

A Prosecutor's Right to Immunity and a Defendant's Right to Another Trial

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Abstract

In 2020, the criminal justice system exonerated 129 persons who had been convicted as a result of prosecutorial misconduct. This paper discusses the judicial doctrines of absolute and qualified immunity and how they have insulated prosecutors from the repercussions of their misconduct. Addressing the origins of 42 U.S.C. § 1983 and how it and its Federal equivalent – *Bivens* – were supposed to protect citizens against the misconduct of prosecutors and other officials. How the Supreme Court’s evolution of what constitutes misconduct, and the Supreme Court’s power over lower courts has left those harmed by misconduct without a real remedy. That the only right a Defendant has when combatting misconduct is another trial.

Defendants are not entitled to a fair trial.

He was tried again after not receiving a jury of his peers.¹

He was tried again after the state claimed he was guilty because he had no defense.²

He was tried again after the state suppressed exculpatory evidence.³

He was tried again after having found another man not guilty.⁴

He was tried again after the state knowingly used false evidence.⁵

He was tried again after the state threatened a material witness.⁶

He was tried again after the state's witness lied on the stand.⁷

Defendants are only entitled to another trial.

INTRODUCTION

Supreme Court Justice Robert Jackson once said that “the prosecutor has more control over life, liberty, and reputation than any other person in America.”⁸ Eighty years later, the power of prosecutors has expanded with many scholars claiming that prosecutors—not legislators, judges, or the police—“are the criminal justice system’s real lawmakers” and the “[rulers of] the . . . justice system.”⁹ With great power should come with great responsibility.¹⁰

¹ That was Curtis Flowers. See *Flowers v. Mississippi* 139 US 2228 (2019).

² That was Kevin Hasting. See *United States v. Hastings* 461 US 499 (1983).

³ That was John Brady. See *Brady v. Maryland* 373 US 83 (1963).

⁴ That was James Franklin Bibbs. See *Charges Dismissed Against Perjured Flowers’ Juror*, (Oct. 8, 2009), <https://themississippilink.com/2009/10/08/charges-dismissed-against-perjured-flowers-juror/>.

⁵ That was Lloyd Eldon Miller Junior. See *Miller v. Pate*, 386 U.S. 1 (1967).

⁶ That was Harry Pyle. See *Pyle v. Kansas* 317 US 213 (1942).

⁷ That was John Giglio. See *Giglio v. United States*, 405 U.S. 150 (1972).

⁸ Robert H. Jackson, *The Federal Prosecutor*, 31 J. Am. Inst. Crim. L. & Criminology 3, 3 (1940). Accord Jeffrey Bellin, *The Power of Prosecutors*, Faculty Publications 1907, (May 2, 2019), <https://scholarship.law.wm.edu/facpubs/1907>.

⁹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001).

¹⁰ See Ilya Somin, *What Constitutional Lawyers Can Learn from Spiderman*, Reason, (Apr. 29, 2019), <https://reason.com/volokh/2018/11/16/what-constitutional-lawyers-can-learn-fr/>.

This paper discusses the reoccurring problem of prosecutorial misconduct in the United States justice system and how local judges could eradicate that problem. Prosecutorial misconduct occurs “when a prosecutor intentionally breaks a law or a code of professional ethics while prosecuting a case.”¹¹ These professional ethics standards are set by state bar associations,¹² through the American Bar Association’s (“ABA”) Model Rules of Professional Conduct,¹³ and by professional associations.¹⁴ However, the current justice system almost always shields prosecutors from the repercussions of their misconduct through the Supreme Court’s judicial doctrines of absolute and qualified immunity.

While the Supreme Court has promoted absolute immunity and qualified immunity as a prosecutorial shield under the guise of judicial efficiency and decreasing the government’s potential litigation burdens.¹⁵ The Supreme Court’s actions in the past few decades have turned this well-intentioned shield into a sword. A sword so powerful that “all but the plainly incompetent or those who knowingly violate the law” receive immunity for actions taken as government officials.¹⁶ Too frequently prosecutors use this shield as a sword to dismiss claims brought under 42 U.S.C. § 1983 or *Bivens* actions.¹⁷

THE “RIGHT” TO IMMUNITY IN THE COURTROOM

Our justice system provides rights for those who walk through its doors. However, not all those rights are for defendants. Courts provide state actors with absolute immunity or qualified immunity for certain actions they take in their official capacities. Both immunities provide government officials with immunity from money damages, criminal repercussions, and civil liability when, through an official act,

¹¹ Emma Zack, *Why Holding Prosecutors Accountable is So Difficult*, The Innocence Project, (Apr. 23, 2020), <https://innocenceproject.org/why-holding-prosecutors-accountable-is-so-difficult>.

¹² *E.g.*, Special Responsibilities of a Prosecutor, Md. Rule 19-303.8.

¹³ Model Rules of Prof’l Conduct r.3.8 (A.B.A. 2020).

¹⁴ *See, e.g.*, *Nat’l Prosecution Standards (Third)*, Nat’l Dist. Att’y’s Ass’n (2009).

