time. As a result, most of these interactions do not result in further investigations at all, such as when a traffic citation or warning was issued. For example, police officers do not continue to investigate whether an individual was speeding after issuing a citation or a warning. Therefore, the law enforcement exception to disclosure is overbroad and should be amended to balance harm alleged by the agency to law enforcement interests with the public interest in disclosure.

Similarly, the law enforcement exception is overbroad because allowing public access to police body-camera footage will not usually interfere with a prosecution. First, defendants may be able to obtain the footage in discovery prior to trial.[154] Therefore, absent an agreement or court order to the contrary, the defendant would be free to share the footage with others, which will not change the prosecutor's ability to subsequently use the footage in the prosecution. In addition, existing rules sufficiently restrict juries from using or considering any information not presented during trial. For example, juries are instructed by the court about how they should behave, when they can discuss the case, and not to seek any outside information about the case.[155] Furthermore, there are provisions for having juries sequestered in extreme situations where the threat of outside information influencing the jurors is greater than normal.[156] Thus, the intent of the law enforcement exception to prevent the release of information that would interfere with prosecutions is

152. *See, e.g.*, *Tex. Appleseed*, 388 S.W.3d at 778–79 ("The purpose of the statute is to prevent disclosure of information that, 'if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State.'" (quoting City of Fort Worth v. Cornyn, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.))).

153. TEX. GOV'T CODE ANN. § 552.108(a)(2).

154. *See* TEX. CODE CRIM. PROC. ANN. § 39.14 (Supp.) (providing specific rules regarding a criminal defendant's rights in Texas to access or view information held by the government); Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

155. *See* TEX. CODE CRIM. PROC. ANN. § 35.23 (requiring the court to instruct jurors regarding their conduct when they are allowed to separate); *cf.* TEX. R. CIV. P. 284 (requiring the court to instruct jurors about discussing the case or searching for information not contained within the evidence).

156. *See* TEX. CODE CRIM. PROC. ANN. § 35.23 ("The court on its own motion may and on the motion of either party shall, after having given its charge to the jury, order that the jury not be allowed to separate . . . until a verdict has been rendered or the jury finally discharged.").

only implicated in the most extreme situations. It is more effective to handle such special or extreme situations individually than to unnecessarily override the public's interest in disclosure of government information. Consequently, the existing PIA exception for law enforcement exception is overbroad with regard to protecting prosecutions from interference by public disclosure of information.

At the same time, the law enforcement exception is overbroad because it can frequently result in a complete denial of public access instead of a temporary one as suggested by its intended purpose of promoting effective enforcement of the law. Since police agencies are able to determine retention periods for body-camera footage as long as it is retained for at least ninety days,[157] a public request after a successful prosecution may be too late because the agency no longer has the footage. In other words, the law enforcement exception prevents public disclosure until after conviction and, assuming a conviction takes longer than ninety days, police agencies can destroy the body-camera footage before the public is able to request it under the PIA.[158] Consequently, the law enforcement exception is overbroad and should be amended to include mandatory retention periods that provide eventual public access even when law enforcement interests require a temporary denial of public disclosure.

Currently, Texas courts do not apply a balancing test when analyzing the application of the law enforcement and prosecutorial information exception to the PIA.[159] In fact, courts "are not authorized to add rules or balancing tests that are not already in the act."[160] This is based on statutory construction rules that "give . . . statutes their plain meaning" when the "text is clear" and unambiguous.[161] Nevertheless, the Texas Supreme Court hinted that the Texas Legislature should consider rewriting the law to balance the competing policy interests implicated in the law enforcement exception.[162] Consequently, the PIA's exception for law enforcement and prosecutorial information should be amended to account for the need to balance the competing public policy interests.

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157. *See* TEX. OCC. CODE ANN. § 1701.655(b)(2) (Supp.).

158. *See id.*

159. *See* Tex. Appleseed v. Spring Branch Indep. Sch. Dist., 388 S.W.3d 775, 779 (Tex. App.—Houston [1st Dist.] 2012, no pet.) ("Nothing in section 552.108 suggests . . . that there is any sort of balancing test between the strength of the public's interest in the information and the degree that the release of the information would interfere with law enforcement.").

160. *Id.* (citing Holmes v. Morales, 924 S.W.2d 920, 925 (Tex. 1996)).

161. York v. Tex. Guaranteed Student Loan Corp., 408 S.W.3d 677, 683 (Tex. App.—Austin 2013, no pet.).

162. *See* Holmes v. Morales, 924 S.W.2d 920, 925 (Tex. 1996) (comparing the Texas statute with the federal Freedom of Information Act and holding, "[i]t is the Legislature's responsibility to impose restrictions, if any, on the . . . Act's unambiguous and unqualified language").

The governmental agency should be required to prove the alleged interference or harm to effective law enforcement or prosecution outweighs the public interest in disclosure when the invocation of the exception is challenged.[163] When an agency is challenged in court for denying information requested under the PIA, the agency has the burden to prove that an exception applies.[164] However, this burden of proof is rendered almost meaningless because of how broad the law enforcement exception is under current Texas law. In fact, an agency only has to prove that no conviction or deferred adjudication resulted from the investigation related to police body-camera footage requested in order to sustain their burden to show that the law enforcement exception applies.[165] Notwithstanding, at least one court held that an agency "must demonstrate that release of the requested information will unduly interfere with law enforcement and crime prevention."[166] This indicates that the court believed that the agency's burden to prove the exception applies must mean something more than simply showing no conviction or deferred adjudication resulted from the investigation. Furthermore, police agencies have the information,[167] so it is very difficult for a PIA requestor to overcome the agency assertion that the exception applies. Consequently, the presumption should be in favor of public disclosure and the agency seeking to withhold the body-camera footage should have the burden of proving that the harm to law enforcement outweighs the public interest in disclosure.

Nevertheless, the public interest in access to government records will not always outweigh the interests of protecting law enforcement efforts. In fact, balancing the interests will only result in disclosure in those instances where there is little, if any, interference or harm that can be shown to occur if the information is released. Therefore, the law enforcement exception will not be eliminated. Instead, it would be narrowed and restricted to protect only serious and substantial interests in effective law enforcement that outweigh the public's interest in disclosure of government information and records.

163. *Cf.* Peoria Journal Star v. City of Peoria, 52 N.E.3d 711, 713–14 (Ill. App. Ct. 2016) (interpreting Illinois Freedom of Information Act and requiring that the government "provide a detailed justification for its claim of exemption, addressing the requested documents specifically and in a manner allowing for adequate adversarial testing" in order to carry their burden of clear and convincing evidence).

164. *See York*, 408 S.W.3d at 688 ("A party seeking to withhold public information requested under the PIA has the burden of proving that an exception to disclosure applies." (citing Thomas v. Cornyn, 71 S.W.3d 473, 488 (Tex. App.—Austin 2002, no pet.))).

165. *See* TEX. GOV'T CODE ANN. § 552.108(a)(2).

166. City of San Antonio v. San Antonio Express-News, 47 S.W.3d 556, 565 (Tex. App.—San Antonio 2000, pet. denied) (citing Ex parte Pruitt, 551 S.W.2d 706, 709–10 (Tex. 1977)).

167. *See* Cyril & Yu, *supra* note 2 ("It's officers who wear and operate body-worn cameras, and it's the departments who own and control the recorded footage.").

However, amending the law enforcement exception to prevent the withholding of information without sufficient justification will result in increased transparency and accountability. As a result, the law enforcement exemption in Texas should be amended to balance harm alleged by the agency to law enforcement interests with the public interest in disclosure.

E. Limited PIA Exceptions Will Sufficiently Protect Individual Privacy Interests

Individual privacy interests are arguably the biggest concern most people have with public access to police body-camera footage.[168] In fact, there is reason for concern particularly because minority and low-income people may the most impacted by any privacy implications and they have the least resources to assert their rights and protect their own interests.[169] Privacy concerns regarding public access to police body-camera footage are particularly controversial because body-camera footage is collected by government officials. Therefore, police agencies can get caught in the middle between trying to appease concerns of individual privacy and requests for transparency and accountability.[170] Nevertheless, there is almost unanimous agreement that public access to government records should be restricted in order to protect individual privacy interests. On the other hand, there is much disagreement regarding the extent that public access should be restricted based on individual privacy interests.[171] The point of disagreement revolves around how much protection from public disclosure of police body-camera footage should be provided by law to protect individual privacy interests. However, the focus on individual privacy interests alone fails to consider other public interests such as the public interest in disclosure of police body-camera footage for transparency and accountability purposes.[172]

168. *See* Alba, *supra* note 27 ("One big concern is that such videos could potentially infringe on personal privacy . . . .").

169. *See id.* ("John Hamasaki, a California-based criminal defense lawyer, further points out that there could be a real concern about an increase in surveillance, especially since the proliferation of body cameras would likely impact more vulnerable communities like low-income neighborhoods and minority communities.").

170. *See* Spivack, *supra* note 40 ("'We are either invading people's privacy without any cause at all, or refusing to hold (ourselves) accountable,' . . . Flynn said. 'Whatever move you make in either direction, someone is going to be furious with you.'" (quoting Milwaukee Police Chief Edward A. Flynn)).

171. *See id.* ("It raises knotty questions about the tensions between privacy and the values of public disclosure." (quoting Rachel Levinson-Waldman, senior counsel at the Brennan Center for Justice at the New York University School of Law)).

172. *See* The Media Freedom & Info. Access Clinic, *supra* note 11, at 16. ("[C]reating categorical exemptions for body cam footage—as some states are threatening to do—would bar agencies and courts from considering the public interest in transparency when deciding whether or not to release body cam footage in a given case.").

Accordingly, narrowly drafted privacy exceptions under the PIA would provide a proper balance of those competing interests.

Currently, individual privacy interests are used to justify excessive restrictions on public disclosure of police body-camera footage in Texas. Since Texas does not regulate public access to police body-camera footage under the PIA, the separate statute provides two broad prohibitions on police agencies releasing body-camera footage. First, police agencies are prohibited from releasing "any portion of a recording made in a private space."[173] In other words, recordings that show places such as personal residences and other locations where a reasonable expectation of privacy exists are likely restricted from disclosure under this prohibition. Such recordings are likely subject to this protection from the U.S. Constitution based on case law that construes the Fourth Amendment because the recordings are made by government officials.[174] In addition, police agencies are prohibited from releasing footage depicting an investigation of criminal misdemeanor that is "punishable by fine only and does not result in arrest" unless the individual that was recorded gives written consent for disclosure.[175] This means that most interactions between police and citizens that occur in public areas are not able to be publicly disclosed without the individual who was recorded agreeing to such disclosure in writing. Accordingly, the prohibition on disclosing footage of private places is reasonable, provided that Fourth Amendment precedent is used as a guide to determine places where individuals have a reasonable expectation of privacy that should be protected.[176] In contrast, there is no need to create privacy rights that do not otherwise exist for individuals who are subject to an investigation for misdemeanor level criminal conduct. Specifically, individuals have diminished privacy expectations in public places. Accordingly, individuals would only be able to assert tort liability for non-government individuals recording their interactions with police occurring in a public place.[177] Therefore, existing constitutional and common law tort rights sufficiently

173. TEX. OCC. CODE ANN. § 1701.661(f) (Supp.).

174. *See* United States v. Jacobsen, 466 U.S. 109, 113 (1984) ("This Court has also consistently construed this protection as proscribing only governmental action . . . .").

175. OCC. § 1701.661(f).

176. *See* United States v. Jones, 565 U.S. 400, 405–406 (2012) (acknowledging that the appropriate analysis is that from Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347, 351 (1967), which states that "a violation occurs when government officers violate a person's reasonable expectation of privacy").

177. *See* Indust. Found. of the S. v. Tex. Indust. Accident Bd., 540 S.W.2d 668, 680–81 (Tex. 1976) (discussing privacy rights that are fundamental and determining "the State's right to make available for public inspection information pertaining to an individual does not conflict with the individual's constitutional right of privacy unless the State's action restricts his freedom in a sphere recognized to be within a zone of privacy protected by the Constitution.").

protect individual privacy concerns that may arise from public requests for disclosure of police body-camera footage. Accordingly, PIA exceptions should be written to reflect the narrow constraints on public disclosure in order to protect existing individual privacy interests under other sources of law.

A narrowly drafted PIA exception for protecting existing individual privacy rights under the Fourth Amendment will properly balance existing individual privacy concerns with the public interest in disclosure.[178] In other words, an individual should not be able to infringe on public access to police body-camera footage by asserting greater privacy rights than the Fourth Amendment provides against government action. As a result, the public interest in disclosure of police body-camera footage will be outweighed by privacy interests when the Fourth Amendment provides the most protection for individual privacy. Therefore, police body-camera footage depicting places where individuals have a reasonable expectation of privacy will be excepted from public disclosure under the PIA. For example, police body-camera footage that shows the inside of an individual's residence would be excepted from public disclosure based on existing individual privacy rights under the Fourth Amendment. In contrast, the public interest in disclosure would outweigh individual privacy interests in public places where Fourth Amendment precedent indicates individuals have a reduced expectation of privacy. For example, the Supreme Court has held that "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."[179] Therefore, release of police body-camera videos showing ordinary traffic stops would not implicate protected privacy interests other than possibly some personal information such as information found on a driver's license, which can easily be redacted from the footage. In addition, public encounters between police and individuals should not be accorded additional privacy rights because "[w]hat a person knowingly exposes to the public" is not protected under the Fourth Amendment.[180] Consequently, Fourth Amendment precedent can be used as a guide for writing PIA exceptions that protect existing individual privacy interests while simultaneously increasing public access to police body-camera footage for transparency and accountability purposes.

Similarly, a narrowly drafted PIA exception for protecting existing individual privacy rights under common law tort principles will properly balance existing individual privacy concerns with the public interest in

178. *See* Cardwell v. Lewis, 417 U.S. 583, 589 (1974) (declaring that "the primary object of the Fourth Amendment . . . [is] the protection of privacy" (citing Warden v. Hayden, 387 U.S. 294, 305–06 (1967))).

179. California v. Carney, 471 U.S. 386, 391 (1985).

180. Katz v. United States, 389 U.S. 347, 351 (1967).

disclosure.[181] In fact, Texas courts already use a tort standard when analyzing an individual's request to deny public disclosure of government records for privacy reasons.[182] Moreover, in order for an individual to successfully prevent public disclosure of government records, the individual must "meet a twofold test."[183] First, an individual must show that "the information contains highly intimate or embarrassing facts" that "would be highly objectionable to a reasonable person."[184] Second, the individual must show that "the information is not of legitimate public concern."[185] Therefore, narrow PIA exceptions to public disclosure should be written to provide for properly balancing existing individual privacy concerns with the public interest in disclosure.

Moreover, limited PIA exceptions would align public disclosure laws with the clearly established First Amendment right to record police, which was recently announced by the Fifth Circuit Court of Appeals.[186] Interestingly, there was no concern presented by either party or amicus brief regarding individual privacy interests for citizens involved in the police interactions that are recorded in public places. This is because individuals have a diminished expectation of privacy in public places.[187] However, the right to record police can be reasonably limited based on "time, place, and manner restrictions."[188] Similarly, public access to police body-camera footage would be subject to reasonable limitations based on individual privacy interests. Therefore, the only significant differences between an individual or a police body-camera recording includes ownership of the video and the level of detail in the recording, particularly the clarity of the audible conversation. First, individual privacy interests regarding the recording by government officials are protected by the Fourth Amendment.[189] Accordingly, there is no need to create additional individual privacy rights

181. *See* Indust. Found. of the S. v. Tex. Indust. Accident Bd., 540 S.W.2d 668, 683 (Tex. 1976) (using tort law to decide "whether any of the information requested . . .would constitute . . . an invasion of a claimant's right of privacy" under the Open Records Act, the predecessor to the PIA).

182. *See id.* ("We must decide, therefore, whether any of the information requested . . . is 'private' within the meaning of the tort law . . . .").

