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Prosecutorial Constitutionalism & Accountability: A National Commitment for the Local Prosecutor

The U.S. Constitution contains protections and rights designed to limit government overreach into a citizen's life and liberty. Many of these rights regulate the conduct of law enforcement and require individuals to be treated fairly and equally during criminal investigations and prosecutions. Prosecutors, who take an oath to uphold and defend the Constitution, are required to neutrally and fairly ensure it is applied.[1] In our system, prosecutors exercise near-absolute authority in decision-making at every stage and are rarely accountable to any judicial body for their actions.[2] This means their power to levy charges, their absolute control over the grand jury, and their unilateral control over the plea-bargaining process are not subject to systematic review.[3] This results in Black defendants routinely being denied their constitutional rights at many phases of the adjudicative process. Because the prosecution's own actions often lead to blatant violations of constitutional rights, the most obvious remedy is easy—prosecutors simply must not commit, support, or benefit from violations of constitutional rights and must affirmatively ensure that individual constitutional rights are protected.

Prosecutors must commit to protecting every person from illegal search and seizure by police.

The Fourth Amendment prohibits illegal search and seizure by the government. Evidence seized by police in violation of the Fourth Amendment is generally barred from use in a defendant's prosecution, even if it is truthful.[4] This exclusion removes any incentive for police to conduct illegal searches and seizures. Courts generally underenforce a defendant's search-and-seizure protections.[5] It must fall to prosecutors to ensure the process is constitutional, fair, and equitable. Prosecutors can self-police by declining to use unconstitutionally acquired evidence, and the Constitution arguably requires them to do so.[6] Prosecutor offices can and should create administrative exclusion rules, a policy that bans the use of any evidence obtained in violation of the Fourth Amendment, even where evidence is technically admissible.[7] This disincentivizes police misconduct by ensuring that line prosecutors aggressively screen and evaluate all evidence for constitutional compliance.[8]

Prosecutors must uphold a defendant's rights to counsel and to a speedy trial.

Under the Sixth Amendment, criminal defendants have the right to counsel at every critical stage of their case.[9] Yet, prosecutors in some jurisdictions routinely confer with judges about important decisions like bail without notifying the defense.[10] Denying defendants the opportunity to present their interests at critical junctures violates their right to counsel and right to due process under the 14th Amendment.[11] All prosecutor offices must

ensure that the right to counsel is protected at every stage of the criminal process and notify the defense of all decision-making opportunities with time to adequately prepare and participate.

The Sixth Amendment also promises defendants a speedy trial. Prosecutors violate this right when they unnecessarily delay prosecutions. This puts a person's life on hold indefinitely and the passage of time can significantly impact the quality of his or her defense.[12] Courts do not rigorously enforce this right because "[i]t is . . . impossible to determine with precision when the right has been denied."[13] Since this creates a greater likelihood of abuse, prosecutor office policy should set clear time limits for every adjudication, with shorter time frames for persons held in custody. Once a trial date is determined, chief prosecutors must limit their staff's ability to use repeated delays to extract plea bargains.

Excluding a prospective juror based on race violates constitutional rights of the defendant and the juror.

Courts have interpreted the Sixth and Fourteenth Amendments to give defendants the right to a jury trial from which people of a particular race have not been intentionally excluded.[14] The Supreme Court has found jurors to also have a constitutional right not to be excluded from jury service on the basis of race.[15] Many prosecutors, however, have engaged in racially discriminatory jury selection because proving discrimination often requires "reading the mind of the prosecutor. If [a] prosecutor can offer a reason for each [peremptory] challenge that sounds race-neutral . . . there is nothing a trial judge or appellate judges can do but nod their heads."[16] Accordingly, office policy must have zero tolerance for line prosecutors excluding jurors due to their race and must gather and analyze selection statistics to uncover and address racial disparities in peremptory challenges, regardless of intent.

Prosecutors must disclose any evidence favorable to the defense.

Starting with *Brady v. Maryland*, which was decided in 1963, the Supreme Court has repeatedly found that the Fourteenth Amendment's Due Process Clause requires that prosecutors disclose to the defense any information favorable to the accused.[17] Further, the disclosure obligation comes with a resulting burden,[18] ensuring that when prosecutors rely on others for expertise they must review their files and evidence and cannot claim ignorance of any exculpatory evidence therein.[19]

Prosecutors routinely fail to turn over exculpatory evidence to the defense,[20] or wait to do so until the defense is unable to use the information effectively (e.g., on the eve of trial).[21] Some prosecutors refuse to disclose exculpatory information they deem inadmissible, immaterial, or not credible, even though none of these is relevant under *Brady*.[22] To ensure compliance with *Brady*, district attorneys must adopt policies to automatically disclose potentially useful information to the defense. Such policies should explicitly reject questions of admissibility, materiality, or credibility as justifications for nondisclosure.[23] Even better, prosecutor offices could institute open-file policies, sharing all information (save for that which might, say, threaten an informant's life) with the defense.[24]