¹⁵ *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (“The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery’” (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring))).

¹⁶ Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L. J. 2, 6 (2017) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

¹⁷ *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971).

they deprive a person of their statutory or constitutional rights.¹⁸ Government officials, such as police officers, are entitled to qualified immunity when their actions do not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁹ Other government officials, such as judges and prosecutors, are entitled to an even broader level of immunity, absolute immunity, so long as their official acts were “intimately associated with the judicial phase of the criminal process.”²⁰

Understanding the concept of immunity requires knowing where it came from—and why. Immunity was the Supreme Court’s response to citizens bringing claims against state officials under 42 U.S.C. § 1983. Originally passed as § 1 of the Klu Klux Klan Act of 1871 (the “KKK Act”) to protect black citizens and their white sympathizers in the post-Civil War era.²¹ Section 1 of the KKK Act was then codified into § 1983 specifying that persons whose constitutional or statutory rights have been violated by a person acting under State authority were entitled to relief.²²

The Supreme Court answered Congress’ passage of 42 U.S.C. § 1983 by “[reading] it in harmony with general principles of tort immunities and defenses rather than in derogation of them.”²³ Holding that the concept of immunity was so well established when the KKK Act was initially passed (in 1871) that the Supreme Court could only assume that Congress meant to include certain immunities because Congress did not specifically outlaw them.²⁴ This was unsurprising as, at the time, many judges were or

¹⁸ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 & n.30 (1982); see also 42 U.S.C. § 1983 (2015); see generally *Qualified Immunity*, Cornell L. Sch. Legal Info. Inst., https://www.law.cornell.edu/wex/qualified_immunity (last visited Oct. 31, 2021).

¹⁹ *Harlow*, 457 U.S. at 818.

²⁰ *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

²¹ Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 485 (1982).

²² 42 U.S.C. § 1983 (2015).

²³ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870, (2017) (Thomas, J., concurring) (quoting *Malley v. Briggs*, 475 U.S. 335, 339 (1986)).

²⁴ *Ziglar*, 137 S. Ct. at 1870 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976)); see *Tower v. Glover*, 467 U.S. 914, 920 (1984). Compare *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978) (finding that Congress intended to include immunities for officials when the language of § 1983 did not mention any forms of immunity), with *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (conceding that the Court has “completely reformulated qualified immunity along principles not at all embodied in the common law”).

had been members of the Klan, supporters of the confederacy, or some combination of the two.²⁵ The Supreme Court specifically held in *Imbler* that prosecutors were absolutely immune from claims arising from actions taken during the “judicial phase of the criminal process.”²⁶

A. ABSOLUTE PROSECUTORIAL IMMUNITY

Prosecutors—the kingmakers of our time—have, through judicial doctrine and case law, a “right” to absolute immunity from civil claims for actions they take in their official capacity.²⁷ The Supreme Court first discussed whether prosecutors had immunity from civil liability nearly a century ago in *Yaselli v. Goff*, where it affirmed the dismissal of a civil claim against the Special Assistant to the Attorney General of the United States for obtaining a grand jury indictment maliciously and without probable.²⁸ This doctrine of prosecutorial immunity quickly became the law of the land and was rebranded as absolute immunity in *Imbler v. Pachtman*, where the Supreme Court held, for public policy reasons, that:

[A] . . . prosecutor who acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case was *absolutely immune from a civil suit for damages* for alleged deprivations of the defendant's constitutional rights under [42 U.S.C. § 1983], and . . . such absolute immunity from liability was applicable even where the prosecutor knowingly used perjured testimony, deliberately withheld exculpatory information, or failed to make full disclosure of all facts casting doubt upon the state's testimony.

Imbler, 424 U.S. at 410 (emphasis added).

²⁵ *Jamison v. McClendon*, 476 F. Supp. 3d 386, n. 91 (S.D. Miss. 2020) (“judges, politicians, and law enforcement officers were fellow Klansmen” (citing Robin D. Barnes, *Blue by Day and White by (k)night: Regulating the Political Affiliations of Law Enforcement and Military Personnel*, 81 Iowa L. Rev. 1079, 1099 (1996))).

²⁶ *Imbler*, 424 U.S. at 430.

²⁷ *Id.*

²⁸ *Yaselli v. Goff*, 275 U.S. 503 (1927); *Yaselli v. Goff*, 12 F.2d 396, 399–406 (1926).

Concluding that absolute immunity for government officials was “well grounded in history and reason” and not nullified “by covert inclusion in the general language of § 1983.”²⁹ Lower courts have gone so far as to describe a prosecutor’s absolute immunity as a “quasi-judicial” immunity derived from common law judicial immunity.³⁰ However, *Imbler* was limited as it “[held] only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.”³¹

The justices in *Imbler* understood, whether for better or for worse, it is “better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.”³² Concurring with Judge Learned Hand in *Gregoire v. Biddle*, where “an official, who is in fact guilty of using his powers . . . for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause.”³³ Yet, misconduct is rarely that black and white. This vast gray area has left courts questioning not only the definition of misconduct but also what the “judicial phase of the criminal process” truly means.³⁴ Currently, prosecutors are entitled to absolute immunity when they falsify evidence,³⁵ coerce a witness,³⁶ solicit or sponsor perjured

²⁹ *Yaselli*, F.2d at 418 (citing *Tenny v. Brandhove*, 341 U.S. 367, 376 (1951) (where a litigant brought civil suit against a state legislator and that legislator’s legislative committee for deprivation of rights when the legislator summoned the litigant to testify before the legislative committee)).