183. Morales v. Ellen, 540 S.W.2d 519, 524 (Tex. App.—El Paso 1992, writ denied).

184. *Id.*

185. *Id.*

186. *See* Turner v. Driver, 848 F.3d 678, 688 (5th Cir. 2017) ("We conclude that First Amendment principles, controlling authority, and persuasive precedent demonstrate that a First Amendment right to record the police does exist . . . .").

187. *See* Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

188. *Turner*, 848 F.3d at 688.

189. *See* Cardwell v. Lewis, 417 U.S. 583, 589 (1974) (declaring that the "primary object of the Fourth Amendment . . . [is] the protection of privacy" (citing Warden v. Hayden, 387 U.S. 294, 305–06 (1967))).

where none have previously existed. In addition, police body-camera footage is likely to have a better audio recording of the conversation between individuals and police officers. However, this distinction of potential audio quality does not violate either Fourth Amendment or common law privacy rights. Again, there is no reason to create individual privacy rights where none have previously existed. In fact, one of the reasons that police officers wanted body cameras was to be able to use the footage to refute allegations of misconduct, especially after short videos are posted on the internet that do not show the entire incident.[190] Consequently, limited PIA exceptions to public disclosure of police body-camera footage is appropriate because individual privacy rights are limited as well.

Indeed, PIA exceptions for existing individual privacy rights should be narrowly written because individuals should not be entitled to additional privacy rights for public disclosure of police body-camera footage for situations where they previously had no privacy rights. In other words, the use of police body cameras and the associated creation of government records should not create a new right of privacy where none previously existed. Furthermore, denying public disclosure of police body-camera footage based on privacy concerns would promote disparate results regarding individual privacy rights. Specifically, individuals who are recorded in public by police body cameras would be able to assert a right to privacy that individuals who are recorded by another individual in public could not assert. Consequently, PIA exceptions for individual privacy rights should be narrowly written so that disparate results in privacy rights are avoided.

At the same time, individual privacy concerns may also be sufficiently protected by using redaction tools such as blurring identifying and personal information in the video. For instance, police usually request individuals to identify themselves, which prompts most people to hand over their state issued driver's license or identification card. Since a driver's licenses and an identification card includes personal information that should be protected, blurring can easily be used to eliminate that information from being disclosed when the footage is requested by a member of the public. Advancements in technology have resulted in many options available for police agencies to use redacting tools for body-camera footage.[191] Furthermore, the costs and time associated with using redaction tools for police body-camera footage have

190. *See* The Media Freedom & Info. Access Clinic, *supra* note 11, at 7 ("Body cams also have the potential to speed up the process of exonerating police officers who have not committed misconduct . . . .").

191. For a discussion about redaction and redacting tools, see *supra* notes 118–27 and accompanying text.

greatly decreased with advancements in technology.[192] As a result, redaction tools can provide a good compromise that sufficiently protects individual privacy interests while allowing for public disclosure of police body-camera footage.

Lastly, one of the alleged benefits of using police body cameras is that citizens are more cooperative and respectful during their interactions with police, which results in improved relations between police and the public.[193] The improved behavior by citizens due to the use of body cameras is based, in part, on the same deterrence theory for the alleged benefit of decreasing police misconduct.[194] However, the deterrence theory is based on a speedy and highly probable adverse consequence that motivates people from acting or behaving in another manner.[195] This motivation that promotes more civilized behavior by citizens is removed when individuals are given the opportunity to refuse to allow public disclosure of police body-camera footage based on statutorily enhanced privacy rights.[196] Therefore, narrowly written PIA exceptions for individual privacy will promote one of the intended benefits of using police body cameras because of the civilizing effect on individuals during interactions with police.

VI. CONCLUSION

The public should have more access to police body-camera footage in Texas in order to achieve the transparency and accountability that was promised when police began using body cameras. In order to accomplish this, Texas's laws regulating public access to police body-camera footage should be changed in three ways. First, public access to police body-camera footage should be regulated by the PIA in Texas. Second, the PIA's exception for law enforcement and prosecutorial information should be amended to balance the competing policy interests of protecting law enforcement efforts while providing public access to government information. Finally, public

192. *See* Spivack, *supra* note 40 ("[T]he technology has advanced enough to diminish the tension between those who are pushing more public release of videos and those who say it's too onerous.").

193. *See* Evans, *supra* note 5, at 82 ("[S]tudies . . . found that body cameras improved citizen behavior."); Gill, *supra* note 49 ("[T]he cameras may also serve as a calming agent in the field . . . .").

194. Evans, *supra* note 5, at 82 ("Essentially, when people know they are being recorded, they are more likely to exhibit appropriate behavior, thus combining self-awareness theory and deterrence theory.").

195. *See id.* at 81 ("Deterrence theory proclaims that a 'swift, certain, and severe' punishment of wrongdoers prevents others from committing that wrongdoing.").

196. *See* TEX. OCC. CODE ANN. § 1701.661(f) (Supp.) (prohibiting police agencies from releasing certain footage unless "the person who is the subject of that portion of the recording" consents in writing).

disclosure exceptions under the PIA should be specifically and narrowly drafted in order to properly balance the policy interests of public disclosure of police body-camera footage and individual privacy. As a result, the increased public access to police body-camera footage in Texas would allow for transparency and accountability without compromising other important policy interests.

Police body-camera footage should be public information, and public access should be regulated by the PIA. In other words, police body-camera footage should be regulated like all other public information under the PIA in Texas. First, this would only require minor changes in Texas's laws. For instance, the PIA's current definition of public information already encompasses police body-camera footage.[197] Furthermore, any concerns regarding increased costs associated with increasing public access to police body-camera footage can be mitigated or eliminated through the use of technological advancements and existing statutory provisions for actual costs of reproduction. In addition, any concerns regarding an increased threat or risk of harm to police officers is misplaced because existing PIA exceptions and common law protections already prevent disclosure in such instances. Most importantly, accountability and real transparency—some of the intended purposes of using body cameras—can only be fully realized when the public has meaningful access to the footage.[198]

The PIA's exception for law enforcement and prosecutorial information is overbroad and should be amended to balance the competing policy interests of protecting law enforcement efforts while providing public access to government information. Police agencies should be required to prove that the harm to effective law enforcement or prosecution outweighs the public interest in disclosure before being able to withhold police body-camera footage. This can be accomplished by amending the law enforcement and prosecutorial information exception and using the existing Attorney General and court review processes in the PIA to ensure proper balancing of the policy interests. In fact, Texas could model its PIA law enforcement exception after Oklahoma's comparable law. In Oklahoma, police must prove that the information sought is "essential to law enforcement."[199] Furthermore, the Oklahoma law enforcement exemption for public disclosure only applies "where police have not yet referred the matter to a prosecutor."[200]

197. *See* TEX. GOV'T CODE ANN. § 552.002(a) (Supp.) (broadly defining public information including "information that is . . . collected . . . in connection with the transaction of official business").

198. *See* The Media Freedom & Info. Access Clinic, *supra* note 11, at 10 ("Exempting body cam footage from the definition of 'public' or 'agency' records in state FOIs is misguided.").

199. Sargent v. Seattle Police Dep't, 314 P.3d 1093, 1099 (Wash. 2013).

200. *Id.*

Consequently, amending the PIA's exception for law enforcement and prosecutorial information will result in increased public access to police body-camera footage, which in turn will promote transparency and accountability.

At the same time, Texas's laws should be amended to require retention of police body-camera footage for at least ninety days after the law enforcement exception ceases to be applicable. The current statutory requirements for retention of police body-camera footage is inadequate to ensure that the public can access the information after a final adjudication because of a proper but temporary exception for law enforcement purposes. In this way, the law enforcement exception does not become a permanent block on the information and allows sufficient time for people to be able to request the police body-camera footage.

Amending PIA disclosure exceptions to be narrowly written will sufficiently protect individual privacy interests. Individuals recorded using police body cameras should not have a greater level of privacy from public disclosure of such footage than the level of privacy accorded to them under the Fourth Amendment from the government itself. Furthermore, individuals asserting privacy concerns or complaints should not have a greater right to privacy from public disclosure than they could assert in a common law tort claim for invasion of privacy. Texas can look to the comparable statutes in other states for drafting narrow privacy exceptions. For example, Connecticut has "exemptions that protect the personal privacy of officials, victims, and third parties without eroding the public's fundamental right of access."[201] In addition, Oklahoma has well drafted, specific exemptions from public disclosure for police body-camera footage that properly balance competing policy interests.[202] Consequently, individual privacy interests will be sufficiently protected if the PIA exceptions are narrowly written in order to properly balance existing individual privacy rights with the public's interest in disclosure for transparency and accountability purposes.

201. The Media Freedom & Info. Access Clinic, *supra* note 11, at 26.

202. *See* OKLA. STAT. ANN. tit. 51, § 24A.8(A)(9) (West 2017) (allowing for redacting of a death or dead body, nudity, identity of minors under 16 or in violation of confidentiality of juvenile records, severe violence and bodily injury committed by a person other than a law enforcement officer, medical information not already publicized, protection of a privilege for mental health or drugs or alcohol evaluation, "personal information other than the name or license plate number," and "the identity of law enforcement officers who have become subject to internal investigation . . . as a result of an event depicted in the recording").

PROVIDING LEGAL SERVICES TO INMATES

BRADFORD COLBERT†

What I want to talk about today is mass incarceration, and also, how it relates to running a clinic at a law school for people who are incarcerated. One of things to start with—I just want to talk a little bit about mass incarceration and what that means. Essentially, what it means is that here in America, we incarcerate more people than any other country in the world—by a lot. We have five percent of the world's population and twenty-five percent of the world's prisoners.

Just to compare us with China, we have a population of 325 million, but we have 2,121,000 prisoners. China, with a population of 1.3 billion, has only 1,659,000 prisoners. So, the number of people that we incarcerate is amazing and it is a fact of life that we have become almost numb to. We don't think about it as that big a deal, but in fact it may be the most important thing going on in our world. It just has become so prevalent that we don't pay attention to it. An important piece of this is that in America, we incarcerate millions of people, but we do that under brutal conditions.

We have 50,000 men now who are in solitary confinement. If you can imagine solitary confinement, if you imagine yourself in a bathroom, close the door to a bathroom, and that's what it's like. And you are there twenty-three hours a day. For those of you of a new generation, that is without your phones. So you would be there in that bathroom without a phone.

Another piece of this are the conditions—it has become almost a fact of life that we accept that prisons are going to be violent, so much so that we laugh about prison rape. The idea that somebody can be raped in prison is a source of humor for people, which is amazing when you think about it. The idea that if you are a man, you have certainly been around people who have laughed about the idea of going to prison and about dropping soap or things

† Bradford Colbert is a professor at Mitchell Hamline School of Law, where he teaches criminal law and constitutional criminal procedure. He is also the director of Mitchell Hamline's Legal Assistance to Minnesota Prisoners (LAMP) Clinic. The LAMP Clinic provides civil legal services to indigent persons incarcerated in Minnesota prisons. In 2005, Professor Colbert received the William E. McGee Public Defender Award of Excellence, which is given in recognition of a person's commitment and dedication to being a public defender. In 2014, Professor Colbert was named one of Minnesota's Attorneys of the Year by Minnesota Lawyer.

like that. That it is a joke. We have accepted that so much so that we can laugh about that.

More recently, I don't know if you all read in the paper, but there were 1,200 prisoners in Brooklyn who did not have heat during the polar vortex; that was just kind of accepted. I found some statistics where it says twenty-three people have died behind bars in Texas since 1998 due to extreme temperatures, and again, that is accepted. It is not seen as something of a crisis. Just to give you some idea, this chart illustrates how many people we incarcerate compared to the world. As you can see, the United States is a complete outlier. We also incarcerate way more women than any other country. Again, ten times as much as the nearest country in NATO; Portugal fifteen people per 100,000, we incarcerate 133 per 100,000.

One of the things about America is we have federalism and so our system is spread out throughout the country. This graphic illustrates just how we incarcerate people. As you can see, the vast majority of the people are incarcerated in state prisons or local jails. There is just a small percentage locked up in the federal prison system, so it is important to acknowledge that we have to look at this from a state level, and this is some area Texas does not do as well. As you can tell, that although the United States is an outlier compared to the rest of the world, Texas is in fact an outlier compared even to the United States. Minnesota, although our weather sucks, we do better as far as incarceration goes. Our rate is actually much less than the United States rate. It is still as is, still much more than the rates throughout the world.

I do want to talk a little bit about the history of incarceration in the United States because it has not always been this way. That is important to know—that this is not the way it has always been. Prior to the American Revolution, we did not have prisons. We relied on fines, public shame, corporal punishment, and death. Famously, we used to have the "A" for adulterer but there are also other ways of shaming people. You know "D" for drunk, "F" for fighter, so there are different ways. We also imposed corporal punishment. We did public whippings, mutilations, and even castrations.

The prisons, up until the revolution, were used primarily as holding institutions. We did not keep people incarcerated after they were convicted. They were just held there until they were convicted, and once they were convicted, then we imposed some type of corporal punishment. After the revolution, Americans started to reconsider how we looked at punishment. In fact, this is where we separated from Europe, and we became more humane in how we treated people who were convicted of crimes. We thought this on practical, political, theological, and philosophical grounds. We thought that we were going do things differently in America because of the American Revolution. We wanted to change how we did it. And we did. This is when the prison system developed.

The first prison probably came in Pennsylvania and the Quakers were active in ensuring the prisoners were healthy and treated with dignity. They developed this system where they would place people in prisons based on the principle that they would go to prison and they would reflect upon their crimes and then they would become reformed. They were generally kept in solitary confinement. They were kept by themselves and they saw no one except for the occasional visitor and the other guards.

As you might imagine, while it seemed like the idea was humane, it was not all that humane. Charles Dickens visited America. He was essentially appalled at what was going on, and what he wrote about the idea is, "I am well convinced that it is kind, humane, and meant for reformation." But he became persuaded that, in fact, it is an immense amount of torture and agony, prolonged for years, inflicted upon the sufferers. And his conclusion was that this, rather than being a humane way of dealing with incarceration, was in fact much more than that. That it was more like torture. But this starts the idea, the idea of "this is the start of separating the people who are incarcerated from the community" and that's a theme that we're to get back to as we look at what we're doing now. We separate the people who were convicted of crimes, separate them from community because either they're going to corrupt the community, or the community is going to corrupt them. So, the idea is we want to separate them, we'll take them to someplace else.

Of course, there were, there was also at this time, slaves in America. And it's important to know that the slaves generally were not sent to prison because they were punished corporally. They did not receive the humane [treatment]. They weren't part of the new humanity that America was trying to do. It is impossible to convey just how awful people were to their slaves. Essentially, they were given the power through the Slave Codes to administer summary punishment, or what they euphemistically called "correction." This was done mostly through whipping. The slave master would have their whips at hand and they could simply, for any reason or for no reason, administer punishment because, of course, the slaves were property. They also—the law was quite clear—that if the slave, if the master, during this "correcting" happened to kill the slave, the master shall be free of all punishment as if the such accident never happened. And this also is part of our system. The racism inherent in our system arising from—obviously—the slave trade, which is much too broad a topic to get into, but it cannot be separated from our prison system.

So, we have the Civil War, and in the Civil War, famously we have the Thirteenth Amendment. The Thirteenth Amendment says, "neither slavery, nor involuntary servitude shall exist within the United States or any place subject to the jurisdiction." Except there is a gigantic loophole in the Thirteenth Amendment, and the loophole is that slavery can exist as a

punishment for crime where the party shall have been duly convicted. So, we have managed to, you know, at the same time we tried to abolish slavery, we enshrine it in our amendment for people who have been convicted of a crime. If you notice, this is famously [what] the *Ruffin v. Commonwealth* acknowledged; and that case from the Supreme Court of Virginia says quite clearly, "a prisoner has, as consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state."

So, the Thirteenth Amendment codifies slavery for people who are incarcerated. I don't know if you follow, but Kanye [West] has decided, in a particular Kanye way, that he talked about wanting to abolish the Thirteenth Amendment. And he clarified actually where he said he wanted to amend the Thirteenth Amendment. But so, we have the Thirteenth Amendment, and what the United States did with this is we changed slavery, and we abolished slavery, but only for people—unless they were convicted of a crime.

