DEAD WRONG

Ronald F. Wright & Marc L. Miller*

I. INTRODUCTION

The flood of people and the interlocking institutions that make up criminal justice systems can absorb huge changes and return quickly to equilibrium. What might we expect once the system reaches equilibrium with DNA evidence? After police and prosecutors start considering DNA evidence routinely at the investigation and charging stages, far fewer DNA-driven exonerations will be likely to happen at the post-conviction stages.

This will be a great day for justice, but also a day of great peril. The systematic, early use of DNA evidence does not mean that mistakes will no longer happen.¹ What will become of those errors when the spotlight of DNA evidence no longer shines so brilliantly on wrongful convictions? What, indeed, are the fundamental lessons of the extraordinary DNA era that has produced both compelling evidence of guilt and compelling evidence of error?

In this essay, we explain why we believe that scholars have drawn the wrong lessons about the work of prosecutors from DNA exonerations. Much of the commentary about prosecutors and innocent defendants starts with a critique of the adversarial mindset, and ends with a call for more openness among prosecutors to claims of innocence among defendants. We summarize and respond to these critiques in Part II. In our view, the most meaningful and enduring changes to the work of prosecutors will focus on the traditional core of their work—the initial charging decisions—rather than novel techniques to identify and remedy wrongful convictions after they occur.

In particular, we focus on two features of the charging decision that are relevant to the ideals of the innocence movement. First, accuracy in the criminal system faces mortal danger when a prosecutor decides what charges to file based on his or her individual assessment of the moral worth of criminal defendants or victims, rather than the categorical public values embodied in the criminal code. Second, we should worry most about errors in the system when the prosecutors

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aim above all to reach a deal with the defendant to avoid trial, rather than pricing the specific crime that the evidence might prove.

These two prosecutor habits of mind—a willingness to draw moral judgments about criminals and victims rather than about crimes, and a willingness to value deals over consistent outcomes—lie at the root of the problem. This problem flowers, sometimes years later, in the strange fruit of wrongful convictions.²

To flesh out these assertions about prosecutors and accurate outcomes, we turn to a case study: two stories from Dallas, Texas. The first episode involves the work of the current District Attorney in Dallas to cooperate with the efforts of local innocence projects as a remedy for an especially high rate of DNA exonerations from the office in recent years. In Part III of this essay, we describe his efforts and explore the limits of after-the-fact remedies.

The second episode from Dallas, discussed in Part IV, came to light in a remarkable set of articles from the Dallas Morning News.³ These reports indicate that prosecutors in Dallas for years have been capricious in their charging of homicide cases, and indifferent to consistent justice in their sentencing recommendations for murderers. In particular, the study suggests that the office brings murder charges in many cases that deserve lesser charges or no criminal charges at all. At the same time, the office requests probation as the sentence for murder convictions far more often than other jurisdictions in Texas. In short, the charges and sentences in murder cases in Dallas appear to be both too high and too low. This pattern of outcomes in homicide cases is dead wrong.

Unreliable charging decisions such as these escape our attention in debates about “innocence” because they do not fall within the working categories of “factual” innocence or “legal” innocence.⁴ We believe, however, that unreliable charging, unconnected to the public moral judgments found in the criminal code, is intimately related to the sort of injustice that drives the innocence movement.

Put another way, the two episodes from Dallas are connected. The high level of DNA exonerations we find in Dallas grows out of a fixation on guilty pleas and an indifference to consistent and accurate application of the criminal code. We glimpse the same forces at work on the front end and the back end of the system.

II. DNA EXONERATIONS AND ADVERSARIAL PROSECUTORS

The prospect of losing DNA evidence creates an urgent need to fix whatever is responsible for these errors—now, before the light shuts off and the problems flourish again in the dark.⁵ Some of the answers look forward, and some look back.⁶

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² Cf. BILLIE HOLIDAY, Strange Fruit, on ULTIMATE BILLIE HOLLIDAY (Verve Records 1997) (lyrics comparing lynching victims to fruit hanging from a tree).
³ See infra Part IV.
⁴ See infra Part III.
⁵ Susan A. Bandes’s contribution to this symposium addresses the power of language to change our expectations for justice when the moral clarity of the DNA exoneration is no
Many proposals to change the system encourage prosecutors to remedy mistaken prosecutions after conviction. Such backward-looking remedies include changes to the relevant rules of legal ethics, and the creation of specialized units to respond to claims of innocence. These suggestions are not surprising, as the DNA innocence movement has captured the public attention with its powerful post-conviction demonstrations of error.

Other proposals aim to prevent mistaken prosecutions and convictions before they happen. As George Thomas suggests, prosecutors might not fall into error so often if they were drawn from the same pool of criminal practitioners who also defend cases. Or as Daniel Medwed proposes, prosecutors may need to move beyond conviction rates and wins at trial as internal measures of success. The external measures of political success may also need to change.


