EVIDENTIARY ERRORS: HOW *BRADY* VIOLATIONS AND INADMISSIBLE EVIDENCE UNDERMINE THE PURSUIT OF A FAIR TRIAL

By

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A THESIS

Presented to the Department of the Psychology
and the Robert D. Clark Honors College
in partial fulfillment of the requirements for the degree of
Bachelor of Science

May 2024

An Abstract of the Thesis of

Ethan Alan Hartman for the degree of Bachelor of Science
In the Department of Psychology to be taken June 2024

Title: Evidentiary Errors: How *Brady* Violations and Inadmissible Evidence Undermine the Pursuit of a Fair Trial

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As with any system run by humans, the American criminal justice system experiences errors within its processes and procedures. Two of these errors are: *Brady* violations, in which a prosecutor does not turn over exculpatory evidence, and *inadmissible evidence,* in which the jury hears something during trial that they were not supposed to hear. In this paper, I analyze the sources of these errors, the solutions we currently have for these errors, and the psychological effects these errors can have. Through this analysis, I propose several possible recommendations for changing elements of the legal system, or the actors within it, in the hope that the system can better prevent and account for these errors in the future.

Acknowledgements

I would like to thank my undergraduate thesis committee for their endless dedication and knowledge that they have provided to my thesis. Dr. Robert Mauro, my primary thesis advisor, spent many hours working with me individually to make this thesis what it is today. I would also like to thank Professor Robert Rocklin, my second reader. He led my first experience with the legal studies minor, and I am glad that he has helped me reach the culmination of that experience. I am thankful to both of them for providing their years of knowledge to this project.

In addition, I would like to thank the Clark Honors College and the Prison Education Program on campus for providing me with so many new experiences, namely my participation in the Inside-Out program. This experience served to fan the flames of my interest in psychology and law, and helped me to shape my own morality and opinions about criminal justice and legal reform.

Finally, I would like to thank my family and friends for their undying support in my studies. My parents have firmly believed in me since the day I was born, instilling in me the knowledge that I could make it as far as I wanted in life as long as I worked for it. And to my friends, who allowed me to reflect my ideas upon them, while always stepping in when it seemed like I needed a break.

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Introduction

The American judicial system is founded upon the idea that, through the adversarial system of law, we can come to find the truth. In the criminal system, this approach operates to determine whether a defendant committed the crime they were accused of, and what punishment to give if they are found guilty. There are multiple checks throughout this process that attempt to prevent bias and mistakes made by the parties to the case, and the judge or judges involved in the case. These checks include appeals, the deference to precedent set by previous cases, and the constitutional right to due process. The trial must be fair and unbiased. Even though protections are in place to help account for possible errors in court processes, errors can still occur and have harmful effects for the accused.

Perhaps the most concerning of these errors is when an attorney fails to perform the duties assigned to them, making the trial inherently prejudicial to the defendant. In the case of the defense, this is typically ineffective assistance of counsel, where the defense attorney did such a poor job that the defendant never stood a chance at winning their case. Within this thesis, I will be focus on the prosecutor: some of the errors that they can make, why they might make these mistakes, and the psychological consequences of these mistakes. I focus on the prosecutor because they make the decision on whether to press charges, what crime or crimes to charge, and whether to offer a plea deal. Prosecutors should be held to a high standard because of the power they hold, and they should be held accountable when they do not reach it.

In wielding this power over persons, the prosecutor is required by law to act within the public interest by considering all possible solutions. The overarching goal of the prosecutor is to pursue justice within the bounds of the law, not merely to pursue convictions (American Bar Association, 2024). This means that, if a prosecutor has reason to believe a defendant is

innocent, then the prosecutor has a responsibility to not pursue that case. Not only this, but prosecutors are required to prove a defendant's guilt *beyond a reasonable doubt*. So, when prosecutors decide that their case is strong enough to go to trial, they should have confidence that they can reach this high standard.

The defense attorney helps to keep the prosecutor accountable throughout the trial. Defense attorneys are required to defend their client zealously, even when there is strong evidence against them. This forces the prosecutor to not only prove the case against the defendant, but to also address any possible criticism of the case that the defense may bring up. This creates two roles: the defense trying to introduce reasonable doubt of guilt, and the prosecutor trying to prove guilt *beyond* that reasonable doubt. This adds another factor that a prosecutor must face when deciding to prosecute a case: whether or not they can argue against the opposing counsel well enough to convict.

Even though there are guidelines for prosecutors to follow, and other attorneys to help make sure they follow them, we know that prosecutors often do not meet the high standard of practice that the law demands of them. This is a pattern that must change. In 2022, a total of 253 defendants were exonerated of their crimes, the highest rate in the last few decades (National Registry of Exonerations, 2024). To be exonerated is to be determined to be innocent of the crimes charged, often due to new evidence coming to light after the trial. This means that, in the eyes of the law, these 252 people were *innocent* people unjustly spending time behind bars. In 2023, eighty-five percent of homicide exonerations were due to official misconduct on behalf of the prosecutor (National Registry of Exonerations, 2024). This is a troubling pattern for prosecutors, who decided to take these people to trial in the first place.

Whether purposeful or accidental, prosecutorial misconduct may lead to innocent people being imprisoned for years or even decades.[1] Though we have statistics on the proportion of exonerations caused by misconduct, these are only the exoneration attempts that succeeded; there are likely more innocent prisoners serving time. These are innocent people that could be giving back to society in a significant way. Instead, they are wondering how they landed behind bars. It is clear that, in spite of statutes and precedents that define the due-process responsibilities of prosecutors, these responsibilities are too often unfulfilled.

This paper will focus on two types of prosecutorial misconduct: *Brady violations* and *improper evidence*. Within these subjects, I discuss the psychological consequences of these errors in relation to the jury, judge, and attorneys themselves, and how these psychological consequences impact elements of our legal system. Throughout, I will also discuss possible solutions to reduce rates of this type of misconduct and mitigate the effects when it occurs. I also suggest a couple of sweeping changes that could be made to the judiciary to help make it more equitable across the board, while heightening our standards for justice.

When Evidence *Is Not* Present, but Should Have Been

When we look at the model criminal trial in the American court system, we observe two parties, the defense and the prosecution, engaging in a structured debate over the guilt of a defendant; if found guilty, this debate can continue into the degree of sentencing. Both parties are allowed to make arguments and introduce evidence. A key part of this process is that both attorneys may object to the other party's evidence or arguments based on well-defined criteria.

[1] For example, Glynn Simmons, 71, spent 48 years in prison before being exonerated of his murder conviction. It was found that prosecutors withheld key evidence from the defense. (NY1 News, 2023)

This allows each attorney to hold the other accountable for any legal missteps in their arguments or evidence.

The prosecutor presents their arguments, witnesses, and evidence first, while the defense can attempt to poke holes into each of these elements. The attorneys then switch roles between presenter and criticizer. This pattern allows the jurors to listen to each argument in full, with criticisms and drawbacks attached, to produce a just outcome for society and the defendant. An important part of this process is "discovery." Both parties submit the evidence that they plan to use during the trial to opposing counsel. The prosecution has the additional requirement to turn over any potentially exculpatory evidence to the defense before the trial. This allows for both sides to prepare their arguments fully and make important decisions and motions before the trial, such as moving to suppress prejudicial evidence, exclude illegally obtained evidence, or disqualify unqualified witnesses.

The prosecutor has this additional exculpatory evidence requirement because they carry the burden of proving guilt beyond a reasonable doubt. Prosecutors represent the state or federal government and decide whether or not to take a case to trial. The prosecutor's office is also concerned with the probability of winning at trial, and will generally not prosecute a case if they do not believe they can win. They have limited resources and prosecutors, so most cases end in a plea bargain, which takes much less time and expense than going to trial. If a prosecutor chooses to go to trial, they have some confidence in their ability to prove guilt beyond a reasonable doubt, and thus do not gain the additional advantage of withholding exculpatory evidence from the defense.