Experts reasonably suggest that prosecutors extend *Brady*-like protection to plea-bargains and give defendants all exculpatory evidence prior to starting negotiations.[25] The spirit of *Brady* could also extend to the grand jury, with prosecutors showing grand jurors all exculpatory and other evidence favorable to the accused before jurors decide whether to indict.[26]

Due process protects against prosecutors using false evidence, like perjured testimony, against defendants.[27] Yet, prosecutors routinely overlook perjury by their own witnesses, often threatening prosecution only for perjured testimony for defense favorable witnesses, including when witnesses wish to recant prior false claims.[28] Prosecutors must have zero-tolerance for false testimony.[29]

The Legal Defense Fund demands that prosecutors embrace their obligations as government officials beholden to the Constitution. Prosecutors must be especially skeptical of evidence favorable to convictions. Where evidence is lacking, prosecutions must not be pursued. District Attorneys must create office-wide policies to: prohibit staff from violating constitutional principles; reprimand those who commit violations; and implement mechanisms to discover such misconduct.[30] Prosecutors must set the highest standards and procedures, despite judicial reluctance to hold prosecutors accountable.

Notes

1 Eric S. Fish, *Prosecutorial Constitutionalism,* 90 S. Cal. L. Rev. 237, 260 (2017).

2 *Id.* at 260*; See* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 Wash. U. L.Q. 713, 715 (1999).

3 Fish, *supra* note 1, at 260–63.

4 *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 649, 655 (1961).

5 *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

6 *See* Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. Davis L. Rev. 1591, 1625-28 (2014).

7 *Id.* at 1595; *cf.* Fish, *supra* note 1, at 251.

8 Gold, *supra* note 7, at 1597.

9 *See, e.g.*, *United States v. Wade*, 388 U.S. 218, 224–25 (1967).

10 Jordan Smith, *New Orleans Prosecutors Routinely Violate Defendants' Rights to Counsel to Keep Them in Jail*, Intercept (May 15, 2019), https://theintercept.com/2019/05/15/new-orleans-prosecutors-sixth-amendment-right-to-counsel-bail/.

11 *Id*.

12 *See* Henning, *supra* note 2, at 772.

13 *Barker v. Wingo*, 407 U.S. 514, 521 (1972).

14 *Batson v. Kentucky*, 476 U.S. 79–80 (1986); *See also*, *Flowers v. Mississippi*, 588 U.S. ___, 139 S. Ct. 2228, (2019).

15 *Batson v. Kentucky*, at 79–80; *See* Jay Willis, *The Supreme Court Just Struck Down The Last State Law Allowing Split Jury Verdicts,* Appeal (Apr. 20, 2020), https://theappeal.org/supreme-court-ramos-v-louisiana-overturning-precedent/.

16 Steve Weinburg, *Anatomy of Misconduct*, Ctr. for Pub. Integrity (June 26, 2003, last updated May 19, 2014) https://publicintegrity.org/politics/state-politics/harmful-error/anatomy-of-misconduct/.

17 *See* 373 U.S. 83, 84–87 (1963).

18 *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

19 Jessica Brand, *The Epidemic of Brady Violations: Explained*, Appeal (Apr. 25, 2018), https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800/.

20 *See, e.g., id.*

21 Weinburg, *supra* note 18.

22 *See* Lisa M. Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence,* 69 Fordham L. Rev. 1205, 1216 (2000); Marc Allen, *Non-Brady Legal and Ethical Obligations on Prosecutors to Disclose Exculpatory Evidence,* Nat'l Registry of Exonerations (Jul. 2018), https://www.law.umich.edu/special/exoneration/Documents/NRE_Exculpatory_Evidence_Obligations_for_Prosecutors.pdf.

23 *See, e.g.,* Fish, *supra* note 1, at 273; Weinberg, *supra* note 18.

24 *See* Fish, *supra* note 1, at 283.

25 Fish, *supra* note 1, at 250–51.

26 *Id.* at 294–95. This is already the practice for federal prosecutors. *See* United States Attorney Manual § 9-11.233 (2020).

27 *See Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935).

28 *See* Monroe H. Freedman, *The Use of Unethical and Unconstitutional Practices and Policies by Prosecutors' Offices*, 52 Washburn L.J. 1, 17 (2012).

29 *See generally* Steven Zeidman, *From Dropsy to Testilying: Prosecutorial Apathy, Ennui, or Complicity?,* 16 Ohio St. J. Crim. L., 423, 431–32 (2019); *see also* Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 Va. J. Soc. Pol'y & L. 305, 313.

30 *Cf.* H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, 32 Colo. Law. 11, 21 (2003). Prosecutors in U.S. Attorney's Offices, for example, are required to report to the Office of Professional Responsibility evidence and non-frivolous allegations of at least some forms of misconduct. *See* Justice Manual § 1-4.300 (2018).