The Case for Pattern-or-Practice Investigations Against District Attorney's Offices

By Rory Fleming*

Introduction

PROSECUTORS ARE SOME of the most powerful public officials in American government. Armed with broad state and federal criminal statutes,[1] prosecutors have wide latitude to decide how to enforce these laws.[2] They are also some of the least accountable. State bars rarely file ethics complaints against prosecutors, even when they commit egregious misconduct on a repeated basis.[3] Prosecutors also enjoy absolute immunity from lawsuits arising from their official conduct.[4] When they lead district attorneys' offices as elected district attorneys ("DA"), they often do not face challengers as they coast to reelection.[5]

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1. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 507 (2001) ("The reason is that American criminal law, federal and state, is very broad; it covers far more conduct than any jurisdiction could possibly punish.").

2. Bruce Frederick & Don Stemen, Vera Inst., The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making ii (2012) ("Prosecuting attorneys enjoy broader discretion in making decisions that influence criminal case outcomes than any other actors in the American justice system.").

3. *See Harmful Error: Investigating America's Local Prosecutors*, Ctr. for Pub. Integrity (June 26, 2003), https://publicintegrity.org/topics/accountability/harmful-error/ [https://perma.cc/S33Y-8FHG]; Parker Yesko, *Why Don't Prosecutors Get Disciplined?*, Am. Pub. Media (Sept. 18, 2018), https://www.apmreports.org/story/2018/09/18/why-dont-prosecutors-get-disciplined [https://perma.cc/9SWF-EGAJ].

4. Samantha M. Caspar & Artem M. Joukov, *The Case for Abolishing Absolute Prosecutorial Immunity on Equal Protection Grounds*, 49 Hofstra L. Rev. 315, 322 (2021).

5. The Prosecutors & Pol. Project, National Study of Prosecutor Elections (Feb. 2020), https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf [https://perma.cc/C2J3-Y75Z].

The wisdom of this arrangement has increasingly been called into question as legal scholars have shown how changes in prosecutorial policies at the local level have coincided with ballooning incarceration rates.[6] Additionally, with improvements in forensic science and sustained efforts to remedy wrongful convictions, exonerations for serious convictions like rape and murder have become painfully common.[7]

Several new efforts to better ensure that prosecutors are more accountable to the public have been initiated in recent years. Perhaps the most closely-watched vehicle for accountability has been prosecutorial elections and the ensuing "progressive prosecutor movement."[8] Since 2015, dozens of attorneys have run for DA with campaign platforms focused on curbing the criminal legal system's most egregious carceral excesses.[9] A significant number of these electoral candidates have successfully defeated entrenched incumbents,[10] and tens of millions of Americans are now served by DAs who are considered progressive.[11] Other complementary initiatives, such as local prosecutorial review boards[12] and out-of-district bar complaints,[13] have also been created and are experiencing varying levels of success.[14]

Another major tool available to hold prosecutors accountable is the "pattern-or-practice" investigation.[15] While federal intervention might not solve issues such as overcharging and cruel sentencing practices, which are largely political, it can create accountability for persistent local misconduct. Furthermore, federal intervention is perhaps

6. *See generally* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017).

7. *See* Emily Barone, *The Wrongly Convicted: Why More Falsely Accused People Are Being Exonerated Today than Ever Before*, TIME (Mar. 6, 2017), https://time.com/wrongly-convicted/ [https://perma.cc/HT2K-W2YH].

8. *See* Rory Fleming, *Legitimacy Matters: The Case for Public Financing in Prosecutor Elections*, 27 WASH. & LEE J. C.R. & SOC. JUST. 1, 5 (2020).

9. *Id.* at 5–6.

10. *Id.* at 16–21.

11. *Id.* at 6 n.23.

12. *See* Ben Brazil, *The New OIR Director's Job Is to Be a Watchdog Over O.C.'s Law Enforcement Agencies. But It's Complicated*, L.A. TIMES: DAILY PILOT (May 20, 2020, 4:45 PM), https://www.latimes.com/socal/daily-pilot/entertainment/story/2020-05-20/office-of-independent-review-orange-county-watchdog-complicated [https://perma.cc/BK6R-33V6].

13. George Joseph, *Prosecutors Wrongfully Convicted Three Men Who Spent 24 Years Behind Bars. Will They Be Disbarred?*, GOTHAMIST (May 6, 2021, 10:01 AM), https://gothamist.com/news/prosecutors-wrongfully-convicted-three-men-who-spent-24-years-behind-bars-will-they-be-disbarred [https://perma.cc/FZ2S-MJNZ].

14. *See* Brazil, *supra* note 12.

15. 32 U.S.C. § 12601 (formerly 42 U.S.C. § 14141).

the only feasible route to prosecutorial reform in conservative districts, while there is also some evidence to suggest a correlation between prosecutorial misconduct rates in DA's offices and excessively punitive policies.[16]

Since the passage of the Violent Crime Control and Law Enforcement Act of 1994, the U.S. Department of Justice ("DOJ" or "Justice Department") has had the ability to investigate local police departments for systemic violations of constitutional rights.[17] As of 2017, the Civil Rights Division of the DOJ had "opened 69 formal investigations, and entered into 40 reform agreements to bring much-needed change to police departments."[18] These investigations have usually resulted in consent decrees, which are approved by federal judges and legally binding on the municipalities that control and oversee police department behavior.[19]

Popular during Barack Obama's presidency, this tool fell out of favor under former President Donald Trump, with the Trump Justice Department only opening a single such investigation.[20] The Biden administration, however, was quick to announce new pattern-or-practice investigations, including one against the Minneapolis Police Department following the high-profile killing of George Floyd by former officer Derek Chauvin,[21] and another against the Louisville Police Department following the high-profile death of Breonna Taylor at the

16. For example, previous research has demonstrated a strong correlation between the DA's offices that obtain the largest number of death sentences and prosecutorial misconduct. *See* FAIR PUNISHMENT PROJECT, HARV. L. SCH., AMERICA'S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY (June 2016), https://files.deathpenaltyinfo.org/documents/FairPunishmentProject-Top5Report_FINAL_2016_06.pdf [https://perma.cc/2EQF-3SAF].

17. Ian Millhiser, *Trump's Justice Department Has a Powerful Tool to Fight Police Abuse. It Refuses to Use It.*, VOX (June 30, 2020, 5:00 AM), https://www.vox.com/2020/6/30/21281041/trump-justice-department-consent-decrees-jeff-sessions-police-violence-abuse [https://perma.cc/WM5T-LQUL].

18. C.R. DIV., U.S. DEP'T OF JUST., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994–PRESENT 3 (2017), https://www.prisonlegalnews.org/media/publications/The_Civil_Rights_Division_US_Department_of_Justice_2017.pdf [https://perma.cc/ZB2E-BTR7].

19. *See, e.g.*, Consent Decree, United States v. City of Ferguson, No. 4:16-cv-000180-CDP, (E.D. Mo., Apr. 19, 2016).

20. Katie Benner & Emily Badger, *A Justice Dept. Skeptical of Police Abuse Cases Vows to Investigate Floyd Death*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/us/politics/justice-department-civil-rights-george-floyd.html [https://perma.cc/BM8U-WS3Z].

21. *See* Andy Mannix, *Justice Department to Probe Whether Minneapolis Police Have 'Pattern and Practice' of Misconduct*, STAR TRIB. (Apr. 21, 2021, 2:52 PM), https://www.startribune.com/justice-department-to-probe-whether-minneapolis-police-have-pattern-and-practice-of-misconduct/600048448/ [https://perma.cc/2JG5-AJ32].

hands of officers Jonathan Mattingly, Brett Hankison, and Myles Cosgrove.[22] Along with this revival of the use of pattern-or-practice investigations against police departments, it is of paramount importance that the Justice Department use this tool to course correct errant DA's offices that have resisted needed change via other available means.

Part I of this Article describes the problem of incalcitrant prosecutorial misconduct in three DA's offices. Part II explains how pattern-or-practice investigations conducted by the Justice Department work in the context of policing. Part III details how these investigations and ensuing consent decrees could force consistently problematic DA's offices to recalibrate their efforts toward the ethical, legally sound practice of law. Part IV acknowledges the potential limitations of pattern-or-practice investigations, while assessing actors that might help guide where these investigations could be most useful in the DA context.

I. The Problem of Incalcitrant Prosecutorial Misconduct in Certain District Attorney's Offices

All prosecutors presumably start in the profession for the right reasons. But, similar to police officers, prosecutors deal with some of the most harrowing harms that human beings commit against one another. Some, perhaps many, prosecutors end up responding to these stressors by delivering justice in ways that deviate from the ethical and legal bounds of the profession. This is not a new realization. Influential judges have spoken in recent years about the "epidemic" of prosecutorial misconduct, as former Judge Alex Kozinski of the Ninth Circuit Court of Appeals once put it.[23]

Even setting aside the issue of unreported or undiscovered prosecutorial misconduct, there is no nationwide database of court findings of prosecutorial misconduct,[24] nor is such information easy,

22. *See* Claire Hansen, *DOJ to Open Probe into Louisville Police Roughly a Year After Death of Breonna Taylor*, U.S. News & World Rep. (Apr. 26, 2021, 5:05 PM), https://www.usnews.com/news/national-news/articles/2021-04-26/doj-to-open-probe-into-louisville-police-roughly-a-year-after-death-of-breonna-taylor [https://perma.cc/A6AB-NXL9].

23. *See* Maura Dolan, *U.S. Judges See 'Epidemic' of Prosecutorial Misconduct in State*, L.A. Times (Jan. 31, 2015, 7:20 PM), https://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html [https://perma.cc/7U9W-UM28].

24. Nicole Zayas Fortier, ACLU, Unlocking the Black Box: How the Prosecutorial Transparency Act Will Empower Communities and Help End Mass Incarceration 8–9 (2019), https://www.aclu.org/sites/default/files/field_document/aclu_smart_justice_prosecutor_transparency_report.pdf [https://perma.cc/4NUN-6VB8].

cheap, or simple to obtain.[25] With no single organization or governmental body collecting data on prosecutorial misconduct, reformers are often left to anecdotes of particularly egregious cases (or particular DA's offices) to describe the problem's seriousness.[26] These cases usually involve violent crimes, where the stakes for both prosecutors and the prosecuted are the highest.[27]

Prior academic research has also shown that perceived unevenness in prosecutorial misconduct cannot be explained away simply by comparing the number of prosecutorial misconduct findings in local districts with the general case volume of those districts.[28] On a per capita basis, some offices do seem to commit more misconduct than others, at least when measured according to judicial findings of misconduct that are made or sustained at the final appellate stage.[29]

At least three offices have received a high and persistent level of scrutiny: the Orange County District Attorney's Office in California, the Orleans Parish District Attorney's Office in Louisiana, and the Shelby County District Attorney General's Office in Tennessee. Each of these offices have been chastised by courts, scholars, and national media for prosecutorial misconduct.[30] The elected DAs in these counties have also lambasted any criticism of office practices or policies

25. There are many reasons for this. First, prosecutorial misconduct studies usually use commercial legal databases such as Westlaw and LexisNexis, both of which are expensive, though they are complementary for law professors and affiliated scholars. *See, e.g.*, FAIR PUNISHMENT PROJECT, HARV. L. SCH., THE RECIDIVISTS: NEW REPORT ON RATES OF PROSECUTORIAL MISCONDUCT (Aug. 9, 2017), https://web.archive.org/web/20171216131743/http://fairpunishment.org/new-report-on-rates-of-prosecutorial-misconduct [https://perma.cc/DYY6-GA39]. But these databases do not contain all reported and unreported decisions, let alone trial court records in cases where there are no appeals. To obtain these records, one usually must track down the official court reporter and pay a fee or personally go to the local county courthouse. *See, e.g.*, VA. CODE. ANN. § 19.2-165 (2014); *Virginia State Court Records*, DIGIT. MEDIA L. PROJECT, https://www.dmlp.org/legal-guide/virginia-state-court-records [https://perma.cc/VJ29-AVH6]; *Obtaining Court Records*, N.C. JUD. BRANCH, https://www.nccourts.gov/help-topics/court-records/obtaining-court-records [https://perma.cc/9GT4-LBJD]. Obtaining the trial transcripts for every locally prosecuted criminal case in the United States since the dawn of its history, or even in the last thirty years, would be an insurmountable task. To understand the scope of the work required, consider that Ohio prosecutors alone handled 792 full trials in 2020. *See State of Ohio Courts of Common Pleas, General Division: Dispositions*, OHIO DEP'T. OF ADMIN. SERVS. (2020), https://analytics.das.ohio.gov/t/SCPUB/views/FormA-judge-state-PROD/Dispositions?iframeSizedToWindow=true&%3Aembed=Y%3AshowAppBanner=false&%3Adisplay_count=no&%3AshowVizHome=no.