9 Shortly before and during the era of the DNA innocence projects, scholars and public officials seriously debated whether any “truly innocent” defendants were in fact convicted of serious offenses. See, e.g., Paul G. Cassell, The Guilty and the “Innocent”: An Examination of Alleged Cases of Wrongful Conviction from False Confessions, 22 HAR V. J.L. & PUB. POL’Y 523, 535–76 (1999). Between the DNA Innocence Projects and the gruesome police behavior in the Los Angeles Police Department Rampart scandal, the existence of regular and nontrivial error is now widely acknowledged.

10 George C. Thomas III, When Lawyers Fail Innocent Defendants: Exorcising the Ghosts that Haunt the Criminal Justice System, 2008 UT A H L. REV. 25, 44–47; see also MICHAEL TONRY, THINKING ABOUT CRIME 206–10 (2004) (suggesting that prosecutors should be selected from a pool for career civil servants and not elected).

11 See Medwed, supra note 8, at 134–37, 172.

12 Id. at 177–83.
The common thread running through these ideas is a call for less adversary zeal among prosecutors. The adversarial model of justice is thought to reinforce the natural human tendency toward tunnel vision. The best response to this toxic combination, from the vantage point of the innocence movement, would be techniques to de-emphasize competition and wins at trial. Put another way, these scholars suggest that we could do with a little less testosterone in our prosecutors' offices.

We do not consider the concept of adversary zeal to be a useful framing device for thinking about prosecutors and innocent suspects. Certainly it is a virtue for prosecutors to show a sense of perspective and to understand that justice does not equate to convictions and wins. Further, prosecutors need self-restraint, grounded in an awareness that the adversary system does not safeguard accuracy as we might hope. But a generalized call for less severe or less aggressive prosecution will not achieve a criminal justice system that is decent, proportionate, and committed to accurate outcomes.

Our alternative proposal for a shift in prosecutorial culture goes like this: prosecutors who value accuracy in criminal justice will have to devalue plea deals. Such prosecutors must file charges that are sometimes less serious and sometimes more serious than the charges best suited to promote plea agreements. When prosecutors improperly use sentencing laws to threaten defendants with enormous trial penalties, the best advice is not to become less adversarial, but to take more seriously the values of the substantive criminal code.

III. DALLAS EPISODE ONE: CLEANING UP THE MESS

Craig Watkins took office in January 2007 as the District Attorney in Dallas, after winning an election campaign against the hand-picked successor to the

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14 These generalized calls for less adversarial prosecution are quite hard to assess in a world of “administrative” criminal justice. As Judge Gerard Lynch crystallized the idea, the criminal process is dominated by the prosecutor who selects charges and negotiates plea agreements, with only occasional judicial involvement in trials or in questioning the propriety of plea negotiations. This system is not adjudicative, but administrative. Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 FORDHAM L. REV. 2117, 2123 (1998) (“The substantive evaluation of the evidence and assessment of the defendant’s responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor.”). What does it mean, in such an administrative system, to speak about the “adversarial” quality of the central administrative officer, when adversarial behavior is defined through a litigation lens?

previous chief prosecutor, Bill Hill.\textsuperscript{16} Hill's office was notorious for its aggressive handling of high visibility cases, especially capital murder cases. Indeed, the bad habits of prosecutors in the Dallas office provoked reversals from the U.S. Supreme Court in two recent cases because the office explicitly relied on racial stereotypes in the selection of jurors.\textsuperscript{17}

Dallas County was also the home of thirteen DNA exonerations from 2001 to 2007, more than any other county in the United States.\textsuperscript{18} Recognizing that an office with this abysmal record may have prosecuted even more innocent defendants, Watkins declared after only a few weeks on the job that his office would cooperate with the Innocence Project of Texas (Innocence Project) to investigate other possible wrongful convictions.\textsuperscript{19} In particular, Watkins allowed volunteers from the Innocence Project to access prosecution files for over 350 defendants (charged with rape, murder, and other felonies) going back to 1970.\textsuperscript{20}

Watkins is not alone among chief prosecutors in cooperating with such efforts. Some have gone beyond a one-time grant of access to prosecution files, using other practices to find and fix wrongful convictions after they occur. At least one chief prosecutor has assigned an assistant district attorney to audit all serious sexual assault and homicide cases prosecuted before the advent of DNA testing.\textsuperscript{21}

What might convince a district attorney to build these post-conviction practices into the office routine? In the case of Craig Watkins in Dallas, the answer is reasonably clear. It is easier to accept scrutiny of closed cases if they were investigated and prosecuted under your predecessor in office. This is doubly true if your predecessor was a political opponent.

\textsuperscript{16} Kevin Krause, \textit{Dallas DA's Coffers Swell After Victory}, DALLAS MORNING NEWS, Jan. 20, 2007, at 1B.


