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Prosecutorial Actus Reus: Appellate Review of Prosecutorial Misconduct and the Diminishment of Responsibility

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Abstract

The socio-historical concept of criminal responsibility links the action (*actus reus*) and mental state (*mens rea*), or intention, of the actor (i.e., the defendant) to determine legal and moral liability for his or her behavior and to apportion punishment. When the actor responsible for immoral conduct is the prosecutor in pursuit of a conviction, the courts respond very differently. More specifically, because prosecutors are presumed to be moral and ethical system actors, assumptions about their good character likely influence the ways in which they are held to account. This study explores the content and arguments made by appellate judges in their review of prosecutorial misconduct when the higher courts concede that misconduct occurred at trial. Borrowing a systems theory framework, we evaluate how Texas appellate courts responded to prosecutorial misconduct in 35 criminal convictions considered on appeal between 2010 and 2015. Systematic content analyses of the courts' opinions demonstrate that closed systems, like the American legal system, both diffuse responsibility for misconduct across other criminal justice actors and prioritize procedural elements above substantively just outcomes. This latter approach is inconsistent with how other systems—civil society, scholars outside of the legal arena, and the media—interpret their decisions. In this way, the misconduct of prosecutors is rendered opaque, and a tenuous confidence in the process of criminal prosecution is maintained.

Keywords: prosecutorial misconduct, harmless error, character theory, systems theory, appellate courts

Introduction

> According to character theories [of criminal responsibility], an individual is responsible for his action only if that action is reflective of the character of the agent. And character persists over time…. [Yet] action is the appropriate focus of the criminal law, in the sense that defendants are held criminally responsible *for their actions*, but an agent is not responsible for his actions if that action is not reflective of him *qua* agent. Character is not the target of responsibility, but the relationship between action and character is a condition of holding an individual responsible for an action. (Tadros, 2005, p. 9)

The term "responsibility" has been defined in several ways but generally encompasses agentic and intended decisions for which accountability, obligation, and/or liability ensue (Giddens, 1999; Mikula, 2003). Responsibility for one's intentional conduct is a central feature justifying criminal punishment for

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a select range of activities that violate legal codes (Morse, 2004). Yet the *character theory* of criminal responsibility recognizes that, beyond the action, the character of the actor influences the nature of the legal system's response (Tadros, 2005). When examining misconduct on the part of criminal justice agents who are tasked with making moral and legal decisions that hold criminal defendants accountable to the rule of law, *character theory* advantages these agents by minimizing their responsibility. This may explain why the serious misconduct of prosecutors in pursuit of a criminal conviction is often overlooked, rendered harmless, and treated as "not reflective" of the agent by higher courts.

American prosecutors wield the most power of all system actors; they unilaterally decide whom to charge, what charges to lay, whether to offer a plea or pre-trial intervention, whether to decline to prosecute, whether to proceed with a trial, what material must be disclosed to the defense, how to effectively argue the state's case, and which sentencing recommendations they will provide judges upon conviction (Davis, 2007). Prosecutors likewise experience very little oversight or accountability at any of these stages, allowing them to make their decisions in highly non-transparent settings prior to, during, and post-trial (Lawless, 2008; Medwed, 2012; Scheuerman et al., 2022; Schoenfeld, 2005; Wright & Miller, 2010).

As representatives of the "People" of the jurisdiction, what prosecutors say and do carries the imprimatur of government approval (Medwed, 2012), and prosecutors are keenly aware that they are given considerable (even if unearned) trust simply by virtue of their role status. It is for this reason that vouching for the credibility of witnesses, which trades on the prosecutor's standing and character rather than the truthfulness of the proffered testimony (Shaffer, 1993), is recognized as misconduct. If the character of prosecutors were in question or was not assumptively positive, their vouching would fail to add undue weight to the value of the testimony. Indeed, strategic courtroom tactics made by prosecutors, such as the drafting of opening and closing arguments, are routinely motivated by an active effort to maintain and strengthen the existing trust jurors and the public have in these "agents of justice" (Offit, 2021). In short, a prosecutor's character is rarely in question.

In this study, we evaluate the manner in which appellate courts in Texas opine about substantiated prosecutorial misconduct in 35 criminal cases decided between 2010 and 2015. We focus on the state of Texas for a number of reasons, including the state's leadership in criminal justice reform efforts (Herman, 2018), the punitiveness of their criminal legal system (Kutateladze, 2009), their election of state prosecutors (Green & Roiphe, 2020), and their illustrious position of being the first (and only to-date) state in the country to have jailed a prosecutor (who served 5 days of a 9-day sentence) for his involvement in prosecutorial misconduct (Ura, 2013).

In the remainder of the paper, we first consider how blame and responsibility may be dependent on the character of actors and then review the literature on the court's evaluation of the harms associated with prosecutorial misconduct. This is followed by a brief discussion of the larger implications of rendering the misconduct of system actors harmless. We then systematically analyze the narrative content of 35 appellate court decisions to reveal that the legal system conceptualizes the harm associated with prosecutorial misconduct in a manner that trivializes serious violations of defendants' due process rights. Two major themes emerging from these data show that: first, higher courts both diffuse and dilute the responsibility for prosecutorial misconduct across an array of courtroom actors, including the defense attorney and the trial judge; and second, the focus of higher courts in evaluating and remedying misconduct rests largely on procedural grounds, consistent with the meaning of communications internal to the legal system, rather than substantive grounds, which are commonsensically assumed by external systems (Nobles & Schiff, 2004).

