A Prosecutor’s Right to Immunity and a Defendant’s Right to a Fair Another Trial

By Raimund P. Stieger

Abstract: In 2020, the criminal legal 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. Also addressed are 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 public officials. Finally, this article covers the Supreme Court’s evolution of what constitutes misconduct, and how the Supreme Court’s power over lower courts has left those harmed by misconduct without a real remedy, and 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.’

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

He was tried again after the state suppressed exculpatory evidence.

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

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

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

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

Defendants are only entitled to another trial.

I. 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.” Eighty years later, the power of prosecutors has expanded, with many scholars claiming that prosecutors—not

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1 That was Curtis Flowers. See Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019).
3 That was John Brady. See Brady v. Maryland, 373 U.S. 83 (1963).
5 That was Lloyd Eldon Miller Junior. See Miller v. Pate, 386 U.S. 1, 6 (1967).
7 That was John Giglio. See Giglio v. United States, 405 U.S. 150, 154-55 (1972).
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 great responsibility.10

This paper discusses the recurring problem of prosecutorial misconduct in the United States legal system and how local judges could eradicate that problem. Prosecutorial misconduct can occur “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 criminal legal 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 prosecutorial shields 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

II. THE “RIGHT” TO IMMUNITY IN THE COURTROOM

The criminal legal 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.18 Both immunities provide government officials with immunity from money damages, criminal repercussions, and civil liability when, through an official act, they deprive a person of their statutory or constitutional rights.19

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.”20 Other government officials, such as judges and prosecutors, are entitled to an

13 Model Rules of Prof. Conduct r. 3.8 (Am. Bar Ass’n 2020).
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)));
20 Harlow, 457 U.S. at 818.
even broader level of immunity—absolute immunity—so long as their official acts were “intimately associated with the judicial phase of the criminal process.”21

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. § 1983.22 Section 1 of the Ku Klux Klan Act of 1871 (the “KKK Act”), originally passed to protect Black citizens and their white sympathizers in the post-Civil War era,23 was later codified into § 1983, which specified that persons whose constitutional or statutory rights have been violated by a person acting under the color of State authority were entitled to relief.24

The Supreme Court answered Congress’s passage of § 1983 by “[reading] it in harmony with general principles of tort immunities and defenses rather than in derogation of them.”25 The Court held in Ziglar v. Abbasi that the concept of immunity was so well established when the KKK Act was initially passed in 1871 that the Court could only assume that Congress meant to include certain immunities because Congress did not specifically outlaw them.26 This ruling was unsurprising as, at the time, many judges were or had been members of the Klan, supporters of the confederacy, or some combination of the two.27 The Supreme Court specifically held in Imbler v. Pachtman that prosecutors were absolutely immune from claims arising from actions taken during the “judicial phase of the criminal process.”28

A. Absolute Prosecutorial Immunity

Prosecutors—the kingmakers of our time—have through judicial doctrine and case law an implied right to absolute immunity from civil claims for actions they take in their official capacity.29 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 maliciously obtaining a grand jury indictment and without probable cause.30 This doctrine of prosecutorial immunity quickly became the law of the land and was rebranded as absolute immunity in Imbler, where the Supreme Court held, for public policy reasons, that a prosecutor “acting within the scope of his duties in initiating

21 Imbler, 424 U.S. at 430.
25 Ziglar, 137 S. Ct. at 1870 (Thomas, J., concurring) (quoting Malley, 475 U.S. at 339).
27 Jamison v. McClendon, 476 F. Supp. 3d 386, n.91 (S.D. Miss. 2020) (“[J]udges, politicians, and law enforcement officers were fellow Klansmen” (citing Robin D. Barnes, Blue by Day and White by Night: Regulating the Political Affiliations of Law Enforcement and Military Personnel, 81 IOWA L. REV. 1079, 1099 (1996))).
28 Imbler, 424 U.S. at 430.
29 Id.
30 Yaselli v. Goff, 12 F.2d 396, 399-406 (1926), aff’d per curiam, 48 S. Ct. 155 (1927).
and pursuing a criminal prosecution” is “absolutely immune from suit for money damages under 42 U.S.C. § 1983.”

The Court concluded 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.” Lower courts have gone so far as to describe a prosecutor’s absolute immunity as a “quasi-judicial” immunity derived from common law. 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 s 1983.”

The justices in Imbler understood, whether for better or worse, that 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.” They concurred with Judge Learned Hand’s ruling 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.” Yet, misconduct is rarely that black or 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.