³⁰ *Imbler*, 424 U.S. at 420; *Pierson v. Ray*, 386 U.S. 547, 554–555 (1967) (“The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine”); see *Bauers v. Heisel*, 361 F.2d 581 (C.A. 3d Cir. 1966).

³¹ *Imbler*, 424 U.S. at 431.

³² *Id.* at 428 (citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

³³ *Gregoire v. Biddle*, 177 F.2d at 581.

³⁴ *Imbler*, 424 U.S. at 430.

³⁵ See *Miller v. Pate*, 386 U.S. 1 (1967); see *United States v. Schatz*, 40 C.M.R. 934, 936 (N.B.R. 1969) (telling jurors to ignore certain evidence “is like telling a person to stare into the corner for three minutes without at anytime [sic] thinking of a purple cow. It simply cannot be done!”).

³⁶ See *Pyle v. Kansas* 317 US 213 (1942).

testimony,³⁷ withhold exculpatory evidence,³⁸ or initiate a prosecution in bad faith³⁹. However, Courts of Appeals are beginning to limit the scope of absolute immunity.⁴⁰ By interpreting *Imbler* from an originalist point-of-view, courts are holding that a prosecutor’s absolute immunity does not extend to when they act as an investigator,⁴¹ perform administrative functions,⁴² or for actions taken during pre-trial investigations.⁴³

B. FOR EVERYTHING ELSE, THERE’S QUALIFIED IMMUNITY

Since *Imbler*, the Supreme Court has held a series of evolving beliefs as to what prosecutorial actions are protected under absolute immunity. Most notably was the Supreme Court’s decision in *Buckley v. Fitzsimmons* that cracked open the door as to what falls “within [the prosecutor’s] function as an advocate.”⁴⁴ As such, prosecutors do not have absolute immunity merely by being prosecutors; it depends on their actions.⁴⁵ More commonly seen is qualified immunity, it “represents the norm” in terms of what level of immunity a court should give an official.⁴⁶

First to evolve was the “clearly established” requirement the Supreme Court laid out for qualified immunity claims in *Harlow*.⁴⁷ Eliminating the subjective prong of the previously established two-part test to qualified immunity.⁴⁸ Despite the phrase “clearly established” not stemming from the Constitution or

³⁷ *Id.*

³⁸ John Thompson, *The Prosecution Rests but I Can’t*, N.Y.T., (Apr. 9, 2011), <https://www.nytimes.com/2011/04/10/opinion/10thompson.html> [<https://web.archive.org/web/20210623060832/https://www.nytimes.com/2011/04/10/opinion/10thompson.html>].

³⁹ *Supra* note 4.

⁴⁰ See cases *Infra* notes 45–47.

⁴¹ *Buckley v. Fitzsimmons*, 509 U.S. 259, 268–271, 274 (1993).

⁴² *Penate v. Kaczmarek*, 928 F.3d 128, 1311 (1st Cir. 2019).

⁴³ *Buckley*, 509 U.S. at 268–271, 274.

⁴⁴ *Id.*; *Imbler*, 424 U.S. at 430, n. 32.

⁴⁵ *Buckley*, 509 U.S. at 274.

⁴⁶ *Malley v. Briggs*, 475 U.S. 335, 340 (1986) (quoting *Harlow*, 457 U.S. at 807).

⁴⁷ *Harlow*, 457 U.S. at 818.

⁴⁸ *Id.*

federal statute—the Supreme Court pulled it out of a hat much like a magician at a child’s birthday party would a rabbit.⁴⁹

The Supreme Court next evolved its doctrine of qualified immunity through *Malley* to include “all but the plainly incompetent or those who knowingly violate the law.”⁵⁰ Yet, “plainly incompetent” was dictum in *Malley*.⁵¹ Then, in 2001, the Supreme Court held through *Saucier* that for judicial efficiency, courts should rule on motions for summary judgment claiming qualified immunity regardless of the case’s material facts.⁵² This change allowed for claims brought under § 1983 or *Bivens* to be dismissed at the earliest possible stage.

Nearly two decades after *Saucier*, qualified immunity evolved yet again when the Supreme Court held that “for [a] law to be clearly established, it must be ‘beyond debate’ that [the prosecutor] broke the law.”⁵³ In its rush to ensure that the public cannot hold government officials accountable for their misconduct, the Supreme Court overlooked the need to define what constitutes “beyond debate.” As of today, it is not “beyond debate” when an official knowingly violates a person’s constitutional rights⁵⁴ or when that official acts in bad faith.⁵⁵

Given these evolutions over the past fifty years, the legal standard that lower courts must apply when considering a motion for summary judgment based on a claim of absolute or qualified immunity has also evolved. Courts must now first “decide whether the facts that a plaintiff has alleged or shown make

⁴⁹ *Jamison v. McClendon*, 476 F. Supp. 3d 386, 404 (S.D. Miss. 2020).

