SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 72 | Issue 3 Article 12

2022

The Next Step in Civil Rights: Abolish Absolute Prosecutorial Immunity so Prosecutors Cannot Use Their Power to Violate Others' Constitutional Rights

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— Comment —

THE NEXT STEP IN CIVIL RIGHTS: ABOLISH ABSOLUTE PROSECUTORIAL IMMUNITY SO PROSECUTORS CANNOT USE THEIR POWER TO VIOLATE OTHERS' CONSTITUTIONAL RIGHTS

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INTRODUCTION

The American legal system is failing us. Recent media attention has broadcasted the devastation that police officers inflict on Black communities. The Black Lives Matter (BLM) movement, as portrayed in the media, is a movement that pushed conversation on police brutality and the murder of Black people to the forefront of American consciousness.[1] Although stories of individual police officers brutalizing Black people are what the media focuses on, the entire criminal-justice system should be scrutinized.[2] Though often overlooked, prosecutors play a central role in perpetuating the legal system's systemic failings. When prosecutors engage in misconduct and violate the Constitution, innocent people end up paying with their lives.[3] It is irrelevant that prosecutors themselves are not pulling the trigger—imprisoning someone for a crime they did not commit destroys lives just as effectively.[4]

1. Andrew Perrin, *23% of Users in U.S. Say Social Media Led Them to Change Views on an Issue; Some Cite Black Lives Matter*, PEW RSCH. CTR. (Oct. 15, 2020), https://www.pewresearch.org/fact-tank/2020/10/15/23-of-users-in-us-say-social-media-led-them-to-change-views-on-issue-some-cite-black-lives-matter/ [https://perma.cc/A5YZ-T24U]; *see also 330 Names*, STAN. LIBRS., https://exhibits.stanford.edu/saytheirnames/feature/330-names [https://perma.cc/YYN7-FDLM] (last visited Jan. 23, 2022) (listing the names of 330 victims of racial violence).

2. Paul Butler, *Chokehold: Policing Black Men and Women in America*, GUARDIAN (Aug. 11, 2017, 7:00), https://www.theguardian.com/us-news/2017/aug/11/chokehold-police-black-men-paul-butler-race-america. [https://perma.cc/J3DP-NQHE]; *see also Mass Incarceration and Racial Oppression*, INNOCENCE PROJECT NEW ORLEANS, https://ip-no.org/what-we-do/advocate-for-change/mass-incarceration-and-racial-oppression/ [https://perma.cc/UN2J-YT94] (last visited Jan. 23, 2022) ("Since the gains of the civil rights movement became apparent, economic interests and political pressure to imprison millions of Americans has steadily but rapidly replaced segregation with mass incarceration. This has grossly overburdened the legal institutions that make up the criminal justice system and has caused police, lawyers, courts and prisons to resort to assembly-line justice.").

3. Kate Levine & Joanna Schwartz, *Hold Prosecutors Accountable, Too*, BOS. REV. (Jun. 18, 2020), https://bostonreview.net/law-justice/kate-levine-joanna-schwartz-hold-prosecutors-accountable-too [https://perma.cc/X9UF-8HAZ].

4. *Id.*

I. WINNING AT ALL COSTS: PROSECUTORIAL MISCONDUCT VIOLATES THE CONSTITUTION AND DESTROYS LIVES

It is not solely police misconduct that needs to be scrutinized, but the misconduct of prosecutors as well. Prosecutorial misconduct often results in wrongful conviction and incarceration, an egregious violation that has devastating effects on the innocent victim. Wrongfully incarcerated individuals are deprived of freedom and placed into the dangerous environment of jail or prison, where death—whether by suicide, correctional officer abuse or brutality, or another inmate—is all too likely.[5] After police arrest someone, prosecutors may, at their own discretion, charge the arrestee and put them on trial to prove their guilt.[6] Prosecutors have dual roles; when prosecutors build their case, they are working as investigators.[7] When prosecutors believe the case against a defendant is strong enough to move forward, prosecution begins. Prosecutors then become advocates for the victims of the crime.[8]

"Prosecutorial misconduct occurs when a prosecutor breaks a law or a code of professional ethics" when trying a case.[9] The result of prosecutorial misconduct can include the imprisonment of innocent people, who serve terms of decades or even life in prison for crimes they did not commit.[10] Despite the devastation of incarceration, prosecutorial-

5. *See* E. ANN CARSON, U.S. DEP'T OF JUST., No. NCJ 256002, MORTALITY IN LOCAL JAILS, 2000-2018 – STATISTICAL TABLES 1–3 (2021) ("In 2018, a total of 1,120 inmates died in local jails, an increase of nearly 2% from the 1,099 deaths reported in 2017.").

6. *See* Daniel C. Richman, *Law Enforcement Organization Relationships with Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 291, 293 (Ronald F. Wright et al. eds., 2021).

7. *See id.* at 294 (detailing some of the steps prosecutors take during the investigation stage, such as negotiating plea deals with accomplices in exchange for vital information).

8. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 54.

9. *Prosecutorial Misconduct*, CAL. INNOCENCE PROJECT, https://californiainnocenceproject.org/issues-we-face/prosecutorial-misconduct/ [https://perma.cc/DJC3-URAP] (last visited Jan. 23, 2022); Emma Zack, *Why Holding Prosecutors Accountable Is So Difficult*, INNOCENCE PROJECT (Apr. 23, 2020) https://innocenceproject.org/why-holding-prosecutors-accountable-is-so-difficult/_[https://perma.cc/KQM3-CT8G]; *see also* Berger v. United States, 295 U.S. 78, 89 (1935) (awarding a new trial because the prosecuting attorney's misconduct was "pronounced and persistent, with a probable cumulative effect upon the jury").

10. *See* Zack, *supra* note 9.

misconduct cases typically end the same way police-officer misconduct cases do[11]: with no accountability, and no justice.

One of the most notorious cases of prosecutorial misconduct happened in New Orleans in 2011. John Thompson, a 22-year-old Black man, was arrested for two separate crimes, an armed robbery and a murder.[12] During the armed-robbery trial, the prosecution withheld exculpatory evidence that could have proven Thompson's innocence. The perpetrator's blood was found at the crime scene and was not a match to Thompson.[13] When Thompson's trial for murder began, Thompson did not take the stand because the prosecutor likely would have impeached his credibility by introducing evidence of his armed-robbery conviction. Thus, Thompson's co-defendant testified that Thompson committed the murder without any rebuttal from Thompson.[14] The prosecution's deliberate failure to disclose the critical blood evidence in his armed-robbery trial led to Thompson's wrongful convictions and sentences of forty-nine-and-a-half years in prison for armed robbery and the death penalty for murder.[15] He spent the next eighteen years of his life in prison, from ages twenty-two to forty. Thompson spent fourteen of those years in a windowless cell, waiting for his execution.[16] In the years Thompson spent on death row, his lawyer hired a private investigator to look into the case.[17] The PI unearthed the exculpatory DNA evidence, which a Louisiana appellate court used to reverse Thompson's murder conviction.[18] Thompson was

11. German Lopez, *Cops Are Almost Never Prosecuted and Convicted for Use of Force*, VOX, https://www.vox.com/identities/2016/8/13/17938234/police-shootings-killings-prosecutions-court [https://perma.cc/6E7W-EPNC] (Nov. 14, 2018, 4:12 PM); *see, e.g.*, Ashley Southall, Ali Watkins & Blacki Migliozzi, *A Watchdog Accused Officers of Serious Misconduct. Few Were Punished.*, N.Y. TIMES (Nov. 15, 2020), https://www.nytimes.com/2020/11/15/nyregion/ccrb-nyc-police-misconduct.html [https://perma.cc/A5MQ-G34S].