26. *See infra* Part I(A)–(C).

27. *See id.*

28. *See* FAIR PUNISHMENT PROJECT, HARV. L. SCH., *supra* note 25.

29. *Id.* (comparing misconduct rates per capita by prosecutors' offices in four states).

30. *See id.*

that resulted in scandal.[31] Two of the offices—Orange County and Orleans Parish—have had a change in leadership since their most significant scandals,[32] but only the latter office seems to have undergone any meaningful change.[33]

That said, there is much we do not know when it comes to the levels of wrongdoing in DA's offices throughout the country. Prior existing studies only tracked misconduct that that was addressed by appellate courts, but that is radically incomplete.[34] In addition, these offices may come up in the prosecutorial accountability literature so often due to their ease of reference, as well as the big-city skew of empirical research on DA's offices.[35] Even so, they provide useful illustrations for how pervasive and destructive prosecutorial misconduct can be to county justice systems.

31. *See* Tony Saavedra, *OC District Attorney Tony Rackauckas Wants Harvard to Retract Unflattering Report*, ORANGE CNTY. REG. (Sep. 13, 2017, 5:19 PM), https://www.ocregister.com/2017/09/13/oc-district-attorney-tony-rackauckas-wants-harvard-to-retract-unflattering-report/ [https://perma.cc/AFN2-6N9G] (regarding Orange County DA Tony Rackauckas); *DA Office Fires Off Tweetstorm About 'Pro-Crime' New York Times Story,* WMC ACTION NEWS 5 (Aug. 3, 2017, 10:50 PM), https://www.wmcactionnews5.com/story/36054933/da-office-fires-off-tweetstorm-about-pro-crime-new-york-times-story/ [https://perma.cc/9VLQ-5FF6] (regarding Shelby County DA Amy Weirich); Tim Morris, *DA Leon Cannizzaro Is Dead Certain in His Convictions*, NOLA.COM (July 22, 2019, 2:13 PM), https://www.nola.com/opinions/article_72cd74cd-ced9-5698-90a9-d066ce29f997.html [https://perma.cc/2978-Y8M4] (regarding former Orleans Parish DA Leon Cannizzaro).

32. *See* Matt Sledge, *Jason Williams Wins New Orleans DA Race, Promising New Era in Prosecutor's Office*, NOLA.COM (Dec. 5, 2020, 10:45 PM), https://www.nola.com/news/courts/article_f044cf7a-368a-11eb-ac4b-0bbdab4e0c09.html [https://perma.cc/RA8B-RVKS]; Nick Gerda, *Ex-Prosecutor Peter Hardin Announces He's Running Against DA Todd Spitzer*, VOICE OF OC (July 9, 2021), https://voiceofoc.org/2021/03/ex-prosecutor-peter-hardin-announces-hes-running-against-da-todd-spitzer/ [https://perma.cc/4XYN-L498].

33. *See* Katie Jane Fernelius, *In Nation's Incarceration Capital, a New D.A. is Freeing People from Prison*, THE APPEAL (Apr. 21, 2021), https://theappeal.org/politicalreport/new-orleans-district-attorney-jason-williams-conviction-reviews/ [https://perma.cc/3MEJ-QTW7] (explaining Orleans Parish DA Williams' various reforms); *But see* Gina Womack, *I Want My Vote Back!*, THE LENS (July 27, 2021), https://thelensnola.org/2021/07/27/i-want-my-vote-back/ [https://perma.cc/TY67-WAUX] (criticizing Orleans Parish DA Williams for still prosecuting children as adults).

34. *See* FAIR PUNISHMENT PROJECT, HARV. L. SCH., *supra* note 25; *see also New Report: Prosecutorial Misconduct and Wrongful Convictions*, INNOCENCE PROJECT (Aug. 25, 2010), https://innocenceproject.org/new-report-prosecutorial-misconduct-and-wrongful-convictions/ [https://perma.cc/4KRJ-VQS2].

35. *See generally* Ronald F. Wright & Kay Levine, *Place Matters in Prosecution*, 14 OHIO ST. J. CRIM. L. 675 (2017).

A. Case Study: The Orange County, California, District Attorney's Office

The core of what is well-known about prosecutorial misconduct in the Orange County DA's Office involves what has been dubbed "the jailhouse snitch scandal."[36] In 2011, Assistant Public Defender Scott Sanders noticed that two of his capital murder clients had apparently confessed their crimes to the same man, Fernando Perez.[37] Sanders asked the prosecutors from the Orange County DA's Office to divulge records about Perez, pursuant to the rule set forth in *Brady v. Maryland*.[38] Prosecutors initially fought the request, but Orange County Superior Court Judge Thomas Goethals[39] demanded they comply with it.[40] Sanders was reportedly stunned by the volume of discovery he then obtained, which involved nine separate criminal cases.[41] Sanders also flagged communications between another informant, Oscar Moriel, and officers.[42] Those communications suggested that local sheriff's deputies were moving Moriel and other detainees around at the jail to produce incriminating statements from their unwitting cellmates.[43]

One of the cases Perez worked on concerned Scott Dekraai. Dekraai committed the worst mass shooting in Orange County history, killing eight people and wounding another.[44] Despite the fact that his guilt was readily probable, Perez, like Moriel and potentially others, was purposely placed in a cell with Dekraai.[45] In over one hundred

36. Jordan Smith, *Anatomy of a Snitch Scandal: How Orange County Prosecutors Covered up Rampant Misuse of Jailhouse Informants*, THE INTERCEPT (May 14, 2016, 6:57 AM), https://theintercept.com/2016/05/14/orange-county-scandal-jailhouse-informants/ [https://perma.cc/57DT- A2JK].

37. *Id.*

38. 373 U.S. 83, 87 (1963) (holding ". . . that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

39. *Thomas M. Goethals, Associate Justice*, CAL. CTS., THE JUD. BRANCH OF CAL., https://www.courts.ca.gov/38267.htm [https://perma.cc./Q5P6-L2PL]. Judge Goethals has since been appointed to the California Court of Appeal, Fourth Appellate District, Division Three.

40. *See* Smith, *supra* note 36.

41. *Id.*

42. *Id.*

43. *Id.*

44. Marisa Gerber & James Queally, '*The Face of Evil': Worst Mass Shooter in Orange County History Sentenced to Life in Prison*, L.A. TIMES (Sept. 22, 2017, 5:15 PM), https://www.latimes.com/local/lanow/la-me-ln-scott-dekraai-sentencing-20170922-story.html [https://perma.cc/T99Q-QXDD].

45. *See* Smith, *supra* note 36.

hours of recordings made by employees of the DA's Office and the Sheriff's Office, Perez could be heard grilling Dekraai about his mental state during the crime, what he had told his lawyers, and other important legal matters.[46]

In January 2014, Assistant Public Defender Sanders filed a motion arguing that the death penalty should be barred in the Dekraai case due to law enforcement misconduct.[47] Dekraai pled guilty on May 2, 2014.[48] The hearing on Sanders' motion began in March 2014 and ran through summer.[49] Judge Goethals ruled that the DA's office did in fact commit prosecutorial misconduct, in the form of *Brady* violations,[50] and that the misconduct was so pervasive and severe that the only appropriate remedy was to remove the DA's Office from the case.[51] Judge Goethals also attempted to transfer the case to then-California Attorney General Kamala Harris's Office.[52] In 2017, despite the unparalleled seriousness of the crime, Goethals took the death penalty off the table for Dekraai due to the misconduct in the case.[53] Dekraai was eventually sentenced to a prison term of life without parole.[54]

Not only did the scandal make national news, but it also led to a November 17, 2015 request for a federal investigation signed by Professor Erwin Chemerinsky and former Los Angeles County DA and California Attorney General John Van de Kamp.[55] That request re-

46. *Id.*

47. *Id.*

48. Greg Yee, *Scott Dekraai Pleads Guilty to Salon Meritage Massacre, Prosecutors Plan to Seek Death Penalty*, L.A. DAILY NEWS (Aug. 28, 2017, 7:34 AM), https://www.dailynews.com/2014/05/02/scott-dekraai-pleads-guilty-to-salon-meritage-massacre-prosecutors-plan-to-seek-death-penalty/ [https://perma.cc/3HDJ-XGYK].

49. *See* Smith, *supra* note 36.

50. *Id.*

51. Kelly Puente & Tony Saavedra, *In Rare Move, Judge Kicks Orange County D.A. Off Case of Seal Beach Mass Shooting Killer Scott Dekraai*, ORANGE CNTY. REG. (Mar. 13, 2015, 12:55 PM), https://www.ocregister.com/2015/03/13/in-rare-move-judge-kicks-orange-county-da-off-case-of-seal-beach-mass-shooting-killer-scott-dekraai/ [https://perma.cc/K8QV-SJ4L].

52. Appellant's Opening Brief, California v. Dekraai, 210 Cal. Rptr. 3d 523 (Cal. Ct. App. 4th 2015) (No. G051696).

53. Tony Saavedra, *Scott Dekraai, Orange County's Worst Mass Killer, Gets Life Without Parole for Eight Seal Beach Murders*, ORANGE CNTY. REG. (Sept. 23, 2017, 12:45 AM), https://www.ocregister.com/2017/09/22/scott-dekraai-orange-countys-worst-mass-killer-gets-eight-life-terms-one-for-each-murder/ [https://perma.cc/QN8S-PUER].

54. *Id.*

55. Erwin Chemerinsky, *A Long Overdue Investigation*, VOICE OF OC (Dec. 8, 2020), https://voiceofoc.org/2016/12/chemerinsky-a-long-overdue-investigation/ [https://perma.cc/HN3M-BLPY].

sulted in the DOJ's Civil Rights Division opening up an official pattern-or-practice investigation, the first against a DA's office in history.[56] Four years later, the California Attorney General's Office concluded its investigation with no criminal charges or other penalties for anyone responsible.[57]

The less well-known reality is that misconduct in the Orange County DA's Office extended far beyond the snitch scandal. A 2017 report from the Harvard Law School Fair Punishment Project conducted an analysis of every published appellate decision in California criminal cases from 2010 to 2015 and found that, out of fifty-eight counties, the Orange County DA's Office had the second-most prosecutorial misconduct findings and the second-most reversals due to prosecutorial misconduct.[58] While legitimate criticisms have been made regarding the definition of prosecutorial misconduct[59] used to calculate those statistics,[60] the cases where California appellate courts found trial court error as a result of prosecutorial misconduct, rather than judicial error, are striking.

56. Amy Taxin, *Justice Department Probing California Jail Snitch Scandal*, Associated Press (Dec. 15, 2016), https://apnews.com/article/029be2bcd9d84762b5d5c6540f79b4f8 [https://perma.cc/8CPC-4ZTR].

57. Lorelei Laird, *4 Years After Orange County Jailhouse Informant Scandal, Investigation Closes with No Penalties*, A.B.A. J. (Apr. 26, 2019, 6:30 AM), https://www.abajournal.com/news/article/four-years-after-O-C-jailhouse-informant-scandal-investigation-apparently-closes-with-no-penalties [https://perma.cc/9CF2-LTFD].

58. *See* Fair Punishment Project, Harv. L. Sch., *supra* note 25.

59. *Cf. id.* at n.2.

60. After the Harvard Law School Fair Punishment Project issued its "Recidivist Prosecutors" report, the *Orange County Register* detailed how the report concluded that, when it came to prosecutorial misconduct, "the embattled Orange County District Attorney's Office has the state's worst record based on population." Tony Saavedra, *Dozens of Convictions Tossed Out of Southern California Courts Because of Prosecutors' Bad Behavior, Harvard Study Says*, Orange Cnty. Reg. (Sep. 11, 2017, 1:30 PM), https://www.ocregister.com/2017/07/28/harvard-study-prosecutor-misconduct-taints-justice-in-southern-california/ [https://perma.cc/AHP3-2FCK]. Then-Orange County DA Tony Rackauckas was not amused. On September 13, 2017, the DA demanded that Harvard Law School retract the report. *See* Saavedra, *supra* note 31. The incident led to a reexamination of the report, and specifically the way it defined prosecutorial misconduct. Using a more restrictive definition of misconduct findings that was in line with the California appellate bench, Rackauckas's office moved from the worst prosecutorial office in California by modified per capita reversals to the second worst. *See* Rob Smith, *Update to Our Recidivist Report*, Fair Punishment Project, Harv. L. Sch. (Sept. 11, 2017), https://web.archive.org/web/20171208035334/http://fairpunishment.org/update-to-our-recidivist-report/; *see also* Fair Punishment Project, Harv. L. Sch., *supra* note 25.