⁵⁰ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

⁵¹ Kin Kinports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 Minn. L.Rev. Headnotes, 62 (2016).

⁵² *Saucier v. Katz*, 533 U.S. 194 (2001).

⁵³ *McCoy v. Alamu*, 950 F.3d 226, 233 (5th Cir. 2020).

⁵⁴ *McCoy*, 950 at 231 (finding that the intentional use of chemical spray against a prisoner locked in his cell is not “a per se violation of the Eighth Amendment”).

⁵⁵ See *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) (“an officer’s actual intentions are irrelevant to the Fourth Amendment’s ‘objectively reasonable’ inquiry” (citing *Graham v. Connor*, 490 U.S. 386, 397 (1989))).

out a violation of a constitutional right.”⁵⁶ Second, they “must decide whether the right at issue was ‘clearly established’ at time of the defendant’s alleged misconduct.”⁵⁷ However, these decisions can be made in any order. In *Pearson*, the Supreme Court explained that an official is “entitled to qualified immunity where *clearly established law* does not show that the conduct violated the Fourth Amendment,” a determination which “turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.”⁵⁸ Thus, in setting the bar at “clearly established,” the Supreme Court allows government officials to continue violating the rights of citizens when there lacks precedent as to whether a law is “clearly established.” To meet this new standard of “clearly established,” a claimant must show that the underlying legal principle has “a sufficiently clear foundation in then-existing precedent”—the principle must be “settled law.”⁵⁹

Yet, because of the Supreme Court’s requirement for judicial efficiency, lower courts cannot set precedent and must instead rule on motions for summary judgment that are immediately appealable if lost. Thus preventing lower courts from ruling on the claim as to what “clearly established” means and establishing precedent.⁶⁰ As fewer lower courts are establishing precedent—regardless of how clearly they do so—“[i]mportant constitutional questions go unanswered precisely because no one’s answered

⁵⁶ *Jamison*, 476 F. Supp. 3d at 409 (quoting *Pearson v. Callahan*, 555 U.S. 223, 242 (2009)).

⁵⁷ See *Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Saucier*, 523 U.S. at 201.

⁵⁸ *Jamison*, 476 F. Supp. 3d at 409 (quoting *Heaney v. Roberts*, 846 F.3d 795, 801 (5th Cir. 2017) (emphasis added) (citations and brackets omitted)).

⁵⁹ *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018). But see, *D.C. v. Wesby*, 138 S.Ct. 577, 590 (2018) (finding there can be “the rare obvious case, where the unlawfulness of the officer’s conduct is sufficiently clear even though existing precedent does not address similar circumstances”).

⁶⁰ See, e.g., *Cleveland v. Bell*, 938 F.3d 672, 677 (5th Cir. 2019) (requiring close factual similarity between existing precedent and the conduct at issue, because “[t]he dispositive question . . . is whether the violative nature of *particular* conduct is clearly established” (quoting *Mullenix*, 136 S. Ct. at 308)); *Sims v. Labowitz*, 885 F.3d 254, 263 (“[A] constitutional right is clearly established . . . not only when it has been specifically adjudicated but also when it is manifestly included within more general applications of the core constitutional principle invoked” (quoting *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002))).

them before,” and “[c]ourts then rely on that judicial silence to conclude that there’s no equivalent case on the books.”⁶¹

THE EROSION OF PROSECUTORIAL ETHICS IN THE JUDICIAL SYSTEM

Ramone Robinson (“Robinson”) was charged and convicted of second-degree murder.⁶² During the trial, Robinson’s counsel told the court that it had multiple alibi witnesses who could testify, but for judicial efficiency and to avoid cumulative testimony, those witnesses could not be called.⁶³ The court noted that it would not issue an adverse inference charge to the jury regarding the non-testifying witnesses and instructed the prosecutor to make no such arguments.⁶⁴ At trial, the prosecutor argued that “although petitioner’s mother testified about many other people being present . . . , none of them were presented as . . . witnesses.”⁶⁵ Robinson was convicted and subsequently filed a petition for a writ of habeas corpus citing prosecutorial misconduct due to the comments relating to uncalled alibi witnesses and the credibility of a witness's testimony.⁶⁶

In New York, *habeas* courts are limited in their scope of review regarding claims of prosecutorial misconduct.⁶⁷ As such, a petitioner must show the *habeas* court that the “prosecutor’s comments constituted more than mere trial error and instead were so egregious as to violate the petitioner’s due process rights.”⁶⁸ The result of this narrow scope in *Robinson* was a finding that the prosecutor’s statements did not violate the constitution because “no constitutional violation occurs unless the

⁶¹ *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (quoting Aaron L. Nielson & Christopher J. Walker, *New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 12 (2015)).