So, we adopted this convict lease system, and this system was developed because the Southern Confederates wanted to retain the dominion over the former slaves. They also needed the laborers. So, they essentially came up, which is a slavery model, for building the economy after the war. It was incredibly profitable for both the government and for the businesses.

They [convicts] were poor people, especially African-Americans who were arrested on minor discriminatory offenses and then were released by the state to private businessman. They [convicts] were forced to work for those business people in coal mines and railroads. It's my understanding this is how the Texas State Capitol was built, through the convict lease program. Where the people who were arrested on minor offenses were leased by the state to these businesses, and, as you might imagine, this was particularly profitable for both the government and the corporations who were working on it.

The treatment and living conditions were akin to slavery, very deplorable and the mortality rates were significantly higher. There was no incentive for the corporation or the state to try to treat these people [who] were convicted of crimes in any way that would be considered humane.

If a prisoner died, the corporation would simply go back and request another prisoner. There was a person named Martin Tabert. And Martin Tabert was a 22-year-old from North Dakota, and he was seeing the world and ended up in Florida. And he didn't pay for his seat on a train. And he was eventually convicted of stealing a seat and sentenced to a fine of $25. He could not pay a fine of $25, so he was sentenced to ninety days in jail.

The sheriff of that jail, J.R. Jones, leased Mr. Tabert to the Putnam Lumber Company. While employed, so to speak, by the Putnam Lumber Company, Mr. Tabert was beaten severely by his employer, a guy named Walter Hugganbuttom, beaten so severely that he [Mr. Tabert] died. This was

just an example of what was happening through this convict lease system and it became such a scandal that, in fact, this was abolished. And so, by about the 1930s, things were starting to change.

And, in fact, by about the 1930s, a new era prevailed in America somewhat akin to after the revolution, where we started to look at our punishment differently again. And from the late 1920s to the early 1970s, the incarceration rate in the United States was low and its capital punishment—we actually had a moratorium on it—it was very nearly abolished between 1872 in 1976. And so, we were on track, essentially, to what was happening in Europe and other countries. We were trying to become more humane and our punishment.

And then, starting in the 1970s and picking up speed in the 1980s, America adopted more and more severe penalties just as Europe was adopting more mild ones. This occurred for a variety of reasons, and it's from racism to capitalism, an incredibly wide mix of things brought this about, but not the least of which, crime became political—crime became a prime political issue in the 1970s.

Richard Nixon used this as a way to become president. He recognized just how this could be—how powerful crime could be—to influence his voters. And as a result, we saw substantial prison growth, and this graph just shows how it grew from 1950 to 2016. The idea that this is how we came to mass incarceration; this is exactly where we were, and I guess I think you can tell it has come down a little bit, but the growth rate is just exponential.

At a time, that is kind of amazing when you think about. At its peak, 3.2 percent of the U.S. population was under some form of correctional control. It's just amazing when you think about three percent of the U.S. adult population was under [correctional] control. And, in fact, among black men in 2007, it was 3,138 per 100,000 residents; and for black men who did not graduate from high school, a third of them have spent some time in prison. The numbers are incredible. It has also become quite expensive. The idea [of] how spending went from $6.5 billion in 1985 to $51.9 billion [today]. This is in the context of both corrections and public defenders—it just becomes [very] expensive.

We also have a big shift in the public perspective of how we consider people who were convicted of crimes. In 1980, for example, fifty-three percent of Americans believed that the primary purpose of incarceration was to rehabilitate. By 1993, this changed, where sixty-one percent of the American population [believed] that incarceration was designed to punish people. The racism aspect of this cannot be underestimated. The idea, and what it is done to the black community, when you incarcerate such an incredibly high percentage of people, [has really] been a dark stain on our country.

What I want to talk about now is, why now did this switch occur? What happened between America and Europe, where America became more, and more, punitive in its view of people who are convicted of crimes, and Europe became more humane? I think it's because there's this conflict of moral visions. They have, and we have, two different views of people who committed crimes; two different views of how we should treat people.

Americans, again generalizing, believe that people who commit crimes are morally defunct people, rather than ordinary people who committed crimes. The person's criminality is a feature of that person rather than the act. Because we consider the crime to be a part of that person, it diminishes the person's claim to membership in the community, and it makes it much easier to justify punishing them harshly. In Europe, no offense marks the offender as a morally deformed person. The persons who commit crimes are distinguishable from the crimes themselves because they are still members of the community, the harsh punishment is not justified. In America, the person who commits the crime is evil and different than us. He is also dangerous. Therefore, he must be kept under control. In Europe, people view people who commit crimes as an "us" and not a "them." It's more like a fellow student who is flunking the class and needs some extra tutoring, or a musician who needs practice but is not tone deaf. In Europe, people who commit crimes are not evil; they have done a bad thing. As a result, it's difficult to imagine how different the worlds are. This is a maximum-security prison in Scandinavia doesn't look anything like you would think a maximum-security prison would look like.

Here is a hallway with doors, and the doors to those are in fact cells. This is a cell and looks actually much better than my dorm room looked. They have their own shower, and this is the living space. Again, this is a maximum-security prison. This is the gym in that same prison, and they also have access to a musical studio.

The incredible thing about how we view people who have committed crimes in America is—this seems incredible to us—that we would actually treat them with a measure of dignity because this is how we treat people incarcerated in America. This is a maximum-security prison in America. It's the idea, [using an] euphemism, called "bedrock" after the Flintstones. The idea, as you can see, is that it is incredibly harsh. In comparison to the idea of the gym in Scandinavia, this is the exercise in a maximum-security prison in America. Here is how you see your visitors in America. This is the idea that you talk to them over the phone through glass. Another example of how we treat people is the overcrowding. This is a prison where we just have too many people incarcerated. We also talked about the idea of shaming. Sadly, and amazingly, we still do this. The idea that we put people incarcerated in uniforms to shame them. Famously, in Arizona, they put them in pink for the

purpose of shaming them, treating them as somebody who's not. We also do this even after they're incarcerated. The idea that, after you are incarcerated, it may become much more difficult for you to find work. The collateral consequences of a conviction in the United States makes it much more difficult for you to get by. It's difficult for you to find jobs, it's almost impossible for you to find housing. The idea is, again, continue the shame. This is not lost on the people who are being released from prison. As Dorsey Nunn put it, "the biggest hurdle you have got to get over when you walk out of the prison gates is shame. That shame. That stigma. That label. That thing you wear around your neck saying, 'I'm a criminal.' It's like a yoke around your neck. It will drag you down and even kill you if you let it." We go so far as to restrict their right to vote even after they've been released from prison.

So, what I want to talk about, is how our clinic in the United States, at the law school, is designed specifically to help students learn how to practice law; but we also hope that we can do something about mass incarcerations. We provide web clinics, and legal assistance is open to our prisoners. We represent people who are incarcerated on their civil legal issues. We do divorces, and tort suits. We sue the prisons. We do all sorts of different fun things. Explicitly, we want to teach them how to be a lawyer—teach them how to file a civil lawsuit, how to effectively communicate with their client, and how to effectively advocate on behalf of their client. The idea of the clinic—and you have some great clinics at South Texas—is that we want to teach students how to be lawyers. I think it is best, the idea would be that, in the clinic, they would actually do the representations. It's like a driver's ed, where the student is driving the car and I, as the clinical professor, am in the passenger's seat. So, the student is driving the car, so it is a great way to learn how to practice law.

But, because they are representing people who are incarcerated, we are hoping to have a bigger goal, by ending mass incarceration. How do we do this? By bridging the empathy gap that plagues the criminal justice system in America. Because in America, for most of us, there is this wide gap between the people who are incarcerated, and people who are not incarcerated. Most of the students in my clinic do not know anybody who has ever been in prison. Nobody in their family, and so they do not have any idea what it is like. While for a lot of America, going to prison has become the norm.

And so, when you don't have that contact you have a lack of empathy for the people who are incarcerated. And this is actually kind of scientifically proven—that you develop what they call "moral exclusion"—the judgment that some people are beyond the circle of moral concern, and not subject to our moral values. That they are an "other." Where prisoners are by necessity behind bars and we place them in remote settings, set apart from the rest of

us—purposely. They are behind steel doors and high security to make it difficult to get there. They are also further insulated from us because of who they are. They are disproportionately African-American, Latino, uneducated, poor, and we have set them off. We consider them "others."

The best way to build this empathy is to increase the contacts between the incarcerated world and the outside world. The idea being that, the more people will go into prisons, the more people communicate with prisoners, they will develop empathy for them, and to reduce the distance, they will see these people as prisoners.

The best story I can tell about that is—so I run a clinic for people who are incarcerated—a friend of mine runs a clinic for people who are victims of domestic violence, and the contrast is amazing because the students who are in the domestic violence clinic, there is always this perception that their clients are going to be angels. And they always walk away from visiting their clients a little surprised that they are, in fact, not perfect human beings. My students, when they go to the prison, they expect, I think, to see something other than a human being, because through our media, through our TV shows, we expect something that is less than human. Almost unanimously, my students come back surprised that their clients are in fact humans.

In that process, I don't believe they will ever look at prisons or prisoners the same again. The idea is that they will have been completely changed by the process. That is not to say that we should not hold people who commit crimes accountable. I believe that is an incredibly important part of the process. We need to hold people who commit crimes accountable. But that is way different than what we do in America. We need to rethink how we do that.

In my opinion, the best way to do that is by connecting with people who commit crimes and that is what our clinic does. Our clinic connects with the people who commit the crimes, and then they come away from that with a view that is completely changed. They have developed empathy for those people, and empathy has been defined as "understanding experiences, behavior, and feelings of others as they experience them." That is what we are able to do in the clinic.

STANDARD OF CERTAINTY IN JUSTIFYING A CRIMINAL CHARGE

GEOFFREY CORN†

What I really want to do is talk about two or three areas I think really create risk that the word "prosecute" moves a little bit too close to "persecute." Think about how closely aligned those words are. I looked them up last night in the dictionary. To "prosecute" is to pursue something to its conclusion. You prosecute the case, you prosecute a war, you prosecute your strategy, whatever it may be, but to "persecute" is to go after somebody improperly.

And it is interesting to me that you're at a symposium that's devoted to ethics, that we should step back for a minute and think about how the role of ethics informs the exercise of discretion. And I think there's no place where that is more significant than in the role of the prosecutor because the authority of the prosecutor is so plenary, and the ability to affect lives is so powerful that we often forget that the exercise of that function is largely unregulated.

Professor Williams just talked to you about the challenge of discovery and I am incredibly sympathetic to his view. The last case that I tried as a military lawyer was a rape case and I defended the soldier. There was a blatant discovery violation and it came to light just, kind of unusually because the government's key witness was an agent who I cross-examined pretty vigorously to no effect—the jury convicted my client. Probably because he did it. I mean, he never told me he did it, but my sense was he did it. And he was not willing to. He came up with some lies that were not particularly effective, but as for my job, I did the best I could.

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† Geoffrey S. Corn is a Vinson & Elkins Professor of Law at South Texas College of Law Houston, and a partner in the international legal consulting firm Corn, Jensen, and Morse LLC. Prior to joining the South Texas faculty in 2005, Professor Corn served in the U.S. Army for 21 years as an officer, and a final year as a civilian legal advisor, retiring in the rank of Lieutenant Colonel. Professor Corn's teaching and scholarship focuses on the law of armed conflict, national security law, criminal law, and criminal procedure. He has testified as an expert witness at the Military Commission in Guantanamo, the International Criminal Tribunal for the Former Yugoslavia, and in federal court. He is co-author of *The Law of Armed Conflict: An Operational Perspective*; *The Laws of War and the War on Terror*; *National Security Law and Policy: Principles and Policy*; *U.S. Military Operations: Law, Policy, and Practice*; and *National Security Law and the Constitution*.

And then a couple weeks later, his partner came to see me because she was in trouble. She was under investigation for misuse of a government vehicle, drinking on duty, and lying in a report after the vehicle was crashed. And I asked her, "Were you alone when this incident occurred?" And she said, "No I was with another agent." I said, "Who?" She said, "The guy who testified in your case." I said, "You mean the agent who testified in my case? When did this incident occur?" She said, "Like a month ago." I said, "So let me get this straight. A month ago, the two of you are out on an investigation, you were drinking on duty, you crash a government vehicle, you lie to investigators and there's an ongoing investigation into this?" She said, "Yes."

I didn't know any of that! The government didn't disclose any of that to me. Now think about it, if you were cross-examining a government agent, isn't that something you might want to know? That you're under investigation for lying under oath? Yes. So, I made a motion for new trial, and by the way, the prosecutor was ignorant of it. The police had not told him that this investigation was going on. He was mortified. He said to the judge, "Your Honor, I have no excuse, I'm sorry, but we didn't know. We didn't have this file." And the judge said, "I don't want to hear it, it's no excuse. It was part of your team. You know, the prosecution team—you're responsible for all that information." By the way, those of you who become prosecutors don't forget that. Police officers will frequently keep information confidential thinking that they don't have to disclose it to you, but you are accountable for it.

And the judge went back to the chambers and came back an hour later and he said, "I find that the defense was entitled to this information. I find that there was a blatant violation of the *Brady* obligation to disclose information. This is clearly impeachment information." And my client is sitting there thinking, "Okay this sounds good." And then, the worst word you ever want to hear: "However, having sat through the cross-examination of that government witness, I can't imagine that any more information would've made him look any worse and therefore, wouldn't have had any effect on the outcome and therefore, the conviction is upheld."

I am very sympathetic to this, but more broadly, I think it's important to step back and remember who we are and what we are, what we're preparing you to be as students. The dialogue we just had couldn't be a better set up because Professor Williams's research and writing has focused on the fact that there's very little that actually has meaning in controlling a prosecutor who decides to game the system.

Now, those of you who have sat through the ethics course that I teach for prosecutors know that in my view, it's less common that you have a malicious prosecutor—a prosecutor who believes she is prosecuting an innocent person and wants to get the conviction. Having supervised

prosecutors and supervised defense lawyers, what's more common is a prosecutor becomes convinced she's prosecuting a guilty person and then becomes concerned that by turning this evidence over—it might create legal doubt. She, therefore, finds an internal moral justification for violating the objective legal duty. What do we do to guard against that?

When you're in law school, you know you read case-after-case-after-case and you kind of start to gravitate towards certain justices. As some of you know, I teach national security law, and since I was in law school, the justice that has always fascinated me was Robert Jackson. He seemed like such a pragmatist and understood humanity. And I didn't know enough about him at that time, but then I learned later that before he was an associate justice on the Supreme Court, he was the Attorney General of the United States appointed by Franklin Roosevelt. I found this speech that he gave in 1940 to the U.S. attorneys in the Great Hall of Justice. Some of you may have read it. You can find it online: Justice Jackson's speech to the prosecutors, and that speech is all about why character and honor and integrity are the principal protections to the citizen against abusive power by the prosecutor. Here's what he writes at the beginning of his speech:

> It would probably be within the range of the exaggeration permitted in Washington to say that assembled in this room is one of the most powerful peace-time forces known to our country. The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. . . . While the prosecutor at his best is one of the most beneficent forces in our society, when he acts with malice or other base motives he is one of the worst. These powers have been granted to our law enforcement agencies because it seems necessary that such a power to prosecute be lodged somewhere. This authority has been granted by the people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved.

Now, Jackson wrote that in an era where we didn't have Rules of Professional Responsibility for lawyers, and when the jurisprudence of the Supreme Court didn't frame the exercise of prosecutorial discretion to the extent it does today. In his view, the protection against that type of abuse was the character and ethics of the individual who chose to be a member of the bar. And I think he would answer to you, if you have prosecutors who are not worried about their reputation among their own profession, that is a true danger. Now, of course, we live in a different era. But I think in an ethics symposium full of students who aspire to join the ranks of the graduates and the alums and the practitioners that are in this room, it's good to step back

and think about why ethics matter, especially in this profession. And I don't really care if you want to be a prosecutor or any other type of lawyer, you have to be your most ardent critic. You have to be the one that looks in the mirror every morning and says, "I'm proud of what I did" and what makes you proud is that you follow the rules. Matt [Fiorillo] wanted me to talk about stop-and-frisk and reasonable suspicion. I said, "Let me think of some other areas where I think framing the discretion of maybe prosecutors, and maybe even law enforcement officers could add to a greater confidence that what we're doing here is prosecuting and not persecuting."