Currently, prosecutors are entitled to absolute immunity when they falsify evidence, coerce a witness, solicit or sponsor perjured testimony, withhold exculpatory evidence, or initiate a prosecution in bad faith. However, Courts of Appeals are beginning to limit the scope of absolute immunity. By interpreting Imbler from an originalist point of view, courts have held that prosecutors’ absolute immunity does not extend to when they act as investigators, perform administrative functions, or take actions during pre-trial investigations.
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, the Supreme Court’s decision in Buckley v. Fitzsimmons^48 cracked open the door as to what falls “within [the prosecutor’s] function as an advocate.”^49 As such, prosecutors do not have absolute immunity merely by being prosecutors; it depends on their actions.^50 Qualified immunity is more commonly seen; it “represents the norm” in terms of what level of immunity a court should give an official.^51

The “clearly established” requirement for qualified immunity claims that the Supreme Court put in place in Harlow v. Fitzgerald was the first to evolve; the subjective prong of the previously established two-part test to qualified immunity was eliminated.^52 This requirement for “clearly established” law was enacted despite the phrase “clearly established” not stemming from the Constitution or federal statute—the Supreme Court pulled it out of a hat, much like a magician at a child’s birthday party would pull out a rabbit.^53

The Supreme Court next evolved its doctrine of qualified immunity through Malley v. Briggs to apply to “all but the plainly incompetent or those who knowingly violate the law.”^54 Yet, “plainly incompetent” was dictum in Malley.^55 Then, in 2001, the Supreme Court held through Saucier v. Katz that for judicial efficiency, courts should rule on motions for summary judgment claiming qualified immunity regardless of the case’s material facts.^56 This change allowed for claims brought under § 1983 or Bivens to be dismissed at the earliest possible stage.^57

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.”^58 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 rights^59 or acts in bad faith.^60

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

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49 Imbler, 424 U.S. at 430, nn.32-33.
50 Buckley, 509 U.S. at 274.
52 Harlow, 457 U.S. at 818.
54 Malley, 475 U.S. at 341.
57 Id.
58 McCoy v. Alamu, 950 F.3d 226, 233 (5th Cir. 2020).
59 Id. 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”).
60 See Mullenix v. Luna, 577 U.S. 7, 24 (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)).
alleged or shown make out a violation of a constitutional right.” Next, they “must decide whether the right at issue was clearly established at time of the defendant’s alleged misconduct.” However, these decisions can be made in any order. In Pearson v. Callahan, 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.” 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.”

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. This prevents lower courts from ruling on the claim as to what “clearly established” means and establishing precedent. 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 them before,” and “[c]ourts then rely on that judicial silence to conclude that there’s no equivalent case on the books.”

III. The Erosion of Prosecutorial Ethics in the Judicial System

Ramone Robinson was charged and convicted of second-degree murder. 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. 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

62 Pearson, 555 U.S. at 232; Saucier, 533 U.S. at 201.
63 Pearson, 555 U.S. at 242.
64 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).
65 D.C. v. Wesby, 138 S. Ct. 577, 589 (2018). 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”).
66 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 v. Luna, 577 U.S. 7, 11 (2015)); Sims v. Labowitz, 885 F.3d 254, 263 (4th Cir. 2018) (“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))).
69 Id. at *12.
At trial, the prosecutor argued that “although petitioner’s mother testified about many other people being present . . ., none of them were presented as . . . witnesses.”71 Robinson was convicted and he 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.72

In New York, habeas courts are limited in their scope of review regarding claims of prosecutorial misconduct.73 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.”74 The result of this narrow scope in Robinson was a finding that the prosecutor’s statements did not violate the constitution because “[n]o constitutional violation occurs unless the comment necessarily indicate[d] the defendant’s own failure to testify.”75 The unsurprising result was that the habeas court affirmed Robinson’s conviction and his prosecutor did not face any repercussions.76

Conrad Truman was tried and convicted of murder and obstruction of justice after his wife died from a gunshot wound.77 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.78 During Truman’s first trial, the prosecutor induced false testimony from the Medical Examiner and failed to disclose multiple instances of exculpatory evidence.79 That false testimony was key to the jury convicting Truman.80

Truman overcame the high hurdles of prosecutorial immunity because there is precedent holding that the use of fabricated evidence81 deprives a defendant of a fair trial.82 For nearly eighty years, the Supreme Court has held that due process rights are implicated when an official deliberately or recklessly falsifies evidence.83 Such acts are a clearly established constitutional violation.84