⁶² *Robinson v. Conway*, No. 05-CV-0542(VEB), 2010 U.S. Dist. LEXIS 103502, at *1 (W.D.N.Y. 2010).

⁶³ *Id.* at *12.

⁶⁴ *Id.*

⁶⁵ *Id.* at *13.

⁶⁶ *Id.* at *1.

⁶⁷ *Id.* at 10.

⁶⁸ *Id.* at 10-11. *E.g.*, *Donnelly v. DeChristoforo*, 416 U.S. 637, 647–48 (1974) (where the prosecutor’s closing argument “deliberately conveyed the false impression that defendant had unsuccessfully sought to plead to a lesser charge.”).

comment necessarily indicate[d] the defendant’s own failure to testify.”⁶⁹ The unsurprising result was that the *habeas* court affirmed Robinson’s conviction and his prosecutor did not face any repercussions.

Conrad Truman (“Truman”) was tried and convicted of murder and obstruction of justice after his wife died from a gunshot wound.⁷⁰ He was granted a new trial five years later, based on newly discovered evidence, where he was found not guilty after it was determined his wife had died from a self-inflicted gunshot wound.⁷¹ During Truman’s first trial the prosecutor induced false testimony from the Medical Examiner and failed to disclose multiple instances of exculpatory evidence.⁷² That false testimony was key to the jury convicting Truman.⁷³

Truman overcame the high hurdles of prosecutorial immunity because there is precedent holding that the use of fabricated evidence⁷⁴ deprives a defendant of a fair trial.⁷⁵ For nearly eighty years the Supreme Court has held that due process rights are implicated when an official deliberately or recklessly falsifies evidence.⁷⁶ Such acts are a clearly established constitutional violation.⁷⁷

The prosecutor’s actions against Truman were an “obvious case” of a constitutional violation and a deliberate attempt by the prosecution to ensure the conviction of an innocent man to mount another head above his prosecutorial mantel.⁷⁸ Truman spent five years in jail only to be tried again

⁶⁹ *Id.* at 13-14 (citing *United States v. Bubar*, 567 F.2d 192, 199 (2d Cir.), *cert. denied*, 434 U.S. 872, 98 (1977)).

⁷⁰ *Truman v. Orem City*, 2018 U.S. Dist. LEXIS 198751 at *2 (D. Utah 2018).

⁷¹ *Id.*

⁷² *Id.* at *4–5; *Truman v. Orem City*, 2021 U.S. App. LEXIS 19191, at *3 (10th Cir. 2021) (“based on the information provided . . . and explanations of the members of the prosecution team, I amend my manner of death classification . . . from ‘not determined’ to ‘homicide’”).

⁷³ *Id.*

⁷⁴ See Evidence, Black’s Law Dictionary (11th ed. 2019) (defining “fabricated evidence” as “[f]alse or deceitful evidence that is unlawfully created . . . in an attempt to achieve or avoid liability or conviction”).

⁷⁵ *Pierce v. Gilchrist*, 359 F.3d 1279, 1283–1284 (10th Cir. 2004).

⁷⁶ *Id.* at 1299 (citing *Pyle v. Kansas* 317 US 213, 216 (1942)).

⁷⁷ *Id.*; see also *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (“[P]resentation of testimony known to be perjured . . . to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice”).

⁷⁸ *Truman v. Orem City*, 2021 U.S. App. LEXIS 19191, at *21 (10th Cir. 2021).

after his conviction was reversed. While Truman has a pending civil case against his prosecutor, his prosecutor has not suffered any repercussions for his misconduct.

Curtis Flowers (“Flowers”) was convicted of murdering four people in a Mississippi furniture store.⁷⁹ Flowers has spent more than two decades in jail for these murders—murders he likely did not commit. In four of his six trials, Flowers was convicted and sentenced to death.⁸⁰ In all four of those cases, appellate courts overturned his conviction because of prosecutorial misconduct.⁸¹

Flowers’ first conviction was reversed after the appellate court found “numerous instances of prosecutorial misconduct.”⁸² The second was reversed after a finding that the prosecutor violated *Batson*⁸³ by racially discriminating during jury selection.⁸⁴ The third conviction, much like the second, was reversed because the Mississippi Supreme Court found that the prosecutor had yet again discriminated against black prospective jurors.⁸⁵ The Mississippi Supreme Court went so far as to say that the *Flowers* case “presents [this court] with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge.”⁸⁶ Both Flowers’ fourth and fifth trials ended in hung juries. Flowers’ sixth trial and fourth conviction was reversed because the prosecutor violated *Batson* when he struck five of the six black prospective jurors in a racially discriminatory manner.⁸⁷ Leaving Flowers, a black man in Mississippi, with a jury that consisted of eleven white jurors and one black juror.⁸⁸

⁷⁹ *Flowers v. State*, 773 So. 2d 309, 314 (Miss. 2000).

⁸⁰ *Flowers v. Mississippi*, 139 S.Ct. 2228, 2234–2235 (2019) (quoting *Flowers v. State*, So. 2d 910, 935 (2007)).

⁸¹ *Id.* at 2235.