And the first area that's always jumped out at me is the standard of cause to justify bringing a charge. You know, in that speech Justice Jackson says you don't have to prosecute somebody till the end to destroy their lives. You can destroy a life just by bringing a charge. You damage the individual's reputation. You can bankrupt them. Even, even the idea that they are under investigation can have a hugely destructive effect on their lives, their reputation, their well-being.

And so, the question has always struck me, what should be enough for a prosecutor to initiate a criminal action against the defendant? And interestingly, I did this. I mean I was, I, I technically no, because in the military the prosecutor doesn't charge anybody. The prosecutor prepares the charge, goes to a commander, and then says to the commander, "I recommend you charge," but it's pro forma. The commanders very, very, very rarely say, "Oh, I disagree. I don't want to charge Snuffy. Private Snuffy is a good kid, we're not charging him." They say, "What's the JAG say? You tell me where to sign, where do I sign to make this happen?" And when I think back on it, I'm not sure I even understood.

So, what's the standard? I mean, the general standard of the United States is probable cause. The Texas Rule for Professional Responsibility, professional standards for lawyers, Special Rule 3.09, Special Responsibility of a Prosecutor: "The prosecutor in a criminal case shall refrain from prosecuting or threatening to prosecute a charge the prosecutor knows is not supported by probable cause." That's not a particularly demanding standard. Now, I don't think you can completely understand my concern over this if we don't step back and consider some critical background. The critical background is very few cases that are initiated by a prosecutor are going to be tried to a jury. I'll read to you from *Missouri v. Frye*. *Missouri v. Frye* is the Supreme Court decision where the Court held that ineffective advice in the plea-bargaining phase of the criminal trial would violate the Sixth Amendment right to effective assistance of counsel. Well, they added to it. They had said that before but the question was, "Whether if I didn't provide you information that I got from the prosecutor—is that ineffective?" This is what Justice Kennedy wrote:

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours 'is for the most part a system of pleas, not a system of trials' (citing *Lafler*, the companion case) it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.

So, put the two together. You have a prosecutor who has the power to bring a charge. The standard is probable cause. The probability is it's never going to be tested in an adversarial contest. It's never going to be tested through cross-examination and confrontation and compulsory process.

The charge has the powerful shock effect on the defendant. And if you're a defense lawyer, depending on whether you're lucky enough to be in a Michael Morton state or in another jurisdiction where you don't get access to timely discovery, it's going to determine how much information you really have to assess the strength of the case. And, for those of you who have never done it, and with great admiration for those who do, people will ask defense lawyers, "Oh, I don't understand how you can defend the guilty people?" Defending a guilty person is damage control.

The really hard part, sometimes, is trying to figure out whether you should recommend to somebody you're not positive is guilty whether they should plead guilty. That's morally demanding. You're doing the best you can with what you've got. So, you put these two things together, and my concern is, it's too easy for prosecutors to initiate a process that's going to put a defense counsel in a position where if they don't accept this offer now it's going to go away, and they don't know how this case is going to develop, and they're trying to cut losses, and you have a defendant who's terrified of the consequences of turning down the deal. What should be the standard to justify initiating that process? Should it be probable cause?

What is probable cause? A reasonable basis to believe a defendant committed a crime. Why am I bickering with my friend over whether we should use the word "information" or "evidence?" Evidence is information that you have assessed is going to meet the evidentiary requirements to be admitted. Information is facts and objective circumstances that you're aware of where you haven't been required to assess whether it's even admissible. The probable cause standard doesn't require a prosecutor to look at a file and say, "Do I think I can prove this case beyond a reasonable doubt?" It doesn't even require the prosecutor to look at the file and say, "Do I believe I can

meet my prima facie burden of production—that I'll win a motion for acquittal?" To me, that seems absurd. It seems absurd.

Now, the U.S. Attorney's Manual is much more demanding as I recall. The U.S. Attorney's manual, when Gerald [Doyle] was a prosecutor for the U.S. Attorney's Office, said you're not supposed to charge somebody until you are satisfied you can prove the charge beyond a reasonable doubt—is that a fair summary? So, if you were a, I'll just use a word overly zealous prosecutor, you could avoid exposing that information to the grand jury, you could get your indictment, and now you got your leverage to try and get the plea, and then you move on.

I actually think the U.S. Attorney's manual standard is unrealistic in most state jurisdictions—I think in all state jurisdictions. I think that it is understandable why a U.S. Attorney should be required to assess the strength of the case to the end before they charge it for two reasons. Number one, the resources available to the U.S. Attorney, the investigatory resources available are pretty remarkable, and number two the nature of the offenses they normally try. I'm not sure as a prosecutor if I had, for example, an acquaintance rape case, that I could be positive that I had enough information to convict before I charged it. I think I could have enough information to know that I would win a motion for acquittal, and to me, that's the middle ground. And so, that's something I wish that the bar would consider, upping the standard for what a prosecutor must be convinced of before she brings a charge. Not that you've got probable cause, probable cause is too easy. You should at least be satisfied that you have enough admissible evidence to overcome a motion for acquittal when you rest your case. That way we are, what we're saying is, you're not charging a crime until you're satisfied you can get through the prosecutor's case and get it to a jury. Now, whether or not a jury acquits, that's much harder, or convicts, is much harder to assess. So, that is one area I think that really could use tightening up.

And again, I think if we had, if we had the immense and amazing privilege of having Justice Jackson in front of us, he would say, well yeah, you could put that in a rule, but the truth is, why would you want a prosecutor who would charge somebody not believing they could prove a case to begin with? My guess is that members of the defense bar would say "I'm not sure they charge people not convinced they can prove the case, but they charge people convinced that the charge will influence a plea bargain." So to those of you who at any point in your future have an opportunity to influence our special rule for prosecutors, it's a question you should be asking, "why are we following the NDAA standard Texas?" And by the way, even the Texas rules say shall refrain, it doesn't even say shall not, you shall refrain.

But again, you know, part of this for me today is not just talking about what I think would be good things to change. It's making you recognize that

when you practice law, so much of the integrity of the process is vested in your sense of honor, your sense of integrity, what you're trying to achieve. At the end of his speech, this is what Justice Jackson said to the prosecutors, and by the way, he's speaking in male terms because it's 1940. I doubt a U.S. Attorney in 1940 was a woman, but if we consider it gender-neutral, it's just as compelling. "The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand anyway." In other words, you don't need rules to tell you how to act ethically. Ethics come from a sense of moral value inside of you. So, while I think that there could be better standards, a better framework, the reality is you're operating in a system where that's not going to exist for large measure.

The other area, interestingly, that I thought of is this whole issue of pretext. Now again, that's the law-enforcement element of it. So, it relates to how evidence is obtained that leads to charges, that leads to plea bargains. And I had notes on the same case—the *Whren* [*v. United States*] case. Although my view on *Whren* is that, even though there's been better efforts to get statistics and have a public accounting for what might be viewed as pretextual stops, there's too much authority there. I don't understand why the Court should not revisit this issue.

So, just to refresh your recollection, *Whren* was the case where an officer sees a SUV being driven by young African-American man in DC, and he waits for the SUV to make a u-turn. Now, this is an undercover officer, and he decides to pull the car over for a u-turn. How many undercover narcotics officers are really worried about a u-turn? It's just so obvious that he's pulling the car over because he's got a hunch—a hunch that the guy driving the car may have something more than just bad driving habits. And then, of course when he pulls him over, he gets reasonable suspicion to pat him down. And then he pats him down, and he finds drugs, and the drugs are admitted.

And *Whren* argues to the Supreme Court that the Court should have some method of smoking out a pretextual exercise of law enforcement authority, in this case a stop. And the Court categorically rejects it. The Court says, "We assess compliance with the Fourth Amendment on an objective standard." Pure reasonableness, that's all that matters. Of course, it begs the basic question of what is reasonable. I think if you're Whren or you're a member of the community that is in the same position of vulnerability, you don't think that's very reasonable.

[Professor Kenneth Williams]: Why do you think the case went nine-nothing?

Because I think they were afraid of a flood gate; that every time there's a stop or seizure, the defendant is going to argue that this is a pretext. And

I'm sympathetic to that, I understand it. And, by the way, part of it is there was a basis to stop him. Why should we assume that the officer is acting improperly? But at some point, do those statistics matter? And this is more of like a query for you—especially you students who are taking criminal procedure, or who have taken it, and my colleagues who teach it—why was the Court so afraid of a subjective inquiry? Think of the *Katz* test, right? What does the Court have to determine to decide whether you have a reasonable expectation privacy? The first question they have to answer is whether you had a subjective expectation of privacy. It's central to the assessment of whether or not what the police did is even a search. And why was that test criticized by Justice Scalia? Because he said it was circular. What was circular about it? How does a judge decide whether you have a subjective expectation of privacy? Anybody know?

If I'm a judge, and Ken says he has a subjective expectation of privacy in the contents of his bookbag, how do I know? I use objective criteria. The objective question is whether you concealed it in your bookbag. If you concealed it in your bag, that objective evidence supports a subjective inference, or an inference that you had a subjective expectation of privacy. I don't see why that's so hard in the area of the Fourth Amendment. If there's enough objective evidence that suggests, that infers, an improper subjective motive, then why can't we consider that?

Same thing with *Batson*, right? Exact same process. The whole notion of *Batson* is that if you use a preemptory challenge against a minority, that objective evidence creates an inference of an illicit motive. Now you have an opportunity to rebut it. You're given an opportunity to rebut it. But *Batson* was just a burden of proof case. *Swain v. Alabama* said you can't do it. But it still has to be one that a judge can verify objectively. All I'm saying is that in other areas of criminal procedure, even in the Fourth Amendment realm, the Court has been unafraid to consider subjective attitude of the law enforcement officer or the prosecutor because there is objective criteria that can reveal it. And that to me is something I think that needs to be the next step in what Cathy [Burnett] was talking about.

If we are going to keep this data, the next question is what is the probative value of that data in assessing what's reasonable? Now one good thing I think, and maybe a little bit surprising if you agree with me on this, but we're in an era where the Court is really starting to question some of its deeply embedded principles of criminal procedure, cases like *Riley*, *Collins v. Virginia*, *Jones*, *Florida v. Ardenez*. So, the time seems right for something like the Pretext Doctrine to get a little bit more resurrection of scrutiny on that. Or what is the appropriate standard for charging somebody?

Again, my presentation was not designed to offer an issue and say here's a solution. What it's really designed to do is to say two things to you,

especially you students. Number one: remember how much we rely on your character, we the people. That's what Jackson said. The harshest critics are members of your own profession. A lawyer's reputation is a shadow cast by his or her character. Let that sink in a little bit. Character is the tree. Reputation is a shadow it casts. The better the character, the wider the reputation.

And the other thing is, don't underestimate, ever, your ability to make a difference. *Your* ability to make a difference. Somebody last night had our colleague from William Mitchell in the London program, that was you, right Mitchell [Austin]? And you said it was amazing to me that our professor had argued *Minnesota v. Olson* in front of the Supreme Court. I would suspect that Brad [Colbert] was a law review member at one point in his legal education. You think when he sat there as a law review member he could imagine that fifteen to twenty years later he would be arguing a case that would end up in every criminal casebook in the country? I kind of doubt it.

So yeah, I mean lawyers day-to-day may seem like you're just sawing the wood in front of you. But if you think things need to be changed and that opportunity falls in your lap, you can be the agent of that change if you're determined to do it. So, you should be inspired by a symposium that's focused on ethics because it's what defines a profession, especially a profession where power is immense, and discretion is immense. And that's what we are. And when you're a prosecutor, you're at the very apex of that pyramid. And you should never forget that. Thank you.

PROSECUTORS AND ETHICS IN THE AGE OF RESTORATIVE JUSTICE

HARRIS COUNTY DISTRICT ATTORNEY KIM OGG†

May it please the court of public opinion, I'm Kim Ogg. I'm your Harris County District Attorney and I'm here to talk to you about prosecutors, ethics, and how that works together in the age of restorative justice. So first, what is a prosecutor? A prosecutor is an elected officeholder in Texas called a district attorney who is responsible for criminal prosecutions of crimes occurring within a jurisdiction. What about ethics? The job of a prosecutor as defined by state law, our role is not just to convict, but to see that justice is done.

The Harris County District Attorney's Office mission statement, which we wrote, "I am, we are, dedicated to making our community safer through evidence-based prosecution and equal justice for all." This means guaranteeing a fair process to obtain a just result for the victim, the accused, and the community in every case. And I'll digress for just a minute to talk about the mission statement and how it changed in the last two years that I served as your district attorney.

It used to read, "this means guaranteeing a just result for the victim, the accused, and the community in every case." But, I realized as we journeyed through, first being elected to office, then to the role of actually being the person responsible for 735 employees, 329 of whom are obligated by our ethical duties every day, on approximately 27,000 cases on any given day, a total of 95,000 adult cases and another 11,000 juvenile cases every year. So, it's a daunting responsibility, and I thought, "you know, are we actually

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† Kim Ogg, Harris County District Attorney, is a native Houstonian licensed by the State Bar of Texas in 1987 and recognized as a specialist in Criminal Law by the Board of Legal Specialization since 1992. In 2016, DA Ogg was elected by a margin of more than 100,000 votes on a platform of criminal justice reform. She believes in equal justice, insuring a just process for the victim, the accused, and the community in every case and has focused her prosecutors on public safety by prioritizing prosecution of crimes against people and property. Kim Ogg brings her strong track record of public service and 32 years of professional experience to the position of Harris County District Attorney. During the first two years of her administration, she has successfully advanced major drug policy and bail reform, diversified the leadership of the District Attorney's Office, and effected legislative reform on behalf of crime victims.

responsible for the results?" We want fair results, the public wants fair results, but I realized that is not the role of the prosecutor; that is the role in a democracy of the people. The people decide on the results in cases, the people have the power to decide the ultimate outcomes in cases where there are disputed facts, and where there aren't, as in most cases, pleas of guilt or no contest are entered by thousands of people. So much of our system is disposed of, like much litigation, by agreement. And that which is not, goes to the public in the form first, of a grand jury, and secondly, of a petit jury. So, we do not guarantee results.

I tell you that because as I came up here, Dean Dennis suggested that I remind everybody I did ten tears as a defense lawyer. Well, let me say, I did seven years as a prosecutor, ten years as a defense lawyer, but I also did six years of public policy at City Hall; I ran a non-profit called Crime Stoppers for six years, and none of those things really prepare you for politics. I'll digress one more time. People often said after our election in 2016, "How in the world did you get through such a mean-spirited process that politics is?" I told them, "I served as the treasurer of my son's PTA for four years, and I practiced family law. And, by comparison, shoot, criminal defense and prosecution, piece of cake."

We really, in a democracy of the people, are the ones who ultimately have the power in our justice system to make decisions about who's guilty and who's not. And in Texas, the power to decide in criminal cases, upon election of the defendant, what the right result is. Everything short of those contested trials is basically done by agreement between the defense lawyer, the prosecution, and ultimately the court, who accepts or rejects the agreement, which they have the power to do. But, they do not have the power to sentence themselves, again that would go to a jury. So, because of that, I thought, "You know, we better control client expectations." Because that's what ten years in private practice taught me, and another seven years at the DA's office and on and on. So, I didn't want to guarantee the public that we would reach the right result in every case; I wanted to guarantee the public that we would protect the process in every single case.

I wanted to guarantee the public that we would protect the process in every single case. Now, why'd I do that? Well, I had an ethical dilemma. I can't guarantee a fair or just result every time, which is what I used to tell my clients, and they'd say well I talked to a lawyer down the street. He swore he could get me off if only I would give him "fill in the blank" with a dollar sign, and I said, then that's not the right lawyer for you because nobody in our system can guarantee the result. So, you lose a lot of clients that way, but you maintain your integrity as a lawyer, and this talk is about ethics. So, we don't guarantee a result. We guarantee a fair process, and why do we do that?