Compare this to public defense attorneys who get assigned to cases, sometimes randomly[2], and are expected to defend their clients zealously, no matter the strength of their case. This also includes some jurisdictions in which attorneys are drafted to serve as a public defender, such as in California and Indiana, called "appointed counsel."(Carroll, 2017). These public defenders do not get to know any details of a case before they are assigned to it, meaning they enter these cases blind. This party does not get the luxury of making a determination on the strength of a case and whether it is worth fighting, which may place them at a disadvantage compared to the prosecutor, who has already been able to make that judgement.

Defense counsel is also excluded from one of the main advantages of being a prosecutor: working with the police. Police departments also have an extreme influence over the strength of a prosecutor's case. They can conduct a full investigation of a crime, interview witnesses immediately after an event occurs, and could even tuck away exculpatory evidence.[3] The key difference here is that the average defendant in need of a public defender would not be able to conduct an investigation on their own behalf. Those in need of a public defender likely cannot afford a private attorney for their defense, much less being able to afford a private investigator. This highlights the economic disparity between some defendants and the prosecutor's office: the prosecutor is almost always better funded than the defendant. Without the ability to conduct its own private investigation, the public defender faces a financial disadvantage compared to the prosecutor.

These systemic advantages can give prosecutors more access to resources, more time to analyze their case and craft plea bargains, and the ability to determine whether or not to take the

[2] Philadelphia and the federal system uses random assignment to appoint public defenders to cases (Criminal Justice Innovation Lab, 2021)
[3] See *Alvarez v. City of Brownsville,* (2017)

accused to trial. This disparity is balanced by the defense having access to any exculpatory evidence but not the duty to turn over potentially incriminating evidence and the presumption of innocence. This creates a balance between the prosecution, who must prove guilt beyond a reasonable doubt, and the defense, who is given every tool available to create a reasonable doubt.

Brady Violations

In *Brady v. Maryland* (1963) the United States Supreme Court determined that, "The government's withholding of evidence that is material to the determination of either guilt or punishment of a criminal defendant violates the defendant's constitutional right to due process." (*Brady v. Maryland,* (1963). In this case, two people were put on trial for murder, *Brady* and Boblit. After *Brady* had been sentenced and his appeals rejected, it was discovered that the prosecutor had not disclosed a key part of Boblit's confession, in which he admitted that he had committed the killing by himself, whereas *Brady* participated in every step of the process other than the homicide itself. This case created the *Brady* violation as we know it today.

This ruling has been expanded in several subsequent cases before the Supreme Court, the first of which was *Giglio v. United States* (1972), which further required the prosecutor to also turn over impeachment evidence to the defense. In this case, the government was relying heavily on one witness's testimony to build their argument, one who was allegedly also involved criminally with Giglio himself. However, it was later revealed that this witness was told that he would not be prosecuted if he agreed to testify at trial. Defense counsel was never informed of this, and the witness testified at trial that no such deal was ever made. The Supreme Court found that this information should have been brought to light at trial to allow the defense to question the witness's credibility before the jury.

While these two cases were built upon the idea that all material evidence relating to the determination of guilt must be disclosed, the next case redefined the standard. In *United States v. Agurs* (1976), the Supreme Court determined that missing evidence by itself does not create a constitutional error. For omitted evidence to give rise to the denial of a defendant's right to due process, the possibility that it could have helped the defendant's case is not enough. Under *Agurs,* the weight of proving that an error "creates a reasonable doubt of guilt that did not otherwise exist" falls upon the defense (*United States v. Agurs,* (1976)).

More recently, the Supreme Court reaffirmed and expanded upon the precedents in *Brady*and *Kyles v. Whitley*, (1995). This case extended the prosecutors' responsibilities in discovery by holding the prosecution accountable for any exculpatory evidence held by the police. In this case, license plate images from the crime scene and some crime-scene testimony that could have helped absolve the defendant of his charges were not turned over to the prosecution. The court found that a *Brady* violation could be established "regardless of any failure by the police to bring favorable evidence to the prosecutor's attention" (*Kyles v. Whitley*, (1995)). This meant that prosecutors could now have their cases overturned because of police action, thus encouraging them to actively seek out evidence from the police before it rises to a *Brady* claim.

Taken together, these precedents frames *Brady* violations as a serious threat to justice. It is clear that the court wants prosecutors to fulfill their role in discovery to the fullest extent of their power. In doing so, prosecutors are protected from having *Brady* claims raised against them, while also uncovering evidence that the defense may not have found on their own. The court also recognizes the capacity for simple human error, in that not every helpful piece of omitted evidence can be considered to be prejudicial to the defense. This omitted evidence must reach

some level of significance, rather than simply being missing. The precedents protect against a large influx of *Brady* claims, while still treating them with the seriousness that they deserve.

Brady violations do not have to be purposeful acts by the prosecutor. Instead, they may be accidental or negligent. For example, prosecutors may not have turned over exculpatory evidence to opposing counsel because a member of their team forgot to do it, or because they did not believe that the evidence was exculpatory. This may, for example, occur when large amounts of email are requested, and through the filtering process something slips through the cracks. This may constitute negligence rather than direct intent to withhold this evidence. In all of these cases, the defendant is put at a disadvantage. Not only does this increase the power disparity between attorneys, but we stray further from arriving at the truth of whether or not the defendant is guilty.

By not turning over these important pieces of evidence before a trial, prosecutors create a unique problem. If they do not disclose that they have pieces of exculpatory evidence, then how does the defense or the judge know to look for them in the first place? The defense and judge will function as though there is no problem, and continue on in the case as they normally would. This differs from other forms of evidentiary misconduct such as *Improper Evidence,* which I will discuss later, in that a *Brady* violation cannot be solved in the moment. Instead, these issues can only be discovered later through the appeals process, or in a collateral challenge, wherein the appeals court may rule upon a *Brady* violation.

Lacking Information: Psychological Effects on Jurors

When a *Brady* Violation is committed, there are a few key characters that lack that information: the judge, the defense, and most importantly the jurors.[4] It is vital that the jurors are presented with all relevant evidence to help make their determination, as they are the ones collectively determining guilt or innocence. This is not only because the law requires it to be so, but also because decision making is complicated and often flawed.

Psychological research has been looking at decision making for a long time, and has come up with several theories around how that process can go awry. For example, the decision for a manager to punish an employee for being late may be plagued by the self-serving bias. This theory poses that we attribute our own positive outcomes to our own actions and abilities, whereas we attribute negative outcomes for others to be a cause of their own choices. In contrast, we tend to attribute our own failures to external factors, and other people's successes more by these external factors as well (Shepperd, 2008). In the case of the manager and employee, the manager may explain being late as due to traffic, but may also explain the employee being late due to that person's laziness. This may also be applicable in the courtroom, as jurors could view the defendant as being in that position due to their own actions and personality, rather than taking into account any environmental factors that may have also been involved.

Another example of decision-making errors is that of groupthink. This theory discusses how by being in a group of people that must return a single decision, which is especially applicable in juries. You may expect that by having more people to make a decision, that decision may be

[4] In a bench trial, juries are not present. Guilt and innocence, as well as sentencing, is instead determined one trial judge. These are more common at the federal level, as well as in certain civil proceedings, such as foreclosure and bankruptcy. (Weignberger et al.)

founded upon more information and discussion to return a fair judgement. However, groupthink has been shown to suppress dissenting opinions due to wanting to maintain group conformity (Günther, 2020). This is especially important to control for in the jury room, as their decision could lead to anything from minor prison time to the death penalty. To that end, researchers have been looking at ways to control this bias, recommending that courts "give jurors strategies to more effectively deliberate and reach better group decisions" (Gordon, 2015, p. 416). As you can see, there are certainly biases within decision making that may come into play on a jury. A *Brady* violation, wherein a piece of the evidence is simply not present, may throw another wrench into this decision-making process.

One popular theory driving our understanding of jury decision-making is the Story Model. According to this theory, an individual juror constructs a narrative based on the evidence they are presented with during the trial, the attorney's arguments, as well as their own knowledge about similar events. They are then presented with one or several possible variations of verdicts by the judge. The theory poses that jurors combine the narrative they have constructed with these possible verdicts to reach their decision (Pennington & Reid, 1992). On top of constructing their own stories, lawyers almost always try to use this theory to their advantage. The prosecutor attempts to create a narrative that the jury will buy, either by strength of the evidence or by emotionally connecting to the jury. (Lempert, 1991). The defense can also create their own alternative story, but they could also focus on simply creating reasonable doubt, as mentioned before.