12. Sam Roberts, *John Thompson, Cleared After 14 Years on Death Row, Dies at 55*, N.Y. TIMES (Oct. 4, 2017), https://www.nytimes.com/2017/10/04/obituaries/john-thompson-cleared-after-14-years-on-death-row-dies-at-55.html [https://perma.cc/38XY-9RA2]. Thompson was one of two co-defendants in the murder case. *Id.*

13. Connick v. Thompson, 563 U.S. 51, 54–56 (2011).

14. *Id.* at 55; *see also* State v. Thompson (La. App. 4 Cir. 7/17/02); 825 So. 2d 552, 556 (concluding that Thompson "would have testified in the absence of the attempted armed robbery conviction").

15. *Thompson*, 563 U.S. at 85–87 (Ginsburg, J., dissenting).

16. Roberts, *supra* note 12.

17. *Thompson*, 563 U.S. at 87–89 (Ginsburg, J., dissenting); State v. Thompson, 2002-0361 (La. App. 4 Cir. 7/17/02), 825 So. 2d 552, 558, *certiorari denied*, 2002-2203 (La. 11/15/02), 829 So. 2d 427.

18. *Id.* at 87, 89.

finally able to walk free after about eighteen years.[19] After this story unfolded, even more exculpatory evidence came to light; the prosecution had hidden ten other pieces of evidence before his trial that cast serious doubt on Thompson's guilt.[20]

Although finally free, Thompson was unable to hold the people responsible for his wrongful incarceration accountable. Prosecutors have absolute immunity from suits alleging prosecutorial misconduct.[21] Because that immunity precludes suits against individual prosecutors for their misconduct, Thompson tried to hold the District Attorney's office accountable for the role it played in his wrongful incarceration, but the Supreme Court blocked him in *Connick v. Thompson*.[22] Thompson successfully sued the DA's office for misconduct in district court and was awarded $14 million in damages,[23] and an evenly divided en banc Fifth Circuit affirmed.[24] But the Supreme Court reversed.[25] In doing so, the Supreme Court effectively granted municipalities their own form of qualified immunity, making it extremely difficult for Thompson and similarly situated future plaintiffs to hold prosecutors liable for their misconduct.[26]

A. A Few Bad Apples vs. A Rotten Orchard: The Issue is Systemic

Connick is not an isolated incident, but rather a well-litigated example of the magnitude of damage that prosecutorial misconduct can cause. Several studies decisively show the systemic destruction caused by prosecutorial misconduct. The National Registry of Exonerations reports that misconduct by prosecutors or police officers occurred in 56% of the 2,946 exoneration cases between 1989 and 2022.[27] On

19. Roberts, *supra* note 12. The jury deliberated for 35 minutes. *Id.*

20. *John Thompson (1962-2017)*, WITNESS TO INNOCENCE, https://www.witnesstoinnocence.org/single-post/john-thompson_[https://perma.cc/NP8F-3ZJ8] (last visited Jan. 24, 2022).

21. Levine & Schwartz, *supra* note 3.

22. 563 U.S. 51 (2011).

23. *Id.* at 54.

24. *Id.*

25. *Id.*

26. *See id.* at 60–62 (finding that a plaintiff may only prevail in a § 1983 claim based on a local-government employee's actions when the municipality is "on actual or constructive notice that a particular omission in [its] training program causes city employees to violate citizens' constitutional rights.").

27. *% of Exonerations by Contributing Factor*, THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [https://perma.cc/P54K-GHFK] (last visited Feb. 2, 2022). This table is updated regularly.

average, wrongfully incarcerated individuals lose nearly eleven years of their lives in prison per case.[28]

Prosecutorial misconduct exists on a spectrum, just like police misconduct does. For example, with police misconduct, the Fourth Amendment only protects people from state actors' excessive use of force, but officers can abuse their position by harming individuals in ways that do not go far enough to be considered a constitutional violation but are still harmful.[29] The prosecutorial-misconduct spectrum includes prejudicial or biased statements, unethical trial and pre-trial tactics, as well as the more serious forms of misconduct, such as "[k]nowingly permitting perjury" and "[l]ying in court."[30] No matter the degree, any form of misconduct is damaging to our criminal justice system: it "undermines public confidence" and discredits the "truth-seeking" process.[31]

But not every form of misconduct is a violation of our constitutional rights. The most common forms of misconduct that rise to the level of constitutional violations include: witness tampering (occurring in 17% of cases of exoneration), concealing exculpatory evidence (occurring in 44% of cases), and misconduct in trial (occurring in more than 14% of cases).[32] That second category—concealing exculpatory evidence—is the most common type of misconduct in cases that eventually result in exoneration. The Supreme Court has held that concealing exculpatory evidence is particularly egregious.[33]

In the seminal case of *Brady v. Maryland*,[34] the Supreme Court held that the Constitution demands that the government disclose favorable evidence to criminal defendants.[35] The government's failure to disclose

28. *Map of Exonerations in the United States*, THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx [https://perma.cc/UUH6-5TH3] (last visited Feb. 2, 2022). This map is updated regularly.

29. *E.g.*, Allen v. Harry, No. 07-CV-15481, 2010 WL 538297, at *5–6 (E.D. Mich. Feb. 10, 2010) (stating that is was improper, but not unconstitutional, for the police to intimidate witnesses by threatening to send them to juvenile detention, call them expletives, and slap them (quoting Michigan v. Allen, 2002 WL 31934025 (Mich. Ct. App. Nov. 19, 2002))).

30. MAURICE J. POSSLEY, KAITLIN JACKSON ROLL & KLARA HUBER STEPHENS, NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT 33 (Samuel R. Gross ed., 2020) (reporting on all known exonerations in the United States from 1989 to 2019).

31. Aimee Ortiz, *Police or Prosecutor Misconduct Is at Root of Half of Exoneration Cases, Study Finds*, N.Y. TIMES (Sept. 16, 2020), https://www.nytimes.com/2020/09/16/us/exonerations-report-misconduct.html [https://perma.cc/3WFU-MXTC].

32. POSSLEY ET AL., *supra* note 30, at 30–33.

33. *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 59 (2011).

34. Brady v. Maryland, 373 U.S. 83 (1963).

35. *Id.* at 87.

favorable evidence violates a defendant's due-process rights.[36] Note that *Brady* and its progeny allow prosecutors to exercise a high degree of independence, requiring disclosure only for "favorable" and "material" evidence. The flexibility of these terms allows for extreme deference to prosecutors' determinations of what is "favorable" and "material," which prosecutors can use to disadvantage the defense.[37] Despite the severe impact a *Brady* violation can have on a defendant, the only available remedy is a reversal—a pittance of a punishment on the prosecutor when weighed against the devastating impact of imprisoning an innocent person.[38]

Simply looking at the data on frequency of prosecutorial misconduct doesn't shed much light on the question of its prevalence. Although the issue of prosecutorial misconduct is clear enough for legal scholars to declare it a widespread issue (and not the result of a few "bad apples"),[39] the severity of the orchard rot is not as obvious. The only readily available data comes from studies examining exonerations, which show that more than half of exonerations are the result of prosecutorial misconduct.[40] Based on this, legal scholars suspect a significant number of cases plagued by prosecutorial misconduct remain hidden.[41] One judge in the Texas Court of Criminal Appeals—the highest appellate court for criminal appeals in the state—estimated 60% of cases in his court involved a claim of prosecutorial misconduct.[42] This data and information all suggest that the issue of misconduct is a widespread problem.