Because under our Constitution, the way I see it, either we all have rights, or no one has rights.

The reference to every case is important, especially, now today while I've engaged in a great battle for the budget of Harris County. It is important because the role of a prosecutor and the ethical obligation under which we perform says exactly that. That we're to see that justice is done. That doesn't mean in most cases. That doesn't mean hey, drag in a hundred people here, we'll convict and process like on an assembly line, a hundred of them and probably get ninety or so correct. Close enough for government work. Is it? Cause it's not for me. Every case means exactly that. But that takes time, and in government, we live in a time of limited resources. So, there's a great deal of pressure to ignore the individual rights of people. And that pressure comes, sometimes, from surprising places.

I know we've heard a lot today about prosecutors, prosecutorial misconduct, wrongful convictions, injustice. But let me suggest to you that our role is exactly the opposite. It is to seek justice. So, prosecutors can change the system through our actions. I don't know about you, but I sure am tired of people talking about what they're going to do, then doing a study on how to get it done, and then not listening to the study or getting it done. So, I believe that good governance, in a democracy, a free country, comes down to action. First, you tell people what you're going to do, then you do it, and then you remind them of what you've done. And what does that do? To me, it inspires trust, not just in the elected person. That's not really the point. It inspires trust in our system, which is an integral part as free courts and free press are to any free country. So, keeping our courts fair and ensuring individual justice isn't just my job, it's my passion. I like living free. Don't you?

So, what is restorative justice? I've seen a lot of different definitions. It's because it's a term of art, not of law. But what it really means, I've heard it said, you know we try to restore, the accused or the victim, or even the community. I like that. I've seen it defined as victim-centric. I've seen it defined as offender-centric. So, restorative justice, from my perspective, means applying the ethics that I learned at this school from lawyers who I've practiced under and with and against and before. And because that's how I learned the practice of ethics, when I was elected, we began an office called the Office of Professional Integrity. And I thought very hard about who would be able to advise 735 employees, 329 of whom are lawyers, and most importantly, me. 'Cause I'm responsible.

And I asked somebody that I practiced in front of, who I've asked to come today, because I wanted to recognize him. He knows what I think of him, but I want you to understand what he does. I think then you will probably share my opinion of Judge Dave Mendoza, who has been a county court

judge, a district court judge, a defense lawyer, and a prosecutor. He has seen the field from every position. He's not just a student of the law. He is a practicing lawyer and has been for a while—over forty years. I didn't want to say it, but at any rate, forty years.

So, we have that office because prosecutors face the limits in the age of restorative justice every day. By the way, they have faced before, we were in the age of restorative justice. We've always faced it. The difference today, especially post-Harvey, is that we recognize and enjoy the privilege and opportunity to represent the people of Texas. But we do it in a system that is very gummed up. Why? Because we had a big natural disaster; the biggest one in the country. Ever. It closed our courthouse. Many of you may be unaware that the courthouse still is not really open; it has some functioning courtrooms, but our lawyers handle cases in the civil courthouse, family courthouse, and in front of the probate courts. And despite that no one can get a trial, it's tough. Last I checked, weren't you entitled to a trial if you contested the accusation?

So, this is no small thing. The fact is that fewer cases are being tried because the courthouse has been knocked out. Nobody changed my duty, nor the lawyers who work with me, or for me. So, when they have dilemmas because they've just seen a case that's scheduled to appear in court tomorrow along with seventy others and the person sitting next to them has a 100 set, and I wish I was kidding, we go to cattle calls. Where judges, through docket control, believe that bringing 200 people into a courtroom at once is a way to move the docket. I didn't see that here. So, moving the docket has become, to some degree, the way courts handle volume. Because of this, we see fewer trials. Partly because of the building, partly because of the judiciary, and partly because of everything, we see fewer trials in Harris County. So, the caseload that pends on any one day is up from 19,000 (which is bad enough) to 27,000.

Now, when lawyers joined the District Attorney's office, I assure you, nobody thinks, "You know what, I'm gonna go in there and convict someone wrongfully today. I think I'm just gonna go after somebody because I'm in a bad [mood]." I haven't seen that. So, when you read about prosecutorial misconduct or ineffective assistance of counsel by defense lawyers, make sure that you understand the reality that where we work does have some variant on those things, because accidents can happen if you're going too fast, if your workload or caseload is too great, and if you just don't have enough hours in a day to keep up with the assembly line justice system that that kind of volume in this kind of post-disaster world presents. So, what do I tell our lawyers? Oh, just do it anyway? Go ahead and move that docket? Don't worry about the victims? No. We can't do that. Don't worry about the

accused? Don't worry about how much it costs? What is it doing to the community people are living in? So, these are some of the dilemmas.

Now, what have we done in terms of the big picture, and what are the ethics of prosecution? I really do think it is trying to guard the process. You do try to guide the result. I can't control it and can't ensure it, but I can guide it. How do I do that? Through evidence-based prosecution. Not relationship-based stuff, like "Hey, I like this defense lawyer," "Hey, I don't like that prosecutor," "Hey, let's tell them something that we wouldn't tell the other lawyer." Absolutely not. We do it based on the evidence.

Now, police can't gather all that evidence on the street, get it to us for charges, and us turn out in an hour like they do on TV. In fact, the Michael Morton Act, with which I agree with in its entirety; I know Michael Morton. John Raley works right now as a special prosecutor. The case has changed everything in criminal law in a way that I support, in a way that our prosecutors support. We believe in disclosure, and open files, because if we've evaluated the case properly and made a decision, if there's a contest, that's what trials are for. If we agree, that's what plea bargaining is for.

But what if you don't have the evidence because it comes in the form of non-interactive technology, like body cameras? Eighty-five law enforcement agencies in Harris County—they all bought different systems. Nobody called us to say, "Hey, do you think this will work with yours?" So, there's a lot of waste, there's a lack of collaboration, there's definitely silos of power. There are many things to overcome, none of which trump our ethical obligation in any age. But there are greater challengers and there's a lot more evidence. There's not just body cameras—there's cameras everywhere. There's also DNA. There's also different labs in town. Evidence comes from many, many sources, and to turn it all over to the defense requires that we have it first.

To make a thoughtfully considered offer on a case, trying to understand: is this a case where we should divert—truly turn this person out of the criminal justice system with a non-permanent mark on his criminal history, or is this a person who endangers the women, children, and men of our neighborhoods, who needs to be incarcerated. Those are decisions that need to be well thought out. That can't be done with the volume of cases we have and the number of lawyers that we've been limited to.

So, as we engage in this budget fight, I find myself thinking about our ethical obligation every minute of every hour of every day because I know mistakes can happen. How do I know that? Because I was a young lawyer. If you don't think that you're going to or have made mistakes, I want to join your firm. I've sweated through my suit on more occasions than I can tell you because I was afraid that I had made a mistake, and sometimes, I had. So, it is important not to be rushed in order to make a well-considered decision and offer.

What we've been doing is what we're going to keep doing. We're dividing, really, the players in the system into two parts: who can we divert and who do we really need to focus on in order, not just to preserve public safety, but to ensure their rights, because everybody can have a trial if they want one. I believe in that. We've been diverting a lot of people. How do we do it? We make them offers. We build programs that they can participate in. The first and biggest, and one that's gained the most notoriety is the marijuana program. We've diverted 8,465 people at a savings of about $36,000,000. I sure wish that they had done that ten years ago when rape kits sat on the shelves. The folks who were deciding where budgets went decided that they didn't need to test those rape kits, leaving rapists on the street.

We have engaged in a huge pretrial intervention program [(PTI)], which is simply a plea bargain contract that doesn't entail any kind of conviction or probation or deferred adjudication. It's basically an agreement that you'll do "X," and after "Y" period of time, you'll come back and we'll dismiss the case. You can immediately expunge it or you can expunge it within a year. It's a negotiable contract; it's another form of plea bargaining that doesn't require or necessitate the court's intervention or acceptance, mostly. Now, under the last judiciary, there were a lot of problems; they didn't want to accept certain agreements.

I was curious why we were bringing pretrial intervention agreements before them in the first place—another ethical issue. It's easy in a political world, which we live in a democracy, for the parties, the judiciary, the defense bar, the prosecution, the funders, the county court commissioners, to kind of get out of our lane. It's easy to sort of not see where your responsibility starts and ends. It gets very confusing. But I will tell you, there is just a lot of things we, as prosecutors, can't do. We don't set bail, but we do make recommendations. We don't determine sentences in contested matters, juries and judges do. We can't make the clerk of the court issue citations. Our powers have a huge amount of discretion for the power that we have, but we're just part of the cog of the big wheel of criminal justice.

So, we had a lot of resistance to these programs from the previous judiciary. Not all of the programs and not all the judiciary, but some people opposed these things. PTI, however, was completely in my discretion and so we have doubled the number of people who get it for non-specific defenses, generally non-violent, but not always. It can be in domestic violence cases. We've taken the number from one in 2001; now it is 5,900. When I came [into office], it was at 2,900.

DWI Diversion: We've expanded it. Felony drug possession: we divert into PTI—deferred adjudication—if we can get them into a special court. If they go through the regular courts, they continue to get convicted at a higher rate than we'd like because here's how that works: people come in, they're

high, their car's been impounded. They just want to get it over with. That's what they tell defense counsel, and as defense counsel, you know your obligation is to represent your client zealously. It is not to be their mother. You're trying to get their case dismissed. That may or may not be best in the long run for that person. But that's not your concern because that's not your ethical obligation.

Ours is different. We're supposed to be the justice system. So, I think it is bad for restorative justice to not have the time to tell that lawyer and that defendant, "Let's give this a week while you're on bond or while you're in jail or agreed to a bond. Let's give this six weeks to get the evidence and really see what is best." And then divert them into a program that actually helps them.

So, all in all, there are a number of reforms that we've enacted, but the bottom line is it has resulted in about 38,000 people in the last two years leaving the criminal justice system with a non-disclosable or expungable result in their criminal case. I'm very proud of that. That makes us the largest volume diverter in the country in terms of progressive prosecutors. I'm not even talking rural prosecutors. But we've got the numbers. The reason we're number one is because we've got four and a half million people. A lot of people commit crimes. A lot of people call the police. A lot of charges get filed.

And then there is the other side of the coin: What is our ethical duty when it comes to fulfilling our role as officials in the courtroom? After all, we represent the people of Texas. That is you. So, when a woman is attacked and her child is assaulted and the police are called and a complaint is made, what is our ethical obligation to consider appropriate punishment for that? Assuming we have the evidence to prove the guilt. Is it to protect the victim? No. Is it to protect the community? To some degree.

Public safety is certainly what people perceive the District Attorney's Office to be about, and if you know of anybody who has had a loved one murdered, you will know that they think of us as their lawyer in court and it doesn't tell the public we're not actually your lawyer, we are gonna try and prove this case and bring for a jury, but you know, we are not actually your lawyer. "Well" they say, "well then who is?" And I say, well, as a member of the public, we're your lawyer; but as the victim, in this case, we're not. We represent all people.

So, what is our ethical obligation to you? Well, it's to see that justice is done, and when you talk to people and when you listen to the results of verdicts being read like I have for thirty-two years, you learn people have pretty strong opinions about violent acts and the people who would inflict them on others. And they are protective of their families, and while they certainly are considerate of the rights of the individual accused, they're

scared and they want to be protected. Again, it's not my job, but that is their perception.

And so, what is justice when we leave those results to the people? Those sentences are often long, and that's because that's what the community thinks is just. So, justice is one of those terms that depends quite a bit on your perspective in the field. Whether you were harmed, whether you harmed someone. Who you represent. Or whether you sit as our judges do. Justice Alcala at the top of the peak in the Court of Criminal Appeals judging, not just people and cases like Judge Mendoza did, but judging then the lawyers who try those cases and the actual impact on the people involved.

So, ethics play a huge role in the daily lives of criminal attorneys, and I'd submit to you all attorneys every minute, of every day. So, what we've done is we've tried to take responsible public safety measures. Example, DWI. We arrest 10,000 people for DWI every year. We don't; the cops do. But that's how many we file and prosecute: 10,000. We are the ground zero for injuries and death caused by DWI in the country. A lot of reasons: we have a lot of roads, we're real big, not much public transportation, terrible conditions on the road, and a lot of bars. And people are people. And sometimes they drink, they get in their car and they kill other people.

What do we do? Well, we prosecute them. But I've thought it best to try something that doesn't just put a Band-Aid on it. And that is trace the source. How did this happen? How was it that Joe Smith was driving 100 miles an hour and going the wrong way on I-59 North. Well, he'd just left, well let's see what was my favorite one, "The He Ain't Here Bar." That's so that when somebody called up in the old days when they had hard lines, they'd say, "he ain't here." That's a joke. It's a real bar, I saw it.

Alright, so we are looking at did he leave drunk? Did the bartender see that he was drunk? Did they know each other? Was it after hours? Are they serving other drunk people? Are they running prostitutes in there, maybe a little human trafficking? It happens, and it happens all over Harris County. In fact, we are the number one human trafficking site in the country. People seem to want me to do something about that.

So, we can't pick and choose our public safety fights. You either really believe that public safety is part of the quality of your life, or you haven't been outside on the streets for very long. It is the way we keep order in our community; where we live free by agreement. We give the police guns to protect us and you give me the authority as your DA to thoughtfully judge these cases and try to achieve results or put them in your hands in a way that protects us because that's what we do to stay free. The courts have to be fair; the press has to be free.

In domestic violence, we find that it is driving the murder rate. About forty percent of our murders are people who love each other. People are

people, bad things happen. Domestic violence has to be treated in a new way. We can't just send people to a class and tell them they were bad, break up the family, and leave the children without support. We also can't leave the offender in the home; there needs to be a cooling-off period.

We have done some extraordinary things with domestic violence, but the idea is that we are taking more charges and are taking more strangulation charges because that is what our data and evidence shows is the highest risk type of offender to become a murderer. Somebody who gets into an argument with somebody they love, but he does not just hit her or she does not just hit him, they impede the breath person; they have that person's life right at their fingertips. That is a high-risk factor. How do we know that? That is what the evidence and data shows. What are we about? Evidence-based prosecution. So, we are filing those as felonies, and we are trying to divert people after the arrest into something where they don't always have a conviction.

How do we accomplish these goals of balancing public safety and the individual's rights to a fair trial, to fair treatment, to a fair process? We do it with people because it takes people to help people. I don't want to do a bait-and-switch on the public. I'm telling you the truth—it takes people to perform the task and fulfill the actions that spring from the vision of a transformed criminal justice system. Not one that doesn't exist, one where everybody behaves well and treats each other nice and employs the golden rule. But one that deals with the problems of real people, everyday people, us.

I'm looking to our funders because I understand my job. If you are for restorative justice, if you are for criminal justice reform, you have to fund that reform. That is why I am engaged in a budget fight. The public defender [Alex Bunin] is here today. We went to this law school together. He married a student named Nancy and I engaged in a lifetime partnership with my partner, Olivia Jordan. We all came right out of school; we went to the same classes—we are your criminal justice leaders today. We like each other; we work together. Of course, we disagree on many things. And now, we are pitted against one another it seems by interests that seek to politicize criminal justice.

There is no party at the scene of a crime. Nobody asks which primary you voted in. Nobody is curious which way you're going to go for president. There's a criminal, there's a victim, there's a result. My question is, "Do you want justice?" Because I do. Thank you.

INCARCERATING MIGRANTS

CÉSAR GARCÍA HERNÁNDEZ†

I'm going to steer us in a somewhat different direction, at least during the portion of my prepared remarks. I'm happy to talk about other issues about the intersection of criminal immigration law in the questions. But in my prepared remarks, I really want to take our focus out of the narrow and the more technical considerations about statutory rights and statutory remedies, as we have been talking about, and provide a little bit more of a historical and theoretical context for a phenomenon that is quite common these days. And that's the flip side of the freedom that District Attorney Ogg mentioned. The flip side of that freedom is imprisonment. So, I want to focus on imprisonment, but in particular, as it arises in the context of "crimmigration" law—the convergence of criminal and immigration law. To do that, I want to set the scene by taking us back in time when the Trump administration's practice of separating families, of prosecuting parents, and of detaining children was in full bloom.