\textsuperscript{18} See Ralph Blumenthal, \textit{For Dallas, New Prosecutor Means an End to the Old Ways}, N.Y. TIMES, June 3, 2007, at A28; Ralph Blumenthal, \textit{A 12th Dallas Convict is Exonerated by DNA}, N.Y. TIMES, Jan. 18, 2007, at A14 ("Nowhere else in the nation have so many individual wrongful convictions been proven in one county."); Sylvia Moreno, \textit{New Prosecutor Revisits Justice in Dallas}, WASH. POST, Mar. 5, 2007, at A4 (explaining that Dallas County has "more postconviction DNA exonerations than any county in the nation").

\textsuperscript{19} See Jennifer Emily, \textit{DA OKs DNA Tests in 7 Cases}, DALLAS MORNING NEWS, Nov. 27, 2007, at 2B.


\textsuperscript{21} This example comes from Santa Clara County, California, where former judge Delores Carr took office as the district attorney in 2007. See Linda Goldston, \textit{Trial by Fire: First Nine Months Test District Attorney Carr}, SAN JOSE MERCURY NEWS, Oct. 27, 2007, at 1A. Carr also offered a reward to office employees who discover innocent persons charged with a crime. See http://www.sccgov.org/portal/site/da/ (follow "Office of the District Attorney" hyperlink; then follow "District Attorney's Office By-Laws" hyperlink).
Another motive for prosecutors to create these venues for innocence work might be a personal conversion of sorts. One such conversion story comes from Forsyth County, North Carolina.

In that county, a nineteen-year-old African American man named Darryl Hunt was charged with committing a horrifying rape and murder in 1984.22 A prosecution case that depended heavily on three eyewitnesses led to a conviction at the original trial and a second conviction on retrial after a reversal for legal error in the state supreme court. Hunt also filed several failed post-conviction motions in the state courts.

A decade after the conviction, DNA evidence confirmed that Hunt was not the rapist. A few years later, the DNA evidence demonstrated that another man, Willard Brown, committed the crime. Brown confessed and exonerated Hunt, who was released after spending eighteen years incarcerated for a crime he did not commit.

Thomas Keith was not the district attorney at the time of the original Hunt trial, but he did hold office by the time of the second trial and the various post-conviction motions. His reluctance to credit the DNA evidence and his shifting theories of the case hurt his credibility with major portions of the community.23 In the aftermath of the Hunt catastrophe, Keith declared his willingness to open case files and to cooperate with innocence projects on a systematic basis.24 The Hunt case shifted Keith’s view about the possibility of error in the system. By all appearances, the case changed Keith on a personal level, although observers of a more cynical bent might say that the case changed the political calculus for him. Whatever the combination of motives at work, one visible failure of the criminal justice system led one chief prosecutor to a different posture about remedies for potentially wrongful convictions. If these changes happened in the prosecutors’ offices in Dallas and in Winston-Salem, might they also happen elsewhere?


24 See DA Seeks Panel to Review Claims of Innocence: Hunt Release Brings First-of-Kind Request to Bar Association, CHARLOTTE OBSERVER, Jan. 25, 2004, at 5B. One of the authors is coordinating the work of students at Wake Forest University to recommend cases to Keith for possible DNA testing.
The prospects here are discouraging because leadership among criminal prosecutors in the United States is radically fragmented and localized. Most criminal prosecutors are elected at the city or county level, and do not serve within a unified statewide prosecutor service. Indeed, there are 2344 separate prosecutor offices in the state court systems in the United States, and almost all of them report to no higher authority, apart from the voters of the local jurisdiction. Thus, while an individual prosecutor such as Tom Keith might from time to time experience a change of heart, the same remarkable series of events would have to occur over and over again, in hundreds of places, before any systemwide reform would result.

While some may hope that newcomers to the prosecutor’s office like Craig Watkins will increase chances for cooperation with the innocence movement, their hope founders upon another reality about American prosecutors: opportunities to work with newcomers come rarely. Turnover among chief prosecutors is slow, because chief prosecutors who campaign as incumbents almost always win re-election. In fact, the retention rate for prosecutor incumbents is even higher than the retention rate for state legislators. Most chief prosecutors who run for re-election run unopposed, although challengers in these races win more often than challengers in state legislative races. Changing the election dynamics for prosecutors offers more than enough work for a lifetime.

There are also reasons to question the staying power of efforts by prosecutors to find and remedy past wrongful convictions. If the “innocence” unit is considered a frill or a response to a temporary need or a fad (comparable, perhaps, to the “cold case” units that some prosecutors established in the wake of popular television programs touting the concept), that innocence unit will suffer the first cuts when budget troubles arrive for the office. Furthermore, the units will probably not find committed champions in most offices to defend them from the budget ax. Such units will find themselves at odds with office culture, much like community

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26 Id. at 1.
27 Matthew Clark & Peter Stewart, A Vote For Justice? An Analysis of the Effectiveness of Elections as a Check on Prosecutorial Power 20 tbl.1 (unpublished manuscript, on file with authors).
28 Id. at 27.
29 Id. at 26–27.
prosecution units find it difficult to fit into the classic trial-based system of rewards and values in a prosecutor's office.\footnote{See Kay L. Levine, The New Prosecution, 40 WAKE FOREST L. REV. 1125, 1130, 1186–87 (2006). The tension between innocence work and traditional prosecutorial duties is similar to the tension between the work of diversion units in prosecutors' offices and the familiar work of criminal prosecution. For example, police departments must sustain different units with conflicting cultures and agendas when they maintain Internal Affairs Divisions to investigate wrongdoing by police officers.}