The current Orange County DA, Todd Spitzer, has issued his own report decrying the prosecutorial misconduct in the Dekraai case.[61] However, in a video shared on YouTube, Spitzer also praised the prosecutors partially responsible for the snitch scandal at their retirement party.[62] Spitzer described them as "honorable men" who care deeply "about the ethics of our profession," and said they were "unfairly blamed" for the outcome of the Dekraai case.[63]

In addition, Spitzer also continues to stand by other controversial and arguably unconstitutional practices from former Orange County DA, Tony Rackauckas, such as the "spit-and-acquit" diversion policy for misdemeanors.[64] This practice is currently the focus of litigation brought by the University of California, Irvine School of Law's Civil Rights Litigation Clinic,[65] which is seeking an injunction that would force Spitzer to shutter the program.[66]

B. Case Study: The Orleans Parish, Louisiana, District Attorney's Office

The Orleans Parish DA's Office has been controversial for decades. Harry Connick, Sr., who served as the elected DA from 1973 to 2003, was the defendant in two Supreme Court cases,[67] one of which involved prosecutorial misconduct in his office.[68] Connick was also federally indicted for allegedly aiding and abetting a gambling opera-

61. *Report: Prosecutors Mishandled Scott Dekraai Mass Murder Case*, FOX 11 L.A. (July 20, 2020), https://www.foxla.com/news/report-prosecutors-mishandled-scott-dekraai-mass-murder-case [https://perma.cc/C2FJ-3GCC].

62. Nick Gerda, *DA Spitzer Praised Ethics of Snitch Scandal Prosecutors After Promising Voters Accountability*, VOICE OF OC (July 8, 2021), https://voiceofoc.org/2020/08/da-spitzer-praised-ethics-of-snitch-scandal-prosecutors-after-promising-voters-accountability/ [https://perma.cc/735Y-YDMD].

63. *Id.*

64. *See generally* Andrea Roth, *"Spit and Acquit": Prosecutors as Surveillance Entrepreneurs*, 107 CALIF. L. REV. 405 (2019) (describing practice whereby the DA agrees to divert a criminal charge in exchange for the defendant offering DNA to an offender database).

65. Tony Saavedra, *UC Irvine Civil Rights Clinic Sues OC District Attorney Over Unregulated DNA Database*, ORANGE CNTY. REG. (Feb. 18, 2021, 5:55 PM), https://www.ocregister.com/2021/02/18/uc-irvine-civil-rights-clinic-sues-oc-district-attorney-over-unregulated-dna-database/ [https://perma.cc/KG3D-7QJU].

66. Complaint for Declaratory and Injunctive Relief, Thompson v. Spitzer, https://www.law.uci.edu/news/press-releases/2021/OCDA-DNA-Complaint.pdf [https://perma.cc/2TBS-56WU].

67. Connick v. Myers, 461 U.S. 138 (1983); Connick v. Thompson, 563 U.S. 51 (2011).

68. *See* Dahlia Lithwick, *Cruel but Not Unusual*, SLATE (Apr. 1, 2011, 7:43 PM), https://slate.com/news-and-politics/2011/04/connick-v-thompson-clarence-thomas-writes-one-of-the-cruelest-supreme-court-decisions-ever.html [https://perma.cc/A7VZ-SZXA] (explaining the facts of Connick v. Thompson, 563 U.S. 51(2011)).

tion, though he was acquitted at trial.[69] However, it was the administration of Leon Cannizzaro, who served as DA from 2008 to 2019,[70] which attracted the most scorn of prosecutorial accountability advocates.[71] Like the Orange County DA's Office, much of the criticism of Cannizzaro revolved around a single scandal that implicated a large number of cases. That scandal is usually referred to as the "fake subpoena" scandal.[72]

In order to get witnesses and victims to testify in criminal investigations, the Orleans Parish DA's Office mailed them documents that stated "SUBPOENA" at the top, along with the office seal of the DA's Office.[73] The documents would order their targets to appear before the Office's prosecutors and "testify to the truth" of these matters.[74] In addition, the documents warned recipients that the "failure to obey" would lead to fines and even imprisonment.[75] This conduct had been occurring for several years before it was revealed by local media outlets.[76] The Orleans Parish DA's Office faced several lawsuits from or-

69. Frances Frank Marcus, *New Orleans Jury Acquits Official*, N.Y. TIMES (July 26, 1990), https://www.nytimes.com/1990/07/26/us/new-orleans-jury-acquits-official.html [https://perma.cc/38U5-J3PK].

70. *See Leon Cannizzaro*, BALLOTPEDIA, https://ballotpedia.org/Leon_Cannizzaro [https://perma.cc/45WW-ASZP].

71. For example, renowned legal journalist, Emily Bazelon, started reporting on Leon Cannizzaro's prosecutorial misconduct as early as 2012. *See* Emily Bazelon, *Playing Dirty in the Big Easy*, SLATE (Apr. 18, 2012, 4:56 PM), https://slate.com/news-and-politics/2012/04/new-orleans-district-attorney-leon-cannizzaro-is-being-questioned-for-his-ethics-in-pursuing-convictions.html [https://perma.cc/GQ3Y-FQQN].

72. Laura Kusisto, *Long Shielded from Lawsuits, Prosecutors Face Scrutiny After Fake Subpoenas*, WALL ST. J. (Feb. 5, 2020, 9:55 AM), https://www.wsj.com/articles/long-shielded-from-lawsuits-prosecutors-face-scrutiny-after-fake-subpoenas-11580914550 [https://perma.cc/JN5Q-AN34].

73. Charles Maldonado, *Orleans Parish Prosecutors Are Using Fake Subpoenas to Pressure Witnesses to Talk to Them*, THE LENS (Apr. 26, 2017), https://thelensnola.org/2017/04/26/orleans-parish-prosecutors-are-using-fake-subpoenas-to-pressure-witnesses-to-talk-to-them/ [https://perma.cc/9W4Q-N539].

74. Alan Blinder, *New Orleans Prosecutors Accused of Using Fake Subpoenas*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/us/new-orleans-subpoenas.html [https://perma.cc/52C5-RR9K].

75. *Id.*

76. Matt Sledge, *Federal Judges Scathing on Fake Subpoenas in New Orleans, But Don't Rule on Key Question*, NOLA.COM (Feb. 5, 2020, 1:38 PM), https://www.nola.com/news/courts/article_253052ac-484f-11ea-995d-837ba3508ff8.html [https://perma.cc/L8VF-DM4K].

ganizations representing people who received the fake subpoenas[77] and, at one point, the Office was even fined for not cooperating.[78]

Despite the fact that these documents were never authorized by a court and a DA in Louisiana cannot, by law, subpoena someone on his or her own authority,[79] a number of fake subpoena recipients were jailed for not cooperating—just as Cannizzaro threatened.[80] One of the people impacted by this illegal practice was a rape victim who was reluctant to testify against her rapist.[81] After Cannizzaro was criticized for this deeply troubling event, he gave a full-throated defense of his actions, saying that the fake subpoenas were necessary to crack down on crime.[82]

Cannizzaro was eventually sued in federal court over the fake subpoenas.[83] Generally, prosecutors are immune from suit under the principle of absolute immunity.[84] On April 21, 2020, however, the

77. Tim Cushing, *Court Says Lawsuit over Fake Subpoenas Issued by Louisiana DA's Office Can Proceed*, TECHDIRT (Mar. 1, 2019, 7:39 PM), https://www.techdirt.com/articles/20190301/19284741710/court-says-lawsuit-over-fake-subpoenas-issued-louisiana-das-office-can-proceed.shtml [https://perma.cc/6R7A-B4F4].

78. Matt Sledge, *New Orleans DA Hit with $50k Penalty for Failing to Provide Fake Subpoenas Under Records Request*, NOLA.COM (Aug. 1, 2020, 6:00 AM), https://www.nola.com/news/courts/article_699a747c-d373-11ea-843c-c78189521252.html [https://perma.cc/9P85-X5WQ].

79. Cannizzaro has admitted as much, stating:

> [t]he Judge is the one who orders the person to be arrested pursuant to a material witness bond if the Judge finds that the person has valuable information, important information as it pertains to the case and the Judge finds that the individual has not been susceptible to the court.

Natasha Robin, *Ruling in Federal Lawsuit Involving 'Fake Subpoenas,'* FOX (June 12, 2020, 3:06 PM), https://www.fox8live.com/2020/06/12/ruling-federal-lawsuit-involving-fake-subpoenas/ [https://perma.cc/BH97-TEAX]. In this quote, DA Cannizzaro is referring to Louisiana's material witness bond statute. *See* LA. STAT. ANN. § 15:257 (2017). However, prosecutors in some states, like Hawaii, can issue subpoenas on their own authority. *See* HAW. REV. STAT. §28-2.5 (2018).

80. Anna Arceneaux, *New Orleans District Attorney Leon Cannizzaro Breaks the Law to Enforce It. We're Holding Him Accountable.*, ACLU (Oct. 17, 2017, 10:45 AM), https://www.aclu.org/blog/smart-justice/new-orleans-district-attorney-leon-cannizzaro-breaks-law-enforce-it-were-holding [https://perma.cc/X8DN-52KH].

81. *Id.*

82. Kevin McGill, *$70,000 in Settlements in Lawsuits over Prosecutors' Tactics*, ASSOCIATED PRESS (Jan. 8, 2021), https://apnews.com/article/subpoenas-lawsuits-archive-courts-crime-cd3076980b6055e562931d7a4c071237 [https://perma.cc/N52A-UR2A].

83. *Singleton v. Cannizzaro*, ACLU (Apr. 22, 2020), https://www.aclu.org/cases/singleton-v-cannizzaro [https://perma.cc/HD72-NJCX].

84. *See* Caspar & Joukov, *supra* note 4 at 322 ("Absolute immunity protects a prosecutor from lawsuits arising out of injuries caused by the prosecutor's own misconduct within the scope of prosecutorial duties, even if the misconduct was willful."); *see also* Imbler v. Pachtman, 424 U.S. 409, 410 (1976) (establishing doctrine of absolute prosecutorial immunity).

Fifth Circuit ruled that the suit could proceed because the fake subpoenas had an investigative purpose not related to the core prosecutorial functions of the DA's Office.[85] The absolute immunity Cannizzaro would otherwise receive was thus downgraded to qualified immunity,[86] the lesser level of shielding that police officers usually receive for actions taken in an official capacity.[87]

The 2017 Fair Punishment Project report analyzed all sixty-four parishes (county equivalents) in Louisiana and found that, between 2010 and 2015, Cannizzaro's Office had the highest amount of prosecutorial misconduct findings made or sustained on appeal, as well as the second-most reversals due to prosecutorial misconduct.[88] Beyond these numbers are other significant occurrences that demonstrate the win-at-all-costs culture that existed under Cannizzaro. In one shocking instance, Cannizzaro charged Taryn Blume, an investigator who worked for the Orleans Parish Public Defender's Office, with allegedly impersonating a peace officer during her early investigation of Curtis Hawthorne's rape case.[89] Hawthorne was prosecuted by Assistant District Attorney Jason Napoli, who Blume's counsel alleged "manufactured the charges against [Blume] in order to shift blame away from his own misconduct."[90] Napoli ended up being barred from the Blume case by Orleans Parish Criminal District Court Judge Tracey Flemings-Davillier.[91] This incident also caused the Chief Public Defender to opine publicly that members of his office were afraid of being prosecuted for doing their jobs.[92] Cannizzaro later

85. Charles Maldonado, *Federal Appeals Court Affirms Denial of Immunity for Prosecutors Who Used Fake Subpoenas*, THE LENS (Apr. 21, 2020), https://thelensnola.org/2020/04/21/federal-appeals-court-affirms-denial-of-immunity-for-prosecutors-who-used-fake-subpoenas/ [https://perma.cc/C4H9-SCJE].

86. Singleton v. Cannizzaro, 956 F.3d 773, 778 (5th Cir. 2020).

87. *See generally* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 6 (2017).

88. *See* FAIR PUNISHMENT PROJECT, HARV. L. SCH., *supra* note 25.

89. Aviva Shen, *Prosecuted by Her Legal Counterpart: 'It Destroyed My Life in So Many Ways,'* THE GUARDIAN (May 1, 2017, 6:00 PM), https://www.theguardian.com/us-news/2017/may/01/prosecuted-law-new-orleans [https://perma.cc/4YRE-62XD].

90. *See* Ken Daley, *New Orleans Judge Bans Prosecutor from Taryn Blume Case*, NOLA.COM (July 19, 2019, 10:59 AM), https://www.nola.com/news/crime_police/article_0f46cdc4-a59a-5f52-875c-ff1dec85644f.html [https://perma.cc/45RC-G88J].