The Character of "Bad" Actors & the Attribution of Blame

Criminal law's communicative function speaks to and for the public by morally condemning certain acts and, by extension, the actors who are viewed as criminally responsible (Tadros, 2005; Tannenbaum, 1938). Legal philosophers have delineated a series of theories on criminal responsibility based upon three characteristics: capacity, choice, and character. Capacity theories view actors as legally responsible for their actions when they have the "capacity to do otherwise, or the capacity to recognize the wrongfulness of what [they have] done" (Tadros, 2005, p. 22). Choice theories attribute responsibility to those who exercise choice in behaving amongst a range of potential options (Tadros, 2005). Lastly, character theories "contend that an individual is responsible for his action only insofar as his action was reflective of his character" (Tadros, 2005, p. 22). The distinctions between the three are not stark, as even capacity and choice theories, to some extent, assign the actor moral culpability for his or her actions.[1] How, then, might the character of prosecutors help to explain whether and how appellate courts hold them accountable for transgressions?

The State has a venerable position in the criminal justice system as the People's representative. Prosecutors are the front line in criminal justice processing and, as such, hold positions of considerable public trust. According to Schoenfeld (2005, p. 253-4),

> principals (in this case the public) transfer power and delegate resources to agents (prosecutors), so that the agents may perform specialized services or complex projects…. The public then trusts prosecutors to use their skills, knowledge, and power to prosecute people who break the law.

Irrespective of whether prosecutors feel like white knights or assembly-line workers (Baker, 1999), many see themselves as public servants who act as "rule enforcers or defenders of the good guys" (Wright & Levine, 2018, p. 1710). In reviewing prosecutor memoirs, for example, Wright and Levine (2018) distinguish a "core absolutist identity" wherein former prosecutors report moral and righteous indignation at those who violate societal rules. They claim, effectively, a moral virtue or high ground. This is true despite longstanding systemic disparities in criminal justice processing that implicate prosecutorial discretion (Cox & Gripp, 2022).

While there is a large body of research on the role of character evidence,[2] related to both the accused and the victim(s), for criminal trials (Cicchini, 2021; Schrag & Scotchmer, 1994), very little attention has been directed at the character of prosecutors when they engage in actions that violate the ethical and legal requirements of their position. This imbalance likely reflects the stereotypical view of prosecutors as moral authorities in the courtroom. Even in the wake of the recent crises of legitimacy around prosecutors' involvement in wrongful convictions, Cox and Gripp (2022, p. 657) report that "progressive" prosecutors both displace blame for past prosecutorial practices on their less progressive counterparts and differentiate themselves from other system actors by way of their "positional and moral authority." In short, both traditional and progressive prosecutors assume a highly moral character that permeates into the public consciousness.

Defendants in criminal court, on the other hand, are tainted merely by accusation and maligned once convicted. Thus, in a battle of character, the prosecutor wears the "white hat" (Wright & Levine, 2018, p. 1689), and the convicted defendant sits somewhere near the other end of the spectrum. To the extent that attributions of blame align with a *character theory* of responsibility, misconduct by the "good guys" will most likely be brushed aside as minor, non-problematic, or out-of-character. When misconduct

by the prosecution is acknowledged at all, it might be expected to be, and often is treated as, harmless (Ridolfi & Possley, 2010; Scheuerman et al., 2022; West, 2010).

The Harmless Error of Prosecutorial Misconduct

Appellate courts make decisions about whether to reverse convictions based on some error at trial. Generally, there are two kinds of errors that may mar a criminal case and that will be subject to a harm analysis: constitutional errors[3] and non-constitutional errors that violate the rules of procedure in criminal case processing. With courts granting wide latitude in treating many types of prosecutorial misconduct as warranting a harm analysis, much of the misbehavior of prosecutors that comes to the attention of the higher courts is subject to review and a judicial determination of its impact on the case.

In Texas, appellate courts conduct harm analyses under two sets of guidelines. For constitutional errors, the courts ask "whether there is a 'reasonable possibility' that the improper argument might have contributed to conviction" (Tex.R.App. P. 81(b)(2); Tex.R.App. P. 44.2(a); *Mosley v. State*, 1998) and, consistent with the federal rules of criminal procedure, Texas appellate courts are free to disregard any error that does not affect a defendant's substantial rights (Tex.R.App. P. 44.2(b); Fed.R. 52(a)). The appropriate harm analysis to be used by Texas courts considers three factors outlined in *Mosley*:

> (1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks), (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the [trial] judge), and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). (*Mosley v. State*, 1998)

Thus, appeals courts will take the position that the prosecutorial misconduct is harmless when: the misconduct is minor, brief, or not egregious; the jury should have been swayed by cautionary instructions to disregard made by the trial judge; and/or the weight of the evidence leans in support of the defendant's guilt.[4] Appellate courts may also decide that misconduct was not preserved for review if the defense counsel failed to object to it during trial.

The harm analysis used by the higher courts to evaluate the responsibility of prosecutors who engage in misconduct, and the consequences for doing so, has no obvious analogy in the way that the criminal law is applied to defendants. For example, where assisted suicide is prohibited by law, the person aiding and abetting a suicide may be charged accordingly (Tex. Health & Safety §166.45-51). This is because the accused factually brought about a death unlawfully; it is not a defense that the terminally ill person would have died anyway. Yet this logic is not applied by the courts in the case of prosecutorial misconduct. Rather than holding the prosecutor accountable, the courts opine on whether the defendant-*qua*-victim's conviction would have happened anyway. Harm analyses effectively diminish the State's responsibility for ensuring fair trials and enable prosecutors to breach their legal and ethical duties without consequence (Goldberg, 1980; Jonakait, 1987; Medwed, 2012).

Misreading Legal Communications

The public may not appreciate the nature of prosecutorial misconduct or properly attribute responsibility for this type of wrongdoing because of the way in which various systems, i.e., the law and media, communicate with each other. Borrowing on Niklas Luhman's systems theory of communications, Nobles and Schiff (2004) argue that the meaning of communications of one system cannot be faithfully or

accurately reproduced in another. This is because various systems of communication, such as the law or medicine or the media, are functionally differentiated from one another and become, effectively, "autopoietic"[5] (Nobles & Schiff, 2004, p. 223). If any system were able to completely reproduce the meaning of communications in another, the system would fail to differentiate and become redundant. Thus, the law, medicine, and the media all represent closed systems of communication that encode the meaning of the same content differently, according to their own internal logic. For example, the media applies an "information/non-information code" or lens to communications in other systems, such as medicine or the law, whereas the law uses a "legal/illegal" dichotomy to encode communications (Nobles & Schiff, 2004). Consistent with Luhman's logic then, "if what was legal was automatically 'news,' the media would simply reproduce the legal system…No system can have an independent existence if it adopts the same basis of selection as another system" (Nobles & Schiff, 2004, p. 226).