⁸² *Id.* at 2235 (citing *Flowers v. State*, 773 So. 2d 309, 327 (2000)).

⁸³ *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that it is a violation of the 6th and 14th Amendments to discriminate on the basis of race during jury selection).

⁸⁴ *Id.* at 2235.

⁸⁵ *Id.*

⁸⁶ *Id.* (citing *Flowers v. State*, 947 So. 2d 910, 935 (2007)).

⁸⁷ *Id.* at 2236.

⁸⁸ *Id.*

During Flowers’ six trials, the prosecutor, Doug Evans (“Evans”), used peremptory strikes on forty-one of the forty-two black prospective jurors.⁸⁹ In a study by *APM Reports*, investigative reporters gathered the race of prospective jurors in 225 of the 418 trials that Evans prosecuted since 1992.⁹⁰ During those trials Evans used peremptory strikes on 1,275 prospective jurors; seventy-one percent of the prospective jurors struck were black and twenty-nine percent of them were white.⁹¹ The data demonstrates that if Evans is the prosecutor, black prospective jurors are 4.4 times more likely to be struck than their white counterparts.⁹²

The state of Mississippi released Flowers after the Supreme Court reversed his latest conviction citing a multitude of prosecutorial misconduct and harmful errors.⁹³ Despite this reversal, the Supreme Court should have, in *Flowers*, discussed the elephant in the courtroom—prosecutorial misconduct. By reversing Flowers’ conviction and not addressing the true cause, the Supreme Court is no better than a physician prescribing pain medication for a broken femur – taking away the pain does nothing for the broken bone that has crippled our judicial system.

Flowers received \$500,000 from the state of Mississippi, the maximum the law allows, for the twenty plus years of wrongful imprisonment he suffered.⁹⁴ However, Evans has not faced—and almost certainly will not face—any repercussions from the state bar or the state itself.

What happened to Ramone Robinson, Conrad Truman, and Curtis Flowers is more than unconstitutional—it happened exactly how the justice system is designed and shows “how flawed the

⁸⁹ *Id.* at 2251.

⁹⁰ Will Craft, *Miss. D.A. Doug Evans Has Long History of Striking Black People from Juries*, *APM Reports*, (June 12, 2018), <https://features.apmreports.org/in-the-dark/mississippi-da-doug-evans-striking-black-people-from-juries/>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Flowers v. Mississippi*, 139 S.Ct. 2228, 2228 (2019).

⁹⁴ Jesus Jimenez, *Curtis Flowers Sues Prosecutor Who Tried Him Six Times*, *N.Y. Times*, (Sept. 4, 2021), <https://www.nytimes.com/2021/09/04/us/curtis-flowers-doug-evans.html> [<https://web.archive.org/web/20211113153253/https://www.printfriendly.com/p/g/NsNXeW>].

system is.”⁹⁵ Regardless of how inappropriate a prosecutor’s misconduct is or how harmless or harmful the result; a defendant’s best hope is limited to getting another trial – not a fair trial, just another one.

RECOMMENDATIONS FOR COMBATTING PROSECUTORIAL MISCONDUCT

“The function of the prosecutor under the Federal Constitution is not to tack as many skins of the victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.”⁹⁶ Justice Douglas wrote those words in 1974.⁹⁷ One year later Justice Douglas retired.⁹⁸ A year after that the Supreme Court gave prosecutors a shield through *Imbler* when it held prosecutors were entitled to immunity for all acts “intimately associated with the judicial phase of the criminal process,” including “initiating a prosecution and . . . presenting the State’s case.”⁹⁹ By giving prosecutors this would-be shield, the Supreme Court made it impossible for prosecutors to be held accountable for actions that violate the Constitution. Regardless of what the Supreme Court said in *Connick*, it is childish and naive to believe that “an attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.”¹⁰⁰

There are several options that states—and their courts—could use to hold prosecutors accountable. First, judges could utilize the broad scope of their contempt power as a deterrent for future instances of prosecutorial misconduct.¹⁰¹ Second, state bar associations must begin enforcing the Model Rules of Professional Conduct that they require law school graduates to study as part of the Multistate Professional Responsibility Examination.¹⁰² Third, courts can eliminate *Batson* violations by utilizing data collected through the decennial census to have juries with a truly fair and representational cross-section.

⁹⁵ Parker Yesko, *Will Doug Evans Face Accountability*, APM Reports, (Oct. 14, 2020), <https://www.apmreports.org/story/2020/10/14/will-doug-evans-face-accountability> (quoting Angela J. Davis).

⁹⁶ *Donnelly v. DeChristoforo*, 416 U.S. 637, 648–649 (1974) (Douglas, J., dissenting).

⁹⁷ *Id.*

⁹⁸ *William O. Douglas*, Oyez, https://www.oyez.org/justices/william_o_douglas (last visited Nov 25, 2021).

⁹⁹ *Imbler v. Pachtman*, 424 U. S. 409, 431 (1976).

¹⁰⁰ *Connick v. Thompson*, 563 U.S. 51, 66, (2011).

¹⁰¹ Fed. R. Crim. P. 42.