91. *Id.*

92. Ken Daley, *Public Defenders Chief Accuses DA Cannizzaro's Office of Unethical Conduct, Bullying Tactics*, NOLA.COM (July 19, 2019, 10:49 AM), https://www.nola.com/news/crime_police/article_b7c71ad4-ffec-5cec-a3c5-39912dd8fbd0.html [https://perma.cc/Q7SE-CNMJ].

dropped the charges against Blume.[93] Cannizzaro's legal bills for defending his own misconduct in court ended up totaling almost $750,000.[94]

Cannizzaro opted not to run for re-election in 2020.[95] His successor, Jason Williams,[96] was one of Cannizzaro's most powerful critics while Williams served on the New Orleans City Council.[97] Williams also ran on a campaign platform that touted promises of criminal justice reform and ending mass incarceration.[98] Several promising developments have occurred in the Office since Williams' swearing-in, including the appointment of Ben Cohen, an advocate for prosecutorial reform and other civil rights causes, as the Office's Chief of Appeals.[99] He also promised to not oppose parole bids,[100] supported resentencing for people sentenced under the state's habitual

93. *See* Ken Daley, *DA Cannizzaro Drops Impersonation Charge Against Ex-Public Defenders Investigator, for Now*, NOLA.com (July 22, 2019, 3:47 PM), https://www.nola.com/news/crime_police/article_c2f0aca0-7fb8-5702-9928-ab5076eac982.html [https://perma.cc/7YFG-GYG5].

94. Matt Sledge, *New Orleans DA Leon Cannizzaro Sees $750k in Legal Bills for Defense Against Misconduct Claims*, NOLA.com (Nov. 6, 2020, 11:12 PM), https://www.nola.com/news/courts/article_91e98820-2088-11eb-9144-b7a14ea3b02c.html [https://perma.cc/4CTE-7P2Z].

95. Mike Perlstein, *New Orleans DA Leon Cannizzaro Retires with a Complicated Legacy After 2 Terms*, 4WWL (July 24, 2020, 5:41 PM), https://www.wwltv.com/article/news/crime/new-orleans-da-leon-cannizzaro-retires-with-a-complicated-legacy-after-2-terms/289-d4fdcccf-3c28-4ff5-96c6-20b3f1bacd20 [https://perma.cc/PY8Y-TZP8].

96. Matt Sledge, *How Did Jason Williams Win Big in New Orleans DA Race? A Grassroots Army, Drumbeat of 'Change,'* NOLA.com (Dec. 12, 2020, 2:30 PM), https://www.nola.com/news/courts/article_91612406-3bec-11eb-a957-5f799a28c345.html [https://perma.cc/Y7SU-LDBR].

97. Matt Sledge, *City Councilman Jason Williams Doubles Down After DA Leon Cannizzaro Asks Him to Reduce Role*, NOLA.com (June 9, 2020, 4:15 PM), https://www.nola.com/news/crime_police/article_651815ac-aa5c-11ea-a4f2-7befb7c82a53.html [https://perma.cc/7WAG-JVA5].

98. *See* Michel Martin, *What Jason Williams Wants to Accomplish as New Orleans District Attorney*, NPR (Dec. 12, 2020, 5:07 PM), https://www.npr.org/2020/12/12/945896655/what-jason-williams-wants-to-accomplish-as-new-orleans-district-attorney [https://perma.cc/7W4J-VZ8M]; *see also* Matt Sledge, *For Insight Into DA-Elect Jason Williams Reforms, Look to 'Progressive Prosecutors,'* NOLA.com (Dec. 12, 2020, 12:19 PM), https://www.nola.com/news/courts/article_91bd2408-3ca6-11eb-a142-df7dab535c9e.html [https://perma.cc/PR7R-E27W].

99. Matt Sledge, *New Orleans DA Jason Williams Hires Ben Cohen, Lawyer Who Led Push Against Split Juries*, NOLA.com (Feb. 9, 2021, 6:00 AM), https://www.nola.com/news/courts/article_90fe45ce-6a32-11eb-9bb1-ff8554e00cce.html [https://perma.cc/GWX6-NPXY].

100. John Simerman, *Jason Williams Says Office Won't Oppose Parole Bids as New DA Launches Reform Agenda*, NOLA.com (Jan. 26, 2021, 8:36 PM), https://www.nola.com/news/courts/article_60463a88-6026-11eb-aafc-2f392551c025.html [https://perma.cc/EWT6-XEBR].

offender statute,[101] and granted new trials for those convicted by split juries.[102]

C. Case Study: The Shelby County, Tennessee, District Attorney General's Office

As Professor Erwin Chemerinsky has said, "[b]ar discipline is fairly rare . . . . It's particularly unusual when it comes to prosecutors."[103] Bar discipline is even rarer for sitting DAs, seemingly in part due to the disruption that would likely result from a sitting DA losing his or her law license.[104] However, Shelby County (Memphis) DA General Amy Weirich, who received a private reprimand as a result of the Noura Jackson case,[105] stands as a peculiar exception.

Jackson was convicted of the murder of her mother in 2009.[106] Weirich, who became DA in 2011,[107] was one of the trial prosecutors

101. Matt Sledge, *Man Sentenced to Life in Wallet-Snatching is Free After New Orleans DA Drops Sentencing Enhancement*, NOLA.com (Aug. 16, 2021, 3:04 PM), https://www.nola.com/news/courts/article_228ff512-fecd-11eb-bf3c-67173d79d501.html [https://perma.cc/Y2Z4-E44F].

102. Matt Sledge, *New Orleans DA Jason Williams Granting New Trials to 22 Convicted by Split Juries*, NOLA.com (Feb. 26, 2021, 12:03 PM), https://www.nola.com/news/courts/article_b3545d42-784d-11eb-9e12-8fb36f86a313.html [https://perma.cc/ZN8U-859V].

103. Erika Aguilar, *OC Supervisors Expand Civilian Oversight to DA and Other County Law Enforcement*, KPCC (Nov. 11, 2015), https://archive.kpcc.org/news/2015/11/11/55595/oc-supervisors-expand-civilian-oversight-to-da-and/ [https://perma.cc/G2MQ-D7CT].

104. For example, the Texas Bar waited to discipline former Bexar County (San Antonio) DA, Nico LaHood, for misconduct until after he was no longer the DA. *See, e.g.*, Mariah Medina, Paul Venema & Misael Gomez, *Ex-DA Nico LaHood Punished by State Bar for Incident Involving New DA*, KSAT (Mar. 7, 2019, 3:21 AM), https://www.ksat.com/news/2019/03/07/ex-da-nico-lahood-punished-by-state-bar-for-incident-involving-new-da/ [https://perma.cc/T7JU-BDQX]. *But see* Karen Chávez, *District Attorney Greg Newman Removed from Office; Only 3rd Removal in NC History*, Asheville Citizen-Times (Apr. 27, 2021, 3:40 PM), https://www.citizen-times.com/story/news/local/2021/04/27/north-carolina-district-attorney-greg-newman-removed-office-3rd-time-nc/7299267002/ [https://perma.cc/SGY9-NZRU].

105. Katie Fretland, *District Attorney Amy Weirich Takes Reprimand in Noura Jackson Case*, Com. Appeal (Mar. 20, 2017, 7:13 PM), https://www.commercialappeal.com/story/news/courts/2017/03/20/district-attorney-amy-weirich-reprimanded-noura-jackson-case/99419886/ [https://perma.cc/B2PA-38VT].

106. Glenn Ruppel & Alexa Valiente, *How a Woman Won Her Release from Prison Years After Being Convicted of Her Mother's Murder*, ABC (Mar. 23, 2017, 12:12 PM) https://abcnews.go.com/US/woman-won-release-prison-years-convicted-mothers-murder/story?id=46313117 [https://perma.cc/M34Q-YPUL].

107. Thomas Bailey, Jr., *District Attorney Weirich Sails to Victory over Challenger Joe Brown*, Com. Appeal (Aug. 8, 2014), https://archive.commercialappeal.com/news/government/district-attorney-weirich-sails-to-victory-over-challenger-joe-brown-ep-542045025-324354241.html/ [https://perma.cc/SUS2-FMTD].

on the case.[108] Despite defense attorneys repeatedly asking for all *Brady* information, a note written by a key witness, Andrew Hammack, admitting that he was high on ecstasy the night of the crime, was not disclosed until after the trial.[109] In 2014, the Tennessee Supreme Court, which only once before had reversed a case due to a *Brady* violation,[110] unanimously reversed Jackson's conviction,[111] stating that it was "difficult to overstate" the importance of Hammack's testimony.[112] In addition, the court opined that the defense could have plausibly argued that Hammack himself was the possible killer.[113] There was no DNA evidence linking Jackson to the crime, but "blood of unknown individuals . . . was present in the victim's bed."[114] The nondisclosure of Hammack's note, which called into question the legitimacy of his testimony incriminating Jackson, was a "flagrant violation" of Jackson's constitutional rights.[115]

Incredibly, the Tennessee Supreme Court held that it would have reversed Jackson's conviction on wholly independent grounds.[116] During Weirich's closing argument, Weirich screamed at the defendant, "[j]ust tell us where you were! That's all we are asking, Noura!"[117] Because the Constitution protects a defendant from self-incrimination,[118] the court stated that pointing to a defendant's decision to not testify as evidence of guilt "should be considered off limits to any conscientious prosecutor."[119] Unlike a *Brady* violation, which one could technically commit by accident, this type of misconduct can hardly be dismissed as unintentional human error.

108. Emily Bazelon, *She Was Convicted of Killing Her Mother. Prosecutors Withheld the Evidence That Would Have Freed Her*, N.Y. TIMES MAG. (Aug. 1, 2017), https://www.nytimes.com/2017/08/01/magazine/she-was-convicted-of-killing-her-mother-prosecutors-withheld-the-evidence-that-would-have-freed-her.html [https://perma.cc/EQM7-B3P5].

109. *Id.*

110. *Id.*

111. State v. Jackson, 444 S.W.3d 554 (Tenn. 2014).

112. *Id.* at 596.

113. *Id.* ("The defense also could have used Mr. Hammack's third statement to bolster its attack upon the thoroughness of the police investigation and to argue that Mr. Hammack himself was a plausible suspect.").

114. *Id.* at 575.

115. *Id.* at 593.

116. *Id.* at 592 ("Considering the record in this appeal, we are constrained to conclude that the State has failed to establish that the lead prosecutor's constitutionally impermissible argument was harmless beyond a reasonable doubt.").

117. *Id.* at 585.

118. *Id.*

119. *Id.* at 586.

The egregiousness of Weirich's behavior in the Jackson case put Weirich and her Office on the radar of national prosecutor accountability advocates.[120] It was soon discovered that Tom Henderson, who Weirich had more recently appointed as her Director of Criminal Trials,[121] committed *Brady* violations in at least two death penalty cases in the 2000s, though the error was found to be unintentional in one of these cases.[122] The intentional error occurred when Henderson prosecuted Michael Rimmer for the murder of Ricci Ellsworth. Rimmer was considered by law enforcement to be the obvious suspect; he previously dated Ellsworth and had gone to prison for raping her.[123] A man that served prison time with Rimmer also told a reporter that Rimmer had told him to tell Ellsworth's family that he was "going to kill Ricci."[124] A jury convicted Rimmer in 1998, and he was sentenced to death.[125]

In 2012, however, Shelby County Criminal Court Judge James C. Beasley, Jr., vacated Rimmer's conviction due to ineffective assistance of counsel at trial.[126] Because the "primary basis" of his claim was that trial and resentencing counsel failed to investigate his case or present evidence on his behalf, Judge Beasley ruled that Rimmer's ineffectiveness claim was "impacted by the court's determination as to what evidence was available to counsel."[127] In this regard, Judge Beasley found that, in Henderson's prior role as an Assistant DA, Henderson "purposefully misled counsel" when he did not disclose that an eyewitness identified a different suspect in a photo identification lineup.[128] Despite Henderson's claim that he did not recall the existence of this evidence,[129] Judge Beasley was unconvinced.[130] In early 2014, Hender-

120. *Report Exposes Persistent Prosecutorial Misconduct*, Equal Just. Initiative (Aug. 3, 2017), https://eji.org/news/report-exposes-persistent-prosecutorial-misconduct/ [https://perma.cc/BAY4-YTCG].

121. *See* Bazelon, *supra* note 108.

122. *Id.*

123. Brad Heath, *Did Prosecutors Taint Memphis Murder Trial?*, USA Today (Aug. 18, 2011), https://www.pressreader.com/usa/usa-today-international-edition/20110818/282510065256925 [https://perma.cc/B7L6-94R5].

124. *Id.*

125. Order Granting Post Conviction Relief at 2, Rimmer v. State, (Tenn. Shelby Co. Crim. Ct., Oct. 12, 2012) (No. 98-010134).

126. *Id.* at 212.

127. *Id.* at 89.

128. *Id.* at 112.

129. *See* Bazelon, *supra* note 108.