Nowhere, more so than in my hometown, the place that formed me, as a lawyer, as an academic, as a person: McAllen, Texas. But it wasn't the only place that this is happening; it was happening throughout the Southwest. So, just after returning from this time that I spent in Slovenia, in Central Europe, I returned back to the U.S. at the end of July. About a week later, I headed down to Tucson, Arizona, and my destination there was an old motel, sitting along Interstate 10 that connects Tucson to Phoenix. Instead of a sign out front of this old motel, instead of a sign welcoming guests, there was a sign warning away visitors. Instead of around-the-clock help at the front desk, there was around-the-clock security monitoring of the perimeter. Instead of families enjoying a vacation, or people visiting Tucson for business, there were children surrounded by high fences and there were doors with electronic locks. That is the face of immigration imprisonment today. It's children.

† César Cuauhtémoc García Hernández is a tenured associate professor of law at the University of Denver. His academic interests center on crimmigration law, the convergence of criminal and immigration law. His first book, titled *Crimmigration Law*, was published by the American Bar Association in 2015. He is currently writing another book, *Migrating to Prison: America's Obsession with Locking Up Immigrants*, to be published by The New Press in 2019. He has published op-eds in *The New York Times*, *The Guardian*, and *Newsweek*.

Sometimes, these are seventeen-year-old children and sometimes these are seventeen-week-old children. It's women. Whether it's women who were traveling by themselves, or it's mothers, who came to the United States with their children. It is men. Some hope to support family back home, wherever that may be. Others have green cards and decades in the United States and call this place home.

In immigration prisons, there are people who are held under the power of civil law, because the government says that they might not belong here, and there are people held under the power of criminal law to punish them for coming here [to the United States]. Immigration prisons display the complexity and the contradictions of migration. Look hard enough, and you will find models of innocence. Those children, who are too young to be asked for their opinions. Look hard enough, and you will find models of repulsion: adults who have committed the most heinous of crimes. This confluence of all that humanity has to offer—this is my interest.

In multiple chapters in my first book, *Crimmigration Law*, I map the doctrine of immigration imprisonment. The legal, doctrinal roadmaps, that are pathways that result in people being locked up for violating migration restrictions. I explored the details of the legal mechanisms and procedures that lead to immigration imprisonment across several academic articles that I've been writing over the last several years. And now, I'm mobilizing this background in migrating to prison. This book, whose subtitle keeps changing, reminds us that we always do things the way that is inevitable. That we would adopt the particular court, on which we now overlook that immigration imprisonment developed and people are categorized as racially undesirable. And it thrives because of corporate profit and political windfall. All the while, real people suffer real harm, and that's why I conclude immigration prisons are indefensible. We should abolish them.

Because we are often among the few people who can access these sites, lawyers have an important role to play—not the only role, and perhaps not even the most important role, but a role nonetheless. What shapes this role takes carries a host of ethical issues. As I do in the book, I will spend the next few minutes describing the immigration prison system that exists today, how we got here, and why it continues to grow. I will start to lay the groundwork for raising, front and center, this question of the abolition of immigration prisons.

First, let's take a step back in time. Back in 1954, President Eisenhower's Attorney General, in a move that today sounds like mere fantasy, announced that the United States would stop detaining migrants, even if they clearly lacked permission to do so, even if the government knew it, and even if the government knew where they were. In November of that year, the *New York Times* reported that the last detained alien, a Norwegian

seaman who had overstayed his shore leave, was a passenger on the Battery-bound ferry at 10:15 AM. Battery is the southern portion of Manhattan. This Norwegian had overstayed his leave, meaning he came to the United States with the federal government's permission to be here for a short period of time. Whatever that period of time was had expired and yet he stayed. So, there he is, on Ellis Island about to head into Manhattan.

Four years later, Justice Clark, writing for the U.S. Supreme Court, explained that physical detention of aliens is now the exception and not the rule. Certainly, this policy reflects the humane qualities of an enlightened civilization. Just as it was possible to take a turn toward enlightenment, it was possible to turn away, and so we did.

In the 1950s, immigration laws strongly favored immigration from western and northern Europe. However, cracks were starting to show. We needed allies, so we ended decades-long exclusions of Chinese migrants (this was during World War II). We needed workers, so we recruited Mexicans from the Bracero Program—the largest temporary guest worker program in the history of the two countries. Migration patterns began to shift, but Jim Crow remained firmly rooted in culture, economics, and of course, in law. Anti-black racism was entrenched across the southwest and, in addition, signs saying "No Mexicans Allowed" were also common. White supremacy was secure until the civil rights revolution threatened to throw it off its perch. The Immigration Act of 1965 shifted immigration law to the form in which it currently exists—you can come to the United States if you have the right amount of education or the right family ties. However, the numbers must be kept to 20,000 per country—the statutory cap adopted by Congress. Within a few years, the face of migrants literally began to change as migration from Asia increased, while migration from Latin America became more unlawful. Those who longed for the old ways were primed to resist.

When dark skin migrants began to arrive without the federal government's permission in the late 1970s and in the early 1980s, federal officials turned to prisons. First, Haitians hoped to escape political and economic turmoil that had engulfed the waning years of the Duvalier regime. The Carter administration of the United States confined them. Within a few years Cubans, leaving the island from the Port of Mariel, joined those Haitians on their northward trek. The Reagan administration expanded and formalized the Carter administration's detention policy.

In 1982, Reagan's Attorney General, William French Smith, explained the administration's rationale this way: he said, "The detention of aliens seeking asylum was necessary to discourage people like the Haitians from setting sail in the first place." Despite Smith's hopes, migrants kept coming. By the mid-1980s, Haitians and Cubans had been eclipsed by Central Americans, who were seeking safety in the United States from the violence

that was racking that region. And they, too, were imprisoned. They were sent to federal penitentiaries, they were sent to military bases, and prison-like detention centers, run by the now nonexistent Immigration and Naturalization Service, the "INS."

Jenny Flores was one of those people. Her birthplace, El Salvador, was in the midst of a war when she headed north. The INS locked her up in a converted hotel surrounded by concertina barbed wire. She was forced to remove her clothing and she was searched. She sued and became the named plaintiff in the Flores Settlement Agreement, that is the court-supervised legal agreement that still sets the bar for the government's treatment of detained children.

Immigration imprisonment began in a bipartisan manner and it remains bipartisan. President Bush kept people in Guantanamo. This is well before September 11th, under the first President Bush. President Clinton left them there, despite public pressure to do otherwise. The next President Bush separated parents from their children. When Congress learned about this, it balked. Bush relented by building a detention site here in Texas, where families were confined together. President Obama shut it down within a few months of taking office, and then a few years later, Obama opened up two such sites—"family residential centers," as the government calls them; critics used the phrase "baby jails." This brings me to immigration imprisonment at present.

Today, immigration prisons are everywhere, and they take just about every form—from that old motel in Tucson to a converted Walmart down in Brownsville. There's a maximum-security prison in Manhattan, and there is a privately-run prison called a "detention center" outside of Denver in a suburb of Aurora. Some people are there because they dared to seek safety in the United States. Others flouted government restrictions about the proper way of arriving, coming here without the federal government's permission (that's a federal misdemeanor). It's close cousin, unauthorized reentry, is a federal felony. Still, others are locked up because the government wants to strip them of their permission to be here.

Take Gerardo Armijo, raised in South Texas, down in the Rio Grande Valley, not far from McAllen where I grew up. We were both born into poor, overwhelmingly Mexican communities; only I was born in McAllen, seven miles north of the river. He was born right on the southern side. I was born a United States Citizen; he was not. After high school, I went off to the Ivy League. He went off to Iraq. I was shocked by a different culture; he was shocked by exploding bombs. When he returned, he fell into drugs and the criminal justice system. One day, ICE picked him up and sent him to an immigration prison.

To run the immigration prison system, the federal government relies primarily on four agencies. There is the Immigration and Customs Enforcement Division of the Department of Homeland Security—"ICE." There's the U.S. Marshal Service and the Federal Bureau of Prisons, both of which are part of the Department of Justice; and there is the Department of Health and Human Services Office of Refugee Resettlement (ORR). ICE is responsible for detaining people who the federal government believes, and who the federal government is trying to figure out, whether they are going be allowed to remain in the United States or not. To do this it relies on hundreds of facilities, spread throughout the United States. Most of these are county jails, ICE simply just rents bed space from the county sheriff. Others are stand-alone facilities that are owned or operated by private prison corporations. The two biggest players in this market are CoreCivic, which used to be called, Corrections Corporation of America, and the GeoGroup. Together, collectively, private prisons corporations hold about sixty-five percent of ICE's detainees.

For its part, the U.S. Marshall Service is responsible for federal pretrial confinement of migrants suspected of violating federal immigration crimes. More than people suspected of violence, more than people suspected of committing a financial crime, immigration crime defendants are the most likely type of federal suspects to be detained pending prosecution. This is particularly noteworthy because there are two justifications for detaining somebody pending prosecution: you are a flight risk, or you are dangerous. And yet, folks who are charged with committing an immigration crime, like coming to the United States without the federal government's permission, are more likely to fall into one of those two categories than folks charged with a violent offense or with some kind of financial crime, that say might result in some cash to flee. Upon conviction, and most of them are convicted since the conviction rate is around ninety-seven percent, they are handed over to the Bureau of Prisons and the BOP then sends them into its network of private prisons.

The last of the federal agencies with a large role in imprisoning migrants is ORR, Office of Refugee of Resettlement. ORR does not run its own facilities, instead, it contracts with non-profits. Its main customer is Southwest Keys, an Austin based non-profit organization. Southwest Keys runs about two dozen sites on behalf of ORR. In Tucson, Southwest Keys uses that converted motel, and in Brownsville, it uses that converted Walmart mentioned earlier. Several states and cities have also gotten into the immigration prison business, and none more prominently than Arizona. SB1070, the so-called "Show Me Your Papers Law" from a few years ago, gets most of the attention, but there is a lesser-known law called "Proposition 100" that I think is also worth flagging. Adopted by Arizona voters through

ballot initiative in 2006, "Proposition 100" added a section to the state constitution barring judges from granting bail to migrants charged with certain felony offenses and who were believed to be in the United States in violation of immigration law. The possibility of freedom that bail promises was categorically converted to imprisonment at least until the federal court found it failed a substantive due process challenge.

Even without considering state imprisonment development, we are talking about a lot of people. In recent years, ICE has detained over 320,000 [people], [and] peaked at 478,000. The Marshall Service, about 100,000; the Bureau Prison, about 20,000; and the ORR, about 65,000. Every year roughly half a million people are deprived of their liberty because they violated immigration law, or at least because federal officials believed that they did. As some people enter and others exit the nation's immigration prison network, migrants are counted, and they are commodified.

The federal government alone spends billions of dollars on immigration prisons every single year and its largesse is welcome news to private businesses and local governments. CoreCivic gets about fifty percent of its revenue from the federal government and so does GeoGroup. With that, they hire people in out of the way locations where decent-paying jobs are quite often slim. Take 3,000-person Milan, New Mexico, where CoreCivic employs about 300 people. To elected officials, a threat to their high employment private prison is a threat to the reelection bids. When the Bureau of Prisons announced that it was cutting off that Milan facility, a local state representative said, "My first option is for it to stay private because of the revenue the prison produces for the city of Milan." And so soon the prison had another customer, ICE. Examples like this are not unusual.

In 2015, inmates at the Willacy County Detention Center, down in Raymondville (not far from Harlingen) left the facility uninhabitable. I was not surprised. I'd represented clients there. At the time, it felt like chaos wrapped up in mistreatment. The Bureau of Prisons pooled its convicted immigration offenders, folks who had been convicted of illegal entry or illegal reentry through the federal district courts, and as a result, ended its contract with the Management and Training Corporation [(MTC)], the private prison company that operated that facility in Raymondville.

This last summer, the facility reopened with ICE as its customer. Now, it houses people facing the possibility of removal from the United States. When the refurbished prison was ramping up, the elected county judge of Willacy County said, "They are committed to the well-being of the people in their care," speaking of MTC. "As you know the last few years have been financially challenging for the county. So, we look forward to the new facility and economic benefits it will bring to our area." I pulled this quote from MTC's press release.

Why is the county so interested? It owns the prison. MTC just runs it. Having prisoners on the inside means MTC can hire guards and nurses. It means that the county can pay its bills. With support from Washington to Willacy County, it seems that the future is quite bright for immigration prisons. In the days after President Trump's election, private prison stock skyrocketed. It is certainly a good time to be in the business of locking up migrants. I shouldn't say it skyrocketed because it didn't actually get back to a historical high. It was higher at periods under President Obama. It had just dropped.

An immigration lawyer, who spoke to me about the experiences she's had helping families locked up in Texas, had some helpful perspective. She says, "Trump escalated things. But this isn't about Trump. It didn't start with him." I agree with her. This is not about President Trump, but he's also not irrelevant to the story. In this topsy turvy world, our collective moral compass has swerved to the point where we no longer are debating whether we ought to lock up children. Instead, we debate whether it's better to lock up children alone or with their parents. Detaining children with their mothers is offered as a humanitarian response to taking children from their parents.

This is not just the Trump administration's position. This is a litigation position the ACLU has taken. When that's our reality, then imaginations have already run wild. What was once a fantasy for some and a nightmare for others, that's just policy for all of us. If nightmares can become reality, then why can't dreams? This is how I have come to evolve.

For three reasons, immigration prisons were born of racism from which corporations and elected officials profit handsomely. They skew our collective moral compass and they create immense human suffering. Instead of an immigration law enforcement strategy afraid that migrants will pour onto streets and into our schools, I imagine a different future. I imagine a future in which immigration prisons do not exist. I imagine a future much like the one Attorney General Brownswell spoke of in 1954.

This is a long and winding road from here to there. I do not pretend to have all the answers or even all the questions, but I do have some thoughts about how we can start heading in that direction. Immigration imprisonment is not about the rule of law. It's not about right and wrong. It's about the politics of fear refracted through that age-old prism of racism.

Today, immigration imprisonment is racially skewed. Government reports tell us that about 125,000 Europeans violate U.S. immigration law every single year, kind of like our Norwegian seaman. Yet ICE's prisons are not overflowing with Brits and Italians. Almost all detainees hail from Latin America. Today, we are afraid of the absurd; that one branch of government, ICE, will remove a person who another branch of government, the U.S. Attorney's Office, wants here.

Take an example from September [2018]. The federal prosecutors asked the judge to keep a migrant locked up, not because he might flee, not because he would endanger the community, but because they were afraid that ICE would take him and deport him preventing the prosecution they were interested in. And so, while ICE and the U.S. Attorney's Office were going after each other, the judge intervened and said it is perhaps a sign of the times that the court has to point out how absurd the government's position is.

Today, we are afraid of the ordinary that migrants might not show up to court. In the language of the law, that they will "abscond." And yet we do not bother to take simple steps to promote compliance with those legal proceedings: lawyers, families, and information. Today, we are afraid of the fantastical, that migrants are boogeymen. To President Trump, they're rapists and beheaders. To President Obama, they were felons, as he famously described his administration enforcement priorities.

Now it's true that reams of evidence show that migrants commit less crime than the native. To humanize the data, it's more likely that I am a criminal than the likelihood that my mother is. But *less* crime does not mean *no* crime. Immigration law tells us that migrants are "aliens," which is how the Immigration and Nationality Act defines everyone who is not a U.S. citizen. Migrants are not aliens; migrants are just people. And like most people, most of the time, migrants are profoundly ordinary. We in the United States like to imagine ourselves as exceptional. When it comes to migrants, we demand of them the exceptionalism we imagine in ourselves. Across the United States, migrants keep finding themselves locked up for possessing the very same marijuana that is being sold legally in Denver where I live and work right now in their big neon signs of green crosses. Across the United States, migrants are imprisoned because they did not get the government's permission to cross the border. Meanwhile, across the United States, sexual assaults are endemic on college campuses like those in which I spent most of my adult life. Few of those perpetrators are investigated, prosecuted, and convicted. Those are my students.