Prosecutors' unique powers make their misconduct particularly damaging. Because prosecutors work on behalf of the state, they may

36. *Id.* at 86–87; Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1452 (2006).

37. Kevin C. McMunigal, *The Craft of Due Process*, 45 ST. LOUIS U. L.J. 477, 487 (2001) (explaining that the Supreme Court subsequently defined the term "material" narrowly to require prosecutors to turn over only evidence with "particularly high probative value" (discussing United States v. Bagley, 473 U.S. 667, 681–84 (1985))).

38. John P. Taddei, *Beyond Absolute Immunity: Alternative Protections for Prosecutors Against Ultimate Liability for § 1983 Suits*, 106 NW. U. L. REV. 1883, 1899 (2012).

39. Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 631 (1972); *see also* Levine & Schwartz, *supra* note 3 (describing prosecutorial misconduct as "an epidemic").

40. *See* Debra Cassens Weiss, *Police and Prosecutor Misconduct Contributed to Over Half of False-Conviction Cases, New Study Finds*, ABA JOURNAL (Sept. 16, 2020, 1:32 PM), https://www.abajournal.com/news/article/police-and-prosecutor-misconduct-contributed-to-over-half-of-false-conviction-cases-study-finds_[https://perma.cc/3PXZ-UJTU] (discussing POSSLEY ET AL., *supra* note 30, and stating that it measures prosecutorial misconduct in exoneration cases—not prosecutorial misconduct generally).

41. Ortiz, *supra* note 31.

42. Alschuler, *supra* note 39.

have access to the crime scene, to lab reports, to the discussions taking place in interrogation, etc.[43] If prosecutors are not honest or if they hide or tamper with evidence over which they have control, there is no way for anyone to know. In most cases of serious misconduct, the defendant likely has no knowledge that a potentially exculpatory piece of evidence exists that could free them from a life of wrongful imprisonment.[44]

B. Our Judicial System is Failing Us—Why Internal Remedies Do Not Work

With potentially high levels of misconduct in our judicial system, it may be surprising that most charges of misconduct go unpunished. This is because the existing remedies for prosecutorial misconduct are weak and ineffective.

1. Appellate Reversal

Appellate reversal is better suited as a remedy to ensure the fairness of a defendant's trial than as a way to punish prosecutorial misconduct.[45] The appellate court will disturb a guilty verdict only when the misconduct was not cured by jury instruction or was "harmless" because other evidence was sufficient to find the defendant guilty.[46] Affirming a guilty verdict despite "harmless" prosecutorial misconduct does not deter future misconduct in any meaningful sense.[47] When the

43. *See* NAT'L RES. & TECH. ASSISTANCE CTR. FOR IMPROVING L. ENF'T INVESTIGATIONS, & NAT'L CRIM. JUST. TRAINING CTR. FOX VALLEY TECH. COLL., INVESTIGATING VIOLENT CRIME: THE PROSECUTOR'S ROLE 4, 7, 14–15 (2018), https://crimegunintelcenters.org/wp-content/uploads/2018/09/Investigating-Violent-Crime-The-Prosecutors-Role-Lessons-Learned-from-the-Field-NRTAC-June-2018.pdf [https://perma.cc/KUS6-EK9Q] (describing the various roles prosecutors can play depending on police practice).

44. David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 209 & n.36 (2011–2012), https://www.yalelawjournal.org/forum/the-myth-of-prosecutorial-accountability-after-connick-v-thompson-why-existing-professional-responsibility-measures-cannot-protect-against-prosecutorial-misconduct; *see* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 412 (2001) (noting that "[t]he victim of [prosecutorial] misconduct may be wholly aware of its occurrence"); Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1010, 1039–40, 1040 n.155 (2009) (explaining that defendants have limited access to information compared to prosecutors).

45. Alschuler, *supra* note 39, at 645.

46. *Id.*

47. *Id.*

court does find error, appellate review may serve as a deterrent—at least to the extent that prosecutors do not want their convictions overturned.[48] However, reversal focuses on the effect the conduct has on justice for the criminal defendant, not on punishing the prosecutor for the misconduct.[49] Additionally, if there is no trial, then there is nothing to review.[50] Because only 2% of federal cases go to trial, appellate review is not an option in most cases.[51]

2. Professional Discipline and Criminal Charges

Because the legal profession is self-policing, professional discipline should be an effective deterrent to misconduct. But internal disciplinary methods do not deter because they are rarely used. Between 1970 and 2000, only 2% of alleged prosecutorial misconduct resulted in some form of discipline.[52]

The federal government can also bring criminal charges under 18 U.S.C. § 242 against state actors who violate people's constitutional rights.[53] States can likewise criminalize prosecutorial misconduct.[54] However, since 1866, only one prosecutor has been convicted under

48. *Id.* at 646–47.

49. *Id.* at 645–46.

50. Jonathan Harwell, Marshall Jensen, Sarah Heath Olesiuk, & Sally B. Seraphin, *Righteous Indignation: Prosecutorial Misconduct,* Brady*, and the Cognitive Limits of Self-Policing*, 87 TENN. L. REV. 715, 753–55 (2020).

51. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/PB86-7U83]; *see also* QUATTRONE CTR., UNIV. OF PA. CAREY L. SCH., HIDDEN HAZARDS: PROSECUTORIAL MISCONDUCT CLAIMS IN PENNSYLVANIA, 2000–2016, at 6 & n.5 (2021), https://www.law.upenn.edu/live/files/11857-hidden-hazards-prosecutorial-misconduct-claims-in (noting that roughly 98% of criminal cases in Pennsylvania, excluding those in Philadelphia, "end[ed] in guilty pleas" or "were diverted, withdrawn, or dismissed" prior to trial).

52. CTR. FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT 8, 13–14 app. B (2013). United States cases were measured from 1963 to 2003 and made up about 66% of the cases in the study. The states included in the study were Arizona (2002–2013), California (1997–2011), New York (2004–2008), Pennsylvania (2004–2008), and Texas (2004–2008). *Id.* at 13–14 app. B.

53. 18 U.S.C. § 242; *Deprivation of Rights Under Color of Law*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/deprivation-rights-under-color-law [https://perma.cc/X435-9QNY] (last visited Jan. 24, 2022).

54. *E.g.*, Price v. State Bar, 638 P.2d 1311, 1315 (Cal. 1982) (noting that a prosecutor had faced a felony charge under state law for falsifying and destroying evidence favorable to a defendant).

§ 242,[55] and only six prosecutors in the 20th century have been criminally charged.[56]

3. Civil Liability

Because we cannot always trust the internal systems to provide a remedy to government actors' misconduct, Congress created a civil-rights cause of action. When state actors violate a citizen's constitutional rights, that citizen can bring a civil action under 42 U.S.C. § 1983.[57]

> Section 1983 . . . creates a claim for legal or equitable relief against (1) every "person" who (2) "under color of" state legislation, custom, or usage (3) "subjects, or causes [another] to be subjected" (4) to the deprivation of rights secured by the federal "Constitution and laws."[58]

However, prosecutors cannot be sued under § 1983 because they have absolute immunity (also called "prosecutorial immunity"). Prosecutorial immunity is a complete bar that prevents a plaintiff from pursuing a civil suit against a prosecutor. It does not matter how egregious their conduct or malicious their intent, officials with absolute immunity cannot be held accountable in a § 1983 action.[59]

C. History Repeating Itself and the Purpose of § 1983—When the Government is Not Playing Fair, We Have a Right to Hold Them Accountable

The legislature created § 1983 claims to give victims a remedy when state actors violate individual constitutional rights. Following the Civil War and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, Southern states continued to violate the rights of Black people.[60] By early 1871, despite repeated attempts to force Southern states to protect the rights of Black people, evidence consistently showed that state and local officials in the South were "fostering vigilante terrorism" against Black people who attempted to exercise their new rights.[61] Congress passed what is now known as 42 U.S.C.