130. Order Granting Post Conviction Relief, *Rimmer* at 111–12 (No. 98-010134) (holding that Henderson's "assertion both in 1998 and 2004 that he knew of no evidence exonerating or exculpating petitioner was blatantly false, inappropriate and ethically questionable").

son received a public censure by the Tennessee Board of Professional Responsibility for his conduct in the Rimmer case.[131] Yet, Weirich kept Henderson in his managerial role[132] and defended him in the press, dismissing his serial misconduct as "human error."[133]

Soon enough, Weirich herself was discovered to have lied to the court repeatedly. In 2014, shortly after Noura Jackson's conviction was reversed due to Weirich's personal, deliberate misconduct, a petition for post-conviction relief was filed by Vern Braswell, a man convicted of killing his wife. This petition revealed that Weirich labeled a particular manila envelope with a sticky note that read "do not turn over to defense."[134] Based on the testimony of Braswell's post-conviction attorney, the prosecutor assigned to the hearing, and several witnesses, the Tennessee Court of Appeals rejected Weirich's claim that the envelope never existed. The envelope went missing, however, and its contents could not be ascertained.[135] Perhaps reluctantly,[136] the Tennessee Court of Appeals held that Braswell could not prove a constitutional violation by a clear and convincing standard,[137] the evidentiary standard required for relief in post-conviction hearings in the state.[138]

Then, in February 2017, the Sixth Circuit reversed the capital murder conviction of Andrew Thomas,[139] which Weirich had personally obtained.[140] This reversal was due to the fact that Weirich elicited fraudulent testimony from a key witness and then refused to correct

131. Toby Sells, *Shelby County Prosecutor Censured by Tennessee Supreme Court*, MEM. FLYER (Jan. 9, 2014, 4:05 PM), https://www.memphisflyer.com/shelby-county-prosecutor-censured-by-tennessee-supreme-court [https://perma.cc/CF38-8UQK].

132. As of May 2021, Henderson was referred to by the DA's Office as a "veteran prosecutor[ ]" in the Capital Crimes Division. *See DA Weirich May Newsletter*, SHELBY CNTY. DIST. ATT'Y (May 28, 2021, 5:13 PM), https://content.govdelivery.com/accounts/TNSHELBYDA/bulletins/2e1d45b [https://perma.cc/4FZL-BMX6].

133. *See* Bazelon, *supra* note 108; *see also* Sells, *supra* note 131 explaining that Weirich's spokesman, Larry Buser, confirmed that there were no plans of intraoffice discipline for Henderson).

134. *See* Bazelon, *supra* note 108.

135. Braswell v. State, No. W2016-00912-CCA-R3-PC, at *57–60 (Tenn. Crim. App. Apr. 9, 2018).

136. *Id.* at *59 ("The olfactory perception of the missing sealed manila envelope is not pleasant.").

137. The court came to this conclusion regarding claims under both *Brady* and State v. Ferguson, a Tennessee Supreme Court opinion "which stands for the proposition that the loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial." 2 S.W.3d 912, 917 (Tenn. 1999).

138. TENN. R. OF POST-CONVICTION PROC. R. 28.

139. *See* Bazelon, *supra* note 108.

140. *Id.*

the record.[141] Specifically, she asked the witness if she had "collected one red cent."[142] The witness denied that she received payment, despite having received seven-hundred and fifty dollars from the Federal Bureau of Investigation to testify against Thomas in a prior case.[143] Weirich's reaction to this scrutiny of her own record, which is marred by repeated occurrences of personal misconduct in high-profile cases, was to smear the *New York Times* as "pro-crime."[144]

Like the Orange County DA's Office and the Orleans Parish DA's Office, the Fair Punishment Project's analysis of prosecutorial misconduct found that Weirich's Office was one of the least ethical in Tennessee.[145] Weirich's Office was ranked tenth out of ninety-five counties for misconduct findings per capita and sixth out of ninety-five counties for reversals per capita.[146] This calculation was made based on the number of findings of prosecutorial misconduct made or sustained by Tennessee's appellate courts, as well as the number of cases that were reversed due to misconduct.[147]

Today, Amy Weirich is still the sitting DA of Shelby County.[148] DAs in Tennessee are elected,[149] but Weirich was first appointed to the position by Governor Bill Haslam in 2011 after her predecessor, Bill Gibbons, left office to become the Tennessee Department of Safety and Homeland Security Commissioner.[150] DA terms in the state are also a lengthy eight years long,[151] compared to the usual four years.[152] Weirich faced her first and so far only electoral contest in

141. *Id.*

142. *Id.* (using idiom to emphasize that not even a penny was supposedly received by the witness).

143. *Id.*

144. *See DA Office Fires Off Tweetstorm About 'Pro-Crime' New York Times Story*, *supra* note 31.

145. Katie Fretland, *Shelby County DA Amy Weirich Ranked Highest in Tennessee for Misconduct*, Com. Appeal (Mar. 20, 2017, 7:13 PM), https://www.commercialappeal.com/story/news/courts/2017/07/13/ethics-harvard-law-school-tennessee-prosecutor-amy-weirich/475649001/ [https://perma.cc/3XTF-L6P6].

146. *See* Fair Punishment Project, *supra* note 25.

147. *Id.*

148. *Meet Amy Weirich*, Shelby Cnty. Dist. Att'y, https://www.scdag.com/meet-amy-weirich [https://perma.cc/J69Z-WPGA].

149. *See* Bailey, *supra* note 107.

150. *Id.*

151. *What We Do*, Off. of the Dist. Att'y Gen. 6th Jud. Dist., Knox Cnty. Tenn., https://www.knoxcounty.org/dag/office/what_we_do.php#:~:text=the%20District%20Attorney%20General%20works,voters%20of%20their%20judicial%20district [https://perma.cc/GN8H-UP6X].

152. *See* The Prosecutors & Pol. Project, *supra* note 5, at 9 ("While most states hold elections every four years, others hold elections every two, six, or eight years.").

2014,[153] but her opponent that year, syndicated television judge Joe Brown, had been described by commentators as "a joke of a candidacy that few took seriously."[154]

II. "Pattern-or-Practice" Investigations: What They Are, and How They Have Worked in the Policing Context

On March 3, 1991, Rodney King was beaten by several officers of the Los Angeles Police Department ("LAPD").[155] George Holliday, a bystander with a Sony Video8 Handycam, filmed the incident.[156] Holliday sent the footage to a local news station, which aired it.[157] While the officers were charged following the incident, they were eventually acquitted, at which point the city of Los Angeles erupted into three days of riots.[158] Over fifty people died, and more than 2,000 people were injured.[159]

Four months after the beating, the Christopher Commission Report was released.[160] This report, authored by future Secretary of State, Warren Christopher, concluded that "there is a significant number of officers in the L.A.P.D. who repetitively use excessive force against the public and persistently ignore the written guidelines of the department regarding force."[161] The Report also raised concerns

153. *See* Bailey, *supra* note 107.

154. *See* Richard Ransom, *Shelby County Has a District Attorney, But Someone Else Wants Her Job*, LOC. ABC 24 (May 10, 2021, 10:29 PM), https://www.localmemphis.com/article/opinion/opinion-shelby-county-has-a-district-attorney-but-someone-else-wants-her-job-richard-ransom/522-37d4fb99-6254-4a90-85a8-9a6f491cc4a3 [https://perma.cc/S2CE-4KAX].

155. *See* Cydney Adams, *March 3, 1991: Rodney King Beating Caught on Video*, CBS NEWS (Mar. 3, 2016, 6:00 AM), https://www.cbsnews.com/news/march-3rd-1991-rodney-king-lapd-beating-caught-on-video/ [https://perma.cc/QR7J- 3TGB].

156. *Rodney King: Camera That Captured 1991 Beating to Be Auctioned*, BBC (July 28, 2020), https://www.bbc.com/news/world-us-canada-53565749 [https://perma.cc/CSG2-UNH7].

157. *Id.*

158. *Riots Erupt in Los Angeles After Police Officers Are Acquitted in Rodney King Trial*, HIST. (Apr. 27, 2021), https://www.history.com/this-day-in-history/riots-erupt-in-los-angeles [https://perma.cc/XNY6-JMY3].

159. Anjuli Sastry & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017, 1:21 PM), https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots [https://perma.cc/3SCW-M2AH].

160. *Christopher Commission Findings: EXCESSIVE FORCE*, L.A. TIMES (July 10, 1991, 12:00 AM), https://www.latimes.com/archives/la-xpm-1991-07-10-mn-1973-story.html [https://perma.cc/9J7Z-8W85].

161. *Excerpts from Report on Los Angeles Police*, N.Y. TIMES (July 10, 1991), https://www.nytimes.com/1991/07/10/us/excerpts-from-report-on-los-angeles-police.html [https://perma.cc/5T3H-RAE9].

about police department mismanagement and officers who were "repeat offenders" when it came to violence and improper tactics.[162]

This set the stage for Congress to augment pre-existing legal redress against bad actors in law enforcement: the section 1983 suit under the Civil Rights Act of 1871.[163] In part because "several judicial rulings . . . held that both private litigants and the Department of Justice . . . lacked legal standing to seek equitable relief to stop unlawful police practices absent specific statutory authorization,"[164] the 1994 Crime Bill included a provision that stated that it is unlawful for law enforcement officers to engage in a "pattern or practice" that "deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[165] More importantly, this provision gave the U.S. Attorney General the express authority to file civil actions to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice."[166] This new cause of action allowed the DOJ's Civil Rights Division to negotiate consent decrees with local governments that require local law enforcement agencies, usually police departments, to address institutional failures that cause systemic police misconduct.[167]

A. The Nuts and Bolts of Pattern-or-Practice Investigations of Police Departments

The law that authorizes DOJ pattern-or-practice investigations of local law enforcement agencies is brief. In its entirety, 34 U.S.C. section 12601 reads:

> (a) Unlawful conduct[.] It shall be unlawful for any government authority, or any agent thereof, or any person acting on behalf of a government authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.
> (b) Civil action by Attorney General[.] Whenever the Attorney General has reasonable cause to believe that a violation of para-

162. *Los Angeles: The Christopher Commission Report,* HUM. RTS. WATCH, https://www.hrw.org/legacy/reports98/police/uspo73.htm [https://perma.cc/8TDR-H5QH].

163. 42 U.S.C. § 1983 (2018).

164. CONG. RSCH. SERV., POLICE USE OF FORCE: RULES, REMEDIES, AND REFORMS 23 (2015), https://www.everycrsreport.com/files/20151030_R44256_f6c3152f4734c1fb057a8d1bb8fe2639fcb3e94f.pdf [https://perma.cc/5JBL-DWHL].

165. 34 U.S.C. § 12601(a) (formerly 42 U.S.C. § 14141(a)).

166. 34 U.S.C. § 12601(b).

167. *See* C.R. DIV., U.S. DEP'T OF JUST., *supra* note 18.

> graph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.[168]

Thus, the Justice Department must have "reasonable cause" of a "pattern or practice of conduct" by law enforcement officers in a particular agency that violates an individual's constitutional rights.[169] Similar to the reasonable suspicion that a law enforcement officer must have before making a brief, non-custodial stop of a person in a motor vehicle, this standard does not require concrete proof of a pattern or practice of conduct.[170] Instead, before launching a pattern-or-practice investigation, the DOJ must simply "believe that a law enforcement agency was engaging in an unconstitutional or illegal pattern of behavior."[171]

Once this occurs, the DOJ can initiate a preliminary inquiry.[172] At this stage, the DOJ conducts its fact-finding mission via monitoring and tracking without yet informing the affected police department.[173] Once investigators at the DOJ are satisfied that there is sufficient cause that a police department has engaged in systemic misconduct, unconstitutional policing, or violations of federal law as a pattern or practice, the agency simultaneously informs the police department and initiates an official investigation.[174]

The official investigation continues until the DOJ is ready to publish its findings letter.[175] Findings letters are sent to the police department as well as the general public and explain what was found during the investigation.[176] In addition, these letters detail which "policies, practices, procedures, systems, and operations" must be reformed in order to recalibrate the department's actions with constitutional standards.[177]

The end result of a pattern-or-practice investigation falls into one of three categories. First, the DOJ can conclude the investigation with-

168. 34 U.S.C. § 12601.

169. *Id.*

170. *Id.*; *see also* Grand Lodge of the Fraternal Ord. of Police v. Ashcroft, 185 F. Supp. 2d 9, 16 (D.C. Cir. 2001) (explaining that the Attorney General need only have "reasonable cause to believe" that such violations are occurring).

171. *See Ashcroft*, 185 F. Supp. 2d at 16.

172. Jason W. Ostrowe, Municipal Police Under Federal Control: A Mixed-Methods Analysis of Title 42 U.S.C. Section 14141 Negotiated Settlements 14 (2019) (Ph.D. dissertation, The City University of New York) (on file with CUNY Academic Works).