Evidence in a trial is not typically presented in a chronological fashion, but rather issue-by-issue. This has great implications for the Story Model, as jurors must take these scattered pieces of evidence and construct a story that incorporates the information they are taking in. However,

the model also suggests that jurors are simultaneously coming up with new stories and editing their current stories in their mind to try and settle on the most plausible version of events. This can create an issue when they are expected to return a verdict, because if two stories seem like an equally plausible version of events, "great uncertainty will result" (Pennington & Reid, 3). This uncertainty in plausibility may be present at the start of the trial as well, as attorneys often frame their opening statements as stories.

Brady violations have cause for concern within the Story Model of decision making, and we can see how the exception or addition of exculpatory evidence may change how jurors construct their stories. If exculpatory evidence is left out of the trial, jurors will construct their stories without vital pieces of information. Indeed, *Brady* violations have been shown to actively harm jury decision making because the absence of evidence inherently diminishes the role of the jury; it takes away the juror's capability to make a determination of that piece of evidence (Kreag, 2018). It was also shown that when prosecutors and judges removed the ability of the jury to make decisions, such as *Brady* violations and judicial override[5], error rates increased, finding that "deliberation creates a better and more accurate result" (Kreag, 2018). By not receiving exculpatory evidence, jurors may be constructing stories that lead them to make flawed decisions that have been shown to result in wrongful convictions.

Not only does the absence of evidence create more errors on behalf of the jury, but its exclusion may also damage the jury's interpretation of other evidence. Take the case of *Connick v. Thompson* (2011), a capital case wherein it was found that prosecutors had left out bloodwork that could have maintained Thompson's innocence. While this piece of evidence was vital in and

[5] In 2017, Alabama became the last state to end the practice of judicial override, wherein a judge could impose a death sentence in spite of the jury ruling for life in prison.

of itself, its exclusion led the jury to apply all of the other damning evidence onto Thompson as evidence of his guilt. However, if it had been included, the other evidence in this case may have become irrelevant to the jury, as the bloodwork wholly discredited Thompson as the murderer.

When the jury lacks evidence, we know that not only are their error rates higher, but it may also bias their interpretations of related evidence as well. However, if the defense presents this exculpatory evidence, the jury is then forced to incorporate that evidence into their narrative constructions of the crime. If a juror already has constructed a story determining that the defendant must be guilty, but are introduced to evidence that their story may be wrong, then the defense may have created a reasonable doubt within the mind of that juror. In the presence of a *Brady* violation, the defense loses out on the opportunity to create uncertainty as defined by the story model.

Pennington & Reid also focused on differences in lawyers presenting evidence in story organization versus in issue order. They created two court cases, one of which had the preponderance of the evidence sway towards innocence and the other towards guilt. They found that when the evidence was presented to jurors in a story organization, they were statistically more likely to rule in favor of the preponderance of the evidence and more confident in their decisions (pg. 7). When jurors were exposed to the issue order condition, they were presented with the exact same information in a non-narrative order, with overall results averaging closer to uncertainty than confidence in their decisions.[6]

[6] This study used *preponderance of the evidence* as the standard of proof, which is a lower standard than *beyond a reasonable doubt*. Attorneys still create narratives at this higher level of proof, implying that, at least anecdotally, narratives are still effective at this standard of proof (Lempert, 1991).

With this difference in mind, both attorneys may be incentivized to create a narrative for the jury even if the evidence is presented in issue order. When the defense lacks a piece of exculpatory evidence, however, the prosecution's narrative construction may seem more bulletproof than it really is. Handing over exculpatory evidence to the defense could help them poke holes into the prosecution's narrative, as well as creating uncertainty within the narratives constructed by the jurors themselves. The defense is trying to introduce a reasonable doubt in the prosecutor's narrative, and a *Brady* violation may remove this opportunity.

When a piece of information is not present, people tend to rely on mental shortcuts to bypass the need for that information to allow them to make a decision. This is called a heuristic, which includes many biases that are present when we make decisions. One paper examined several heuristics and biases that may play a role when people make uncertain judgements. One of these heuristics is *anchoring and adjustment*. This occurs when we make an initial starting point for our determination that then adjusts upwards or downwards based on subsequent information gained (Tversky & Kahneman, 1974). Every person starts with a different anchor for their judgement, which is based both on past experience and their present reality. In the case of a jury panel, individual jurors may vary in their initial feelings or judgements about a defendant before any evidence is presented, and then their opinion on guilt or innocence may change over the course of the trial.

The jurors in *Brady v. Maryland*, according to this heuristic, made an initial judgement on *Brady* that was then shifted throughout the trial. As they heard evidence in favor of both guilt and innocence, they arrived at the end of the trial with their decision relatively set. However, they were not given all of the information before they started making their deliberations. It is possible that had that exonerating evidence been present at the time of the trial, one or more of

the jurors may have had their anchor adjusted even more towards innocence. This may have resulted in a lesser punishment for *Brady*, as the appellate court found, or at least shifted the discussion in the jury room.[7]

Overall, the *Brady* violation is inherently problematic for juror decision-making. When you don't have all of the information relating to your decision, you are more likely to make a mistake in either the decision itself, or how you reached it. If exculpatory evidence had been properly admitted into the trial, the jurors in *Brady v. Maryland* may have been able to create a more complete and confident narrative in their minds. They would have also relied less on heuristics in finding that *Brady* had also committed the homicide. Even if we were to better control the influences of *Brady* violations at the trial level, the issues concerning *Brady* violations also extend to the appellate courts

Why do Prosecutors Violate *Brady*?

In light of the various impacts that *Brady* violations have on both the trial and appellate process, it is worth looking at where these problems originate: the prosecutors themselves. As discussed before, not every *Brady* violation is intentional on behalf of the prosecutor. Indeed, they may not even know that a piece of exculpatory evidence exists. However, there are some documented cases in which prosecutors have intentionally withheld exculpatory evidence from the defense.[8] In these cases and others, prosecutors encounter a lack of accountability or official

[7] Generally, the trial judge decides the sentence in criminal cases. However, *Brady* was a capital case, meaning that the jury also decided the sentence.
[8] In the case of Walter McMillian, prosecutors suppressed evidence that that state's witnesses had been coerced to testify in court. (Equal Justice Initiative).

reprimand for their actions, resulting in the wrongfully convicted having no recourse to hold their own prosecutor accountable.

There are several pieces of research discussing the rates at which prosecutorial misconduct occurs and what the results are upon appeal. As of March 2024, it is estimated that 60% of exonerations nationally are at least partially attributable to official misconduct, including *Brady* violations. (National Registry of Exonerations) One analysis of 2,131 California cases in which a defendant raised official misconduct resulted in 444 cases in which the judge agreed. Further analysis of these cases focused on 54 that resulted in conviction reversal. These particular cases should have been reported to the state bar association for disciplinary investigation, but *no single instance* of this was found (Rudin, 2011). This pattern extends to other states as well.

In addition to not being held accountable with disciplinary action, prosecutors also are protected from civil lawsuits by *prosecutorial immunity*. Similar to qualified immunity for police officers, prosecutorial immunity protects prosecutors from any civil actions relating to their job as a prosecutor, which includes the following: falsifying evidence, soliciting testimony, and withholding exculpatory evidence (National Police Accountability Project, 2020). While these factors may result in a reversal or retrial, affected defendants do not get to hold their prosecutors or their related offices accountable. This doctrine is longstanding, and stems from the Supreme Court decision *Imbler v. Pachtman* (1976) which stated, that a prosecutor is absolutely immune from civil suit for actions taken within the scope of his duties in pursuing a criminal prosecution.

This case involved a prosecutor, Pachtman, who was found to have both falsified testimony and suppressed evidence favorable to Imbler. Imbler then attempted to sue Pachtman for this misconduct, but the Supreme Court found that prosecutors gain absolute immunity from civil

lawsuits because of the public interest in not restricting the prosecutor from fulfilling their role fearlessly. If a prosecutor were to be held civilly liable for every error they make, this may inhibit the pursuit of justice on behalf of the state and the victims. However, the majority opinion made note that prosecutors should still be held accountable by other means, stating that, "The conduct in either case is reprehensible, warranting criminal prosecution as well as disbarment (*Imbler v. Pachtman* (1976)).