Judicial opinions are legal communications. They are written explanations of legal decisions that clarify the basis on which the court resolves a legal dispute. Appellate decisions, in particular, describe the facts of the case, briefly outline the arguments on appeal, and make determinations on those arguments to reach a final and binding decision. Importantly, appellate opinions are crafted as legal communications that respond to other legal communications – the appellant's brief. Within this closed system of communication, the rules and procedures of the law dictate judicial rationales in resolving legal disputes. In some cases, those rationales may be procedurally appropriate but fail to convey the substantive justice that defendants and the public presume is being arbitrated. A classic example of such a disconnect is the distinction between "factual innocence" and "legal innocence" in the law (Aglialoro, 2014; *Shinn v. Martinez Ramirez*, 2022). The rules of criminal procedure prioritize legal guilt over factual guilt, wherein defendants who are found guilty within the American legal system are those persons whom the prosecutor can prove guilt beyond a reasonable doubt based on sufficiency of evidence (Bowers, 2010; Givelber, 2001). The burden of proof is not absolute or beyond all doubt, and as such some doubt about the actual guilt of the accused may exist, even in those instances in which a conviction is secured (Whitman, 2008). Yet legal communications that affirm a lower court's guilty verdict are misread by the public as reaffirming the conclusion that the defendant is faculty guilty and deserving of the original verdict (Nobles & Schiff, 2004).

In this study, we analyze the content of appellate decisions—or legal communications—in which the higher courts acknowledge that prosecutorial misconduct marred trials in which guilty verdicts were reached. In doing so, we assess the extent to which the court treats that misconduct as harmless (or not), with an eye toward evaluating the courts' attributions of responsibility. That is, we conduct a systematic analysis of the content of appellate opinions to clarify who the court believes is accountable for the State's misconduct. Ultimately, these decisions tend to exonerate prosecutorial misbehavior and apportion legal responsibility to other court actors for failing to temper or inadequately address prosecutors' misconduct at trial.

Data & Methods

This study examines 35 written opinions from Texas appellate courts between 2010 and 2015 in which prosecutorial misconduct is alleged by convicted defendants on appeal, and the higher court concedes that, indeed, the prosecutor engaged in misconduct in securing the conviction.[6] These opinions were collected by the Center for Prosecutor Integrity (CPI) as part of a data collection effort to locate legal system cases wherein prosecutorial misconduct was substantiated by the trial court or higher courts.[7] According to the CPI, cases were collected for inclusion from individual submissions, media reports, and LexisNexis legal database searches using the following terms: *Brady* violation, ethical, *ex*

parte communication, failure to disclose, false evidence, improper argument, inadmissible evidence, inflammatory statement, lack of candor, mischaracterizing evidence, perjury, professional conduct, professional responsibility, prosecutor improp!, and prosecutor! misconduct. Table 1 provides definitions of distinct types of prosecutorial misconduct identified in our sample of Texas appeals cases collected via these search terms. The CPI then confirmed case eligibility by locating and analyzing the court (trial, appellate, supreme) or bar disciplinary committee decision. All cases selected for inclusion in the database were subsequently reviewed by the CPI Registry Director and supplemented by additional bar disciplinary records, defense counsel reports, and media accounts where possible.

Table 1. Types, Definitions, and Examples of Prosecutorial Misconduct[a]

Type	Definition [b]	Case Example
Brady violation ($n = 2$)	Withholding evidence that is material and favorable to the guilt or punishment of the defendant.	"Appellant contends that because the statement was not disclosed until several years after it was taken and after the victim had died, he was unable to present the exculpatory evidence in any other admissible form." (*Ex parte Mares*, 2010)
Impugning ($n = 6$)	Mocking or disparaging the defense.	"The witness, Gonzalez's son, testified that Gonzalez was a loving, caring parent [...]. On cross-examination, the State improperly impeached Gonzalez's son with several misdemeanor marijuana convictions." (*Gonzalez v. State*, 2014)
Vouching (n = 3)	Inserting personal opinion regarding the credibility of a witness.	"Appellant complains of the [...] following remark by the prosecutor during jury argument: 'So, if you believe Amy, which I don't see any reason not to believe Amy –.' Appellant contends that, with this argument, the prosecutor was attempting to interject his personal feelings into the case. [...] It is axiomatic that a prosecutor has a duty to keep his view of the evidence to himself." (*Scott v. State*, 2013)
Misstating the law ($n = 8$)	Shifting the burden of proof. Referencing the defendant's failure to testify.	"After detailing this evidence during closing summation, the prosecutor concluded her argument with a final discussion on the presumption of innocence. The argument proceeded as follows: 'It's true, everybody is presumed innocent. But as soon as the witnesses take the stand, soon as they tell their story, soon as evidence is introduced, they are no longer presumed innocent.' Appellant timely objected to this argument as a misapplication of the law." (*Garcia v. State*, 2013)
Inadmissible/false evidence/lack of candor ($n = 20$)	Arguing facts excluded at trial or misrepresenting the nature of the evidence.	"[Prosecutor:] And you got a small glimpse into their marriage. You got a small glimpse, because, see, Belinda's not here to tell you, is she? And the rules of evidence prohibit Belinda's girlfriends from telling you anything Belinda ever told them. That's the way…". The defense immediately objected at trial and the appellate court "agree[d] with appellant that this argument improperly referred the jury to evidence outside the record, namely, that Belinda's friends had information about appellant and Belinda's marriage. Argument that attempts to introduce matters not in the record is clearly improper." (*Temple v. State*, 2010)

(Continues)

Table 1 (Continued)

Inflammatory statement (n = 3)	Statements that inflame the passions or prejudices of the jury (e.g., encouraging the jury to maintain public safety via conviction).	"Here, we find that asking the jury to 'fight for those little girls' constituted 'a plea for abandonment of objectivity,' which does not fall within the four categories of permissible jury argument." (*Franklin v. State*, 2015)

Note: The total number of types of misconduct exceeds 35 as more than one type of misconduct may be substantiated in any given case.