55. BRIAN M. MURRAY, JON B. GOULD & PAUL HEATON, BERKELEY L., PIERCING PROSECUTORIAL IMMUNITY THROUGH *BRADY* CLAIMS 9 (2021) (citing *In re* Brophy, 442 N.Y.S.2d 818 (N.Y. App. Div. 1981).

56. *Id.*

57. HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, CIVIL RIGHTS LAW AND PRACTICE 46 (2d ed. 2001).

58. *Id.* (alteration in original).

59. LEWIS & NORMAN, *supra* note 57, at 48, 60.

60. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1141–42 (1977).

61. *Id.* at 1153.

§ 1983 after states refused to punish the Ku Klux Klan for their crimes against Black people.[62] Section 1983 was originally passed as part of the Ku Klux Klan Act of April 20, 1871, a federal remedy to hold state actors accountable for violating people of color's rights.[63] As long as prosecutors are "state actors," victims of prosecutorial misconduct should be able to use § 1983 to hold prosecutors accountable and to get relief.

II. WHY ABSOLUTE IMMUNITY IS DESTROYING OUR JUDICIAL SYSTEM

A. Section 1983 Does Not Recognize Absolute Immunity for Prosecutors

Despite the availability of § 1983's cause of action, the Supreme Court has made it impossible for victims of prosecutorial misconduct to get relief. In *Imbler v. Pachtman*,[64] the leading case on prosecutorial misconduct, the Supreme Court declared that prosecutors have absolute immunity from any causes of action that stem from performing their official duties.[65]

The Supreme Court overstepped its authority by granting prosecutors absolute immunity. There is no basis for creating prosecutorial immunity in the plain text of § 1983, and despite what the Court claims, there is also no common-law basis for prosecutorial immunity.[66] The Court, however, disputes this lack of foundation through conclusory and ill-informed arguments; it claims that because of § 1983's silence on immunity, absolute immunity is incorporated into the statute.[67] The Court argues that absolute immunity existed at common law, so if Congress wanted § 1983 to abrogate the immunity, then Congress would have explicitly written it out.[68] However, the Court's history is inaccurate—a misgiving the late Justice Scalia ardently spoke out about.[69] Prosecutors did not get absolute immunity at common law

62. LEWIS & NORMAN, *supra* note 57, at 45.

63. *Id.* (citing Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13.); *Section 1983 and Federalism*, *supra* note 60, at 1141–42.

64. 424 U.S. 409 (1976).

65. *Id.* at 430–31.

66. Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INSTITUTE (Sept. 14, 2020), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure [https://perma.cc/E8ZQ-BXEA]; Samantha M. Caspar & Artem M. Joukov, *The Case for Abolishing Absolute Prosecutorial Immunity on Equal Protections Grounds*, 49 HOFSTRA L. REV. 315, 320 (2021).

67. *Imbler*, 424 U.S. at 418 (referring to legislative immunity).

68. *Id.* at 418, 422–23.

69. Kalina v. Fletcher, 522 U.S. 118, 132–33 (1997) (Scalia, J., concurring).

because the concept of prosecutorial immunity was not invented until 1896, twenty-five years after § 1983 was passed.[70]

When Congress passed § 1983, private, non-governmental prosecutors were the norm in most states. Victims and their families would prosecute their offenders either themselves or by hiring a private attorney to lead the prosecution on their behalf.[71] And even the states that did have public prosecutors did not recognize prosecutorial immunity. For instance, in *Parker v. Huntington*,[72] which took place before the passage of § 1983, the Massachusetts Supreme Judicial Court sustained a tort action against a district attorney after the attorney used false testimony to convict a defendant.[73]

Parker goes directly against the common-law understanding that the Supreme Court espoused in *Imbler*: *Parker* acknowledged that public prosecutors may be liable in actions of malicious prosecution for their misconduct as prosecutors.[74] There is no contrary evidence at common law that shows prosecutors used absolute immunity to escape liability for malicious prosecution before Congress passed § 1983.[75] Absolute immunity for prosecutorial misconduct developed years after 1871. And when most states had a public prosecutor, there was no common understanding among the courts about when or if immunity applied to prosecutors. Indeed, the Court has acknowledged that the absence of an equivalent common-law immunity precludes the recognition and application of new immunities today.[76]

Common law did recognize absolute judicial immunity but only extended it to individuals who served as neutral parties helping to resolve a legal dispute.[77] Public officials who made decisions that did not involve adjudication were given "quasi-judicial" immunity—better known today as "qualified immunity."[78] There is evidence of prosecutors having protection "more akin to 'quasi-judicial immunity,' which was

70. *See* John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 316 (1973); Taddei, *supra* note 38, at 1900–01; Johns, *supra* note 8, at 54–57; *Kalina*, 522 U.S. at 123, n. 11.

71. Johns, *supra* note 8, at 108–09.

72. Parker v. Huntington, 68 Mass. (2 Gray) 124 (1854).

73. *Id.* at 125, 128.

74. *Id.*

75. *Kalina*, 522 U.S. 132–33 (Scalia, J., concurring).

76. *See* Burns v. Reed, 500 U.S. 478, 493 (1991) (determining that prosecutors are not entitled to immunity when providing advice to police because no such immunity existed at common law).

77. *Kalina*, 522 U.S. at 132 (Scalia, J., concurring).

78. *Id.*

not absolute and could be overcome by proving malice."[79] Therefore, the judiciary had absolute immunity at common law, but prosecutors did not.

Justice White, in his concurrence in *Imbler*, argued that absolute immunity should not shield prosecutors from claims of unconstitutional prosecution.[80] He explored the common-law understanding of prosecutorial immunity and concluded that absolute immunity should apply only in narrow cases—those where a prosecutor is being accused of bringing an improper charge. But when the claim is of "unconstitutional suppression of evidence," prosecutors ought to receive only qualified immunity.[81] Justice White recognized the threat that the *Imbler* decision would pose to our Constitution. He stated that absolute immunity "would threaten to *injure* the judicial process and to interfere with Congress' purpose in enacting 42 U.S.C. § 1983, without any support in statutory language or history."[82]

The Court in *Imbler* glossed over the weak historical evidence of prosecutorial immunity at common law.[83] Because it believed the policy reasons underlying judicial immunity for judges applied with equal force to prosecutors, the Court used its discretion to intentionally stretch absolute immunity to shield prosecutors.[84] To justify this extension, the Court opined that anything short of absolute immunity would "prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."[85] Rather than stay within its judicial role, the Court enacted its own public-policy preferences by essentially reading new provisions into § 1983. Without textual or historical support, the Court cannot justify its grant of immunity—it is a clear violation of the separation of powers doctrine. Congress' intent is clear: prosecutors should be held liable for prosecutorial misconduct and victims should use § 1983 as the vehicle that holds them accountable.

79. Taddei, *supra* note 38, at 1901 (quoting *Burns*, 500 U.S. at 500–01 (Scalia J., concurring in part and dissenting in part)).