This case was expanded to the prosecutor's office in *Connick v. Thompson* (2011), which was previously discussed in relation to jury decision making under *Brady* violations. In *Connick,* it was found that Thompson had mistakenly spent fourteen years on death row because prosecutors failed to turn over exculpatory bloodwork. These issues were not contested with the Supreme Court, but rather if the district attorney and the 3 assistant district attorneys could be collectively be sued for their errors. The main issue around the case was whether or not this is one instance of a *Brady* violation or a pattern of misconduct based on the same error made by multiple prosecutors. The Supreme Court majority found that the instance would be treated as one *Brady* violation, and that this did not give rise to a pattern of behavior that could lead to civil claims of misconduct.

These two factors reflect a lack of checks and balances upon the prosecutor. In the eyes of the law, as long as the violation is addressed and the defendant sees justice by being let out of prison, then the error has been corrected. While the error has technically been corrected, our modern system does not account for the violating prosecutor, despite warranting official discipline as noted by the Supreme court in *Imbler*. With the knowledge that they are unlikely to be disciplined by the state bar, and that they cannot be sued by defendants that they have

wronged, what is to stop a prosecutor from using the *Brady* violation as a valuable tool to help win over the jurors?

It seems that prosecutors are using *Brady* violations to their advantage and, in some cases, frivolously defend themselves when accused of doing so. One article from The Appeal describes how *Brady* violations have not seen a significant reduction in a long time. In this article, several cases are cited in which prosecutors refuse to admit fault for putting innocent people behind bars, including one example where city and state officials paid the family nearly 14 million dollars but did not admit to a *Brady* violation (Brand, 2018).

On top of this, it is very likely that not every instance of a *Brady* violation gets reported or appealed. The discovery of a *Brady* violation falls on the defendant, and discovery can certainly fail to find what the prosecutor has hidden away. As discussed earlier, *Brady* violations can only be addressed retroactively. If the defense does not appeal or continue their investigation, some *Brady* violations could go entirely undiscovered. Through a combination of factors including the initial discovery of the *Brady* violation, knowledge that they will very rarely be held accountable, and the possibility that they could just pay to make it go away (Brand, 2018), prosecutors are given nearly no negative consequences for committing *Brady* violations.

Why would a prosecutor want to withhold exculpatory evidence in the first place? As I discussed before, the prosecutor decides whether or not they have a strong enough case to prove guilt beyond a reasonable doubt. We could assume from this that they would not pursue cases that they know they cannot win, leading to determinations of innocence before it even reaches the courtroom. However, career pressures and the structure of the prosecutor's office may cause the prosecutor to seek convictions rather than pursue justice.

The first career-related motivation is succeeding within the prosecutor's office itself. Almost all prosecutors' offices use "a few highly visible metrics, such as conviction or case-processing rates or wins in a few notable trials" to conduct performance reviews (Bibas, 2009). Normally, having a business focused on success rates makes good business sense. However, success within a prosecutor's office should not be defined by the rate at which prosecutors are winning their cases. When we are dealing with human life possibly being put way for years or decades, it is important that the prosecutor be given enough time and grace to fulfill their job effectively. If they know that they are being evaluated by case-processing speed, prosecutors may begin to cut corners to get their numbers higher. By encouraging wins over losses, the prosecutor's office also encourages unethical behavior instead of achieving justice.

Secondarily, a prosecutor may be motivated intrinsically through their role in their communities. One researcher went around interviewing prosecutors on why they enjoy their role, with one saying, "I represent the good tax-paying, law-abiding citizens of the county, and I'm protecting them from the bad guys" (Harris, Wright & Levine, 2018). This is a common assumption among many prosecutors. Many feel that they are doing good for the community.[9] However, the assumption that you are automatically doing good for the community is another motivation that encourages winning cases over achieving justice. While prosecutors should take pride in their work and perform it well, their actions should serve the revealing of truth in any given case, rather than trying to win.

The duty of the prosecutor is to pursue justice no matter what. This was established in *Berger v. United States* (1935), when the court said "therefore, in a criminal prosecution is not that it

[9] Many also cite their tough-on-crime approach to help them get elected to attorney general (The New Republic, 2023)

shall win a case, but that justice shall be done." "while he may strike hard blows, he is not at liberty to strike foul ones". Nearly one-hundred years after this decision, we are still faced with a prosecutorial environment defined by winning. Rather, as the court dictated, prosecutors function as one side of the scale, shared with the defense. Both roles should valiantly fulfill their jobs and, as a result of their structured debate, justice will be dealt out by the judge and jury.

There are several possible solutions to help hold prosecutors accountable and help reduce the rates of *Brady* violations in the future. The first and most obvious of these is to give teeth to both reporters and reviewers of prosecutorial misconduct. More reports should be made, and more prosecutors who commit misconduct should receive some kind of penalty from their state bar. In addition, defendants who have wrongly spent time in prison should be allowed to hold their prosecutors accountable as well. Whether it be through claims on the lawyer's malpractice insurance, or being able to also report them to the state bar, placing avenues to accountability in multiple hands would help prevent misconduct.

Larger changes could include to state prosecutors' offices. As I discussed before, these offices have largely strayed from the ideal the Supreme Court had for prosecutors back in 1935. To try and reach that ideal, prosecutors and defense counsel should be treated more as two halves of a coin. Prosecutors should not be reviewed poorly for having lower win rates, but rather in the amount and quality of cases they go through, no matter what the outcome may be. If the prosecutor's goal is to attain justice, then the defense winning a case also qualifies as justice. This also allows the prosecutor to maintain their connection to serving their community. They are still performing a public service in trying to keep innocent people out of prison and putting the guilty away, but their duties are no longer marred by career pressures to win every case.

Concerns for the Appellate Court

In the United States, you have a constitutional right to an appeal in criminal cases. These appellate courts review your case on issues of law, rather than fact. This means that they are not re-adjudicating your case, but rather making sure that proper procedure was followed and that your rights as a defendant were not violated. While both parties may appeal pre-trial and evidentiary rulings, only the defense may appeal from the outcome in a criminal trial. This includes the reviewing of any errors that the defense may bring up on appeal, which may include *Brady* violations

Is Harmless Error Really Harmless?

One key difference between the initial trial and an appellate court is that appellate cases are decided solely by the judges presiding over the case, rather than by a jury. In their analysis of various types of possible legal issues, one question remains consistent across jurisdictions: whether the error presented to them was harmless or harmful to the appealing party, and if harmful, whether the harm is sufficient to constitute grounds for a new trial (Cornell LII, *Harmless error*).

This legal concept, as a federal standard, first arose in *Chapman v. California* (1967). In this case, Chapman's prosecutor pointed out to the jury that Chapman remained silent throughout the trial, citing this as an admission of guilt. The California Supreme Court said that, in light of all the overwhelming evidence Chapman faced against him in the trial, this error did not result in a miscarriage of justice. The Supreme Court's logic differed. They found that there is a conflict of interest between states being able to set their own standard for harmless error, while also being able to rule upon this same error. To help solve this, the Supreme Court remanded the case back

to the trial court and established its own federal harmless error rule: "the court must be able to declare a belief that it was harmless beyond a reasonable doubt" (*Chapman v. California* (1967)). This forced judges to have a very high standard for ruling that errors were harmless, while also acknowledging that there could be future cases in which errors are legitimately harmless.

This question of harmless or harmful error has been debated over the past several decades (Greabe, 2016)[10]. Particularly, the debate centers on what degree of prejudice should a particular error be allowed to cause before a new trial must be granted. One author opined that any and all errors are inherently prejudicial when the goal is achieving justice. He suggested that an optimal test would not weigh the evidence found in the *Brady* violation on a hypothetical reality in which it *was* given to the defense, but rather, "to prevent a conviction based in any way on error" (Boy, 1979). This is the optimal reality, of course, in which every single aspect of every case should go perfectly and we achieve perfect justice. However, humans are prone to error, and thusly "A defendant is entitled to a fair trial, but not a perfect one" (*Lutwak v. United States*, 1953).