¹⁰² Jurisdictions Requiring the MPRE, <https://www.ncbex.org/exams/mpre/> (last visited on Nov. 12, 2021).

A. NO ONE IS IMMUNE FROM CONTEMPT OF COURT

Contempt of court¹⁰³ is a finding that Hollywood would like you to think is commonplace. However, that is simply not the case.¹⁰⁴ It is incredibly rare for a court to hold a prosecutor in contempt despite every court having the power to punish the “misbehavior of any person in its presence,” “misbehavior of any of its officers in their official transactions,” and “disobedience or resistance to [the court’s] lawful writ, process, order, rule, decree, or command.”¹⁰⁵ One instance that received national attention was former-District Attorney Mike Nifong’s (“Nifong”) contempt charge for failing to turn over exculpatory evidence during the Duke rape case. Despite the national attention and severity of his misconduct, the court held Nifong in contempt and sentenced him to only a single day jail for the false statements he made before the court regarding the exculpatory evidence he failed to disclose.¹⁰⁶

Despite courts having this power, it is rarely used. As John Thompson, wrongfully incarcerated after his prosecutor withheld exculpatory evidence, wrote: “I don’t care about the money. I just want to know why the prosecutors who hid evidence, sent me to prison for something I didn’t do and nearly had me killed are not in jail themselves.”¹⁰⁷ John Thompson’s plea fell on deaf ears as courts are unlikely to sanction prosecutors because of the argument that such sanctions are overly harsh for mere “technical errors.”¹⁰⁸ Is it not overly harsh for a wrongfully convicted defendant to spend years—or in some cases,

¹⁰³ Contempt, *Black’s Law Dictionary* (11th ed. 2019).

¹⁰⁴ See, e.g., Rachel E. Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31 *Cardozo L. Rev.* 2089, 2094 (2010) (covering the civil and criminal liability and discipline by State bars as checks on prosecutorial misconduct).

¹⁰⁵ 18 U.S.C. § 401. *But see*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017) (where “subjecting officers to broader liability would be to ‘disrupt the balance that our cases strike between the interests in vindication of citizens’ constitutional rights and in public officials’ effective performance of their duties’ . . . For then, both as a practical and legal matter, it would be difficult for officials ‘reasonably [to] anticipate when their conduct may give rise to liability for damages’” (quoting *Davis v. Scherer*, 468 U. S. 183, 195 (1984)).

¹⁰⁶ Julia Lewis, *Nifong Guilty of Criminal Contempt Sentenced to 1 Day in Jail*, WRAL.com, (Sept. 1, 2007), <https://www.wral.com/news/local/story/1763323/>.

¹⁰⁷ Thompson, *supra* note 40.

¹⁰⁸ See Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 *N.Y.U. Ann. Surv. Am. L.* 45, 84 (2005) (“[E]ven where a knowing deprivation is proven, many judges and juries are hesitant to impose criminal sanctions for ‘technical’ constitutional violations. This provision would, thus, be reserved for only the most extreme cases of prosecutorial

decades—in jail? Judges have the power and authority to hold prosecutors accountable for their misconduct. That power is granted to them by Congress, and they should use it.¹⁰⁹

B. DISCIPLINE THROUGH THE RULES OF PROFESSIONAL CONDUCT

Regardless of a prosecutor’s jurisdiction or the state they may be barred in, the Model Rules of Professional Conduct apply.¹¹⁰ These rules help define what our legal society defines as “ethical” and help shape our behavior. However, the past few decades have shown that rules are only as good as their enforcement. Requiring law school graduates to pass the Multistate Professional Responsibility Examination before being barred and then not enforcing those rules could be why people hate lawyers.

Rule 3.8 of the ABA’s Model Rules of Professional Conduct, Special Responsibilities of a Prosecutor,¹¹¹ is the embodiment of Justice Sutherland’s admonishment in *Berger v. United States* that

abuse resulting in what are perceived to be the most serious deprivations. Even in the context of extreme prosecutorial abuse, however, judges may prefer to use a less severe, quasi-criminal remedy available to sanction the misconduct, such as the contempt power.”).

¹⁰⁹ 18 U.S.C. § 401.

¹¹⁰ While it is true that California has not adopted the ABA’s Model Rule 3.8, Special Responsibilities of a Prosecutor, California has its own variation of the ABA’s rule. Therefore, for practical purposes, it is implied that every jurisdiction and state have a rule governing prosecutorial ethics. Model Rules of Prof’l Conduct r. 3.8 (Am. Bar Ass’n 2020); r.3.8 (Cal. Rules of Prof’l Conduct 2021).