80. Imbler v. Pachtman, 424 U.S. 409, 441–45 (1976) (White, J., concurring).

81. *Id.* at 441–42.

82. *Id.* at 433.

83. *See id.* at 421 (majority opinion) (purporting to undertake "a considered inquiry into the immunity historically accorded [to prosecutors] at common law" but beginning that inquiry with an 1896 Indiana case).

84. *Id.* at 422–27.

85. *Id.* at 427–28.

B. Municipal Liability Falls Short of Honoring the Purpose of § 1983

The Court's policy decision completely stripped away the remedial purpose of § 1983 with respect to prosecutors.[86] The "fundamental purpose" of § 1983 "is to provide compensatory relief to those deprived of their federal rights by state actors."[87] Another potential avenue to compensation—suing the state that employs the prosecutor—is foreclosed by the Court's interpretation of the Eleventh Amendment, which grants states sovereign immunity.[88]

One way for a victim of prosecutorial misconduct to receive compensation under § 1983 is by bringing suit against the prosecutor's office.[89] However, municipalities are not subject to a *respondeat superior* theory of liability. A municipality can only be sued if it did something directly or indirectly to allow the constitutional violation.[90]

In *Monell v. Department of Social Services*, the Court held that municipalities can be held liable for constitutional violations, but added the crippling caveat that municipalities are only liable if the violation is an "official policy" or "custom" of the municipality.[91] Subsequent cases recognized two other theories of municipal liability: failure to adequately screen job applicants[92] and—the theory at issue in *Connick v. Thompson*—failure to train municipal employees.[93] To hold a municipality liable for its failure to train employees, a plaintiff must demonstrate the municipality's deliberate indifference—meaning that the exact violation at issue was committed in the past, in the same way, and with enough frequency that it was equivalent to an official policy.[94]

For example, in the formative case of *Connick v. Thompson*, the Court held that, for a municipality to be liable for a *Brady* violation, the violation at issue—which "involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence"—needed to

86. Taddei, *supra* note 38, at 1903.

87. *Id.* at 1909 (first quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986); and then quoting Felder v. Casey, 487 U.S. 131, 141 (1988)).

88. The Eleventh Amendment restricts § 1983 actions brought against states. LEWIS & NORMAN, *supra* note 57, at 206 & n.69.

89. Connick v. Thompson, 563 U.S. 51, 54 (2011); *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690, 694–95 (1978) (holding that a municipality is a "person" and can be sued).

90. *Monell*, 436 U.S. at 694–95.

91. *Id.* at 690–91, 694; Mark C. Niles, *Here's a More Important Reform Than Ending Qualified Immunity*, LAWFARE (May 18, 2021, 2:13 PM), https://www.lawfareblog.com/heres-more-important-reform-ending-qualified-immunity [https://perma.cc/ZDZ7-53HV].

92. Bryan Cnty. v. Brown, 520 U.S. 397, 409–410 (1997).

93. City of Canton v. Harris, 489 U.S. 378, 388–92 (1989).

94. Levine & Schwartz, *supra* note 3 (discussing *Monell* and *Connick*).

have happened often enough to constitute a pattern.[95] Without that pattern, the municipality could not be held liable.[96] As some commentators have noted, the Court's ruling effectively meant that

> Connick would have to be put on notice [that he] need[ed] not only to instruct his attorneys about the requirements of *Brady*, but also to instruct his attorneys about *Brady* obligations as they applied to [scientific] evidence [as distinct from evidence that Thompson did not match police descriptions of the suspect]. This parsing of past *Brady* violations makes no sense. *Brady* obligations do not attach differently to different types of evidence—prosecutors are obligated to turn over all exculpatory evidence, no matter the type.[97]

By continually moving the ball and creating these detailed requirements, the Court makes it almost impossible for any plaintiff to receive compensation for the very real and harmful violations that prosecutors commit under the supervision of their respective district attorneys' offices.

While § 1983's fundamental purpose is to offer a remedy to individuals who have suffered constitutional violations caused by their own governments, that is not its only purpose. In *Imbler*, the Court discussed the additional purposes of § 1983 as both remedial and deterrent in nature. But if victims cannot prevail under § 1983, prosecutors have little incentive to stop violating constitutional rights.

Culturally, prosecutorial misconduct permeates the field, but forcing municipalities to pay damages does not deter the individual prosecutors who are committing the misconduct. Even if a § 1983 plaintiff has a case strong enough that the prosecutor's office cannot use the *Monell* doctrine as an affirmative defense *and* the plaintiff succeeds on the merits, this result would have little effect on the prosecutors who are engaging in the misconduct.[98] Municipalities do not respond to misconduct by disciplining rulebreakers. Municipalities focus on making changes that will benefit them politically—disciplining has too much red tape surrounding it to be an effective political tool.[99] Thus, punishing prosecutors' employers and municipalities does not rectify the issue—the change must come by punishing prosecutors as

95. *Connick*, 563 U.S. at 62–63, 71–72.

96. *Id.* at 71–72. Although the *Canton* Court had left open the possibility that a single act could demonstrate deliberate indifference, *Connick* did not qualify. *Id.*

97. Levine & Schwartz, *supra* note 3.

98. Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 60–61, 64, 66 (2005).

99. *Id.* at 65–66.

individuals.[100] Individual prosecutors are the problem; the solution to prosecutorial misconduct lies in harming their interests through personalized punishments. Prosecutors are motivated by professional gain, and being labeled a crooked prosecutor who is a liability to employers would undoubtedly hinder that interest.[101]

In order to give effect to the full purpose of § 1983, there must be a penalty for misconduct and that penalty must address the many low-level prosecutors who contribute to the systemic problem.[102] Only after their careers are threatened will prosecutors prone to misconduct think twice before coercing a witness, hiding evidence, or otherwise harming a defendant's right to a fair trial.[103]

C. Qualified Immunity Is Not an Alternative Solution

Qualified immunity is the other form of immunity available to some state actors, and the level of immunity that Justice White's concurrence in *Imbler* considered proper for prosecutorial misconduct.[104] Qualified immunity is not the appropriate type of immunity for prosecutorial misconduct; it is a weakly supported doctrine that both sides of the aisle have criticized.[105] The current state of qualified immunity is Court created.[106] In *Monroe v. Pape*,[107] the Supreme Court broadly authorized § 1983 suits against state officials who violate individual constitutional rights, even if their violation was unauthorized by state law.[108] *Monroe* did not discuss any immunities available to state officials under § 1983 actions. Following *Monroe*, the Court created the common-law affirmative defense of qualified immunity in *Pierson v. Ray*.[109] The

100. *Id.* at 64–66.

101. *Id.* at 60–61, 64, 66 (employing a cost-benefit analysis to explore the ways to improve the effectiveness of deterrents by customizing them to groups and their incentives).

102. *Id.* at 55, 64–66.

103. *See id.* 55, 60–61.

104. *See supra* notes 78–79 and accompanying text.

105. Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1889–91(2018).

106. Lewis & Norman, *supra* note 57, at 56 ("Section 1983 today is almost entirely a judicial construct. . . . After the Court's most recent ministrations, this historic statute of sweeping potential application yields an odd and desiccated residue. . . . [T]he individual defendant's qualified immunity absolves him from liability for even an intentionally inflicted constitutional harm, so long as his conduct was not clearly and specifically prohibited by a prior decision.").

107. 365 U.S. 167 (1961).

108. *Id.* at 168–69, 171–72.