Before the ruling in *Chapman,* the move to create a harmless error rule, either at the state or federal level, was one touted by many legal scholars of the early 20th century. They criticized courts at the time for adopting the presumption of prejudice – wherein even the tiniest clerical error could result in the reversal of a conviction (Fairfax, 2009). They cited several reasons for courts to adopt the harmless error rule such as improving the efficiency, and by extension public confidence in, the criminal process (Fairfax, 2009).

These steps towards efficiency do indeed seem logical, and still apply to harmless errors today. If all courts in the country were to be bogged down by the tiniest of errors, courts would

[10] Greabe discusses, in part, the history of the harmless vs. harmful error debate as it stemmed from *Chapman v. California* (1967).

become backlogged and unable to carry out rulings in a timely manner. Indeed, it seemed that over time state and federal judiciaries seemed to agree with them, becoming the law of the land through *Chapman*. However, it seems as though the definition of harmless errors has been stretched over the last 50 years, originally accounting for clerical errors and statements on behalf of the prosecutor, but now extending to minor *Brady* violations. As I have discussed, it is up to the defendant to prove that a *Brady* violation was so significant as to have caused prejudice in their case, meaning that *Brady* violations are up for harmless error review by appellate judges. As you will see, *Brady* violations seem to have a more significant effect on the outcome of a trial than the original clerical errors the harmless error rule was supposed to supersede.

Harry T. Edwards (1995), a former federal circuit judge turned law professor, agrees with this sentiment. He argues that because human error is inherent to any type of activity or pursuit, errors are inevitable, therefore time would be better spent moving onto the next case and accepting the potential injustice rather than paying the enormous monetary and time expense that retrying a case may require. However, finding errors to be harmless may send "dubious messages" to police officers, prosecutors, and judges who may have played a role in the evidentiary misconduct (Edwards, p. 1169). This places the appellate court in a precarious position in which it must determine whether an error is harmful or harmless.

In the case of a *Brady* violation, appellate judges must determine whether, if the missing evidence had been presented at the trial, one or more jurors would have made a different decision regarding either the guilt, or sentence in the case of a capital trial, of the defendant. We will also discuss how *Brady* violations can be inherently harmful to jurors' decision-making. In addition, appellate judges placing themselves into a what-if scenario when determining harmless error may, in itself, be psychologically problematic.

Counterfactual Thinking in Appellate Courts

Appellate judges review decisions of trial courts within their jurisdictions. In their review, they address only issues brought to them by the appealing party. They do not re-adjudicate the case as a whole. The appellate court's primary role is to determine, as a matter of law, whether there was an error present. Secondarily, their role is to also determine whether the error before them is harmless or prejudicial. In their analysis of harmful versus harmless error, appellate judges attempt to put themselves into the shoes of the jury at trial, asking themselves some version of the following question: If the error had been remedied, or not been present at all, would one or more of the jurors have decided differently?

While it makes legal sense to have higher courts acting as review boards, the process of putting ourselves into someone's shoes is much more complicated than appellate judges make it seem. When judges ask themselves, "what if this happened at trial?" they are actually engaging in counterfactual thinking. Counterfactual thinking is very common in our daily lives, defined as "thoughts about alternatives to past events, that is, thoughts of what might have been" (Epstude & Roese, 2008). For example, imagining what your life might be like had you chosen another university to attend is counterfactual thinking. While counterfactual thinking may allow us to imagine how events might have gone differently and learn from them, it is not helpful in solving current problems that decision caused.

Counterfactual thinking is generally broken down into two main parts: the antecedent and the consequent (Spellman & Kincannon, 2001) The antecedent is the element we are hypothetically changing. The consequent is the hypothetical result of this change. In this case, the addition of

exculpatory evidence left out by a *Brady* violation is the antecedent, and the changes it would have in the trial and verdict would be the consequent.

While we may be able to determine one antecedent in any counterfactual scenario, it is nearly impossible to determine any one possible consequent for this antecedent. In the case of an appellate court reviewing a *Brady* violation, the antecedent of the defense having the exculpatory evidence may have many possible consequents. Perhaps, the jury may have ended up deciding in favor of the defense, but they may also simply not be persuaded by the evidence. Indeed, the defense could have received this evidence before trial but forgot to bring it up at all. All of these are possible outcomes to the turning over of exculpatory evidence, all possible because appellate judges are thinking counterfactually.

This problem stems from assumptions about *relevant conditions* in the counterfactual world. (Strassfield, 1992). In this case, we are assuming that everything else in the trial and jury deliberations would have remained the same except for the inclusion of the exculpatory evidence. “Seldom does the counterfactual's consequent follow from the antecedent alone as a matter of logical implication” (Strassfield, 1992) In other words, we cannot extrapolate every possible change that the presence of an antecedent could have caused. This also means that we cannot assume about the relevant conditions, because the relevant conditions could also be changing based upon the inclusion of the antecedent. This is all to say that by changing one aspect of the trial, anything after this change becomes unpredictable, and we can no longer identify one possible consequent.

Jury decisions do not function as one input creating only one output. As discussed before, each individual juror has a different threshold for decision making. Many of them are also

creating narratives based on the evidence they hear at trial. Decision making by jurors is so complicated that counterfactual thinking by appellate judges may be a moot venture, as we cannot determine whether an individual would have made a different decision based off of a hypothetical antecedent. Indeed, the whole harmless versus harmful error debate is entrenched in counterfactual thinking.

To this end, perhaps the only factual conclusion that an appellate court could make is whether or not there was a *Brady* violation present at the time of trial. *Brady* violations are especially damaging in that they are only brought up after the initial trial, meaning that the appellate court exclusively engages in counterfactual thinking when assessing its harm. Other errors such as improper evidence, which will be discussed later, have solutions that could be enacted during the initial trial, which leaves room for debate at the appellate level as to whether or not a given solution was effective. If we wish to avoid instances of counterfactual thinking in relation to *Brady* violations, then appellate judges should not decide whether or not the violation caused harm, but rather only if it was present. Perhaps all *Brady* violations should result in a new trial or sentencing phase to account for the fact that including one piece of exculpatory evidence could have an infinite number of possible outcomes.

Overall, prosecutors need to see a major shift in their positions as a whole. Right now, they face rare negative consequences for committing misconduct, and tend to have positive reinforcement when winning cases quickly. By holding prosecutors accountable for their actions, we stand to have fewer wrongful convictions and less unethical prosecutors. By attacking *Brady* violations at their root cause, we could worry less about the psychological effects that they may have on judges in the appellate process. Prosecutors may even do a better job handing over exculpatory evidence for fear of negative consequences, meaning that the jury gets to make a less

biased decision based on all of the evidence at hand as well. Misconduct is a threat to justice, and *Brady* Violations are one of the most offensive examples.

When Evidence *Is* Present, but Should Not Have Been

Attorneys within a criminal trial are restricted by procedures and case law relating to what can and what cannot be presented at trial. These issues are typically sorted out at an evidentiary hearing. At this hearing, evidence or witness testimony is presented to the judge, wherein they rule on whether or not the jury will hear the evidence or testimony at trial. If something is not allowed to be brought into trial, that evidence is ruled as inadmissible, meaning that the attorney may not bring up this evidence at trial. This evidentiary hearing, however, does not prevent all situations in which juries hear evidence in error.

Improper Evidence

In contrast to the *Brady* violation, another common and multidimensional problem facing courts is "improper" or "surprise" evidence. This form of evidentiary error occurs whenever a witness, a juror, or attorney, discusses inadmissible evidence. This may occur in a variety of different ways. For example, a witness or expert may make an inadmissible statement while testifying about another matter or jurors may mention something that they saw in a news report that was not admitted into evidence.

State v. Gowen (2000) is an example of improper evidence production. After the witness stated that the defendant was an honest and trusting person, the prosecutor asked a series of follow-up questions. After this, the prosecutor told the witness that "[Defendant] isn't honest". The judge then allowed the prosecutor to bring up various factors relating to his dishonesty or character. The prosecutor brought up the defendant's previous perjury conviction, how the

defendant was currently on probation, and how he was currently being sued. This helped lead the jury to find Gowen guilty. This case was later brought to the Montana Supreme Court, which decided that only the defendant could bring up evidence of their character, which includes past criminal history.