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

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70 Id.
71 Id. at *13.
72 Id. at *1.
73 Id. at *10.
74 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.”).
76 Id. at *26.
78 Id.
79 Id. at *4–5; Truman v. Orem City, 2021 U.S. App. LEXIS 19191, at *7 (10th Cir. 2021) (“[B]ased on the information provided . . . and explanations of the members of the prosecution team, [the medical provider] amended [his] manner of death classification . . . from ‘not determined’ to ‘homicide.’”).
81 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”).
82 Pierce v. Gilchrist, 359 F.3d 1279, 1297 (10th Cir. 2004).
83 Id. at 1299 (citing Pyle v. Kansas 317 U.S. 213, 216 (1942)).
84 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[.]”).
innocent man to mount another head above his prosecutorial mantel.85 Truman spent five
years in jail, only to be tried again after his conviction was reversed.86 While Truman has a
pending civil case against his prosecutor, his prosecutor has not suffered any repercussions
for his misconduct.87

Next, Curtis Flowers was convicted of murdering four people in a Mississippi furniture
store.88 Flowers spent more than two decades in jail for these murders—murders he likely
did not commit.89 In four of his six trials, Flowers was convicted and sentenced to death.90
In all four of those cases, the appellate courts overturned his conviction due to prosecutorial
misconduct.91

Flowers’ first conviction was reversed after the appellate court found “numerous instances
of prosecutorial misconduct.”92 The second conviction was reversed after a finding that
the prosecutor violated Batson93 by racially discriminating during jury selection.94 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.95
The Mississippi Supreme Court went so far as to say that Flowers “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.”96 Both Flowers’ fourth and fifth trials ended in hung juries.97 Flowers’
second and sixth convictions were reversed because the prosecutor violated Batson when
he struck five out of the six Black prospective jurors in a racially discriminatory manner.98
The strikes left Flowers, a Black man, with a jury consisting of eleven white jurors and one
Black juror.99

During Flowers’ six trials, prosecutor Doug Evans used peremptory strikes on forty-one of
the forty-two Black prospective jurors.100 In a study by APM Reports, investigative reporters
gathered the race of prospective jurors in 225 of the 418 trials that Evans prosecuted since
1992.101 During those trials, Evans used peremptory strikes on 1,275 prospective jurors: 71

86 Jennifer Gardiner, Conrad Truman loses lawsuit against Orem police, prosecutors over murder trial, ABC 4 (Aug.
org/2021/09/03/1034198690/curtis-flowers-mississippi-lawsuit-prosecutor-da-freed-prisoner.
91 Id. at 2235.
92 Id. (citing Flowers v. State, 773 So. 2d 309, 327 (2000)).
93 Batson v. Kentucky, 476 U.S. 79, 85 (1986) (holding that it is a violation of the Sixth and Fourteenth Amendments to
discriminate on the basis of race during jury selection).
94 Flowers, 139 S. Ct. at 2235.
95 Id.
96 Id. (citing Flowers v. State, 947 So. 2d 910, 935 (2007)).
97 Id. at 2235.
98 Id. at 2236-37.
99 Id. at 2237.
100 Id. at 2251.
101 Will Craft, Miss. D.A. Doug Evans Has Long History of Striking Black People from Juries, APM REPORTS (June 12,
percent of the prospective jurors struck were Black, and 29 percent of them were white.\textsuperscript{102} 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.\textsuperscript{103}

Mississippi released Flowers after the Supreme Court reversed his latest conviction, citing a multitude of prosecutorial misconduct and harmful errors.\textsuperscript{104} Despite this reversal, the Supreme Court should have discussed in Flowers the elephant in the courtroom: prosecutorial misconduct. By not addressing the true cause of Flowers’ original conviction, 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 allowed by law, for the twenty-plus years of wrongful imprisonment he suffered.\textsuperscript{105} However, Evans has not faced—and almost certainly will not face—any repercussions from the state bar or the state itself.\textsuperscript{106}

What happened to Ramone Robinson, Conrad Truman, and Curtis Flowers is more than unconstitutional—it happened exactly how the criminal legal system is designed and shows “how flawed the system is.”\textsuperscript{107} 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.

\section*{IV. Recommendations for Combating Prosecutorial Misconduct}

In 1974, Justice Douglas wrote: “The function of the prosecutor under the Federal Constitution is not to tuck 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.”\textsuperscript{108} One year later, Justice Douglas retired.\textsuperscript{109} A year after that, the Supreme Court gave prosecutors a shield through Imbler, which entitled them 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.”\textsuperscript{110} By giving prosecutors this would-be shield, the Supreme Court made it impossible to hold prosecutors accountable for actions that violate the Constitution. Regardless of what the Supreme Court said in Connick, it is

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102 Id.
103 Id.
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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.”