173. *Id.* at 15.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

out taking further official action against the targeted police department.[178] However, DOJ publications note that other actions, such as prosecuting individual officers or referring the department to the Office of Community Oriented Policing Services, may also be taken as a result.[179] Second, the DOJ can decide that there was no established pattern or practice of unconstitutional policing, but that "significant operational and systemic deficiencies that have the potential for unconstitutional policing outcomes" exist.[180] This may result in the DOJ offering non-binding technical assistance to improve the department's policing protocols.[181] Finally, the DOJ can decide that the threshold of proof needed to formally allege a pattern or practice of unconstitutional policing has been met.[182] When this occurs, the DOJ will attempt to negotiate a binding legal settlement between itself and the police department.[183] These settlements are referred to as consent decrees.[184] If no agreement can be reached, the DOJ can litigate its claims against the police department at issue.[185]

Out of the sixty-nine pattern-or-practice investigations initiated through 2017, only six police departments initially opted to litigate the Justice Department's allegations against them.[186] Only one of these departments prevailed at trial,[187] and all six of them eventually entered into a consent decree with the United States at a later date.[188] Thus, pattern-or-practice investigations are a powerful tool to force local police departments into reforms that they would otherwise neglect to implement.

Consent decrees between the Justice Department and municipalities overseeing errant police departments have come to be seen as the default mechanism for forcing department-wide change in police departments. As Sam Walker, Emeritus Professor at University of Ne-

178. *Id.*
179. *Id.* at n.3.
180. *Id.* at 16.
181. *Id.* This was the preferred reform mechanism under the George W. Bush administration from 2000 to 2008. *See* Li Sian Goh, *Consent Decrees Can Reduce the Number of Police-Related Killings, but Only When Used Alongside Court-Appointed Monitoring.*, LSE PHELAN U.S. CTR. BLOG (Mar. 18, 2020), https://blogs.lse.ac.uk/usappblog/2020/03/18/consent-decrees-can-reduce-the-number-of-police-related-killings-but-only-when-used-alongside-court-appointed-monitoring/ [https://perma.cc/A645-98CD].
182. *See* Ostrowe, *supra* note 172, at 16.
183. *Id.* at 16–17.
184. *Id.*
185. *Id.* at 17.
186. *Id.*
187. *Id.*
188. *Id.*

braska at Omaha, has said, "[i]f you have a troubled police department, this is how you do it . . . . Consent decrees and settlement agreements really offer systemic reforms for entire police departments. Just photocopy some decrees and change the wording and there you are."[189] Some scholars, such as University of Maryland law professor Michael Greenberger, have opined that pattern-or-practice consent decrees are "the *only* reliable way to rebuild police-community relations."[190]

B. The Successes of Police Department Consent Decrees in Practice

There is significant evidence that consent decrees have worked to reduce police violence and other problematic police practices.[191] Fifteen years after being placed under a consent decree, the Cincinnati Police Department is considered a model of reform.[192] For example, between 1999 and 2014, police use-of-force incidents "declined by 69 percent, citizen complaints against police declined by 42 percent, and injuries resulting from encounters with police declined by 56 percent."[193] However, at least one researcher, Dr. Li Sian Goh, has suggested that it is not the police department consent decree itself that decreases police violence, but the court-appointed monitoring team that sometimes, but not always, accompanies the settlement.[194]

There is also evidence that consent decrees obtained by the DOJ against local police departments have been most successful in places where other reform efforts are also in place. In some jurisdictions reform-minded police chiefs, city leaders, and police accountability ad-

189. James D. Walsh, *The Most Powerful Weapon for Police Reform Is Back*, N.Y. MAG.: INTELLIGENCER (Apr. 21, 2021), https://nymag.com/intelligencer/2021/04/what-do-justice-department-consent-decrees-do.html [https://perma.cc/ZDV8-7YLT].

190. *See generally* Michael Greenberger, *The Only Reliable Way to Rebuild Police-Community Relations: The Justice Department Pattern and Practice Consent Decrees*, 16 U. MD. L.J. RACE RELIG. GENDER & CLASS 201 (2016).

191. Chiraag Bains & Dana Mulhauser, *The Trump Administration Abandoned a Proven Way to Reduce Police Violence*, WASH. POST (June 9, 2020), https://www.washingtonpost.com/outlook/2020/06/09/trump-pattern-or-practice/ [https://perma.cc/2UWU-UY8G].

192. *See* Alana Semuels, *How to Fix a Broken Police Department*, THE ATLANTIC (May 28, 2015), https://www.theatlantic.com/politics/archive/2015/05/cincinnati-police-reform/393797/ [https://perma.cc/65Q8-6GQ7].

193. Greenberger, *supra* note 190, at 206.

194. *See* Goh, *supra* note 181; *see also* Li Sian Goh, *Going Local: Do Consent Decrees and Other Forms of Federal Intervention in Municipal Police Departments Reduce Police Killings?*, 37 JUST. Q. 900, 901 (2020).

vocates have used consent decrees as political cover for bold reforms or to break through institutional inertia.[195]

The potential risk of a DOJ investigation and an ensuing consent decree might even compel police departments to collect their own data to avoid the unwanted hassle of DOJ involvement. Mark43, a venture capital-driven public safety software company[196] that consults with the Boston Police Department and the Washington, D.C. Metropolitan Police Department, among others,[197] has marketed itself using just this risk. In one blog post, Megan McDonough, a product manager at Mark43, explicitly addresses the looming concern of pattern-or-practice investigations for police department leaders, asking: "But what if departments were able to routinely keep tabs on how they were doing? To flag potential disparities in proactive stops? And to decipher trends in uses of force on subjects in mental crisis?"[198] McDonough then writes that consent decrees may demand this data collection anyway, so it may be "[b]etter to take the initiative and do it on your own terms[.]"[199]

III. How Pattern-or-Practice Investigations Could Work Against District Attorneys' Offices

While the tool is essentially untested in this arena, the law permits the Justice Department to file section 12601 suits against municipalities for the actions of their corresponding DA's offices, with the goal of settling suits in the form of binding consent decrees. Similar to how there are different categories of police misconduct,[200] there are different types of prosecutorial misconduct that could be committed sys-

195. Radley Balko, *Consent Decrees Have a Mixed Record of Success, But Sessions's Plan to End Them Is Still Worrisome*, WASH. POST (Apr. 4, 2017), https://www.washingtonpost.com/news/the-watch/wp/2017/04/04/consent-decrees-have-a-mixed-record-of-success-but-sessionss-plan-to-end-them-is-still-worrisome/ [https://perma.cc/J6XP-LYE2].

196. Jason Shueh, *Police Tech Problems Draw Interest from Venture Capitalists*, GOV. TECH. (Aug. 19, 2015), https://www.govtech.com/budget-finance/police-tech-problems-draw-interest-from-venture-capitalists.html [https://perma.cc/J9Q4-544G].

197. *See About Us*, MARK43, https://mark43.com/about-us/ [https://perma.cc/FU8B-JPT7]; *see also* Avery Hartmans, *This Startup Founder Rode in Police Cars for Hours to Build His Software*, BUS. INSIDER (Nov. 27, 2016, 9:00 AM), https://www.businessinsider.com/mark43-builds-software-to-aid-police-forces-2016-11 [https://perma.cc/3LT6-9GR6].

198. Megan McDonough, *The Cost of Not Knowing*, MARK43 (Sept. 23, 2019), https://www.mark43.com/the-cost-of-not-knowing-and-consent-decrees/ [https://perma.cc/DD6Q-JV9G].

199. *Id.*

200. *Law Enforcement Misconduct*, C.R. DIV., U.S. DEP'T OF JUST., https://www.justice.gov/crt/law-enforcement-misconduct [https://perma.cc/SW6Q-2KBP] (listing as examples of police misconduct excessive force, sexual misconduct, theft, false arrest,

temically. Different types of misconduct would require different interventions to address them on a systemic level—though all interventions would relate back to two primary issues: training and discipline. Ideally, both a consent decree and a court-appointed monitoring team would result, as changing policies on paper does not mean they are changed in practice.

A. An Appropriate Interpretation of the Statute Permits Its Usage Against District Attorneys' Offices

The congressional debate around section 14141 was about police, not prosecutorial, misconduct.[201] However, the fact it has not been used by the Justice Department to crack down on unconstitutional, pervasive, and deliberate prosecutorial misconduct in specific offices (except once)[202] shows only that few people were aware of, or particularly concerned with, prosecutors as bad actors until the last decade.

In terms of the statute itself, there is little guidance on the exact scope Congress intended when it passed former section 14141 as part of the Violent Crime Control and Law Enforcement Act. The House and Senate versions of the bill included the section under a heading of "Police Pattern or Practice."[203] Under the "Title-and-Headings" canon of statutory construction,[204] the use of that language would suggest that Congress intended the law's application to police only.

But even if the meaning of section 12601 (the recent recodification of section 14141) is ambiguous, one canon of interpretation is not by itself decisive. The text of the statute is broader than police officers, creating two categories of officials that are subject to the law. It includes "law enforcement officers," a term that is well-understood to include other justice system actors such as correctional officers and

and "deliberate indifference to serious medical needs or a substantial risk of harm to a person in custody").

201. *See generally* Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189 (2014).

202. *See* Taxin, *supra* note 56; *see also* C.R. DIV., U.S. DEP'T OF JUST., *supra* note 18.

203. Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. § 103-322 (1994) (House version); Violent Crime Control and Law Enforcement Act of 1993, 103d Cong. § 1067 (1993) (Senate version). *See also* H.R. REP. NO. 103-711 (1993) ("Sections 210401-02—House recedes to Senate sections 1111–12, Police Pattern or Practice, with modification to section 1112.").

204. ANTONIN SCALIA & BRYAN A. GARDNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 221 (2012).

prosecutors.[205] It also includes "officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles."[206] The plain language employed by Congress thus extends the statute's reach to officials who work in juvenile justice departments, probation officers who supervise juveniles, and even judges who preside over delinquency hearings.

No part of a statute is supposed to be superfluous.[207] If Congress meant to restrict the statute to police departments, it could have easily said so. Instead, another forty-five words were expended, indicating a significantly broader intent.

B. How Section 12601 Can be Used to Ensure Prosecutorial Reform

When prosecutorial misconduct is committed on a systemic level at a DA's office and the misconduct in question rises to the level of violating *constitutional* rights, then a pattern-or-practice investigation under section 12601 can trigger meaningful change. Such an investigation would need to revolve around violations of *Brady*,[208] *Batson*,[209] or summation misconduct that has been held to violate due process,[210] such as commenting on a defendant exercising his or her Fifth Amendment right against self-incrimination by not testifying.[211] This narrows the pool of prosecutorial misconduct that can be addressed, but such investigations would still help address offices with the most egregious ethical problems.

1. Addressing a Pattern or Practice of *Brady* Violations

While several individual instances of *Brady* violations found by appellate courts in a relatively short period of time may not be enough to sustain a section 1983 suit, such evidence should be enough to provide the Justice Department with reasonable cause to initiate a preliminary inquiry under section 12601. Depending on what is found during the preliminary inquiry, this could develop into a full investigation.

205. *See 4 Signs You Should Pursue a Career in Law Enforcement*, UTEP CONNECT, https://www.utep.edu/extendeduniversity/utepconnect/blog/november-2018/4-signs-you-should-pursue-a-career-in-law-enforcement.html [https://perma.cc/S2V5-FEUV].

206. 34 U.S.C. § 12601(a) (2017).

207. *See* Bailey v. United States, 516 U.S. 137, 146 (1995).

208. Brady v. Maryland, 373 U.S. 83 (1963); *see also infra* Section III(B)(1).

209. Batson v. Kentucky, 476 U.S. 79 (1986); *see also infra* Section III(B)(2).

210. *See infra* Section III(B)(3).

211. *Id.*

During the preliminary inquiry stage, when the local DA's office would be unaware of the investigation, the Justice Department should confidentially interview public defenders and private defense lawyers who are willing to come forward to discuss discovery problems in the jurisdiction. Presumably, defense lawyers in the specific local jurisdiction would have the best working knowledge of policies and practices in the DA's office, as well as the legal knowledge necessary to evaluate the constitutionality of current discovery policies. It is likely that many defense lawyers would be unwilling to discuss issues they might have had with the DA office's discovery policies short of a court order or bar investigation, due to the very real risk of retaliation by the DA's office against them or their clients.[212] However, this also means that the lawyers willing to talk to DOJ investigators would likely have been motivated to come forward by a sense of fairness and justice, making it even more likely that they are telling the truth.