Immigration prisons turn some people into demons just like neatly manicured college greens make others into images of success. This is a double standard that President Trump certainly did not create. He just escalated it. Now, immigration lawyers know this very well. For eight years under President Obama, immigration lawyers ran hard every day defending their clients from the administration's heavy hand. And under President Trump, that heavy hand now wields a hammer. Most people locked inside an immigration prison will not get any help of any kind, from anyone. The largest study ever done of representation rates of people facing the possibility of removal found that twenty-four percent of detainees had a lawyer. One

quarter. In Houston, the number was even lower—only thirteen percent of detainees have counsel.

These numbers reveal an ugly reality of immigration law enforcement. Lawyers are a rarity. Inside immigration prisons, they are only seen occasionally and for that reason what they do see must be magnified. The access that lawyers have to courtrooms and to clients who are all sealed behind steel doors means that they must be conduits to the outside world. They are among the few who can watch, who can ask, who can hear, and who then get to walk out the doors that they came in and feel the sunlight beaming down on them without the refraction of concertina wire. And yet, [lawyers] must, because they can in a way that so few others can. But they must always do so, always do so, with the client's support. Not client's acquiescence, not even the client's approval, but support.

Migrants are not pawns to be played with Michael Avenatti-style. They're autonomous thinkers to be engaged with. They are emotional beings to be deferred to. And they are people to be respected. People are people, District Attorney Ogg said just a few minutes ago. The lawyer-turned-poet, Martín Espada, writes of a world in which he said dreams of immigrants crossing the border to be treated with trumpets and drums. For me, the cacophony of migrants being treated like the imperfect, fallible people who they are, that's good enough. But if it comes with trumpets and drums, well that's worth thinking about, too.

ETHICAL RESPONSIBILITIES OF THE CONVICTION INTEGRITY UNIT

GERALD DOYLE†

I'm the chief of the Conviction Integrity, we call it "Division," in Harris County. I'll use the acronym CIU or Conviction Integrity Unit because that's how these divisions are generally known throughout the country. I want to tell just a little bit about how we're set up. We have two full-time attorneys, so it's me and Randi Capone, who is a proud South Texas College of Law graduate. We've got a full-time paralegal and we've got a full-time investigator; we are the cold case unit, we deal with old cases. Cases where appeals have already run out, where there has been at least one writ, multiple writs in many cases, all of which relief has been denied, and there's still a claim of innocence out there. So those claims come to our division.

I want to talk a little bit about this scenario. I know a lot has been said about prosecutorial misconduct and there is definitely that. There are definitely situations, and the case law is out there with plenty of situations, unfortunately, where prosecutors have withheld *Brady* information or failed to disclose things; some intentionally, some unintentionally. But let me pause at this scenario with you and then tell you how I'm going to divide up my time. So, you're an ethical prosecutor. You were in Professor Corn's class. You know how to do the right thing for the right reasons. You attended the Ethics Symposium at your law school and you're out there practicing, and you've got a conviction as a prosecutor. It's now come to your attention that one of your key witnesses has recanted. Said, "You know what I said? That wasn't right, that was incorrect." Or the snitch that you used, and you had a good basis to believe the snitch was credible, turns out that that snitch was not credible, and you find out after the fact. Or you find that your police officer, your lead officer on the case, who has had a stellar reputation up to

† Gerald Doyle served in the Criminal Division of the United States Attorney's Office for the Southern District of Texas for 27 years in the Fraud, Financial Institution Fraud, Civil Rights, and Asset Forfeiture Sections. He also served as the Deputy Chief of the Criminal Division, Chief of the Special Prosecutions Section, and the Regional Director of the Southwest Region of the Department of Justice's Organized Crime Drug Enforcement Task Forces Program. Gerald is currently Chief of the Conviction Integrity Division for the Harris County District Attorney's Office in Houston, Texas.

this point, has now been found by the department to be untruthful. Or to have planted evidence. Or you've got a situation where forensic science, which you relied on, and which was thought to be credible at the time you presented your case, the Texas Forensic Science Commission has now determined that that is junk science. That there really is no science supporting what was thought to be science at the time of your conviction. Through no fault of your own as a prosecutor, you've got this information and it looks like there's a problem with your conviction.

I want to talk about two things: I want to talk about what is your ethical obligation as a prosecutor in that situation. Then I want to talk about how CIU's came to be formed and what really makes an effective CIU. They are an interesting phenomenon in our criminal justice system and a very recent phenomenon in our criminal justice system. So, let's talk about the ethical obligation post-conviction of this information that you now are aware of. I want talk about two rules in particular; I want talk about the ABA Model Rule 3.8., I want to focus on subsections (g) and (h). Then, I want to talk about Texas Disciplinary Rules, in particular, 3.09. We heard Professor Corn reference that earlier this morning, but I want to talk about it in post-conviction context.

So, analyzed under subsection (g) and (h) of Rule 3.8, a prosecutor's post-conviction ethical duties are substantial. Under subsection 3.8(g), if we become aware of new credible and material evidence creating a "reasonable" likelihood that a convicted defendant is innocent, we have two obligations: an obligation of disclosure, we must promptly disclose that evidence to the defendant; and "undertake further investigation or make reasonable efforts to cause an investigation" to determine whether the defendant is in fact innocent. So, under subsection (g) of Rule 3.8 of the Model Rule, we've got two obligations. We've got to disclose this information and we've got to conduct an investigation to see if that information really is true, it's credible and would lead to an exoneration of the defendant. Let's look at subsection (h) of Rule 3.8. Subsection (h) places an additional ethical responsibility on the prosecutor. If the prosecutor knows of "clear and convincing evidence" that the defendant is innocent, then the prosecutor shall, (not may, it's not discretionary) seek to remedy the conviction. That's quite an ethical obligation. Comment 1 to Model Rule 3.8 says that prosecutors have a specific obligation to "prevent and to rectify the conviction of innocent persons." Can't be any clearer than that. Texas Rule 3.09 was adopted based on Model Rule 3.8. They're both called "Special Responsibilities of the Prosecutor" but here's the difference: under Texas Rule 3.09, the prosecutor does not have an ethical obligation to investigate innocence. There's no ethical obligation under that rule to remedy a conviction if there's clear and convincing evidence that the defendant is innocent.

One of the cases that interpreted Rule 3.09 and compared it with Model Rule 3.8 came out of Houston. Texas Court of Criminal Appeals, Houston, the 14th District. It's the *Commission for Lawyer Discipline v. Hanna*. It had to do with Fort Bend County. In that, the Texas Court of Appeals compared Model Rule 3.8 and Texas Rule 3.09 and concluded that Texas Rule 3.09 did not even impose a post-conviction duty of disclosure on the prosecutors. Essentially, Texas Rule 3.09 does not pick up 3.8(g) or 3.8(h). However, I think that in just reading the opinion, I think the court was a little uncomfortable with the result it reached. It went on to add a couple of important caveats. It noted that its ruling was pre-Michael Morton Act. Article 39.14(k) of Texas Code of Criminal Procedure now poses a postconviction duty of disclosure. The court also noted that in the Preamble to the Texas Rules of Disciplinary Conduct, they say that those Texas rules establish only a minimum standard. It's like going to class pass or fail, just enough to pass. That's what our ethical rules provide. Then, the court reminded prosecutors that Comment to Rule 3.09, you heard this echoed throughout this morning and this afternoon, a prosecutor has the responsibility to see that justice is done and not simply be an advocate. The Michael Morton Act has added a post-conviction disclosure obligation on prosecutors. Prosecutors are required to disclose exculpatory, impeaching, or mitigating information, and again, that distinction that Professor Corn mentioned between evidence and information, we have to disclose information. It is not a determination if it is going to be admissible at trial or anything like that. If we get information, we've got to turn it over to the defendant or the court. However, Michael Morton still does not impose an ethical obligation to investigate if there's a reasonable likelihood a convicted defendant is innocent.

Let's look at another rule under the Texas Disciplinary Rules, Rule 3.03, which adds a post-conviction obligation of disclosure on all lawyers. Under that rule, subsection B, "a lawyer shall take reasonable remedial measures, including disclosure of the true facts, if the lawyer offered material evidence and comes to know it was false." However, the term "remedial measures" is not defined, and again we are talking evidence, not information, and again we are talking material. There is a materiality assessment in 3.03. So, in summary, if you're a Texas prosecutor and you have that information, your minimum ethical obligations would be to disclose the information to the defendant, or the court, under the Michael Morton Act and take remedial measures if, as a prosecutor, you learn that the material evidence offered to convict or punish the defendant was false. That is a far cry from the ethical duties under Model Rule 3.8.

So, what are moral obligations as prosecutors and where do we look for that? I would suggest we look back to 1935—we heard Professor Corn talk

about Justice Jackson's comments in the 1940s. This is about five years prior to that, in a case [called] *Berger v. United States*, the Supreme Court articulated the moral considerations that should guide a prosecutor. Although referring to federal prosecutors, it was a counterfeit case, the Court's remarks are equally applicable to state prosecutors. In the state, the Court noted that "a prosecutor is not an ordinary party to a controversy, they are part of a sovereign." You heard Kim Ogg talk about representing the people—that is what prosecutors are and their obligation is to govern, to prosecute, impartially. As such, said prosecutors are peculiar servants under the law. They have a twofold purpose, to see that guilt should not escape and they must see that innocence not suffer. I think that informs the moral obligation that Comment 1 to the disappearing Texas Disciplinary Rule 3.09 states when it says, "the prosecutor has a responsibility to see that justice is done not simply be an advocate." The Supreme Court later, in a case in 1976 *Imbler v. Pachtman*, expounded a little more about the prosecutor's obligations in post-conviction context. The Supreme Court stated, "after a conviction, the prosecutor is bound by the ethics of his office to inform the appropriate authority of after-acquired, or other information, that casts doubt upon the correctness of the conviction." So, moral obligation of disclosure, not necessarily investigation.

Barry Scheck comments in his 2010 law review article that appeared in the *Cardozo Law Review* titled *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work and Models for Creating Them*. In it he notes that the Supreme Court clearly intended responsibility for addressing wrongful convictions on prosecutors in their office. Why? Because we're the ones that have the most ready access to the documents, and the witnesses, and the information that we collect. As Barry Scheck notes, the proper place to investigate and take steps to correct wrongful convictions is in the prosecutor's own office. I think it's against these ethical and moral obligations that Conviction Integrity Units were formed.

Conviction Integrity Units—and I use the acronym CIUs—are a recent development in our criminal justice system. The first really functioning, and I think there is an argument Santa Clara, California or Dallas first, but I am going to go with Dallas. The first functioning CIU really was 2007 in Dallas County, and you will hear from Mike Ware who was founder of the CIU and how that came about. Harris County followed quickly thereafter in 2009. There are thirty-three CIUs in the United States as of 2017 and a couple have come online since then, Detroit, Jacksonville, and here in Texas, Collin County just north of Dallas. There are six CIUs in Texas: Dallas, Harris, Tarrant, Bexar, Travis, and Collin which is still in its formative stages.

We are very unique in the criminal justice system because we're staffed by prosecutors— and not just prosecutors—we're staffed by the prosecutors of the very office that convicted the person who now says they were innocent. And that has caused some speculation, and some suspicion, among those about CIUs. That CIUs are really formed as a way to cover—a political cover—for DA offices to protect their own offices to make it appear to the community that we're trying to do the right thing, but in reality, were really incentivized to protect our own. I think the facts suggest otherwise, so let's go to the National Registry of Exonerations that you heard a little bit about in Professor Williams's comments about that this morning. In the annual report they released in March 2018, it says "in 2017, and three prior years, most exonerations were produced by CIUs and innocence organizations with an increasing number resulting from cooperation with trained CIUs and innocence organizations." Let me share with you a headline that appeared in March 8, 2017 in an article *How One Texas County Drove a Record Rise of Exonerations*—that's Harris County and that's mostly our drug cases. CIUs and innocence organizations cooperated in sixteen exonerations in 2017 alone. CIUs have helped secure 269 exonerations, more than eighty percent of which occurred since 2014.

Two things are uniformly true about CIUs: they have a common function—they conduct a fact-based review of convictions, with the goal of rectifying wrongful convictions, of rectifying convictions of innocent persons. The second thing that's uniformly true about CIUs is there is no two that are alike. They are different in structure. They are different in policies. They are different in procedures. In April of 2016, the Quattrone Center at the University of Penn[sylvania] Law School released a report. They conducted a survey of CIUs. They reported on that survey, and from their report they identified three characteristics of effective CIUs—what makes them work. They identified those three categories as independence, transparency, and flexibility. And I want to talk a little bit about those characteristics and what makes an effective CIU in each of those categories.

Independence. To be effective, a CIU should be independent of peer pressure within the office and open to the possibility that the office made mistakes, made errors in judgment, either intended or unintended. How are we viewed in our own office? I hope we're viewed as a resource, I think we are. We're involved in training; we're involved in doing things to try to prevent wrongful convictions. We are a critical component of that office. We view ourselves as quality control. I think others might view us as internal affairs and that's okay. Most every organization has an internal affairs area and I think it does help people to know that someone else is looking and grading their papers.

The CIU should also be empowered to identify and report mistakes including instances of prosecutorial misconduct, and we have that, and we report to our general counsel. So, if there's something that we see, official misconduct of some kind, it immediately goes to a general counsel in our office. And we should be empowered to report systemic problems that we see. We have a unique perspective because we cover a wide spectrum of years, and prosecutors, and issues. And I think the perfect example of that is the systemic issue that our division played a part of with the controlled substance cases.

That call came in—those cases were being—relief was granted on those writs, on a number of writs, and there was a pattern out there, but it wasn't really picked up by the office. It was picked up by a journalist who called the office, and that call made it to the Conviction Integrity Unit, and we drilled down. And it was my predecessor, in 2014, that drilled down and did an excellent job to say, "Oh yes, I think that there is a problem here. I think people are pleading guilty for a variety of reasons before there has been a confirmatory lab." So, the office went through an extensive review of lab reports, matched them up with the judgments. Out of that, about 133 defendants, were determined that plead guilty but when the lab report came in after they plead guilty, confirmed that it wasn't a controlled substance that they possessed. That policy changed because of what the division found and reported to upper management. So, as I commented on earlier, in 2015, it changed so we don't do that anymore. Fortunately, the labs have caught up from that backlog and it takes about seven days at least—Houston Forensic Science Center—to come back with a confirmatory report. That 133 number—that you heard from Professor Williams earlier this morning—is not a static number. That number is changing, keeps changing, and still goes up. Our unit is involved in reviewing, still reviewing, labs and judgments. What happens is as these law enforcement agencies seek to destroy their controlled substance property, they send motions to our office and we review them.

In a controlled substance area, we review each to make sure that there is a confirmatory lab. If there is, we will match it up with a judgment, if not, then we ask the lab to test the material again, before it is destroyed, to get a confirmatory judgment. We have over 250 cases; they are not innocence cases, but they are wrongful convictions. We have notified the defendants or the defendants' attorney. We work with the public defender's office and they identify someone that we will notify when we come upon that situation. The distinction is in an actual innocence case is what they thought was a drug is not a controlled substance, confirmed by a confirmatory lab. In a wrongful conviction, the judgment says it was meth and it was really cocaine. So, it is still a wrongful conviction, as far as we are concerned. We give notice to the

defendant and the defendant has an opportunity to file a writ and say, "I was convicted wrongfully of possessing a drug that I did not possess."

Best practices in the independence area for effective CIUs: a direct line of communication with the elected DA and her leadership team. Independence from other post-conviction units including the Appellate Division and Post-Conviction Writs Division, both of which have different perspectives than our unit. The development of internal policies and procedures for reporting findings of official misconduct, whether by a prosecutor or by law enforcement. The second element was transparency. To be effective, a CIU must be transparent. In other words, non-prosecutorial stakeholders in the criminal justice system must have confidence in the CIU. By that, I am talking about judges, the defense bar, innocence organizations, and the community at large. All of them must believe that we are transparent in what we do and we are in fact part of the effort to seek the truth. Its conviction integrity, the truth is that if we have the right person then we are thrilled about that because that means that an innocent person is not sitting in jail for crime they did not commit. By the same token, if the truth is that an innocent person may be in jail for a crime they did not commit, then we are going to drill down and find out what the truth is and get that rectified.