[a] Two instances of misconduct were coded as "other" wherein the prosecutor: 1) read juror notes during recess, and 2) made an inappropriate statement to the *venire* during *voir dire*.

[b] Definitions of misconduct are drawn from the CPI (2016) and Medwed (2012).

In total, the CPI identified 37 appellate court decisions in Texas, between 2010 and 2015, in which the court admitted that defendants who identified prosecutorial misconduct[8] as at least one basis of appeal were correct.[9] Of these 37, we excluded two cases that were resolved by plea, which left a total of 35 opinions in which the appeals court conceded that prosecutorial misconduct had marred the criminal trial of the defendant. Among these, there were only five[10] cases (14%; *n*=5) in which the court considered the prosecutors' actions "not harmless," and the appeals court took some action, typically reversing the conviction and remanding the case for retrial. It was far more common for the appellate courts to hold that, while prosecutorial misconduct occurred, it was effectively harmless (86%; *n*=30).

We used NVivo 1.6.1 to inductively code the Texas appellate court opinions. After an initial review of the cases, we developed an open coding scheme that reflected the way the courts justify their decisions around the harm associated with prosecutorial misconduct and the concept of responsibility (Charmaz, 2014). In our first round of coding, we anticipated that we would be primarily coding words, sentences, or paragraphs under a parent node entitled "'prosecutor responsibility," with child nodes like "State concedes," "State concedes but views the misconduct as harmless," and "State does not concede." Upon closer inspection of the opinions in the first round of coding, however, it became clear that we would need focused axial codes that captured how the appellate judges apportioned blame or responsibility to other system actors. This led to a final coding scheme as follows: appellate decision, harmless, prosecutor responsibility, defense responsibility, trial court responsibility, and appellate court responsibility. To enhance interrater reliability, we coded a series of opinions jointly, recoded those opinions once the final coding scheme had been established, and discussed any discrepancies in coding to reach an agreement.

We use an analytic coding strategy based on grounded theory (Charmaz, 2014; Corbin & Strauss, 1990; Glaser & Strauss, 1967). By systematically analyzing the content of these judicial opinions, we establish a series of findings, derived directly from the data, that elucidate how the responsibility for prosecutorial misconduct is conceptualized by the higher courts. In doing so, we unpack how the courts discuss, justify, and evaluate the actors responsible for engaging in, controlling, and responding to prosecutorial misconduct.

Findings

Two central themes emerge from these analyses of Texas appellate court opinions. First, the court routinely diffuses the responsibility for prosecutorial misconduct among an array of courtroom actors; more specifically, the responsibility for prosecutorial misconduct is shifted onto other court officials, such as the defense (in preserving the issue by offering an immediate objection to misconduct) and the trial court judge (in sustaining the objection and providing a curative instruction to the jury to disregard). Second, due to their focus on whether *legal* innocence has been proved or disproved, these higher courts

use legal and procedural grounds for evaluating and remedying the misconduct that they concede to have occurred during trial. Recall that, in most of the cases in which the appellate court acknowledged that prosecutorial misconduct tainted the original trials, the court took the position that the prosecution's misconduct was "harmless" (86%; *n*=30). In reaching these conclusions, their opinions negate the damaging consequences of prosecutorial overreach for the victims of misconduct, and the court's legal communications are misread by the media and the public as confirming both the factual guilt of the defendant and the virtuous moral character of the prosecution. Our study thus confronts social scientists with a legal logic that leads to a "misreading" (Nobles & Schiff, 2004) of the role of the appellate courts as providing a mechanism of substantial oversight of system actors to correct for errors in favor of one that prioritizes perceptions of legal legitimacy.

Blame-Shifting Prosecutorial Misconduct

Even though onus should be placed on the actor who engaged in misconduct, this logic does not appear to apply to justice agents who represent the state. Rather than attributing responsibility to prosecutors, it is the other court actors whom the appellate courts tend to hold accountable for the prosecutor's behavior. Indeed, far more of the content in the appellate court decisions focused on *responses* to prosecutorial misconduct by both the defense and, especially, trial court judges than on the prosecutors themselves. We can see this diffusion of responsibility for prosecutorial misconduct simply in the number of items coded within the 35 appellate opinions across the four courtroom actors: prosecutors, the defense, the trial court, and the appellate court. Only 33 (12%) of the textual references in these data relate to prosecutor responsibility. By contrast, there were considerably more references to each of the remaining actors in these data (i.e., 43 to appellate court responsibility [16%], 78 to defense responsibility [28%], and 121 to trial court responsibility [44%]).

As we describe in more detail below, the defense was noted to have either invited the misconduct or failed to adequately preserve it for appellate review. Trial court judges were responsible for sustaining the defense's objection and issuing a curative instruction to the jury; provided they did so, the misconduct is treated as if it did not even happen. In focusing so fully on the actions of other criminal justice actors in response to prosecutorial misbehavior, the appellate courts diminish the substantive harm of prosecutorial misconduct.

Holding the Defense Accountable. There are two ways in which the higher courts assign responsibility for addressing prosecutorial misconduct to the defense. The most prevalent, and in some ways the most problematic, way the defense is held to account is in preserving an objection to the prosecutor's conduct so that it remains reviewable on appeal. Technically, the appeals court may review allegations of prosecutorial misconduct when they believe that the substantial rights of the defendant have been violated, yet appellate courts often maintain that, for example, "the argument raised on appeal must comport with the specific objection made at trial, or error is waived" (*Richardson v. State*, 2012). In effect, despite the higher courts acknowledging that the prosecutor overstepped or was overzealous in their prosecution of the defendant, a review of the prosecutor's behavior is unwarranted if the defense fails to make that point at trial. This is akin to arguing that a criminal defendant should not be held accountable if the victim of a crime fails to immediately inform law enforcement of the event.