Because of these barriers to success, those who value accuracy in the criminal justice process must shift their gaze to an earlier point in the process. After-the-fact remedies for wrongful convictions have been the mainstay of the innocence movement. But after-the-fact review of any kind cannot produce any deep and pervasive effort at prosecutorial reform, because such reviews will always be exceptional. Instead, those who treat accuracy as a core value should emphasize the high-volume charging decisions and plea negotiations that occupy most of the prosecutors, for most of their time, in offices all over the country.

With our focus on charging decisions, we can see that the working categories of the innocence movement leave a blind spot. DNA exonerations uncover examples of "factual" innocence. Improper police practices sometimes produce convictions of those who are "legally innocent"—that is, defendants who did commit the crime as charged but are wrongfully convicted because the police violated the law to obtain the evidence.

Neither of these categories, however, captures the problem of defendants who are charged with a crime that is more serious than the conduct typically supports, or those who receive a sentence that is less serious than the conduct deserves. Although these inaccuracies take different final forms, we believe they all have similar origins.

IV. DALLAS EPISODE TWO: CREATING THE MESS

Just as events in Dallas can illustrate the possibilities and limits of prosecutor efforts to remedy past wrongful convictions, events in Dallas can also reveal some of the origins of wrongful convictions. The story we tell here is based on recent news reports from Dallas.\footnote{The reporting, developed over several months, appeared in a five-part series and ancillary articles. See Brooks Egerton & Reese Dunklin, Fixing a Justice System That's "Off the Track": Experts Question Ethics of Putting Killers on Street, Say Changes Can—and Should—Be Made, DALLAS MORNING NEWS, Nov. 15, 2007, at 1A [hereinafter Egerton & Dunklin, Fixing a Justice System]; Brooks Egerton & Reese Dunklin, Prosecutors' Ploy in Shaky Cases: Even with Strong Self-Defense Claims, DAs May Pressure Defendants to Take Probation, DALLAS MORNING NEWS, Nov. 14, 2007, at 1A [hereinafter Egerton & Dunklin, Prosecutors' Ploy]; Brooks Egerton & Reese Dunklin, Back Door to New Crimes: Taurus Ephraim Killed but Dodged Prison—Until He Was Charged with Beating a 1-Year-Old Boy, DALLAS MORNING NEWS, Nov. 13, 2007, at 1A [hereinafter Egerton & Dunklin, Back Door to New Crimes]; Brooks Egerton & Reese Dunklin, In Some Cases, It's High Crime, No Time: She Killed 55 Years Ago and Served 7} The \textit{Dallas Morning News} collected information over
many months about homicide prosecutions. The reporters focused on homicide cases from 2000 through 2006 that ended in murder convictions. They examined court records for information about the charges and sentences imposed, interviewed the families of homicide victims and the attorneys involved in the cases, and searched public records to learn about the defendant’s earlier or later contacts with the criminal justice system.33

The news headline was shocking, at first glance, for an office with a reputation for aggressive prosecution, including the aggressive pursuit of the death penalty: at least fifty-six people accused and convicted of murder in the metropolitan Dallas area received a probation sentence instead of prison over this seven-year period.34 Moreover, Dallas County led the state of Texas in probation sentences for murder convictions. Statewide, 3.8% of the defendants convicted of murder were sentenced to probation rather than prison, while in Dallas County, the rate was 9%.35 We repeat: 9% of convicted murder defendants in Dallas over a seven-year period received sentences of straight probation.

Eleven of these sentences resulted from a jury sentence (recall that Texas is one of the few jurisdictions to use jury sentencing in noncapital cases),36 while judges sentenced three of these defendants without a plea bargain.37 But in the bulk of these cases the prosecutors endorsed these probation sentences. In forty-two of the fifty-six cases, the prosecutor negotiated a guilty plea with the defendant, agreeing to recommend probation to the court as the appropriate sentence.38


33 See Egerton & Dunklin, Misdemeanor Murder, supra note 32.

34 There were forty-seven such cases in the Dallas County. See Egerton & Dunklin, Fixing a Justice System, supra note 32.

35 See Brooks Egerton & Reese Dunklin, By the Numbers, http://www.dallasnews.com/sharedcontent/dws/spe/2007/unequal/index2.html [hereinafter Egerton & Dunklin, By the Numbers]. The rate was 11% for the entire metropolitan Dallas area. See also Editorial, Getting Away with Murder: Prosecutors and State Lawmakers Can Fix This, DALLAS MORNING NEWS, Nov. 18, 2007, at 2P.