109. Pierson v. Ray, 386 U.S. 547, 555, 557 (1967).

Court held that police officers were entitled to qualified immunity for arrests made with "good faith and probable cause."[110]

Since *Pierson,* the Supreme Court, in *Harlow v. Fitzgerald*,[111] changed the test for qualified immunity and completely gutted § 1983 by making the defense of qualified immunity almost impenetrable.[112] Before *Harlow*, the Court espoused a subjective "good faith" requirement, so qualified immunity would not shield officers who did not have a good-faith belief that their conduct was lawful. The *Harlow* Court eliminated the "good faith" test and replaced it with a purely objective test that gives police officers qualified immunity if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[113] Therefore, even if they act with subjective malice, qualified immunity will apply unless prior case law shows that the conduct at issue is unconstitutional.[114]

The way the Court has interpreted the "clearly established" standard is extremely stringent. Mere generalities do not satisfy the standard; instead the standard requires a high level of factual similarity to a previous case. Because of the extreme particularity requirement, most plaintiffs will fail in defeating the defense.[115]

The other major issue with the standard is that the Supreme Court has allowed lower courts to dismiss cases using qualified immunity without developing the law.[116] Originally, the Court mandated that, when deciding cases with a qualified immunity defense, courts should apply a two-pronged test: the court must first decide whether a constitutional right has been violated and then decide whether the violation was clearly established.[117] If lower courts followed this mandate, there would be a rich library of "clearly established" constitutional violations, so that even if one officer is entitled to qualified immunity

110. *Id.* at 554–57; *see also* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1342 & n.18, 1353–54, 1354 n.97 (2021).

111. 457 U.S. 800 (1982).

112. *Id.* at 817–18; *see also* Keller, *supra* note 110, at 1388, 1392–93.

113. *Harlow*, 457 U.S at 816–18.

114. *See id.* at 815, 817–18.

115. Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure* 1, 6–7 (Cato Inst., Policy Analysis No. 901, 2020), https://www.cato.org/sites/cato.org/files/2020-09/pa-901-update.pdf [https://perma.cc/9GFR-M9WU].

116. Blum, *supra* note 105, at 1893–95.

117. *See* Saucier v. Katz, 533 U.S. 194, 200 (2001) ("[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals.").

for siccing a police dog on an unarmed man with his hands in the air, the next officer who does will be liable for the constitutional violation.[118]

But the Court eliminated this requirement that courts address each prong in order because deciding the first question takes up too many judicial resources.[119] The Court reasoned that tackling the second question is less wasteful because if the law is not clearly established, then there is no effect on the instant case.[120] Lower courts have taken this grant and created a catch-22 situation; courts will avoid deciding whether constitutional violations occurred and dismiss the case because the conduct at issue did not violate clearly established law. This pattern ensures that no clearly established law is created.[121] The result is that qualified immunity is a failed doctrine that counteracts the purpose of § 1983 by depriving victims of a remedy. Through the decisions discussed above, the Court has transformed qualified immunity unilaterally, without a legislative grant.[122]

If the Supreme Court instead applied qualified immunity as it existed at common law—allowing a claim of bad faith to defeat qualified immunity—then qualified immunity might function in a way that gives full effect to § 1983. As it works currently, even if prosecutors were entitled only to qualified—rather than absolute—immunity, a § 1983 suit against crooked prosecutors would be unlikely to result in any accountability.

III. WHY ABOLISHING IMMUNITY IS THE BEST WAY TO DETER PROSECUTORIAL MISCONDUCT AND PROVIDE A REMEDY TO VICTIMS

A. The Environment Prosecutors Operate in Justifies Less Immunity Than Other Public Officials

Even if qualified immunity were an effective and fair policy, it should not apply to prosecutors. This Part shows that several factors support depriving prosecutors of any immunity for their misconduct:

118. *See* Baxter v. Bracey, 751 F. App'x 869, 872 (6th Cir. 2018); SCHWEIKERT, *supra* note 115, at 7–9 (discussing *Baxter*).

119. Pearson v. Callahan, 555 U.S. 223, 232, 236, 242–43 (2009) (holding that lower federal courts do not need to follow the "rigid" analysis demanded by *Saucier v. Katz*, and making the "merits" analysis in prong one of the qualified-immunity defense discretionary).

120. *Id.* at 236–37.

121. Blum, *supra* note 105, at 1893–97.

122. *See* Crawford-El v. Britton, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting); *see also* Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (White, J., concurring) ("It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, that was precisely the proposition upon which § 1983 was enacted.").

prosecutors' opportunities to make thoughtful decisions, the relative secrecy in which prosecutorial misconduct takes place, prosecutors' incentives to win cases, and the disproportionate impact their misconduct has on people of color.

1. Police vs. Prosecutors: Snap Judgments or Reasoned Decision-making?

Qualified immunity applies to all government officials who do not get absolute immunity,[123] but not all government officials carry guns or have the power to manipulate evidence and imprison people.[124] Because both police and prosecutors hold great amounts of power, some commentators point to the similarities between them to advocate for giving prosecutors qualified, rather than absolute, immunity.[125] Prosecutors certainly should not get a heightened immunity that police do not get, and in fact there are differences that support prosecutors getting less immunity.

Those who support maintaining qualified immunity as a defense for officers describe rationales that are superficially reasonable,[126] however, those rationales do not make sense in the context of prosecutors. Prosecutors are afforded a safe environment and all the time and information that they need to make well-thought-out decisions.[127] But when those decisions are wrong, they are always immune from suit. Police officers, by contrast, often need to make rapid decisions in high-stress situations that are life or death.[128] Even though officers often make these decisions under duress, people are able to sue them for clear federal-law violations under § 1983.[129] This difference supports giving prosecutors less, not more, immunity.

Further, police officers do not receive the comprehensive education that lawyers do. Officers receive basic training and learn on the job, and while some officers may be able to recall the legal standards that will be used to judge their actions in life-threatening situations, many

123. *See* Harlow v. Fitzgerald, 457 U.S. 800, 806–07 (noting that all government officials are entitled to either absolute or qualified immunity).

124. *See* Ian Millhiser, *Qualified Immunity, Explained*, VOX (Jun. 3, 2020, 8:00 AM), https://www.vox.com/2020/6/3/21277104/end-qualified-immunity-police-definition-george-floyd [https://perma.cc/G64E-LEVA]; *The Power of Prosecutors*, ACLU, https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors [https://perma.cc/FFY6-ZCWG] (last visited Jan. 23, 2022); *supra* notes 27–33 and accompanying text.

125. Caspar & Joukov, *supra* note 66, at 375–76.

126. *See id.* at 358.

127. *Id.*

128. *Id.*

129. *Id.*

are unable to.[130] There is no excuse for police misconduct, but the law can factor in the extent to which situational factors muddle an officer's ability to control the outcome.[131]

Lawyers go to law school for three years, pass a bar examination, and then receive on-the-job training about the current state of criminal law.[132] Ignorance is no excuse, but even if it were, when it comes to prosecutors, they should not be able to claim unfamiliarity with the law.[133] The law does not need to accommodate the unique difficulties prosecutors face because prosecutors are better positioned to understand which of their decisions might violate federal rights.