Best practices: collaborative, non-adversarial review of the evidence. We partner with innocence organizations, we partner with the defense bar, we partner with anyone who brings us that information. Good-faith efforts to identify and locate evidence that may be available to test or retest. Providing access to documents and records including the state's file which contains everything that we have collected in connection with that offense.

An example of the transparency and the willingness to collaborate in a non-adversarial review is a two-year grant that our Conviction Integrity Unit is currently participating with the Innocence Project of Texas and the Anthony Graves Foundation, an innocence organization here in Houston; Anthony Graves was an exoneree. The purpose of the grant is to collaborate on the review of over 300 cases where DNA testing was denied by giving those cases a second look from multiple perspectives. So, perspectives of the prosecutors; we're gonna be involved in that review. Defense attorneys, innocence organizations, an exoneree, Anthony Graves is in on that project, and I'm proud to say that South Texas College of Law students are gonna be participating in that as well reviewing these cases; and we're happy to have everyone review cases. Our view is the more eyes you have on this stuff, the better off you're gonna be in seeking the truth.

And then the last item is flexibility. The more flexible and open the CIU is to consider a variety of claims, the more likely it is to address the causes of wrongful conviction. According to the National Registry of Exoneration as of today, updates a little bit Professor William's statistics, there are 2,372

exonerations since 1989 with over 20,735 years lost due to incarceration for crimes that people did not commit. The exonerations include multiple contributing factors: mistaken witness identification, perjury, false accusation, false confessions, false or misleading forensic evidence, and official misconduct.

Best practices: we review cases whether there's a plea or a confession, we'll take a look at it. We review cases despite the defendant's previous post-conviction history; whether they've appealed it all the way to the Supreme Court, we'll still take a look if there's new evidence out there or stuff that wasn't tested. And we're open to the possibility of discovering new evidence or questioning the science used to convict. And I'll give you an example of that—a recent example. Just about six weeks ago, the Texas Court of Criminal Appeals exonerated Stephen Chaney who was sentenced in 1987 to life in prison for a murder he did not commit. This conviction, over thirty years ago, was based on bite mark analysis which is, as the Criminal Court of Appeals stated in its December 19, 2018 opinion, "once appeared proof positive Chaney's guilt and now no longer proves anything."

In summary, CIUs are effective if we follow the moral precepts articulated by the Supreme Court, and although not obligated to follow Model Rule 3.8, if our best practices are established such that we *do follow* the precepts of Model 3.8, then we will be effective. It should be noted in the Chaney case, the CIU in Dallas County participated in that exoneration, and it is my pleasure to pass the baton to Mike Ware who founded the Dallas County CIU, is Executive Director of the Innocence Project of Texas and a former classmate.

INNOCENCE PROJECT OF TEXAS

MIKE WARE†

When Gerald [Doyle] and I started practicing in the mid-80s, criminal law, it was a much different landscape—a much different narrative that prevailed. We were overrun with crime; criminals were bad; everybody was guilty; everybody had to go to the penitentiary for as long as possible. The prosecutors were the good guys; the defense lawyers were the sleazy guys. If I at that time were to go into a district attorney's office—number one—if I were to have asked for the conviction integrity unit, they would've had no idea what I was talking about because that didn't come for another thirty years or twenty-something years. But, if I were to imply that they had convicted my client who was factually innocent, they probably would've called security on me. I mean that was just a totally foreign concept. Innocent people in the mid-80s—in people's minds—did not get convicted in the United States of America, except in movies or except on TV, and then it was so astounding it was a story—a fictional story—but a story.

The post-conviction DNA testing—I think the first postconviction DNA exoneration was in 1989 out of Lake County, Illinois—changed all that. All of a sudden during the nineties and early 2000s—you know case after case, high-profile case after case—you would see science proving that someone who everybody thought was guilty, who the whole world thought was guilty, in fact, was not guilty. Who in fact had served years and years for a crime that had been committed by someone else. This was proven by irrefutable

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† Mike Ware has been board certified in criminal law by the Texas Board of Legal Specialization since 1990. In 2006, he co-founded the Innocence Project of Texas. From July 2007 until July 2011, he was the Special Fields Bureau Chief for the Dallas County District Attorney's office, and was head of Dallas County's Conviction Integrity Unit (CIU). In April 2009, Mr. Ware was featured in "Dallas DNA," a six-week television series on Investigation Discovery (ID) based on his work with the CIU. In July 2011, he resumed private practice in Fort Worth. Mr. Ware has an AV rating from Martindale-Hubbell, and has been voted a "Texas Super Lawyer" by his peers as both a criminal defense attorney and prosecutor. In 2014, he was selected as the Percy Foreman Lawyer of the Year by the Texas Criminal Defense Lawyers Association. In 2018, Mr. Ware was honored with the Judge Norman W. Black Award from the LGBT Law Section of the State Bar of Texas for his representation of the San Antonio Four, which was the subject of an award-winning and Emmy nominated documentary, "Southwest of Salem." Currently, Mr. Ware is in private practice and is an adjunct professor at Texas A&M University School of Law. Since 2017, he has been the Executive Director of the Innocence Project of Texas.

science and this began to—if not change the narrative—sort of creating a competing narrative. Innocent people in America, we don't know how many, but innocent people in the United States of America get convicted. People who didn't do it get convicted.

In 2006, Craig Watkins got elected as the District Attorney of Dallas County and took office in 2007. I'd been practicing criminal defense in Fort Worth, next door to Dallas, for twenty-something years. Everybody hated going to Dallas County as a criminal defense lawyer. Dallas people hated going to Dallas County. Their discovery, their idea of discovery—I guess they thought this was funny—was if you want discovery, go talk to your client. He or she was there, they know what happened—that's your discovery. That was obviously before the Michael Morton Act. Craig Watkins, as an outsider, was the first African-American person to be elected DA anywhere in Texas, but certainly in Dallas County. Seeing the panic—if you will—of some of the old-time prosecutors there thinking "what we going to do now," you know somebody from the outside is going to come in and be looking at what we've been doing. Seeing them resign, seeing Craig fire ten high-ranking prosecutors his first day. Honestly, I was sitting back looking at it and a lot of us were kind of amused at what was going on because of what had been going on in Dallas County for so long. Even at that point, Dallas County I think was leading off all counties with DNA exonerations. It wasn't that many at the time, maybe five, six, seven, eight, or nine. They were leading the nation in DNA exonerations, which surprised no one, really.

Craig hired my best friend—not my best friend, but a very good friend of mine—to be his first assistant. She came up with the idea of a conviction integrity unit. She called me and asked me if I would leave private practice, and I headed up to Dallas. At that point, we hadn't even decided what it was going to be called. She suggested a "conviction integrity unit," and I said you know, whatever. But there weren't any in the country. It really was a revolutionary concept in that DA's office. We're supposed to convict as many people as they could, put them away for as long as they could, and then you know, let God sort them out.

The concept of going back and looking at old convictions that the office may have wrongfully got, and trying to right that from inside the DA's office was unheard of and very controversial. People were questioning whether we really knew what the heck we were doing; that we were really out of our lane doing that. Craig himself had some serious questions about it, about the optics of it. Here he was, under the spotlight, the first African-American man to be elected DA in Texas, and the first thing he starts doing is turning loose a bunch of people, which is the opposite of what the police and many, many people thought he was supposed to be doing. But, he went along with, and we had some success.

I'm going to talk about a few cases that we had, and I think, largely because of the success that we had, is why there are CIUs all over the country. First case I am going to talk about is Greg Wallace. This just shows how you can be so sure you're right and be so wrong. He was convicted in the mid-80s, here in the last days of Henry Wade as the DA. Back at that time, it was a cold and stormy night, and some poor woman answered a knock on her door. A man said, "I need to use your phone my car is broken down." It's snowing, it's sleeting, and he pushed his way in and sexually assaulted her for several hours and then made off into the night.

They didn't have any leads for it. The only thing she could really describe is he had a unique tattoo on his arm, his left arm. It was a woman, with long flowing hair, and it basically covered his whole arm. So, the police did a composite drawing of the tattoo as she described it, put it up in jails, soliciting informants, and someone informed them that they knew a guy that had a tattoo like that: Greg Wallace, who in fact was on parole at the time for aggravated robbery. He had never been accused of a sexual offense or anything like this, but he was on parole for aggravated robbery.

That's the composite drawing that she made or that was made based on her description. She actually described the head is on his back and the hairs flowing down his arm. So, based on that, they put Greg Wallace's photo in a photo spread, and she picked it out. She said, "That is the man that sexually assaulted me for several hours; I will never forget it." So, he was arrested based on that, and they took pictures of his tattoo. Sure enough, there's his tattoo, it roughly meets the description, although, it really is in a completely different place. It's on his arm rather than on his back. Long story short, he wasn't arrested until a couple of months later, and he had an alibi. He, every night at that time, and his wife were home. The alibi didn't work, he was convicted; she got on the stand saying, "there's no doubt in my mind, that's the man who assaulted me." Besides, look at the tattoo.

Well, Dallas County did DNA testing, and Greg Wallace was excluded. It wasn't him. This is years later. This is in 2006 or 2007. He was exonerated. The police were upset. They didn't believe the DNA test. The victim, bless her heart, was upset. She didn't believe the DNA test. But, fortunately, we were able to put the profile into the CODIS database and it came back to this guy, Richard Jean Wolfered. This is twenty-five years later, and I guess you could say he and Greg look similar in those pictures. But, we found him in Seagoville, the federal penitentiary, serving time on another violent offense and sent our investigator out there to talk to him. He wouldn't talk to us. But, the guards made him take his shirt off, and there's the tattoo, which actually fits much more closely to the way she described it than Greg's does.

When I got there, our first task was pretty much like we were talking about doing with the Harris County Conviction Integrity Unit. We identified

about 300 cases in 2007 and 2008, where the defendant had been denied DNA testing because the office prior to Craig's administration automatically opposed every DNA test. Most of time, they won, and most of the time, it was upheld on appeal.

Patrick Waller was one of those cases. We looked at it in our review and decided Patrick Waller really should have gotten a DNA test. The facts were that this couple was abducted on the West End in Dallas. They were robbed, and they were taken to a basement of an abandoned house over in Oak Cliff. They were abducted by two men, which they described as, "One big, one small." I think Patrick was arrested based on the fact that a police officer had it in for him and put him in a photo spread. There was another couple involved too, so he got two or three of those people to pick his picture out as the "small" perpetrator, who actually committed the sexual assault. Then, they did what was called "ABO testing." DNA was not as sophisticated and advanced as it is now. Supposedly, Patrick Waller met the ABO blood type taken from the sexual assault kit, as did twelve percent of other African-American males. There is your corroboration. There was never a second suspect, even though two men committed this crime, and he was convicted.

He was one of the first people to ask for DNA testing under the post-conviction DNA statute, which was passed in 2001. I think he had served about fifteen years by that time. This also became an episode of Dallas DNA, which was a documentary that we did in real-time while we were doing this. So, we tested the DNA, and it was not Waller's. We put it in CODIS, and once again, as in with Greg Wallace, we got a match of whose DNA it was. This is fifteen years later, and of course, the ABO from the sexual assault kit supposedly came back to Patrick Waller. This guy is the guy who is supposedly Patrick Waller in this scenario because the DNA comes back to him.

Yet, there was another person, and we wanted to know who it was. That's how we got the name of the person who turned out to be a co-defendant, LeMondo Simmons. The statute of limitations had run by then, so we could not prosecutor them. If the DA's office had agreed to testing when Waller first asked for it, they could have been identified and prosecuted back then. But we got LeMondo Simmons. We got him in front of a grand jury. He had an attorney, and he basically gave us the full account of how the two of them did it and how he does not know Patrick Waller, and he had nothing to do with it. Patrick Waller was denied a test. We had to go back and agree to give him a test.

This case is interesting to me because it shows how eyewitness identification and pretrial identification procedures mean nothing. This was a home invasion and sexual assault in the mid-80s out of Richardson, Texas. A poor woman comes home for lunch. There is a man already in the process

of burglarizing her home. He sexually assaults her. He escapes. Thomas McGowan became a suspect just because he generally met the description. He was pulled over for a traffic violation, and the police officer decided he generally met the description. In other words, he was a young African-American male. He was put in a photo spread. He was identified based on that. He was tried twice for two separate crimes. Two separate juries convicted him, and he was given two life sentences that were stacked. Years and years later when we started running the Conviction Integrity Unit, his attorneys asked for a DNA test, and we agreed to it. We found the sexual assault kits, and we found the stuff to test. We tested it, and he was excluded, and we exonerated him. We agreed to an exoneration.

Once again, we had a very angry victim. Bless her heart. She said, "DNA doesn't mean anything. I know who sexually assaulted me. I know who sexually assaulted me; two different juries convicted that man." Fortunately, there was enough of a profile to put it in CODIS and it came back to Kenneth Wayne Woodson, who was also, at that time, in the Texas prison for another home invasion sexual assault he committed in Dallas County, after he committed one that Thomas McGowan got falsely convicted of. He admitted that he was guilty; he gave a full recording session that he was guilty, and actually even wrote a letter of apology to the victim. When the victim heard the recorded confession from him, she conceded she knew that was the guy because he talked about some details she had never told anyone and recognized the voice. But here's my real point number one: they really don't even look alike. Number two: when we went back and investigated it, the actual perpetrator was in the original photo spread. That's what the photo spread looked like back then, so she passed over the actual perpetrator to pick out McGowan, who had nothing to do with it, and based on that, McGowan was convicted twice and given two life sentences.

This is a case we did at the Innocence Project. I'll go through it pretty quickly and my main point here is just the profound effect wrongful convictions have on families. This is a case in San Antonio back from 1994. The allegations were very sensational, albeit incredulous. Two little girls had said that their aunt and her three gay friends had sexually assaulted them and basically gang-raped them. I think that the police, for whatever reason, were all too eager to believe that, and the rape examiner, Dr. Nancy Kellogg, made a long physical diagnosis and these are her notes: "Her examination revealed a hymenal tear consistent with vaginal penetration. I spoke to Sgt. McKay, concerns this may be Satanic-related." I mean this is just ludicrous, but it got the police, and the prosecutors, and the media all excited, and all four went to trial. All four testified on their own behalf. In reading the transcript credibly, the little girls, bless their hearts, were all over the map. They testified differently from each other. They testified differently from one trial

to the other, and the prosecutors argued, "Well how do you explain that hymenal tear? You know, that's physical evidence." Turns out, that was completely false; that was completely wrong; that was completely inaccurate. Fortunately, they kept the photographs from the sexual assault exam, and going back and looking at them, the expert says there is no hymenal tear. There is nothing there. These are normal examinations, and we got other evidence and even Dr. Kellogg gave an affidavit that she had been mistaken when she testified to that back then. That's what the whole case was oriented around; that's what gave the whole incredulous accusation credibility. That's what drove the investigation and gave them the moral high ground to get these girls. So, we were able to get an agreement from the Bexar County DA's office to release them on bail pending a final hearing on all the evidence we were able to gather on innocence, and this is what I mean by the profound effect these things have on families.

Well, the way that story ended is the judge at the trial level ruled that we win on junk science, but don't win on actual innocence. But, we took it to the Court of Criminal Appeals and said, "Look at all this evidence of innocence" and they agreed. Actually, in a published opinion, agreed that all these women were absolutely innocent based on all the evidence. They were exonerated. [They're] lovely people and they all spent about fifteen years in prison.

So, I do have another case I would talk about. It's a fascinating case—it's a deaf kid who the Richardson police, after eighteen hours, got to falsely confess in which DNA and other evidence later exonerated him, but I'll save that for another day because we are running out of time. Thank you.