Here, the Montana Supreme Court limited and clarified the cross-examination abilities of the prosecutor. It is clear that the prosecutor shouldn't be able to bring up character evidence lightly. As well, in reversing the lower court's ruling, the Montana Supreme Court is also stating that the judge conducted this part of the trial improperly. It was clear to them upon appellate review that this character evidence was too prejudicial to be allowed, and should have been struck from the record. This creates two problems. Firstly, prosecutors using gray areas in the law. In this example, the Montana Supreme Court had not yet defined whether or not the prosecutor could argue over character evidence when it is brought up by a witness. The prosecutor was able to use this undefined "gray" area of the law to bolster his argument. Secondly, disagreement between trial and appellate courts about what the law is, possibly creating these aforementioned gray areas. It is important to investigate some of the causes and consequences of these problems, including impacts on jury decision making.

The presence of improper evidence is easier to identify in the courtroom than the absence of important exculpatory evidence. As discussed before, cases that lack important exculpatory evidence are commonly corrected *after* the trial has been completed. The most common solution is reversal of the conviction on appeal (Wex Definitions Team, *Brady rule* 2023). Improper evidence, on the other hand, can be spotted and corrected at trial. As such, judges have come up with ways to counteract cases of improper evidence. The first of these is a preemptive measure, before any evidence even reaches the jury. After being selected to serve on the jury, jurors

receive a set of jury instructions from the judge. These instructions are standardized within their jurisdictions. Federal courts within the Ninth Circuit, which include those in Oregon, lay out the following instruction for what the jury may consider as evidence in criminal cases:

> **1.3 WHAT IS EVIDENCE**
>
> - The evidence you are to consider in deciding what the facts are consists of:
> - First, the sworn testimony of any witness; [and]
> - Second, the exhibits that are received in evidence [.] [; and]
> - [Third, any facts to which the parties agree.]
>
> (United States Courts for the Ninth Circuit, 2019)

This seems pretty straightforward. As a juror in the ninth circuit, you may consider the testimony of those on the witness stand, the exhibits presented to you, and facts upon which the parties agree as evidence. However, the court soon confuses the jurors with the next set of instructions:

> **1.4 WHAT IS NOT EVIDENCE**
>
> - First, statements and arguments of the attorneys;
> - Second, questions and objections of the attorneys;
> - Third, testimony that I instruct you to disregard; and
> - Fourth, anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.

These sets of rules are presented as mutually exclusive to the jurors. The judge wants to make it clear to the jury what should and should not be considered when deciding the facts of the case. However, these rules also include that the judge may instruct the jury to disregard a piece of testimony, but does not include an example of why this might happen, creating an exception to the rule. It may better serve the jury to explain or elaborate on exceptions to these rules at the start of the trial.

The third category of "WHAT IS NOT EVIDENCE" is any evidence that the judge tells you to disregard, but is that so easy to do? This reactive judicial tool is known as admonishing the jury. When a judge admonishes a jury, the judge instructs them on what evidence to consider and for what purpose they may use such evidence. In some cases, the judge may instruct the jury to disregard a piece of testimony or evidence entirely, often because it was not approved to be shown or discussed at trial. This includes improper character evidence such as we saw in *Gowen,* but could also include the discussion of inadmissible physiological evidence such as a lie detector test, which varies across in admissibility across jurisdictions (Majaski, 2023). If the judge deems a piece of inadmissible evidence to be too prejudicial towards one side, thus permanently biasing the jury, the judge may declare a mistrial.

These examples highlight a disconnect between how courts try to create an objective ruleset for every trial versus how trials occur in reality. Case law is continually evolving, but the procedures currently in place, such as what we see in the Ninth Circuit, seem to have plenty of gray areas for prosecutors to exploit. Although judges have these two main tools to help prevent and fix problems with evidence in their courtroom, the problem is still not being addressed as a major issue. Prosecutors bring cases to trial because they believe they have a decent chance at

winning the case. If these procedures are not tightened, it could give prosecutors an unjust way of achieving justice. To prevent retroactive solutions as we saw in *Gowen,* judges and legislatures should focus on how to prevent gray areas of evidentiary procedure before the trial starts, and take it more seriously when it does occur.

It is not as simple as judges make it seem to simply tell the jury to disregard a piece of improper evidence. As shown in the jury instructions for the Ninth Circuit, jurors are initially told that they may consider sworn testimony and exhibits of evidence in their decisions around the facts of any given case. However, when something prejudicial is revealed during the course of the trial, there is disconnect between what the jurors consider to be relevant evidence and what the judge states is allowable evidence. Surely, knowing that someone has a past criminal history might sway a decision, especially if the defendant has committed a similar crime before. This disconnect between common-sense decision making and judicial procedure is not only a systemic problem that prosecutors have been known to exploit, but is a psychological phenomenon as well; one that has been studied through research; both within and outside of the judicial context.

The Addition of Improper Evidence: Psychological Effects on Jurors

Harmful Irony in the Courtroom

This disconnect between the judge and jury has been experimentally observed for the better part of a century. One of the earliest pieces of research on this subject comes from a simulated civil damages experiment from Broeder (1959). The evidence focused on in this experiment was insurance coverage. Researchers found that when the jury was told to disregard this evidence, jurors tended to award damages nine-thousand dollars higher than the non-admonishing

condition. Even though the jury did not mention this piece of evidence during their deliberation, it seems that being told not to use the evidence still swayed their decision to a higher degree of punishment.

This psychological phenomenon was studied throughout the late 20th century by Daniel Wegner. Wegner initially studied thought suppression through his 'White Bear' experiment in 1987, wherein participants were told repeatedly to *not* think about a white bear. Most participants did end up picturing a white bear in their mind. This led to Wegner expanding this process into a full theory: the Ironic Process Theory. In sum, the theory states that when a person is trying to actively suppress their thoughts or actions, it ironically makes them more prone to those thoughts or actions (Wegner, 1994). For example, someone who is trying to listen to the judge and forget an improper piece of evidence may end up thinking about it more than ever.

One piece of this theory is especially relevant to the courtroom setting. Under the *Balance of Processes* section of his theory, Wegner describes several environmental factors that may increase ironic processes in an individual: concurrent tasks, time pressure, stress-related preoccupations, or anything else that distracts the person from the task of mental control. (Wegner, 1994). These are all factors that influence jurors. First, we know that jurors are told to do several things at once: weigh all the evidence throughout the trial, decide what the facts are, listen to testimony, etc. which may dampen their ability to fully disregard a piece of evidence. Jurors in the Ninth Circuit are allowed to take their own notes on pen and paper while the trial is going, though they are reminded to not let their note taking distract them from paying attention to the trial (United States Courts for the Ninth Circuit, 2019). They are also instructed to weigh

the prosecution's arguments versus that of the defense, which could already be taking the majority of their mental processing.

Jurors may also deal with stress as described in Wegner's theory. Not many people are excited to receive a jury summons, and following all of the procedures could be infuriating for someone who especially does not want to be there. The trial could be stressful or quite boring, leading to opposite problems for jurors: either trying to keep track of all the evidence around a murder trial, or monotonously going through accountant's records in a tax case. While the jury deliberation is given an unlimited amount of time, deliberation is usually far from a relaxing experience. Juries are selected from those in the community surrounding the crime, meaning that different kinds of people with all types of opinions may be trying to debate guilt or innocence at the same time. Not only this, but criminal trials often deal with graphic violence and evidence related to the crimes. This combination of environmental distractions that we find in the courtroom all mirror what Wegner describes in his research.

Unusual Evidence

Research on the subject has advanced into the 21st century, with many papers expanding upon and citing Wegner's work. One study looked at whether or not making evidence unusual in addition to inadmissible increased the ironic processes that jurors go through when being admonished (Pickel et. al, 2009). By manipulating whether the evidence was ruled admissible or inadmissible, as well as whether the evidence was neutral or unusual, researchers found that the combination of unusual and inadmissible evidence led to more guilty verdicts. On top of this, they remembered this type of evidence more clearly than the neutral evidence by providing a higher number of accurate details about this type of evidence.