37 Egerton & Dunklin, By the Numbers, supra note 35.

38 Id.
A. Killing Legal Guilt

Why might prosecutors agree to a probation sentence for a murderer? In rare cases, one might imagine some very good reasons for a prosecutor to agree to probation even when pressing for a murder conviction. But how often would such a sentence be appropriate?

Perhaps in some cases the prosecutor goes along with a probation sentence because the available evidence to establish the elements of the crime is weak. Prosecutors might figure they should take half a loaf (or in these cases, closer to a single slice) rather than no loaf at all. Obtaining convictions in such cases, even with a low-level sentence, extends the reach of the criminal law to control past and future criminals. Arguably, this leads to a safer society.

But the reporters' analysis suggests that weak evidence was the exception rather than the rule in Dallas. In only twelve of the fifty-six cases did prosecutors declare any doubts about whether they could convince a jury of the defendant's guilt for each element of the crime. For the larger group, forty-four cases, there was no doubt about the defendant's involvement, and no doubt about proving the elements of the crime. The key issue instead was sympathy for the killer, arising most often from the victim's actions before the murder or the victim's criminal history.

This brings us to the troubling heart of the matter. Did too many of these probation sentences flow from the prosecutor's belief that the harm wasn't serious or the victim wasn't worth the full protection of the law? For forty-nine of the cases, the killer was responding to the victim's actions, which ranged from a refusal to get out of bed to angry words to physical threats to crimes that the victim committed. Consistent with other studies of criminal defendants over the

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39 See Egerton & Dunklin, Fixing a Justice System, supra note 32 (quoting DA Watkins: "It's basically an attempt to get something out of the case so the person can be under supervision."); Egerton & Dunklin, Case Profiles, supra note 36, Jose Juarez, Jr.


41 See Egerton & Dunklin, By the Numbers, supra note 35; Egerton & Dunklin, Misdemeanor Murder, supra note 32. In a total of eleven cases, the defendant was an accomplice rather than the killer. Id. The prosecutors in these cases created a subcategory of murder liability that they believed should be punished less severely than murder that a defendant commits personally.

42 Egerton & Dunklin, By the Numbers, supra note 35.
years,—but an overlooked point that deserves highlighting—most of these killers knew their victims before the deadly incident began.

The point made by the Dallas cases is more subtle and disturbing than just the prior relationship of many killers and victims. In many respects, the killers and the victims resembled one another. The racial-ethnic mix of the victims closely tracked the mix for the killers themselves. Among the killers, there were thirty-one Blacks, fifteen Hispanics, six Whites, and four Asians. Among the victims, there were twenty-nine Blacks, thirteen Hispanics, twelve Whites, and two Asians. The killers and victims also shared similar criminal histories: thirty-four killers and twenty-nine victims had previously been convicted of a crime. The question is whether prosecutors at the charging or plea negotiations thought of the killer and the victim as bad actors who both deserved punishment. In this view, each killing and prosecution worked together as a “two-fer.”

Many of the case studies from the newspaper series offer a flavor of how the system actors evaluated the attractiveness—even the moral worth—of the homicide victims. Take one example: Steven Lawrence was convicted of murdering his neighbor, Paul Tisdale. As the newspaper describes the scenario:

Over a period of weeks in 2005, Mr. Tisdale harassed, threatened and stole drugs from people at a rooming house where Mr. Lawrence lived. Despite being told to stay away, Mr. Tisdale returned, high but unarmed. Mr. Lawrence ordered him to leave again. He refused. Mr. Lawrence shot him six times.

Tisdale had at least eighteen convictions in Dallas County, on charges including evading arrest, fraud, burglary, and assault. Did prosecutors discount the killing because they believed that the victim would be unappealing to jurors?

A related theme in the cases involves the slight weight the prosecutors in these cases assigned to the wishes of the survivors, that is, family members and

44 See Egerton & Dunklin, By the Numbers, supra note 35. The killer knew the victim in thirty-two of the fifty-six cases. Id.
45 See Egerton & Dunklin, Misdemeanor Murder, supra note 32.
47 See, e.g., Brooks Egerton & Reese Dunklin, One Man’s Deal Is Another Man’s Life Term, DALLAS MORNING NEWS, Nov. 11, 2007, at 15A.
48 See Egerton & Dunklin, Case Profiles, supra note 36, Steven P. Lawrence.
49 Id. ("The victim’s actions and criminal history led prosecutor Jenni Morse to offer a plea deal.").
others who were close to the murder victims. In interviews months or years after
the court imposed a probation sentence, the survivors expressed their unhappiness
in various ways: “Justice was not served,”50 or “that boy [the killer] knew what he
was doing,”51 or “Nobody deserves to die the way he did,”52 or “They cleaned up
an old case, but they didn’t care whether they did justice or not.”53 In one vivid
example, prosecutors agreed to a plea bargain for a probation sentence for murder
defendant Lillie Childers, age sixty-seven, because her heart disease and
hypertension repeatedly delayed the trial date. Prosecutors feared the court might
never enter judgment. The victim’s relatives opposed probation and questioned
whether Childers intentionally timed her hospital stays to coincide with court
dates.54

In any given case, a prosecutor might legitimately discount the wishes of
survivors. But the law of Texas—like the law in many states—expresses a
commitment to make the criminal justice system responsive and respectful of the
victims of crime.55 While we are operating with information filtered through
memory and restated by journalists, the number of surprisingly low sentences for
murder, combined with the recurring unhappy comments of the survivors, suggests
that Dallas County prosecutors may not have placed a high priority on the wishes
of some crime victims. Indeed it appears that in many of these cases the
prosecutors did not merely discount the survivors’ views on the probationary
sentence, they ignored them.