A second way in which the appellate courts hold the defense responsible for prosecutorial misconduct is by invoking the invited error (also known as the invited response or invited reply) doctrine (Balske, 1986). According to this legal argument, the defendant may not raise on appeal a concern about the actions of the prosecutor or the trial court that was "invited" by his or her own actions. For example,

in *Raborn v. State* (2011), the prosecutor stated, "'I'm the prosecution. I took an oath to see that justice is done [...].' As part of his speaking objection defense counsel stated[,] 'Your Honor, I object, I took an oath too [...].' The prosecutor responded to the speaking objection by stating[,] 'Not to see that justice is done, Counsel.'" In this case, the Court of Appeals for the Fifth Judicial District of Texas ruled that:

> Because of the interruption of the prosecutor, the prosecutor's argument was incomplete and any interpretation that it was an 'attack' on defense counsel is rank speculation. The prosecutor's unfinished statement never rose to the level of an 'attack' on defense counsel or was so improper that it could have disrupted the factfinder's orderly evaluation of the evidence. Even if it was improper, it constituted 'invited argument.' The State notes that appellant's counsel was the one who commented on his own oath and obligations as an attorney, not the prosecutor. The only statement made about defense counsel was in response to defense counsel's assertion that he took the same oath as the prosecutor. (*Raborn v. State*, 2011)

This case thus illustrates the redirection of responsibility for prosecutorial misconduct from the prosecution to the defense.

In yet another example, the court held that while the prosecution should not have discussed plea negotiations in front of the jury, it was the defense who raised the issue of the plea in the first place (*Bassett v. State*, 2014). The court went on to suggest that the misconduct was relatively minor as "the prosecutor may have been able to elicit the same information from [the] appellant using appropriate cross-examination questions." That the prosecutor did not use an "appropriate" mechanism to extract this information is, evidently, excusable because he or she could potentially have done so some other way. This logic, when applied to the criminal responsibility of the defendant for the perpetration of a crime is less compelling. For instance, the fact that one can earn income through legal employment does not excuse forcibly robbing someone else of their money.

The invited error doctrine provides a legitimate rationale for ensuring that the defense cannot create, encourage, or prompt errors at trial that then serve as a basis for an appeal or "ask the court to render a particular ruling and then ask the appellate court to reverse the trial court for that ruling" (Hall, 1998, p. 367). When the defense induces errors, the defense needs to be held responsible for their ineffective trial court strategies. Yet, absolving the prosecution of any responsibility based on invitation fails to hold the State to standards of conduct that are expected of the People's representatives. Behaving unfairly in a trial is no less damaging to due process when it is "invited" than when it is not.

Blame It on the Trial Judge. It is not only the defense that is held to account for identifying and preserving for review the misconduct of prosecutors during legal proceedings. Indeed, the Texas appellate opinions show that the trial court judge is the main party responsible for acknowledging and addressing misconduct before it ever reaches the appellate court. In nearly half of the cases that are ultimately deemed harmless by the appellate court (n=14; 47%), the trial judge sufficiently "cured" the prosecutor's misconduct by sustaining the defendant's objection and instructing the jury to disregard. It is the position of the Texas appellate courts that "only [very] offensive or flagrant error warrants reversal when there has been an instruction to disregard" (*Kibble v. State*, 2010) because "the law generally presumes that instructions to disregard and other cautionary instructions will be duly obeyed by the jury" (*Vega v. State*, 2012). Harm is thus sufficiently ameliorated by a trial judge's cautionary instruction to the jury. This practice enables the higher courts to ignore prosecutors' problematic conduct if a trial court judge notified the original jury that the prosecutor erred. Yet this transfer of responsibility does nothing to address

whether a jury can, in actuality, "unhear" inadmissible evidence or inflammatory remarks, or ignore the power of a prosecutor's vouching for a witness, for example.

In assigning responsibility for controlling prosecutorial misconduct to the defense and the trial court judge, the appeals court effectively dilutes accountability for the prosecutor's actions and diminishes their role obligations. It is, of course, the duty of all court actors to play by the rules to ensure just and fair outcomes for both defendants and the people. Trial judges act as referees to the adversarial process, ensuring that the adversaries behave in accordance with the rules and procedures of criminal trials. The question is whether simply noting that one party failed to adhere to the rules – in front of factfinders – negates the rule-breaking altogether. This sort of oversight fails to hold prosecutors liable for their misconduct in any meaningful or measurable way and further, in the words of Arthurs (2004, p. 1707), prioritizes "procedure over justice."

Misreading the Court's Rulings & Maintaining System Legitimacy

The decisions of appellate courts influence how prosecutorial misconduct will be viewed by those outside of the law. When prosecutors engage in behavior that violates the rules of criminal procedure or the substantial rights of the accused, these powerful system actors unfairly tip the scales of justice in their favor. To the extent that their behavior is downplayed and treated as out-of-character or a one-off, the system perpetuates a narrative that it operates fairly to achieve correct outcomes. When high courts affirm the convictions obtained in lower courts, they effectively endorse a view of the defendant as guilty and deserving of punishment. It could undermine the legitimacy of the system if the checks and balances routinely identified wrongful decisions upon review (Schoenfeld, 2005).