While the Pickel study focused on unusual evidence, such as adding polka-dots and Batman to a witness statement, extremely damning pieces of inadmissible evidence could show the same effect. For example, if the prosecuting attorney mistakenly brought up a petty shoplifting charge from ten years preceding a current armed robbery trial, it may be somewhat easier for the judge to admonish the jury. However, if the prosecuting attorney were to bring up how defendant had been found guilty on conspiracy to commit an armed robbery in the past, this piece of inadmissible evidence is much more applicable to the case at hand. While both of these examples would rightly be deemed inadmissible, the more pertinent, and thus more memorable, inadmissible evidence would likely stay with jurors clearer and longer. This degree of transgression also hearkens back to if harmless error really is harmless, as discussed under *Brady* violations.

Overall, is seems as though simply admonishing the jury by either limiting or disqualifying evidence from their decision-making ironically primes jurors to hold onto that evidence more

than they otherwise would. On top of this, the effect seems to increase based on how notable the inadmissible evidence was. This puts admonishing the jury into a bit more of a problematic light. After all, why would a judge try to admonish the jury at all when several studies indicate that this might increase the attention they pay to such a piece of evidence? The answer to this question is that there aren't many practical solutions besides admonishing the jury.

Alternative Solutions to Admonishment?

The first possible alternative to simply admonishing the jury is to simply not highlight the piece of inadmissible evidence at all. Based on what we know of the Ironic Process Theory, perhaps if the defense never objected to a piece of inadmissible evidence and the judge never stepped in against its inclusion, then inadmissible evidence may become less salient in the minds of the jury and have less effect on their decision-making. However, this becomes problematic quickly. In this scenario, the defense may let a piece of inadmissible evidence slide without objection, but also creates an environment wherein the prosecutor goes unchecked. This may lead to the prosecutor building off of the initial piece of inadmissible evidence and crafting a more convincing argument for the jury overall. In order to facilitate the argumentative nature that exists between the prosecution and defense, objections should not lose their utility.

The second and more extreme alternative to admonishing the jury is declaring a mistrial. Mistrials are not a desirable outcome for any judge, as it essentially restarts the whole trial. This includes scheduling, staffing, and finding a whole new set of jurors to serve. This may be fine if cases were being resolved in a timely manner, but in many places they are not.[11] By declaring a

[11] In Multnomah County, OR, less than 50% of felony and misdemeanor cases are resolved in a timely manner, according to state-set goals for court productivity (Manfield, 2023).

mistrial, a case goes longer without being resolved, the defendant may spend more time in jail waiting for their trial to be completed, and more money gets spent. The judge is weighing all of these systemic factors against that of ensuring a fair and unbiased trial. If a piece of inadmissible evidence is extremely prejudicial, then a mistrial may be warranted.

With the alternatives considered, it may be best to try and bolster the current solution to allow the judge to more effectively admonish the jury. The problem is that jurors are not effectively disregarding evidence when they are told to, so perhaps the instruction to disregard needs to highlight the importance of this. A meta-analysis on mock-jury trials by Steblay et al. (2006) found that this solution could prove very effective. By comparing similar trials that both had pieces of inadmissible evidence, researchers found that when the instruction to disregard included an explanation, rates of individual juror guilty verdicts dropped compared to when they did not include an explanation.

A later piece of research found that there are also differences in juror compliance with instructions to disregard based off of the gender of the judge. Oakes et al. (2020) found that when an instruction to disregard was given, jurors tended to adhere to the instruction better when the judge was male, indicated by lower rates of guilty verdicts. However, when a collaborative explanation was given in both of these conditions, results were reversed. Female judges now had higher compliance than their male counterparts. This may indicate that the use of higher quality jury instruction and explanation could be an even more valuable tool for female judges.

Within our current system of law, admonishment continues to be used widely across jury trials. However, it is a double edged sword. Its use indicates that there has been an error in the trial itself, and we have discussed how these errors may be harmful to jury decision making.

However, its use may ironically give the evidence more mental standing within the minds of the jurors. It may prove fruitful to judges to take the extra time and improve upon the admonition of juries by providing explanation and elaboration rather than the simple instruction to disregard.

Discussion

Throughout this paper, I have discussed several problematic aspects of the judicial system with several hypothetical solutions to them. In addition to those listed throughout, it is also useful to discuss some additional solutions that may help these specific issues, as well as the judicial system as a whole. Also included are some actions that you, the reader, can take if any of these problems seem particularly unjust to you.

Starting with improper evidence, some recommendations can be made. Firstly, judges should not just rely on their scripted instruction to disregard, especially when the inadmissible evidence is especially memorable or prejudicial to the case. The details on this will vary trial to trial, but judges should explain to the jury why a particular piece of evidence is being ruled inadmissible. Whether it was illegally obtained or was a simple error on behalf of a witness, an explanation could help turn ineffective memory suppression into a *considered disregarding* of harmful evidence. If the same type of inadmissible evidence comes up again and again, such as hearsay evidence, then perhaps the explanation only needs to be given once.

Secondly, courts should consider expanding pre-trial and post-trial jury instructions to better reflect what the judge is asking when instructing the jury to disregard evidence. In the same vein as expanding upon the in-the-moment rulings by judges, a higher detail of explanation could prepare jurors for both the trial itself and the deliberation. This difference in detail can be

seen within the Ninth Circuit in the difference between criminal and civil jury instructions. Paragraph three of these sections highlights this difference plainly:

1.4 WHAT IS NOT EVIDENCE (Criminal)

The following things are not evidence, and you must not consider them as evidence in deciding the facts of this case:

- Third, testimony that I instruct you to disregard;

1.10 WHAT IS NOT EVIDENCE (Civil)

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

- (3) Testimony that is excluded or stricken, or that you [are] [have been] instructed to disregard, is not evidence and must not be considered. In addition, some evidence [may be] [was] received only for a limited purpose; when I [instruct] [have instructed] you to consider certain evidence only for a limited purpose, you must do so, and you may not consider that evidence for any other purpose.

While these two sets of instructions tackle the same issue, the civil instruction is much more detailed than the criminal instruction. It may prove fruitful for judges and courts to bring these expanded sets of instructions into the criminal realm, given that the standard of proof is higher.

Finally, judges and lawyers should use their tools to their full effectiveness. This includes cross-examination and mistrials, as discussed before. For defense counsel, cross-examination and motions to limit or disregard evidence are invaluable in combating potentially prejudicial statements or evidence brought up by the prosecutor. Often, it is the defense counsel who has to move for something to be disregarded by the jury as not every instance could be caught by the judge at trial. Defense attorneys should be encouraged to pay close attention and object to any forms of improper evidence. While their objection may bring more attention to the issue than desired, cooperation with the judge could help reduce this effect while still keeping the prosecutor in line.

In addition, the judge should be less restricted on their use of mistrials as a tool in maintaining justice. If a piece of evidence is truly prejudicial and threatens to permanently bias the jury, the judge should not have to consider the pressures of their court to keep cases moving along. In order to make this happen, action must also come from the legislature, both at the state and federal level. If legislation was passed requiring that lowered the bar that must be reached for a judge to declare a mistrial, they could be less concerned with monetary or logistical impact and instead focused on what the law demands of them and the case at hand. Making the mistrial more common will take systemic change, but judges should be instructed to use this tool more liberally in cases where justice can no longer be attained.

Overall, the several studies analyzed in this section and the legal doctrine that surrounds these issues place prosecutors with a specific advantage. Even by introducing improper evidence that they know will be objected to and admonished, they might still be able to influence jurors towards a guilty verdict. It is important in a system that maintains innocence until proven guilty,

that the party seeking guilt has every check and balance made against them. This brings us closer to a truly impartial system that doesn't rely on psychological manipulation, but rather proper procedure and persuasive arguments.