Another common occurrence in these cases raises equally profound concerns:
often the prosecutor decided that the killer did not deserve a prison term because of
the defendant’s personality or unfortunate events in the defendant’s life. (Or
perhaps the prosecutor predicted that the jury would see things this way.) Take the
case of Eddie Mae Dudley, age 71, who shot and killed her housemate Charles
Dudley, age 68. During an argument about money, Eddie Mae ordered Charles to
get out of bed, and Charles refused. As Eddie Mae later put it, he “begged me to
shoot him,” and she did so.56

The defendant confessed to police and handed over the murder weapon. The
prosecutor, however, was willing to accept a probation sentence because he

50 See Egerton & Dunklin, Case Profiles, supra note 36, Priscilla Adams.
51 See id. Anthony Baker.
52 See id. Kevin Carillo.
53 See id. David Hickman; id. Bobbie Joe Jones (girlfriend of victim “was ‘in a state
of shock’ that [defendant] received probation”); id. Lee Rusk (“It’s an amazing criminal
justice system.”); id. Harvey Staten (survivor wished that prosecutors had gambled on a
trial because “Anyone could tell that what he said happened didn’t make sense.”).
54 See id. Lillie Childers.
55 See generally Patrick Glen Drake, Victim-Offender Mediation in Texas: When “Eye
law’s Victim-Offender Mediation Program); Office for Victim’s of Crime, Crime Victim’s
resources for crime victims).
56 Egerton & Dunklin, High Crime, supra note 32.
considered her to be "a little sweet old lady" who did not deserve to go to prison. 57
She was not always so sweet: Eddie Mae Dudley stabbed a woman to death in
1953, was convicted of murder and spent seven years in prison. 58

These quick sketches, based on case records and brief interviews, cannot tell a
definitive story. Taken together, however, it is reasonable to surmise that the
prosecutors in these cases valued the fact of a murder conviction more than the
sentence imposed. They found it worthwhile to accept steep discounts from the
expected levels of sentences for murder: sometimes because of doubts about the
available proof, sometimes because of doubts about the blameworthiness of the
defendant as a person, sometimes because of doubts about the appeal of the victim.

Most of these cases involved intentional, unjustified killings; yet the
prosecutor did not act as if the label of "murderer" should lead to consequences
different from a conviction for any other offense. The fact of a conviction trumped
the severity of the offense. The murderer, the petty thief, the drug user, and the
speeding driver all stand on the same level. Little remains here of the criminal law
as society's declaration of relative culpability—in Dallas murder cases, prosecutors
have embraced the pure crime control model of criminal law. While this is a
legitimate vision of criminal justice that others share, 59 in practice it requires more
information and time for careful evaluation than the system can realistically offer
to its prosecutors. In the end, Dallas indicates that such prosecutorial priorities
promote inaccurate charges and wrongful convictions.

B. Killing Legal Innocence

Although it is puzzling why prosecutors might agree to probation sentences
for murderers, it is equally mysterious why defendants who very likely are not
murderers would plead guilty to that charge. In particular, why do defendants and
defense attorneys agree to a murder charge, even in the face of plausible and
sometimes compelling self-defense claims or other facts suggesting a strong
likelihood of acquittal? 60

57 Id.
58 She was later pardoned, although records do not indicate the reason for the pardon.
See Egerton & Dunklin, Case Profiles, supra note 36, Eddie Mae Dudley (last visited Mar.
26, 2008). The judge in one case imposed a probation sentence over the objection of the
prosecutor because the defendant killed a victim during a robbery but was then himself
wounded during the crime, leaving him mostly paralyzed. Brooks Egerton & Reese
Dunklin, In Some Cases, It's High Crime, No Time: A Killer Given Mercy After He Showed
None, DALLAS MORNING NEWS, Nov. 12, 2007, at 1A (Aaron Lamont Jackson).
59 Cf. Christopher Slobogin, The Civilization of the Criminal Law, 58 VAND. L. REV.
121, 121–22 (2005) (describing and encouraging the trend in criminal law towards focus
on individual's future actions rather than evaluation of past actions).
60 See Brooks Egerton & Reese Dunklin, No Evidence of Murder, No Problem,
DALLAS MORNING NEWS, Nov. 14, 2007, at 14A (describing a case charged as homicide
when medical examiner ruled its cause undetermined); Egerton & Dunklin, Prosecutor's
Ploy, supra note 32.
The oddity looks more pronounced when one considers that self-defense is a broad doctrine in Texas. This wide-open version of the doctrine should make it easier in Texas than in other states to be acquitted of murder charges; as a result, defendants should find it easier to avoid homicide convictions altogether.