¹¹¹ Rule 3.8 states that the prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts . . . that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - (1) the information sought is not protected from disclosure by any applicable privilege;
 - (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - (3) there is no other feasible alternative to obtain the information;
- (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of

“while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones.”¹¹² The prosecutors discussed in this paper violated several—if not the majority—of the items listed in Rule 3.8.¹¹³ Despite the intent of Rule 3.8 being to ensure that prosecutors behave in such a manner that is ethical and beyond reproach, repercussions rarely occur.¹¹⁴ The Northern California Innocence Project conducted a study where it identified 707 cases of prosecutorial misconduct between 1997 and 2009; 159 of those cases were deemed harmful.¹¹⁵ The study compared this with disciplinary actions filed in the *California State Bar Journal* and found that only six of the disciplinary actions filed involved prosecutorial misconduct.¹¹⁶

A shift in where the legal profession’s ethical values lie and in what direction its moral compass points is the only feasible solution to correcting this lack of enforcement within State Bar associations and the ABA. This could be accomplished by establishing anonymous independent committees, like grand juries, that determine whether a complaint alleging a violation should be pursued further. At which point,

the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor’s jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

¹¹² 295 U.S. 78, 88 (1935); Model Rules of Prof’l Conduct r. 3.8 (Am. Bar Ass’n 2020).

¹¹³ Rule 3.8, *supra* note 112; see discussion *supra* Parts I and III.

¹¹⁴ Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 966 (1984) (writing that “both scholars and bar grievance committees have paid scant attention to prosecutorial ethicality, and consequently, prosecutors may have developed a sense of insulation from the ethical standards of other lawyers”).

¹¹⁵ Kathleen M. Ridolfi & Maurice Possley, N. Cal. Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, at 3 (2010).

¹¹⁶ *Id.* at 55; see also e.g., Radley Balko, *Another Study Finds Few Consequences for Prosecutor Misconduct*, Wash. Post (Mar. 8, 2017), <https://www.washingtonpost.com/news/the-watch/wp/2017/03/08/another-study-finds-few-consequences-for-prosecutor-misconduct/>.

actual enforcement would fall under Rule 9 of the ABA’s Rules for Lawyer Disciplinary Enforcement.¹¹⁷ Such an approach would avoid the dilemma currently faced by attorneys were reporting a prosecutor of violating the Model Rules could result in retaliation against the reporting attorney or their clients by the prosecutor. A similar concern is seen with court officials. Until the ABA provides actual enforcement, the Model Rules continue to be a perfunctory checkbox for prosecutors.

C. SIDESTEPPING *BATSON* WITH A TRUE REPRESENTATIONAL CROSS-SECTION

In examining the success rate of prosecutors offering a race-neutral explanation to *Batson* challenges, one study found that while it was relatively easy for a defendant to establish a prima facie case, it was difficult to prevail on a *Batson* challenge overall.¹¹⁸ The phrase “*Batson* challenge” stems from *Batson v. Kentucky* where the Supreme Court held that a prosecutor’s use of peremptory challenges based on the race of the venireperson was a denial of a defendant’s equal protection.¹¹⁹ These violations, like many other instances of prosecutorial misconduct, result only in the defendant being given another trial. However, what if it was possible to get rid of *Batson* violations entirely?

This paper proposes sidestepping the caselaw of *Batson* and its progeny by requiring juries be comprised of demographics that align with those reported in the last United States Census. For example, Montgomery County in Mississippi, where the prosecutor subjected Curtis Flowers to multiple instances of *Batson* violations, has a total population of 9,822 people.¹²⁰ Of that 9,822 people, 4,494 people disclosed that they identified as Black.¹²¹ Therefore, a true “cross-section of the community,” as required by *Taylor v. Louisiana*, would be six black jurors and six white jurors.¹²² This process can easily be applied to any county in the United States by utilizing the data collected during the decennial census.

¹¹⁷ Model Rules for Law. Disciplinary Enf. r.9 (2020).

¹¹⁸ *Supra* Note 115.

¹¹⁹ 476 U.S. 79, 96-98 (1986).

¹²⁰ U.S. Dept. of Com., U.S. Census Bureau, *2020 DEC Redistricting Data*, https://data.census.gov/cedsci/table?g=0400000US28_0500000US28097&tid=DECENNIALPL2020.P1&hidePreview=true (last visited on Nov. 12, 2021).

¹²¹ *Id.*

¹²² *Taylor*, 419 U.S. at 528-30.

This information could—and should—be used to ensure that juries in criminal trials are composed of a fair and representational cross-section of the county, district, or jurisdiction that they are within. Doing so also treats the problem of unenforced *Batson* violations without having to carve out exceptions to a prosecutor’s absolute immunity. If a jury is formed that does not align with the census data, the court can adjust it. Replacing jurors and bringing in new venirepersons to be selected such that the result is a jury that closely matches what is reported to the United States Census Bureau.

CONCLUSION

Integrity means, among other things, “doing the right things, to the right people, for the right reasons.”¹²³ Prosecutors and the justice system must be better. It is unreasonable to expect prosecutors to be free of error, but that is not what this paper proposes. This paper proposes that the courts evolve with the times to ensure that prosecutorial errors are not repeated. While these proposed solutions may not be ideal, they are solutions that can be put in place without requiring substantial changes to our current judicial system. Solutions our system desperately needs.

¹²³ J. Carlos Acosta, Lecture on Advanced Criminal Trial Advocacy: Challenges and Obligations of the Prosecutor (Aug. 23, 2021).