On a grander scale, we could shift our current common law system to take inspiration from civil, or codified, law systems around the world. Within these systems of law, the judge plays a much more active role in the trial. For example, compare how a case comes to trial in the first place. In our American common law system, it is up to the prosecution to collect the initial evidence and to decide whether or not to press charges, and bring a case to trial. In a codified legal system, the prosecutor still gets to collect evidence to determine whether charges will be made, but an *examining judge* gets to review this evidence, ask for more evidence, interrogate witnesses, and decide whether or not a case goes to trial (Apple & Deyling, 1995). By the time the trial comes around, every piece of evidence and testimony has been entered into evidence, and the separate trial judge will oversee the conclusion of the criminal proceeding (Apple & Deyling, 1995).

This system would reduce the amount of possible bias that a trial judge could face when dealing with various pieces of evidence and motions. As all pieces of evidence have been heard and entered into the record before getting to the trial judge, they simply need to hear the arguments of the attorneys. It also increases the reliability of rulings because the examining judge is an independent party who ensures everything in the record is valid according to the legal code.

Codified systems largely do not have juries, except in high-profile cases, which helps ensure the speediness of the courts (Apple & Deyling, 1995). It is possible, however, that we

could combine the constitutional requirement to have a jury of your peers with the advantages of the codified system of a criminal trial.[12] It would simply be that the jury also be made aware of all of the evidence that is contained within the record before the attorneys begin their arguments. This may decrease the effects of surprise evidence when it occurs, as jurors would already know what the attorneys are basing their arguments off of. The jury may simply be reminded that the attorneys cannot introduce any additional evidence at this stage, and that to do so would seriously violate the rules of trial procedure, instead of being confused as to why they aren't allowed to incorporate surprise evidence into their decisions, as discussed before.

In addition, the appellate process in a codified system of law acts differently than it does within common law systems. While they are both entitled to review cases that come before them, codified systems of law often entrust the appellate court to retry the whole case again. This may also include a new examination phase of the appellate trial, in which attorneys and the judge may find and enter new evidence into the record (Apple & Deyling, 1995). Compare this to your guaranteed right to an appeal in America, wherein low-level appeals courts consider only questions of law instead of fact.

Expanding American automatic appeals courts to include the ability to retry a case could specifically help with *Brady* violations, in addition to other forms of prosecutorial misconduct. Appellate judges would not have to debate between harmless or harmful error at all. Instead, the appellate court would simply retry the whole case. If the defense retroactively found a *Brady* violation this evidence could be entered into the appellate trial. This would ensure a full, substantive review that could better help to account for any errors along the way. This would

[12] Some civil law countries, such as Spain and Austria, do have citizen juries (Hans, 2008).

ensure that the judge is not relying on counterfactual thinking to try and determine what the jury would have done. Instead, this scenario would play out properly, and the judge can then rule upon a now corrected trial.

On a smaller scale, we could change how individual attorneys function within our judicial system. Several of the issues relating to prosecutor culture may stem from the fact that prosecuting is all they know how to do. In the U.S. military, attorneys function somewhat differently. Instead of being deciding to be a public defender or a prosecutor, military attorneys, also known as JAGs, "are trained in and practice a very wide variety of law, including criminal prosecution and defense (courts-martial), family, tax, estate planning, contracts, immigration, torts, environmental, landlord-tenant, and more" (Lautemann, 2017). This means that JAGs have experience not only with different types of law, but routinely switch sides in criminal cases, allowing them to gain a lot of experience on both sides of alleged crimes.

It is possible that if we were to adopt the military system of training public attorneys, they could become more well-rounded practitioners of the law. Current errors caused by unethical prosecutors could be reduced simply because they are more knowledgeable about the impact these errors can make. They would also be able to use and defend against effective strategies on both sides of the isle, meaning that they can better win a case through good lawyering rather than through error. In addition, the structure of the public defender and prosecutor's office could shift entirely. Both sides would be committed to performing their assigned role valiantly, without the career pressures of being a prosecutor, and the pay-disparity

of being a public defender.[13] This may lead to more effective attorneys and more accountability between them, resulting in a result closer to justice.

Many of the problems discussed throughout this paper could also be addressed through a straightforward budget increase to the judicial system as a whole. Through a budget increase, the public would gain access to many more judges, public attorneys, and legal resources as a whole. This would allow cases and appeals to go through our system more efficiently. In addition to helping get through a backlog of cases, this would also allow judges to use more extreme solutions, such as a mistrial, to account for prejudicial errors such as the inclusion of improper evidence. Without the pressures of timeliness or money weighing on their decision, errors may be taken more seriously more often. Combining a budget increase with legislation around the liberal use of a mistrial would increase both the quality and quantity of cases being processed, but would take huge amounts of support and effort on behalf of legislators.

In addition to improving the number of actors in the judicial system, we should maintain high standard for those within it. This can occur with two changes: require that trial and appellate judges report any instances of misconduct to the state bar, and require state bars to treat instances of prosecutorial misconduct seriously. Even when a prosecutor is reported to the state bar, it is very rare that the state bar takes significant action against them,[14] but actions are slowly being taken to increase the accountability of prosecutors.[15] I discussed before how prosecutors are often encouraged by their offices to get through their cases quickly, while also having very little

[13] Starting pay for a new public defender in Multnomah County, Oregon is about $73,000. In comparison, an entry-level prosecutor in Multnomah County has a starting salary of about $98,000 (Botkin, 2023).
[14] Only six of the prosecutors in the 707 cases where misconduct was found were disciplined by the California State Bar: From January 1997 to September 2009 (Ridolfi, 2010)
[15] California Governor Jerry Brown signed a law in 2016 that stated: “A prosecuting attorney who intentionally and in bad faith [alters or withholds evidence] is guilty of a felony punishable by imprisonment” (Gunsberg, 2020).

consequences for when they commit misconduct. This environment creates incentive to either purposefully gain an advantage over the defendant, or at the very least promotes bad lawyering. By changing this environment to one of accountability and consequences, prosecutors would be encouraged to reach a higher standard of practice across the board. Combine this with the increase of judges and lawyers to get through these cases, and we could create a judicial environment that puts out just and efficient decisions that benefit the courts, the defendants, and society as a whole.

Now I come to what you, the reader, can do to help the judicial branch of the government better reach its goal of maintaining justice. The most blanket solution is to use the legislature for what it is designed to do: reflect the values of the American people. This means voting for those whose policies align with your own moral and ethical values, but it also means holding them to the duty that they are elected to do. You should regularly be calling your representatives to remind them of the people they are representing, both at their state and DC offices. In Oregon alone, as of the most recent census, you have 2 senators and 6 representatives that should actively be upholding your values. If you agree with any of the problems or solutions presented within this thesis, or have other concerns you wish to express to your representatives, don't be afraid to bother them to do their job.

On a more community level, you can also get involved with projects and organizations in your local area. There is a branch of The Innocence Project operating within all 50 states, and are always looking for volunteers. This organization is dedicated to exonerating those with wrongful convictions and continuing to provide legal resources to those involved with the criminal justice system. You can also search through your local city or county websites for volunteer

opportunities relating to prisoner rehabilitation or otherwise volunteering your skillset to help those attempting to adjust to life outside of prison.

Finally, perhaps the best thing that you can continue to do is to have intelligent conversations with those around you in your daily life. By keeping court and prison reform in the public eye, discussion and troubleshooting of solutions can flourish. This can lead to heightened awareness of an issue, if not social change. Societal change is not usually the result of a large influx of people calling for action right now, but the consistent reminder that change needs to happen, usually over the course of months or years. In our current common-law judiciary, which is by design meant to hold onto the past, it is even more important to maintain public discourse. Whether you focus your efforts at the problem's conception in the police and courtroom, or to rectifying issues during or after imprisonment, defendants and prisoners who have faced unjust judgment and punishment will feel the effects of your efforts.

As you have seen, the current system of checks and balances within our judiciary is severely lacking. Those that we entrust to make informed decisions on whom to take to trial are instead incentivized to progress their careers. Prosecutor's misconduct carries a great deal consequence, but very rarely on behalf of the prosecutor themselves. Misconduct creates grave biases and errors within the psychology of judges and jurors, and these mistakes often cost innocent people years or even decades of their lives. The strength of a prosecutor should not be measured upon the rate at which they win cases, but instead on their ability to create justice for the American people. I ask that all state bars hold unethical prosecutors accountable for their actions with the same high-quality justice that is so often refused to the ones they prosecute.

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