In Dallas County, however, a number of defendants pleaded guilty to murder charges, despite convincing self-defense claims. Consider the case of Todd Johnson, who was charged with the murder of his friend Charles Dorris. Johnson and Connie Vaughn, an ex-girlfriend of Dorris, spent the night at a friend’s trailer. Dorris, who was trained in martial arts, forced his way into the home, accused them of having sex, and started beating Johnson. After Vaughn and her five-year-old son escaped the trailer, Dorris attacked Johnson again. Then Johnson stabbed him twice.

After his arrest, Johnson remained in jail for about a year because he could not afford bail. Johnson accepted a plea deal to the murder charge, he later told reporters, to get out of jail. It seems quite likely that a Texas jury would have concluded that Johnson “reasonably” believed that the use of force was “immediately necessary” to protect him, Vaughn, and her five-year-old son against Dorris’s “use or attempted use of unlawful force.”

One might expect more outright dismissals of cases or acquittals and fewer pleas of guilt to murder charges. So what leads defendants to accept these deals? A defendant could choose a guilty plea to avoid a remote chance of conviction, which could expose the defendant to some extreme penalties. In Texas, the threat of receiving the death penalty for murder is exceptionally strong.

A short-term perspective on the meaning of a probation sentence could also explain some defendants’ choices. As Todd Johnson’s case indicates, defendants might grasp a short-term benefit by getting out of jail after a guilty plea. Whatever else a probation sentence means, it allows a defendant to avoid a prison term; perhaps defendants do not see beyond this immediate benefit.

The full impact of the probation sentence, however, goes beyond the initial freedom from a prison term. Defendants must comply with probation conditions,
and many fail to do so. Prosecutors anticipate that a number of murderers who receive straight probation will slip up and land in prison anyway.  

A number of defendants charged with murder and offered an immediate release might not appreciate these longer-term effects of a probation sentence. Their appreciation for risk and long-term consequences might be underdeveloped. More worrisome, their own attorneys—anxious for a plea agreement to avoid a high-stakes murder trial—might not direct their clients’ full attention to the long-term risks of probation.

A failure to predict the consequences of probation took center stage in the lives of some defendants in Dallas. Of the group of fifty-six murderers sentenced to probation in the Dallas area, nineteen so far have been re-sentenced to prison because they committed new crimes or otherwise violated conditions of probation. Three of them received life terms, and four received less than life but more than fifteen years. Moreover, the new district attorney, in response to the uproar surrounding the publication of the *Dallas Morning News* stories, promised to seek probation revocation more actively for the defendants who remain at liberty.

Some of these revocations are triggered by minor “technical” violations of probation conditions. For instance, Brandon Littleton violated only one term of his probation: before spending a weekend in jail as required under his probation, he drank two beers. The judge revoked his probation and sentenced him to nine and one-half years in prison. Another maddening aspect of the probation sentences for murder is the inconsistency among judges in responding to probation violations. Some defendants who committed relatively serious probation violations did not return to prison for substantial time.

**C. Dead Wrong Pattern**

If prosecutors and defendants each had their reasons to reach a plea deal, exchanging a murder conviction without a trial for a probation sentence, should the public object? We believe that the public in Dallas has reason to second-guess the

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69 Egerton & Dunklin, *By the Numbers*, supra note 35.

70 See *id*.


72 See Egerton & Dunklin, *Case Profiles*, supra note 36, Brandon Littleton.

deals that the litigants reached; Dallas prosecutors indeed operated in troubling territory.

The problem for the public in Dallas was that they could not assess the work of their agents, because the actors in these cases sent mixed signals, perhaps even dishonest ones. The probationary outcome in many of these cases did not match the factual reality, whether the reality was a culpable murder deserving of serious punishment or the legitimate use of self-defense calling for prosecutorial discretion not to file charges.

The kindest view of this dishonesty is that Dallas represents the epitome of modern American administrative justice. The prosecutors, in this view, were making rational and public-spirited choices about how to use limited resources to control crime. Where cases were weak or uncertain and conviction was difficult or sentences modest, prosecutors responded by taking what lay within realistic reach.

Prosecutors might say that a good number of these cases involved secondary actors, or that it was important to get bad people onto probationary status to set up the potential for revocation. Given the number of jury sentences and judge sentences that ended with probation, the prosecutors had to anticipate the worst in murder cases.

A less-kind inference is that prosecutors in Dallas lacked a sense of the purposes of the criminal law and a sense of modesty about their own ability to judge character and predict future criminal behavior. Prosecutors, the managers of negotiated criminal justice, converted murder charges into determinations of risk. Their choices became unmoored from the criminal code and public values. Prosecutors in Dallas appeared to base choices on nontransparent judgments about moral desert of victims, survivors, and the killers themselves. They did not judge the acts; they judged the people.