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. Second, state bar associations must begin enforcing the Model Rules of Professional Conduct they require law school graduates to study as part of the Multistate Professional Responsibility Examination. 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.

A. No One Is Immune From Contempt of Court

Contempt of court is a finding that Hollywood would like you to think is commonplace. However, that is simply not the case. 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.”

One instance that received national attention was former District Attorney Mike Nifong’s 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.

Despite courts having the power to hold prosecutors in contempt, it is rarely used. John Thompson, who was 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.”

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112 Fed. R. Crim. P. 42.
114 Contempt, BLACK’S LAW DICTIONARY (11th ed. 2019).
115 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).
116 18 U.S.C. § 401. But see, Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017) (“[S]ubjecting 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)).
118 Id.
120 Thompson, supra note 42.
harsh for mere “technical errors.” Is it not overly harsh for a wrongfully convicted defendant to spend years—or in some cases, 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.

**B. Discipline Through the Rules Of Professional Conduct**

Regardless of a prosecutor’s jurisdiction or the state they are barred in, the Rules of Professional Conduct still apply. These rules help define what conduct is “ethical” and help shape behavior. However, the past few decades have shown that rules are only as good as their enforcement. Requiring almost all law school graduates to pass the Multistate Professional Responsibility Examination before being barred and then not enforcing those rules could be why many people view the legal profession as hypocritical.

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

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121 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 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.”).


123 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. Conduct r. 3.8 (Am. Bar Ass’n 2020); Cal. Rules of Prof. Conduct r. 3.8 (2021).


125 See [Jurisdictions Requiring the MPRE](https://www.ncbex.org/examrs/ncbex.org/exams/mpre/).

126 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 the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associat-
that “while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones.”

The prosecutors discussed in this paper violated many—if not the majority—of the items listed in Rule 3.8. Despite Rule 3.8’s intent to ensure prosecutors behave in an ethical manner and are beyond reproach, repercussions rarely occur when prosecutors fail to meet this standard. 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. 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.

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, actual enforcement would fall under Rule 9 of the ABA’s Rules for Lawyer Disciplinary Enforcement. Such an approach would avoid the dilemma currently faced by attorneys, wherein reporting a prosecutor of violating ethical obligations under their state’s rules could result in retaliation by the prosecutor against the reporting attorney or their clients. There is a similar concern with court officials. Until states provide actual enforcement, the Rules of Professional Conduct 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 “it is relatively easy for a Batson complainant to establish a prima

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ed 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.

(b) 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.

128 Rule 3.8, supra note 126; see discussion supra Parts I and II.
129 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”).
facie case, but that it is much more difficult ultimately to prevail on a Batson challenge.”¹³³ 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.¹³⁴ These violations, like many other instances of prosecutorial misconduct, result only in the defendant being given another trial.¹³⁵ However, what if it was possible to get rid of Batson violations entirely?

This paper proposes sidestepping the case law 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.¹³⁶ Of those 9,822 people, 4,499 people disclosed that they identify or partially identify as Black.¹³⁷ Therefore, a true “cross-section of the community,” as required by Taylor v. Louisiana, would be six Black jurors and six white jurors.¹³⁸ This process can easily be applied to any county in the United States by utilizing the data collected during the decennial census.

This information could—and should—be used to ensure that juries in criminal trials are composed of a fair and representational cross-section of their county, district, or jurisdiction that they are within. Doing so would also treat 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.

V. CONCLUSION

Integrity means, among other things, “doing the right things, to the right people, for the right reasons.”¹³⁹ 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 and are solutions that our system desperately needs.

¹³⁷ U.S. CENSUS BUREAU, supra note 136.
Author Profiles

IVAN PARFENOFF

Ivan Parfenoff graduated magna cum laude and Order of the Coif from Northwestern School of Law in 2022. Born and raised in Chicago, Illinois, he received both a Bachelor’s and Master’s degree in history and philosophy from the University of Chicago. In September 2022, Ivan will start as a fellow at the Illinois Office of the Solicitor General. In 2023, he will clerk for the Honorable District Judge Sarala V. Nagala on the U.S. District Court for the District of Connecticut. In 2024, he will clerk for the Honorable Circuit Judge Karen Nelson Moore on the U.S. Court of Appeals for the Sixth Circuit.

RAIMUND P. STIEGER

Raimund P. Stieger is an Ethics Attorney in the DOJ Honors Program and an alumnus of the Evening Division of the American University Washington College of Law. I would like to thank my wife, my friends, and the Honorable Carlos F. Acosta for their support and encouragement as I worked on this article. Finally, thanks to The Criminal Law Practitioner for their effort and help throughout the publication process.

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