In 14 of the 30 Texas appellate cases (47%) in which prosecutorial misconduct is found to be harmless, the judicial opinions expressly suggest that the magnitude of the prosecutors' misbehavior was relatively minor. For example, the court categorized the misconduct as "not extensive" (*Williams v. State*, 2011), "largely inconsequential" (*Irielle v. State*, 2014), "mild…and not as flagrant as the conduct in other cases" (*Raborn v. State*, 2011), "isolated" (*Arias v. State*, 2010; *Garcia v. State*, 2013; *Snowden v. State*, 2011) or "not particularly offensive or outrageous" (*Garcia v. State*, 2013). The court appears to have fashioned an ambiguous system for determining how significant the misconduct must be to be injurious to the defendant, opining that the State's "objectionable comments consisted of a few sentences" (*Franklin v. State*, 2015), "constitute[ed] only a small portion of the prosecutor's argument" (*Williams v. State*, 2011), or was "brief in the context of the State's entire argument" (*Richardson v. State*, 2012). Thus, even when the court acknowledges that the prosecutor's actions are unacceptable, its estimates of the degree of harm to the defendant lean heavily toward the behavior being a nuisance or innocuous.

In perhaps a most unusual example in which a prosecutor intentionally read the notes of a juror during a trial recess, the appellate court claimed to be concerned and then deemed the action harmless. It described the prosecutor's conduct as "severe in the abstract sense," "egregious," and "totally inappropriate"; yet the court held that "a mistrial is not necessarily required even though a State's attorney should be punished for misconduct" and the appellant's conviction was affirmed (*Benefield v. State*, 2012). These legal communications indicate that the court will tolerate prosecutorial overreaching generally and that even when they acknowledge that the overreaching is "totally unacceptable," it may still be viewed as excusable.

The Texas high courts further dilute the harms associated with prosecutorial misconduct in making implicit claims about the good character of the State. For instance, in *Williams v. State* (2011), the appellate court concluded that "nothing suggests declaring the error harmless will encourage the State to repeat this error." Here, they refer to the improbability of prosecutors repeating their errors in the future

as a basis to avoid holding them accountable for the errors that they have already committed. In suggesting that the misconduct is unlikely to be repeated, the courts treat prosecutorial misconduct as unusual and out-of-character mistakes rather than routine violations deserving of punishment, despite the ostensible theoretical basis for punishment (at least for defendants) being centered on the deterrence of future misconduct.

Appellate courts repeatedly reference repetition in a second way, wherein they praise the State for not repeatedly engaging in the misconduct in the same trial and, in so doing, absolve them of responsibility for engaging in it in the first place. For instance, the Court of Appeals of Texas (Dallas) claimed that "the prosecutor did not repeat the improper argument once the court sustained the objection and instructed the jury to disregard" (*Williams v. State*, 2013) and in another case, the Court of Criminal Appeals of Texas argued that the "error was isolated…[and] the illegitimate inference—that the jury should also hold the appellant's apparent lack of courtroom remorse against him, in derogation of his constitutional right to remain silent—was never repeated or emphasized" (*Snowden v. State*, 2011). Likewise, in *Raborn v. State* (2011), the court found that "after the appellant's objection was overruled, the prosecutor moved on to a discussion of the evidence and did not continue with the improper argument." In these and numerous other instances, the appeals courts seem to laud the prosecution for only committing misconduct once in the course of trying defendants. Yet even the repeated misconduct of the prosecutor in *Alcala v. State* (2014) was thought not to have unduly prejudiced the jury given the trial court's instruction to disregard.

In all, these examples demonstrate a central theme of appellate court opinions on prosecutorial misconduct: the conduct is not severe, it happens only infrequently, and thus it is not worrisome. The message that is then translated to the media and the public is that trials are fair, prosecutors are the "good guys," and the defendant was rightfully convicted.

Causing Harm

Despite the overall "positive" view of the character of prosecutors, which diminishes and transfers their responsibility to other parties for engaging in misconduct, there are a minority of cases in which prosecutors were recognized to be the "bad guys." Texas appellate courts conceded that the prosecutor's behavior at trial was "not harmless" in five of the cases in the sample. The higher courts opted not to diffuse responsibility to the defense in any of these cases and, in *Kelly v. State* (2010), the appellate court expressly disagreed with the prosecutor's contention that the defense "invited" the prosecutor's improper questioning, instead noting that the defense objected (but was erroneously overruled by the trial judge) every time the prosecutor referred to co-defendants having been convicted in earlier trials. The improper comments were made on multiple occasions during trial, and were "clearly inflammatory. The argument occurred late in the State's final closing argument and likely left a strong impression on the jury. Thus, the prejudicial effect of the evidence and the argument was severe" (*Kelly v. State*, 2010).

While the defense was not held to account for controlling the prosecution in the sample of cases resulting in an assessment of harm, the trial court was implicated as primarily responsible for regulating the prosecutor's misbehavior in all five cases. Namely, the courts viewed the misconduct as tainting trials due to the failure of trial judges to adequately correct the misconduct at the time it happened, either by sustaining the defense's objections or by offering curative instructions to the jury. The appellate court went so far as to assign *more* of the responsibility for prosecutors' misbehavior to the trial judges than to the prosecutors themselves when they noted, for example, that "the trial judge erred by *allowing* the prosecutor to engage in improper jury argument" (*Ex parte Mares*, 2010; emphasis added) or that "the trial

court *magnified* this harm by overruling appellant's objections, thereby giving its stamp of approval to the prosecutor's remarks" (*Watts v. State*, 2012; emphasis added).

Despite a heavy focus on the third factor outlined in *Mosley*—the weight of the evidence absent the error—in reaching a decision that prosecutorial misconduct is harmless (as expressed in 16 of the 30 opinions; 53%), the court openly acknowledged the importance of ensuring a fair trial only in *Kelly v. State* (2010). Here, the court opined that…

> A reviewing court in applying the harmless error rule should not focus upon the propriety of the outcome of the trial. Instead, an appellate court should be concerned with the integrity of the process leading to the conviction. Consequently, the court should examine the source of the error, the nature of the error, whether or to what extent it was emphasized by the State, and its probable collateral implications [...]. [T]he reviewing court should focus not on the weight of the other evidence of guilt, but rather on whether the error at issue might possibly have prejudiced the juror's decision-making [...]. In other words, a reviewing court must always examine whether the trial was essentially a fair one. (*Kelly v. State*, 2010)

This case, however, is the exception; ensuring the fairness of trial outcomes and the due process rights of the accused does not appear to be the normative approach to appellate review of prosecutorial misconduct.