None of the policy reasons that justify police immunity apply to prosecutorial immunity.[134] As explained earlier, courts give police leeway because they often make decisions under dire circumstances, and therefore, courts cannot analyze their misconduct under a rational lens. We do not expect police officers to choose between their safety and potential internal penalties.[135] This difficult choice never applies to prosecutors.[136] When prosecutors engage in misconduct, the analysis is much clearer. Prosecutors defy the law and Constitution to win a case because they believe they are protecting the public from "bad actors" or because they want to further their careers; there are no external factors that courts should give weight to in analyzing whether to penalize a prosecutor. We do not need to cut prosecutors slack—follow the rules of fairness and the worst outcome is a lost case.

2. Judges vs. Prosecutors: Why Prosecutorial Misconduct's Invisibility Requires Strong Deterrents

Prosecutorial misconduct is particularly damaging because it is often kept secret from defendants and there is no easy way to shed light on it. This difference alone justifies separating prosecutors from other state actors who are afforded immunities. It is not only the unique power that prosecutors hold that justifies differentiating their roles from other government roles, it is also the manner in which prosecutorial misconduct is committed.

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130. *Id.* at 363–64.

131. *Cf.* Lange Eldridge, *Understanding the Officer–Prosecutor Divide*, POLICE 1 (Oct. 15, 2010), https://www.police1.com/legal/articles/understanding-the-officer-prosecutor-divide-NKLsp5aiNjBDLCyr/ [https://perma.cc/7G2X-CJUM] (describing how officers engage with the law differently than prosecutors do).

132. Caspar & Joukov, *supra* note 66, at 358–59, 363.

133. *See id.*

134. *See id.* at 358.

135. *See id.* at 358–59, 362, 364.

136. *See id.* at 358–59, 362.

Comparing prosecutorial misconduct to judicial misconduct illustrates why the former should be treated differently. Judges and prosecutors overlap in a lot of meaningful ways. Both act on behalf of the government and both are—at least ostensibly—committed to justice.[137] In *Imbler*, the Court used the policies backing judicial immunity to justify prosecutorial immunity, but the Court's logic there ignored the differences between the roles.[138]

Judicial misconduct frequently takes the form of openly berating and demeaning the intelligence of the defense and the prosecution.[139] Another form of possible judicial misconduct was discussed in the media coverage of the highly publicized 2021 murder trial of Kyle Rittenhouse.[140] In the Rittenhouse case, the judge brought the jury into the courtroom and then had the jury applaud the single veteran in the room—who coincidentally was the defense's first witness of the day.[141] Some legal experts argued that was not an act of neutrality by the judge, and that the act likely biased the jury in favor of the witness.[142] But other legal experts did not believe the judge's actions crossed the line into misconduct.[143] Scholarship detailing the misconduct of judges

137. *See* Imbler v. Pachtman, 424 U.S. 409, 420, 422–23 (1976) ("The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties.").

138. *See supra* notes 84–85 and accompanying text.

139. *See* Alschuler, *supra* note 39, at 681–84.

140. Nick Niedzwiadek, *Judge Shares the Spotlight in Kyle Rittenhouse Trial*, POLITICO (Nov. 16, 2021, 7:45 PM), https://www.politico.com/news/2021/11/16/judge-schroeder-kyle-rittenhouse-trial-522772 [https://perma.cc/9LZ8-2QX2]. Rittenhouse was charged with "first-degree intentional homicide, first-degree reckless homicide, attempted first-degree intentional homicide and first-degree recklessly endangering public safety." *Id.* Rittenhouse was charged after he crossed state lines, violated a curfew, and carried a firearm at the age of seventeen to watch over a Black Lives Matter protest. Barbara McQuade, *The Kyle Rittenhouse Verdict Makes Us All Less Safe*, TIME (Nov. 19, 2021, 5:54 PM), https://time.com/6122142/kyle-rittenhouse-verdict/ [https://perma.cc/84Q3-B3D4]. Rittenhouse killed two men and injured another, but was acquitted after he argued that he acted in self-defense. *Id.*

141. Nicholas Bogel-Burroughs, *In Scrutinized Kyle Rittenhouse Trial, It's the Judge Commanding Attention*, N.Y. TIMES, https://www.nytimes.com/2021/11/11/us/kyle-rittenhouse-judge-bruce-schroeder.html [https://perma.cc/86RP-U3V9] (Nov. 15, 2021).

142. *Id.*

143. Kathleen Foody, *Rittenhouse Judge's Nod to Veterans Includes Defense Witness*, AP NEWS (Nov. 11, 2021), https://apnews.com/article/kyle-rittenhouse-wisconsin-kenosha-homicide-0f514cc4c04762bf42cccb5f2473b76c [https://perma.cc/YV2U-DW43] ("For some trial observers, [defense counsel's] opening was a clear mistake that could have swayed jurors'

often focuses on inappropriate remarks which bias the jury against a party.[144] While a judge's every action and word has the potential to impact during a trial, a judge's human influence is not always grounds for misconduct.[145]

Judicial misconduct does not have the same shroud of secrecy that a prosecutor has when hiding evidence from the opposing party.[146] Instead, it occurs in plain view of anyone in the courtroom; this gives attorneys the opportunity to intervene before too much damage is done—a safeguard that does not apply to prosecutorial misconduct.[147] Bitter and bad-intentioned comments also do not have the same unfair impact of a prosecutor coercing a witness or hiding evidence.[148] When judges neglect their duty to be wholly neutral, they harm the justice system, but it is out in the open, allowing each party to proceed with appeals as necessary.[149]

The late Judge Julius Hoffman presided over the famous trial of the Chicago Seven, which is a case of egregious judicial misconduct and provides an example of how it can be remedied.[150] Following the trial of the Chicago Seven, Judge Hoffman was heavily criticized by the public, the Seventh Circuit where he sat, and the legal community at large.[151] His misconduct during the trial is too extensive to list, but in essence, he made the defendants look like dishonest criminals while also making absurd rulings that denied defendants their right to a fair trial.[152]

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opinion of a defense witness at the expense of prosecutors' already shaky case. *But other watchers shrugged it off, suggesting prosecutors were best served letting the moment pass without objection.*") (emphasis added).

144. *See, e.g.*, Alschuler, *supra* note 39, at 681–85.

145. *See* Jonathan Wolf, *Cut Kyle Rittenhouse Judge Some Slack, The Judicial Conduct Code Doesn't Prohibit Having a Personality*, ABOVE THE L. (Nov. 17, 2021, 11:18 AM), https://abovethelaw.com/2021/11/cut-kyle-rittenhouse-judge-some-slack-the-judicial-conduct-code-doesnt-prohibit-having-a-personality/ [https://perma.cc/P8SX-Y7VQ].

146. *See* Alschuler, *supra* note 39, at 694.

147. *See* Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245, 1249, 1256, 1263–65, 1275 (2004) (describing common forms of judicial misconduct, including inappropriate demeanor, refusal to exercise jurisdiction, and repeated error, all of which occur with the knowledge of interested litigants).

148. *See* Wolf, *supra* note 145.

149. *See supra* notes 45–47 and accompanying text; *see also* Alschuler, *supra* note 39, at 685–87, 690.

150. Bennett L. Gershman, *Judging Judges Fifty Years After—Was Judge Julius Hoffman's Conduct So Different?*, 50 LOY. U. CHI. L.J. 839, 839–42 (2019).

151. *Id.* at 839–41.

152. *Id.* at 840–41.