The bulk of the cases involved some facts that would indeed make them judgment calls. But most first-rate prosecutors would deem many of the facts about victims to be irrelevant. The history of the victim should not matter; the victim’s own criminal record, or lifestyle, or nasty language should be irrelevant in a murder case.

Certainly the personality and past behavior of the victim or witnesses can make it harder to convict a defendant. But judgments about the likelihood of conviction can quickly slip into judgments about the value of human lives. Accepting a murder plea along with a sentence to probation in all but the most unusual cases suggests either the victim was not worthy of the full protection of the law—or, less obviously but just as importantly, that the defendant was not worthy of the full protection of the law.

74 Put in more philosophical terms, prosecutors are not carrying out limited retributivism; the entire criminal code is used as a leverage point to obtain crime control. For a summary of current approaches to questions of “purposes” of the criminal law and criminal sentences, see Richard S. Frase, Punishment Purposes, 58 STAN. L. REV. 67, 69–75 (2005); Michael Tonry, Purposes and Functions of Sentencing, 34 CRIME & JUSTICE 1, 16–23 (2006).
When prosecutors become profligate with the use of murder charges combined with probation sentences, they avoid the risk of losing at trial, and they avoid criticism for declaring that murder charges are not provable at trial. Sometimes, however, the prosecutorial duty to see that justice be done\(^7\) entails a willingness to embrace risk. In short, the ethical duty requires prosecutorial guts.

\[D.\] **The Connection Between the Dallas Episodes**

Dallas experienced both a lot of DNA exonerations and an overuse of probation sentences in murder cases during the same period. Is there a connection between the two types of problems? We believe there is.

Both of these results grow from a habit of slighting the criminal code in favor of what can produce a deal. The prosecutor in this mindset asks what sentence will dispose of a case, not how society should respond to a profound allegation of violent misconduct.

A wariness of criminal trials goes hand in hand with the habit of judging individual worth rather than invoking criminal law values. Trial lawyers are attuned to their own fallibility, along with the fallibility of witnesses and evidence. Experience teaches trial lawyers to trust group wisdom and public values more than their individual valuation of the people involved.\(^7\)

Unfortunately, the current availability of DNA evidence and the success of post-conviction searches for factual innocence may lead us in the wrong direction. These exonerations could desensitize us to the higher volume (and therefore more important) obligation to select the proper charges and a proportional sentence rather than finding the “right” person for administrative processing in the crime control machine.

\[V.\] **CONCLUSION**

The remedies for this common mindset that produces both categories of problems in Dallas could emerge from two different directions. Internally, many district attorney offices need serious overhaul. Probationary sentences for murder reached as part of a plea deal should be the extremely rare exception. The office leadership should set up policies, procedures, and data-collection practices to guide

\[^7\] Berger v. United States, 295 U.S. 78, 88 (1935) (describing prosecutor as “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done”); [MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. (2004)](http://www.modelrules.org/) (characterizing government officers as “minister[s] of justice”); [MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (2004)](http://www.americanbar.org/) (stating that the prosecutor’s “duty is to seek justice”).

decision making in such cases. In effect, the leadership should set price caps on the discounts that prosecutors can offer to obtain plea deals.\footnote{See Ronald Wright & Marc Miller, \textit{The Screening/Bargaining Tradeoff}, 55 STAN. L. REV. 29, 112 (2002) ("Limits on charge bargains should take the highest internal priority for supervising prosecutors.").}

This goal is not limited to murder cases, for it would be surprising indeed if the misuse of the plea power at work in the most visible cases does not operate with even greater force in lesser cases. These cases are dramatic, but the poor judgment that led to them is likely to infect an office, not just one class of cases.

The legal tools that individual prosecutors can use to produce a deal are plentiful: the law in Texas, as in other states, makes it possible to offer steep enough discounts to clear the market.\footnote{Cf. Wright, supra note 15. This observation does not lead to the conclusion that the Texas legislature should remove probation as a possible sanction in homicide cases. There are some circumstances, even if rare, where probation is a just sentence for a culpable killing. The defendant may be very ill. The defendant may have a credible but incomplete self-defense claim. The fact that in eleven of the fifty-six cases it was juries who recommended probation should have led the legislature to think seriously about preserving, not eliminating, this sentencing option.} But what is legally possible does not settle the question of wise management and use of discretion.

Part of the solution may also be external. While other branches of government might be able to hold prosecutors accountable and prevent poor choices, a more promising force to promote accurate charging is the media. Many of these cases standing alone should have made front page news long before the \textit{Dallas Morning News} collected fifty-six of them that had occurred over a seven-year period. Homicides that result in probation make a gripping story, and they deserve coverage.

Whether the response occurs internally or externally or both, the most important goal is to reshape the legal culture in Dallas. The values that underlie the criminal justice system and the justifications for punishment have been lost. The desire to protect innocent people has been lost. Now trust will be lost. The point of any new procedure or office practice must be to find these values again.