Conclusion

How do appellate courts handle prosecutorial misconduct, and who is responsible for ensuring that criminal trials are fair and that prosecutors act within the bounds of rules and procedure? This study has shown that, in Texas, prosecutorial misconduct tends to be regarded by higher courts as mild, infrequent, and ultimately harmless. It is not surprising, then, that Texas appellate courts only occasionally hold prosecutors to account for their misconduct by reversing the convictions that are secured in trials where the prosecutor's "white hat" falls askew. Consistent with Tadros' (2005) theorizing, we argue that the presumptive character of prosecutors—as morally virtuous seekers of justice—helps to explain higher courts' apathetic reaction to misbehavior. The courts seemingly view most prosecutorial misconduct as mere overzealousness, an unfortunate side effect of the adversarial process by otherwise ethical actors (Givelber, 2001; Medwed, 2012).

To the extent that punishment is intended not merely to respond to past behavior but to deter future behavior, the relative leniency of appellate courts in addressing prosecutorial misconduct is instructive. Deterrence theorists maintain that effective punishments are certain, proportional to the offense, and swift (Nagin, 2013). Failure to punish should, theoretically, have the opposite effects both on the actor and on the larger community. It minimizes the harm of the act and signals to those responsible that the behavior is, if not acceptable, at least tolerable. Said differently,

> the moral justification for punishment lies in its effects—in its contribution to the prevention of crime and the social readjustment of the criminal. [...] [W]e cannot know by looking only at what the criminal has done, what should be done to him. His act, lying in the past, is important merely as *a symptom—one symptom among others—of his character, mind and disposition*; it helps us to diagnose what he is like and predict the effects of our action on him and on society. (Hart, 2008, p. 159-160, emphasis added)

Texas appellate court judges, in viewing most misconduct as harmless, treat the misbehavior of prosecutors as anomalous, inconsequential, and, in many ways, out-of-character. In this way, prosecutorial misconduct is not viewed as deserving of punishment because it is not *reflective* of the prosecutor as a person or as a representative of the state (Tadros, 2005).

Our research shows that a central mechanism by which the appellate courts diminish prosecutorial accountability for their misconduct is by shifting the responsibility to other courtroom actors, including the defense and the trial judge. Indeed, far more of the references to "responsibility" in these appellate judicial opinions focused on the actions (or inactions) of defense attorneys and trial judges when confronted with prosecutorial misbehavior. Rather than holding the prosecutors—who have an obligation to seek justice and ensure fair trials—to account, the courts tend to absolve them of the misconduct and place the blame squarely at the feet of others to regulate and respond to prosecutorial overreach. It is largely in reaction to the *defense* or *trial judge's* apparent dereliction of duty that the appellate court attends to prosecutorial misconduct.

Part of the explanation for why this is the case may lie in the legal system's need to maintain legitimacy and the confidence of the public in the integrity of its rulings (Duff, 2010; Tyler & Sevier, 2014). If prosecutors are the moral authorities in the courtroom, then they must be seen to be steering the system to reach the right outcomes—conviction of the guilty through just procedures. When it is prosecutors who are guilty of stepping outside the bounds of their duty and obligations, the system must downplay the severity of the misbehavior, emphasize its rarity, and minimize the potential reputational harm in response. This becomes easier to accomplish when the higher courts can use procedural bases on which to ignore misconduct that is not preserved for review, or summarily assume that the misconduct was cured by the actions of the lower court judge. While the reversal of a conviction may not reflect much about the factual guilt or innocence of the defendant, neither does the affirmation of a conviction. And yet, the media and the public misread appellate decisions to affirm convictions as proof that the system got it right the first time. In this way, the character of prosecutors as the "good guys" and criminal defendants as the "bad guys" is consistently reaffirmed.

These findings illustrate how determinations in the criminal justice system regarding responsibility do not readily translate to parties in other systems (Nobles & Schiff, 2004). It is the responsibility of state appellate courts to review the procedures and decisions of lower courts and, in so doing, ensure that criminal trials are fair, and laws are properly and objectively applied. Appellate courts are not responsible for retrying cases or reestablishing the guilt of the defendant. Appellate courts are, effectively, overseers of the trial process. It is in this role that they should operate as the first line of defense against errant prosecutors, and yet they routinely skirt this duty by justifying or diminishing the harms associated with procedural injustices that take place in lower courts (Ridolfi & Possley, 2010; Scheuerman et al., 2022). This is despite the "sound principle of a liberal criminal law that we should be liable to conviction and punishment only for what we do, not for what we are" (Duff, 2010, p. 135). However, in truly fulfilling the responsibilities of their role as overseers, higher courts could jeopardize the efficiency of the legal system if the character of prosecutors is too often brought into question. Moreover, as public perceptions about the legitimacy of the legal system are tied to notions of procedural justice (Cann & Yates, 2016; Tyler & Sevier, 2014), routine admonishment of prosecutors' behaviors could weaken public support for, and confidence in, the courts.

We expect that our findings would apply to the determination of responsibility for prosecutorial misconduct in other contexts. Although harm analyses may be crafted differently in different states, most incorporate some version of the *Mosley* factors, including the contribution of the misconduct to the conviction, the application of existing remedies at the trial level, and/or the weight of the evidence absent the error (*Chapman v. California*, 1967; *Harrington v. California*, 1969; *Delaware v. Van Arsdall*, 1986).

Nevertheless, future studies should explore whether our findings are generalizable to jurisdictions other than Texas and to other periods of time.