If the Justice Department finds enough evidence to move forward with a formal pattern-or-practice investigation, then communications between the federal agency and the local DA office would begin.[213] The first thing the DOJ should attempt to ascertain is the method by which the DA's office attempts to fully comply with its discovery obligations. Some offices will have an "open file" policy, whereby the defense is given unhindered access to all documents related to the law enforcement's case against his or her client.[214] On the other hand, some offices will give the defense restricted access to law enforcement files about the case in a way that may make access to files or witnesses unduly cumbersome.[215] A DA in charge of an office with the latter

212. Prosecutors threatening retaliation against the defense bar is not a hypothetical concern for defense lawyers who speak out against problematic practices. *See* Mick Stinelli, *DA Stephen Zappala Responds to Criticism of Stopping Plea Deals with Black Attorney over Race Comments*, PITT. POST-GAZETTE (June 4, 2021, 2:17 AM), https://www.post-gazette.com/news/crime-courts/2021/06/03/allegheny-county-DA-stephen-zappala-milton-raiford-plea-deal-attorney-racial-justice/stories/202106030141 [https://perma.cc/8QVL-XNVH]; *see also* Jessica Brand, *When Prosecutors Bully*, SLATE (Aug. 4, 2017, 9:07 AM), https://slate.com/news-and-politics/2017/08/when-prosecutors-bully.html [https://perma.cc/XGD7-C37F].

213. *See* Ostrowe, *supra* note 172, at 15.

214. Editorial, *Justice and Open Files*, N.Y. TIMES (Feb. 26, 2012), https://www.nytimes.com/2012/02/27/opinion/justice-and-open-files.html [https://perma.cc/4DAH-E8F5].

215. *See, e.g.*, State ex rel. Joyce v. Mullen, 503 S.W.3d 330 (Mo. Ct. App. 2016) (explaining former St. Louis Circuit Attorney Jennifer Joyce's practice of redacting information from police reports before handing the evidence to the defense, including in ways that directly contravened Missouri Supreme Court Rules).

policy might openly discuss it as a victims' rights maneuver,[216] or argue that his or her office should be the determining factor of what items are relevant for building a defense case.[217]

The easiest way to find this information, at least in theory, is for the DA's office to hand over its written *Brady* policy. But many offices have no written policy,[218] while many others still lack formal training for line prosecutors to help ensure *Brady* compliance.[219] Even with a written *Brady* policy, an office can also obviously deviate from what is stated in practice.

DOJ investigators should be prepared to act as an intermediary between local prosecutors and defense lawyers in an effort to ascertain the truth. Investigators may also want to interview other county or city governmental officials if there is reason to suspect that these officials have provided *Brady* material to prosecutors involving local police officers or other officials.

A settlement between the DA's office and the Justice Department should focus on audits and other post-hoc court monitoring to ensure that the pattern or practice of a violation of specified constitutional rights has ceased. The occasional violation of *Brady*, especially if not committed intentionally, would not constitute a pattern or practice of the violation of the constitutional rights vindicated by *Brady*. A *Brady* compliance officer or team could also be installed by the federal court for evaluative purposes.

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216. Joel Currier, *St. Louis Circuit Attorney, Public Defender Clash over Sharing Witness Information*, St. Louis Post-Dispatch (June 11, 2016), https://www.stltoday.com/news/local/crime-and-courts/st-louis-circuit-attorney-public-defender-clash-over-sharing-witness/article_5a25c2dc-1d02-5bee-b816-e58e5ddd7570.html [https://perma.cc/GZ8K-SP2Z].

217. *See infra* Section IV(A); Wolfe v. Clarke, 819 F. Supp. 2d 538 (E.D. Va. 2011) (noting that former Prince William County Commonwealth's Attorney Paul Ebert asserted during his testimony at a habeas evidentiary hearing that "I have found in the past when you have information that is given to certain counsel and certain defendants, they are able to fabricate a defense around what is provided").

218. *See, e.g.*, Michael Kranish, *Crime Lab Scandal Rocked Kamala Harris's Term as San Francisco District Attorney*, Wash. Post (Mar. 6, 2019), https://www.washingtonpost.com/politics/crime-lab-scandal-rocked-kamala-harriss-term-as-san-francisco-district-attorney/2019/03/06/825df094-392b-11e9-a06c-3ec8ed509d15_story.html [https://perma.cc/AKR7-AFAY] (explaining that, in 2010, then-San Francisco DA Kamala Harris admitted to a judge that her office failed to develop a written *Brady* policy after two years of trying); *The RLS Brady Summit: Renowned Speakers and A Sell-Out Audience*, Rains Lucia Stern St. Phalle & Silver, PC (May 23, 2021), https://www.rlslawyers.com/the-rls-brady-summit-renowned-speakers-and-a-sell-out-audience/ [https://perma.cc/QE4G-9MEJ] (stating that Ventura County was "one of the very earliest counties to formulate a written Brady policy more than 10 years ago").

219. Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 Cardozo L. Rev. 1961, 1989 (2010).

Even so, without fully integrated cooperation between the DOJ's Civil Rights Division and the particular DA's office, it would be impossible for the DOJ to independently ascertain whether the pattern or practice has stopped—at least without relying on a decline in appellate findings of *Brady*-based prosecutorial misconduct over a certain period of years. Without such compliance, the Civil Rights Division might not receive full access to the state files of ongoing cases. Thus, a decline in appellate findings of same-type misconduct is the most reliable way to determine whether the objectives of the settlement have been reached. This should apply to both *Brady* violations that rise to the level of reversals for misconduct, as well as violations a specific appeals court rules to be "harmless error."[220]

2. Addressing a Pattern or Practice of Racial Discrimination During Jury Selection

The discriminatory use of peremptory jury strikes on race or gender grounds was ruled to be unconstitutional under *Batson v. Kentucky*.[221] In *Batson*, the Supreme Court established a three-part test to determine whether a peremptory jury strike was made for impermissible, racially discriminatory reasons.[222] First, the objecting party must demonstrate a prima facie showing of purposeful discrimination in a jury strike.[223] Second, the striking party is called by the trial court to respond with a race-neutral explanation for its strike.[224] Third, the trial court determines whether the striking party's justification is credible.[225]

Batson has been criticized as a toothless, inadequate tool to remedy racism in jury selection.[226] It focuses on the intent of the party making the jury strike, as well as the effect, making it very difficult to prove violations. Many judges are overly eager to accept weak but nominally race-neutral justifications, especially ones that focus on personal characteristics more common amongst people of color.[227]

220. Gabe Newland, *Harmless Error: Explained*, THE APPEAL (Nov. 10, 2019), https://theappeal.org/the-lab/explainers/harmless-error-explained/ [https://perma.cc/U2HH-PHTS].

221. 476 U.S. 79 (1986).

222. *Id.* at 96–98.

223. *Id.* at 96–97.

224. *Id.* at 97.

225. *Id.* at 97–98.

226. *See generally* Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501 (1999).

227. Annie Sloan, *"What to do About Batson?": Using A Court Rule to Address Implicit Bias in Jury Selection*, 108 CALIF. L. REV. 233, 240 (2020).

Still, *Batson* violations are an ample springboard for DOJ investigators who need to establish that there is a pattern or practice of constitutional violations from a DA's office on equal protection grounds during voir dire. Constitutionally speaking, a prosecutor should not be striking a single prospective juror on impermissible racial or gender grounds.[228] A defendant is entitled to equal protection under the law, including in who gets to compose the jury deliberating his guilt or innocence.[229] That right is implicit in the Fourteenth Amendment, which precedes the ruling in *Batson*.[230]

Even in offices with few *Batson* violations found by appellate courts, there may still be a pattern or practice of constitutional violations on equal protection grounds during voir dire. There are many appellate decisions where courts have refused to find *Batson* violations, even ones constituting only "harmless error," despite the prosecution's jury strikes being suspect at a minimum.[231] Such "close calls" might act as an early warning sign to investigators that even more significant and pervasive racial discrimination in voir dire is occurring. There are also numerous academic studies of DA's offices' jury strikes by race that predate pattern-or-practice investigations of prosecutors' offices on these grounds, which could provide starting points for preliminary investigations by the Justice Department.[232]

Beyond the preliminary inquiry stage, DOJ investigators can also request a written *Batson* policy and any applicable training materials, acknowledging the fact that many offices will not have one or both of these items. Local defense lawyers might also point investigators to specific cases to investigate as further examples of juror discrimination that could suggest a pattern or practice violation.

228. *Batson*, 476 U.S. at 85 ("[T]he State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded."); *see also* Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2015 (1998) (explaining that the Supreme Court has shifted to seeing the stricken juror as the victim of discrimination, especially after *Batson* was applied to preemptory strikes made by the defense).

229. Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

230. *See* Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. MICH. J.L. REFORM 229, 231 (1993).

231. *See* People v. Taylor, 220 P.3d. 872, 888 (Cal. 2009) (upholding trial court's denial of *Batson* motion where prosecutor struck four of five Black prospective jurors and the trial judge called challenge to juror C.C. a "close one"); Felkner v. Jackson, 562 U.S. 594, 597-598 (2011) (overturning a Ninth Circuit decision to reverse conviction due to alleged *Batson* error based on "the fact that two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors").

232. *See e.g.*, Ronald F. Wright, Kami Chavis & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407 (2018).

There are two possible ways the Justice Department can make the argument that a DA's office violates the constitutional right of equal protection as a pattern or practice as it pertains to jury selection. First, there is a significant pattern of *Batson* violations found or sustained by appellate courts. Second, there is *not* a significant pattern of *Batson* violations, but only because local and state judges are opting toward willful blindness on violations. For example, an office can repeatedly use the "race-neutral" justifications for strikes, despite knowing their disparate impacts, as a pretext to purposely exclude jurors of the same racial identities as defendants. Courts are supposed to consider these impacts when adjudicating claims of *Batson* violations, but they do so unevenly.[233]

A settlement agreement between the DA's office and the Justice Department should focus on audits and other post-hoc court monitoring to ensure that the pattern or practice of a violation of constitutional rights on equal protection grounds during voir dire has ceased. The occasional violation of *Batson*, especially if not committed intentionally, would not constitute a pattern or practice of the violation of the constitutional rights vindicated by *Brady*. A *Batson* compliance officer or team should be installed by the federal court for evaluative purposes. The court should also mandate implicit bias training and the rewrite of the office's *Batson* policy and training materials—if these materials exist.

In determining whether a DA's office is abiding by the terms of the agreement, the Justice Department should consider two factors. First, it should seek a perceivable drop in appellate findings of *Batson* violations over a certain number of years. This should apply to both *Batson* violations that rise to the level of reversals for misconduct, as well as violations that appellate courts rule to be "harmless error."[234] Second, the local jurisdiction should see a decrease in people of color being stricken from juries in criminal trials on a macro level.

233. *See, e.g.*, Hernandez v. New York, 500 U.S. 352, 358 (1991) (upholding the New York Court of Appeals decision that preemptory strikes based on bilingual status of Hispanic individuals were race-neutral, despite dissenting judges urging that state constitutional law required a different result); *see also* Anne Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS L. REV. 1359, 1363 (2012).

234. *See* Gabe Newland, *Harmless Error: Explained*, THE APPEAL (Nov. 10, 2019), https://theappeal.org/the-lab/explainers/harmless-error-explained/ [https://perma.cc/9QGA-UXX4] (explaining the creation and development of harmless error review by the Supreme Court).

3. Addressing a Pattern or Practice of Summation Misconduct

Summation misconduct includes a broad category of improper conduct at trial.[235] Yet not all misconduct in this class implicates constitutional, rather than non-constitutional, rules. For example, commenting adversely on a non-testifying defendant's silence categorically violates the Constitution,[236] but many other types of prosecutorial comments must be prejudicial under the totality of the circumstances to implicate the Constitution.[237] That does not mean that some forms of misconduct are acceptable. Rather, the misconduct in this area that is the proper target of a section 12601 must be predicated on constitutional violations, given the text of the statute itself.[238]

Without reading the trial transcript of every criminal trial in a given jurisdiction, it would be difficult to discern how often these misconduct issues arise. But DOJ investigators can first see if the appellate courts have made or sustained findings of summation misconduct by DAs of the type that implicates constitutional rights. A number of appellate reversals within a short period, supplemented by defense lawyer interviews, should identify high-problem districts. Artificial intelligence techniques for analyzing texts might also make it possible to monitor a much larger pool of closing argument transcripts to flag potential errors. Once this research is conducted, DOJ investigators should have enough information to proceed with formal investigations.

Again, settlement agreements should focus on audits and other post-hoc court monitoring to ensure that the pattern or practice of a violation of constitutional rights during closing argument has ceased. A constitutional compliance officer or team should be installed by the

235. Ryan Patrick Alford, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury*, 59 OKLA. L. REV. 479, 483 (2006).

236. State v. Jackson, 444 S.W.3d 554, 587–89 (Tenn. 2014).

237. *See* Mark S. Davies, *Enlisting the Jury in the "War on Drugs": A Proposed Ban on Prosecutors' Use of "War on Drugs" Rhetoric During Opening and Closing Argument of a Narcotics Trial*, 1994 UNI. CHI. LEGAL F. 395, 399 (1994) (explaining that improper comments must be "highly prejudicial" to the defendant's right to a fair trial for reversal, and that courts apply the standard differently); *see also* Harry Caldwell, *Name Calling at Trial: Placing Parameters on the Prosecutor*, 8 AM. J. TRIAL ADVOC. 385 (1985) (reviewing the propriety of a wide range of prosecutorial comments).