Two additional limitations are also worthy of consideration. First, not all the appellate court decisions provide enough detail about the specific behavior of the prosecutor to generate a continuum of severity; this makes it hard to evaluate how trivial or severe the misconduct was in the context of the trial. Second, the opinions examined in this study include only those decisions in which the appellate court concedes that prosecutorial misconduct marred the trial. It does not include a larger group of cases in which the appellant claims that the prosecutor engaged in misconduct, but the higher courts disagree. Nonetheless, because a harm analysis is only appropriate to address acknowledged errors, and our interest is in evaluating how higher courts hold prosecutors responsible for misconduct that they believe to have occurred, a fitting subset of cases is examined here.

Despite these limitations, this study offers insight into the circumstances in which prosecutors are subject to oversight, the diffusion of responsibility for their bad actions, and the ways in which the courts work to protect and defend their legitimacy in producing just outcomes. How appellate courts and the public view the "character" of prosecutors may contribute to a minimization of the attribution of responsibility when these agents of the state engage in misconduct. It is in this instance that these two systems, the public and the legal system, appear to agree.

Notes

1. However, Tadros (2005) suggests that a strict reading of both choice and capacity theories fails to capture the necessary and sufficient conditions of criminal responsibility specifically, which hinge on morality or wrongfulness of actions.
2. The Federal Rules of Evidence (and most state jurisdictions) forbid the use of character evidence as indicative of propensity (effectively, guilt) in a specific instance, with the exception of cases of rape and child molestation (Colb, 2001). We submit, however, that the role-status of prosecutors and defendants, respectively, carries with it an insinuation of good (prosecutor)/bad (defendant) character in criminal cases writ large (see also Cooney, 1994).
3. Under *Chapman v. California* (1967), the Supreme Court held that prosecutorial errors could be disregarded if the state could prove that the errors were "harmless beyond a reasonable doubt." In a later case, the court attempted to clarify the harmless error rule by distinguishing two types of constitutional errors: (a) structural errors, which require the finding of a mistrial by the trial court or an overturning of the verdict by an appellate court provided that a timely objection was raised by the defense at trial; and (b) trial errors, which require harmless error review (*Arizona v. Fulminante*, 1991; Tisdale, 2016).
4. Although states are free to fashion their own criteria for harm analyses, most draw on some combination of the weight of evidence in support of the defendant's guilt (either the quantity of evidence, i.e., New York, or the nature of the evidence, i.e., Texas), the extent to which the misconduct was addressed or remedied at trial, and/or an estimation of the contribution of the misconduct to the defendant's conviction (Scheuerman et al., 2022).
5. According to Nobles and Schiff (2004, p. 223), the term "autopoietic" originates "in theories of the role played by cells in biological evolution, [and] refers to the idea that communication takes place only within separate systems. Like cells, which must reproduce themselves out of their own elements, legal communications can only be created by reference to prior legal communications, medical communications by reference to prior medical communications, and so on."
6. We restrict our analysis to cases in which the appellate court substantiates the prosecutor's misconduct – rather than including cases in which misconduct is alleged by the defendant but not conceded by the appellate courts – because it is only those cases in which the appellate court agrees that prosecutorial misconduct occurred that

are: (a) eligible to be subject to harm analysis, and (b) allow for an analysis of attributions of responsibility and blame. When the higher court fails to acknowledge or concede that the prosecutor engaged in misconduct at all, the court is effectively saying that misconduct did not happen. Because our interest is in how the courts hold prosecutors responsible (or not) for their misbehavior, we examine only those cases in which higher courts acknowledge that some behavior occurred outside the bounds of standard trial and case processing rules.

7. The Center for Prosecutor Integrity database is publicly available and can be found here: http://www.prosecutorintegrity.org/registry/database/
8. It is not possible to effectively differentiate between prosecutorial misconduct that is intentional and prosecutorial error that is accidental. In part, this is because the observable behavior and its effect on securing a fair trial for the accused is, for all intents and purposes, identical. Higher courts generally refrain from attempting to discern whether the prosecutor simply got "carried away" in an adversarial zeal or deliberately set out to taint the trial in the state's favor. Prior to *Berger v. U.S.* (1935), the Supreme Court held in *Dunlop v. U.S.* (1897) that "there is no doubt that, in the heat of the argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be prejudicial to the accused….If every remark made by counsel outside the testimony were ground for a reversal, comparatively few verdicts would stand, since in the order of advocacy, and in the excitement of the trial, even the most experienced counsel are occasionally carried away by this temptation." By 1935, the court established a balance in which, for strong evidentiary cases, prosecutorial misconduct could be safely disregarded as having substantially affected the rights of the accused and, for weak evidentiary cases, any misstep of the prosecutor out of bounds should carry more weight irrespective of intention (*Berger v. U.S.*, 1935). Some scholars implicitly suggest that intentionality may be detected by the number of times a prosecutor errs in a single trial (wherein more misconduct suggests greater egregiousness and, perhaps, intentionality) (Landes & Posner, 2001; Scheuerman et al., 2022), but even this standard is merely an assumption absent any information on the internal thoughts and decision processes of prosecutors.
9. Of these opinions, five were decided by the Court of Criminal Appeals, Texas' court of last resort for criminal cases, and the remainder were decided by state intermediate appellate courts.
10. In two of these five cases, the appeals courts found that prosecutors had engaged in perhaps the most serious and insidious form of misconduct possible in criminal cases, *Brady* violations. *Brady* violations take their name from the Supreme Court case, *Brady v Maryland* (1963), which held that prosecutors must disclose all exculpatory evidence to the defense in a timely fashion. Failure to disclose violates the central principles undergirding fair trials in that, in the American system, case investigators (e.g., police) are members of a law enforcement community that includes prosecutors. As such, the defense is dependent on prosecutors to gather evidence from the police and, when that evidence is exculpatory, share that information with the defense. These were the only two cases in which a *Brady* violation was found to have occurred by the Texas appellate courts in these data. In the three remaining cases where prosecutorial misconduct was viewed as not harmless, prosecutors introduced inadmissible evidence (either during opening or summation, or in questioning a witness), with one case noting that this inadmissible evidence was also inflammatory. It is noteworthy, however, that most cases involving inadmissible evidence (80%) were deemed to involve harmless error.

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