238. 34 U.S.C. § 12601(a) declares unlawful conduct that is the purview of pattern-or-practice investigations as conduct that "deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." In the absence of state statutes forbidding various forms of prosecutorial misconduct, the statute regulates only constitutional violations, assuming the prosecutor is not otherwise engaging in unlawful behavior that violates persons' rights.

federal court for evaluative purposes. The court should also mandate the rewrite of the office's *Batson* policy and training materials—if these materials exist. If the DA's office complies with the agreement, a decline in appellate findings of summation misconduct should follow, and local lawyers who litigate against the DA's office should also report a difference.

IV. How the DOJ Should Decide Which Beleaguered District Attorneys' Offices to Investigate

Without being inside the halls of the Justice Department, it is hard to know how it decides which local law enforcement agencies to investigate for constitutional violations. One 2017 study that attempted to elucidate the DOJ's process found that "[t]he Department of Justice is more likely to notice and sue a department that seems to have a serious pattern of misconduct if it is especially large or its problem is especially salient."[239] A different scholar compiling the research classified the DOJ's approach as a "combination of informed judgments and intuition . . . ."[240]

But the DOJ should not make its decision to investigate a DA's office based on whether a league of the nation's most famous lawyers and law professors demanded such an investigation.[241] Instead, when choosing which offices to investigate, the Justice Department should prioritize offices where recent misconduct findings are present *and* leadership is either particularly entrenched, appellate reversals based on prosecutorial misconduct are prevalent, or striking racial disparities are present in the selection of jurors.

A. Where Elections Fail to Bring About Accountability

DAs are elected in forty-five out of fifty states at the local level.[242] This process, however, has failed to ensure accountability for DAs whose offices routinely violate constitutional rights as a pattern or practice. One reason is that these elections are rarely competitive.[243] When the Justice Department is aware of a spate of appellate findings

239. Rachel A. Harmon, *Evaluating and Improving Structural Reform in Police Departments*, 16 CRIMINOLOGY & PUB. POL'Y 617, 620 (2017).

240. *See* Ostrowe, *supra* note 171, at 24.

241. *See* Smith, *supra* note 36.

242. Evan Hughes, *America's Prosecutors Were Supposed to Be Accountable to Voters. What Went Wrong?*, POLITICO (Nov. 5, 2017), https://www.politico.com/magazine/story/2017/11/05/cyrus-vance-jr-americas-prosecutor-problem-215786/ [https://perma.cc/JN5C-RUZB] ("Today, prosecutors are elected in 45 states.").

243. *See* THE PROSECUTORS AND POL. PROJECT, *supra* note 5, at 4.

that a local DA's office engaged in a specific type of misconduct that implicates constitutional rights, the additional factor of the DA having remained in office for a long period or having been re-elected with no challengers for a number of electoral cycles should spur a preliminary inquiry.

Until 2020, when the successor to Commonwealth's Attorney Paul Ebert, Amy Ashworth, took office, Prince William County, Virginia was a prime example of this category. Ebert served as the jurisdiction's top local prosecutor for an unprecedented fifty-two years.[244] But that did not signify Ebert's commitment to ethical prosecution.

In March 2001, when Justin Wolfe was nineteen years old, he allegedly committed acts leading to the murder of Daniel Petrole, Jr.[245] Petrole was a large-scale distributor of marijuana and ecstasy, and Wolfe used to buy drugs from him.[246] According to trial testimony from Owen Barber, Wolfe paid Barber to rob and kill Petrole.[247] Barber received thirty-eight years in prison, while Wolfe was sentenced to life.[248]

However, a federal judge vacated Wolfe's conviction in 2011 due to *Brady* violations from Ebert's office.[249] During Wolfe's federal habeas hearing, Ebert admitted that he created his office's *Brady* policy based on the concern that defendants are "able to fabricate a defense around what is provided."[250] Wolfe's conviction was vacated after Ebert's testimony, which generated substantial media attention.[251]

This was far from the first time Ebert committed highly dubious acts in his capacity as top prosecutor. He jeopardized the successful

244. Matthew Barakat, *Ebert Retires After 52 Years of High-Profile Prosecutions*, Associated Press (Dec. 24, 2019, 11:33 AM), https://abcnews.go.com/US/wireStory/ebert-retires-52-years-high-profile-prosecutions-67916357 [https://perma.cc/PC9Y-YB94].

245. Tom Jackman, *Supreme Court Orders Virginia to Hear Appeal of Justin Wolfe, Who Pleaded Guilty to Murder*, Wash. Post (Jan. 8, 2019), https://www.washingtonpost.com/crime-law/2019/01/08/supreme-court-orders-va-hear-appeal-justin-wolfe-who-pleaded-guilty-murder/ [https://perma.cc/B3PS-MMSM].

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. Wolfe v. Clarke, 819 F. Supp. 2d 538, 566 n.24 (E.D. Va. 2011).

251. Dahlia Lithwick, *Murder Conviction Most Foul*, Slate (July 14, 2011, 4:42 PM), https://slate.com/news-and-politics/2011/07/justin-wolfe-case-the-problem-goes-deeper-than-prosecutorial-misconduct.html [https://perma.cc/UZ6M-4K2N]; *see also* Dahlia Lithwick, *Why Is Justin Wolfe Still In Prison?*, Slate (Nov. 13, 2014, 5:37 PM), https://slate.com/news-and-politics/2014/11/justin-wolfe-case-his-murder-conviction-was-vacated-three-years-ago-so-why-is-he-still-in-prison.html [https://perma.cc/2457-Y7FV].

prosecution of John Allen Muhammad for the 2002 D.C. sniper attacks by withholding evidence that the Virginia Supreme Court could have considered exculpatory, but opted not to.[252] In a sexting case involving close-in-age minors, Ebert obtained a warrant that would have allowed local police to "apprehend the boy, take him to a hospital, and submit him to an injection to force an erection so that Ebert's office could match his aroused penis to the penis in the video."[253]

B. Where Appellate Reversals Based on District Attorney Misconduct Are Particularly Prevalent

The Justice Department could also prioritize which DA's offices to investigate based on the severity of misconduct, as decided by appellate courts in the jurisdiction. While this factor can understate the seriousness of problems in DA's offices where the appellate bench is particularly deferential to law enforcement, it should not overstate the problem in a given office, especially considering how often appellate courts deem prosecutorial misconduct "harmless error" overall.

The District Attorney's Office in Clark County, Nevada, which includes Las Vegas, is a prime target for federal intervention.[254] This office has repeatedly violated *Batson* in recent years. Within a two-year span, the Nevada Supreme Court reversed and remanded two murder convictions with death sentences due to *Batson* issues.[255]

In another recent case, a judge on the Nevada Supreme Court stated during oral argument:

> This isn't the first time we've been in the rodeo on [*Batson*] with the Clark County District Attorney's Office . . . . I just don't understand knocking these two Black women off . . . I just don't understand why it's so necessary in these cases. You're so afraid of losing a case that you're knocking off African-Americans consistently.[256]

252. Muhammad v. Commonwealth, 619 S.E.2d 16, 49 (Va. 2005) (discussing the "Pacman" letters written by the defendant's co-conspirator).

253. Radley Balko, *What the New Amazon Doc About Lorena Bobbitt Gets Wrong About Prosecutors*, WASH. POST. (Mar. 8, 2019), https://www.washingtonpost.com/opinions/2019/03/08/what-new-amazon-doc-about-lorena-bobbitt-gets-wrong-about-prosecutors/ [https://perma.cc/D673-2J27].

254. *District Attorney*, CLARK CNTY., NEV., https://www.clarkcountynv.gov/government/departments/district_attorney/index.php [https://perma.cc/2S6V-HEUQ].

255. *See* State v. Conner, 327 P.3d 503 (Nev. 2014); McCarty v. State, 371 P.3d 1002 (Nev. 2016).

256. *See* FAIR PUNISHMENT PROJECT, HARV. L. SCH., TOO BROKEN TO FIX: PART I, AN IN-DEPTH LOOK AT AMERICA'S OUTLIER DEATH PENALTY COUNTIES (Aug. 2016), https://files.deathpenaltyinfo.org/documents/FairPunishmentProject-TooBroken_2016-08.pdf [https://perma.cc/ZYJ5-79KL].

But that may be the tip of the iceberg, given the other issues in this Office that are already publicly known. Under incumbent DA Steve Wolfson, who was first appointed to the seat in 2012 and has been re-elected since,[257] the Office has fought the exoneration of Fred Steese, a man who was not even located in the same state when the murder he was convicted of occurred.[258] That was despite the fact that prosecutors on that case violated *Brady* disclosure requirements.[259] This year, one of Wolfson's supervising prosecutors, Chief Deputy District Attorney Jonathan VanBoskerck, even went viral for writing a newspaper editorial decrying Disney's attempts to eliminate offensive racial imagery from exhibits at Disney World.[260]

C. Where Non-White Prospective Jurors Are Struck at Extraordinary Rates Across Cases

Defendants in criminal court have no right to a specific racial composition of the jurors deciding their guilt or innocence. However, the existence of recent *Batson* violations from a DA's office, combined with a large macro-level racial disparity in preemptory strikes from the same office, should together justify an investigation.

Luckily, academic studies that analyze macro-level preemptory strikes by race already exist. For example, in 2016, Professors Barbara O'Brien and Catherine M. Grosso published a study on discrimination in jury selection in Charleston County, South Carolina.[261] They found that prosecutors in this district struck 38.5 percent of eligible Black venire members, compared to 5.7 percent of eligible white venire members.[262] The disparity was statistically significant, meaning that "there is less than a one in a thousand chance that we would observe a

257. *Steve B. Wolfson*, Clark Cnty., Nev., https://www.clarkcountynv.gov/government/elected_officials/county_district_attorney/steven_b_wolfson.php [https://perma.cc/K7RJ-WM65].

258. *See* Fleming, *supra* note 8, at 53.

259. Rachel Christiansen, *Nevada Pardons Commission Gives Full Pardon to Man Who Spent 21 Years in Prison*, KNPR (Nov. 21, 2017), https://knpr.org/knpr/2017-11/nevada-pardons-commission-gives-full-pardon-man-who-spent-21-years-prison [https://perma.cc/98DG-M59J].

260. Briana Erickson, *Clark County's Prosecutor's Column Criticizing Disney World Goes Viral*, L.V. Rev. J. (Apr. 23, 2021, 5:09 PM), https://www.reviewjournal.com/local/local-las-vegas/clark-county-prosecutors-column-criticizing-disney-world-goes-viral-2337333/ [https://perma.cc/K8A8-5HVL].

261. *See* Barbara O'Brien & Catherine M. Grosso, Mich. St. Uni. Coll. of L., Report on Jury Selection Study: State of South Carolina, County of Charleston (2016), https://sclawyersweekly.com/files/2016/04/MSU-Report.pdf [https://perma.cc/AZ4C-STDV].

262. *Id.* at 6.

disparity of this magnitude if the jury selection process were actually race neutral."[263]

Of course, such numbers by themselves, while concerning, are not grounds for a pattern-or-practice investigation. Prosecutors are currently allowed to use preemptory strikes to craft all-white juries, so long as they can provide ostensibly race-neutral reasons if their strikes are challenged.[264] However, if the Charleston County Solicitor's Office was contemporaneously the subject of recent prosecutorial misconduct findings on *Batson* grounds, then it would be a prime target of a pattern-or-practice investigation. The mix of court findings of *Batson* violations and damning statistical data easily brings the Justice Department to the evidentiary threshold needed to justify at least a preliminary inquiry. The macro-level strike trend should also signify that the likelihood of future *Batson* violations is at least somewhat greater than in offices that do not show such trends.

Conclusion

There is no sound reason why the Justice Department, given its power and resources, should be reluctant to intervene in situations where a DA's office has committed a pattern or practice of misconduct. The iron is hot on police reform, and the language of section 12601 allows it.[265] The DOJ should respond by liberally using pattern-or-practice investigations to ensure that DA's offices are doing their jobs the right way. For starters, DA's offices must respect due process by abiding by the rulings in *Brady*, *Batson*, and other seminal Supreme Court cases that determine the proper bounds of appropriate prosecutorial conduct.

263. *Id.*
264. *See* Raphael & Ungvarsky, *supra* note 229, at 236.
265. *See supra* Section III(A).