Notably, Bobby Seale, the single Black defendant, repeatedly requested to represent himself as allowed by the Sixth Amendment, and he was repeatedly denied this right by Judge Hoffman.[153] Hoffman also ordered Seale to be *bound and gagged* and brought him in front of the jury.[154] After the defendants were convicted, they filed appeals and won because of the many prejudicial decisions Hoffman made.[155] Judicial review is not a perfect remedy, or even a sufficient one, because it often fails to correct the biases that impede a fair trial, but it *can* provide an avenue for correction in almost every case in which it occurs.[156]

It is nearly impossible to apply the same remedy to prosecutorial misconduct because there is no way of shedding light on most instances of prosecutorial misconduct. "It is very difficult to find proof of misconduct that by definition is designed to stay hidden—especially when prosecutors hold so much power to control access to what's in their files and to witnesses."[157] How is a defendant supposed to know they should appeal their case because of bad conduct when they have almost no way of detecting the bad conduct?

3. Prosecutors and the Winning-Is-Everything Mindset

Prosecutors are under immense pressure to win, which necessitates the strongest incentives possible to deter prosecutorial misconduct. Roger King, a prosecutor in Philadelphia who served from 1973 to 2008, earned himself the reputation of being "the best."[158] King held this reputation even though he was notorious for using illegal tactics to lock up innocent people.[159] As the "King of Deathrow," King put more people on death row than anyone else—approximately thirty people.[160] The court of appeals in King's district repeatedly flagged him for prosecutorial misconduct. "At least seven of his murder convictions have been overturned amid allegations that he made improper statements in court, hid exculpatory evidence, or manipulated witnesses by intimidation, threats, or undisclosed benefits."[161] Despite the notoriety of King's

153. *Id.*

154. *Id.*

155. *Id.* at 840 n.6, 841 n.11, 842.

156. *See id.* at 842 (noting that although convictions are often upheld despite judicial misconduct, the appellate system remains open to review trial judge conduct and "occasionally corrects the most flagrant abuses").

157. Zack, *supra* note 9.

158. Samantha Melamed, *King of Death Row*, THE PHILA. INQUIRER (Nov. 11, 2021), https://www.inquirer.com/crime/a/roger-king-philadelphia-da-conviction-reversals-20211111.html [https://perma.cc/9D9W-NUB9].

159. *Id.*

160. *Id.*

161. *Id.*

misconduct, neither the court nor the prosecutor's officer ever disciplined him. People in the district attorney's office did not care if King violated the Constitution because he was a winner.[162]

A former DA commented on King's actions, claiming it was not necessarily a pattern of misconduct, but rather the effect of King being overzealous.[163] To have a former prosecutor react to King's constitutional violations with praise and excuses demonstrates how broken the system is. His reputation for misconduct dates back to his first few years at the office. It is unknown how many innocent people he locked away, but the Philadelphia DA's office knows that if they see a case was handled by King, they should assume misconduct.[164]

Of course, not all prosecutors cheat and break the law, just like not all lawyers cheat and break the law. But some do. And everyone in an adversarial system wants to win. Our system's safeguards against prosecutorial misconduct need to adjust to this. Prosecutors are just lawyers who are trying to get convictions.[165] They are under enormous pressure, both internal and external, to win every case they try.[166] This need to win can come at the expense of a fair trial.[167]

> Capital cases are so political that winning becomes far more important for the average D.A. . . . We're not talking about being competitive. We're talking about winning at all costs. Deliberately deceiving the court. Withholding favorable evidence. Arguing things they know aren't true. Harassing defense witnesses. Concealing deals they make with their witnesses. Winning means getting a death sentence. They are out to win.[168]

This combination of invisibility, incentives, and access creates an environment ripe for misconduct. There are dozens of studies covering

162. *Id.*

163. *Id.*

164. *Id.*

165. Catherine Ferguson-Gilbert, Comment, *It is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 289–96 (describing the incentives that prosecutors have to win and how those incentives affect their prosecutorial behaviors).

166. Melamed, *supra* note 158.

167. *See id.*

168. Christopher John Farley & James Willwerth, *Dead Teen Walking*, TIME, Jan. 19, 1998, at 50 (quoting an attorney from the Loyola Resource Center) (examining the case of Shareef Cousin).

the span of 1932 to 2018 that show the prevalence of serious prosecutorial misconduct.[169] Prosecutors have no reason to stop, so the legislature must step up and give them a reason to stop.

4. The Harmonious System of Oppression: How History Repeats Itself

Failing to deter prosecutorial misconduct disproportionately impacts people of color. Mirroring how police officers arrest, attack, and kill Black people at higher rates than white people,[170] prosecutors hide evidence, coerce witnesses, and imprison innocent Black people more than white people.[171] Just like anything "that has to do with criminal justice in the United States, race is the big factor."[172]

Roger King's misconduct disproportionately imprisoned innocent Black and Latino people. During his thirty-two years in the Philadelphia DA's office, most of the people King prosecuted were Black or Latino.[173] King himself was a Black man, but that apparently did not offset the racial bias that often influences prosecutorial decisions

169. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 62 (referring to a book by a professor at Yale Law cataloguing sixty-five cases of wrongful convictions).

170. The Chicago Police Department uses force "almost 10 times more often against [B]lacks than whites." Paul Solotaroff, *The Untouchables: An Investigation into the Violence of the Chicago Police*, ROLLING STONE (Nov. 19, 2020, 7:00 AM), https://www.rollingstone.com/culture/culture-features/chicago-police-racism-violence-history-1088559/ [https://perma.cc/JB4N-K4NY]. Modeling predicts 1 in 1,000 Black males will be killed by police compared to 39 in 100,000 white males. FRANK EDWARDS, HEDWIG LEE, & MICHAEL ESPOSITO, PROC. OF THE NAT'L ACAD. OF SCIS. OF THE U.S., RISK OF BEING KILLED BY POLICE USE OF FORCE IN THE UNITED STATES BY AGE, RACE–ETHNICITY, AND SEX (John Hagan ed., 2019). Five percent of drug users are Black, but they make up twenty-nine percent of those arrested for drug offenses. *Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet (last visited Feb. 1, 2022) [https://perma.cc/8UXG-4RLF].

171. Ortiz, *supra* note 31 (discussing POSSLEY ET AL., *supra* note 30, at iv); *see* MAURICE POSSLEY & KLARA STEPHENS, NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/3DCK-FSGQ] (noting that Black people are convicted of crimes and later found innocent at "three times their rate in the population") .

172. Niraj Chokshi, *Black People More Likely to Be Wrongfully Convicted of Murder, Study Shows*, N.Y. TIMES (Mar. 7, 2017), https://www.nytimes.com/2017/03/07/us/wrongful-convictions-race-exoneration.html [https://perma.cc/C6BW-BAL9] (quoting Samuel R. Gross, University of Michigan law professor).

173. Melamed, *supra* note 158; Chokshi, *supra* note 172.

and leads to disproportionately convicting people of color.[174] King, like many other prosecutors, struck Black people from his jury list twice as often as white people.[175]

Empirical research demonstrates that King was no exception:

> Black defendants 'were slightly more likely than white defendants to be victims of official misconduct,' by a margin of 57 percent to 52 percent. The disparity grew when it came to drug crimes (47 percent to 22 percent) and for murder cases, (78 percent to 64 percent). In exonerations involving death sentences, there was misconduct in 87 percent of the cases involving Black defendants compared with 68 percent for white defendants.[176]

In murder cases, "[B]lack defendants account for 40 percent of those convicted of the crime, but 50 percent of those wrongfully convicted."[177] Prosecutorial misconduct like hiding evidence and manipulating witnesses "may also . . . contribute[] to the racial disparity."[178]

The public heavily criticizes our justice system because police officers frequently injure and kill Black citizens, all sanctioned by the badge they wear on their chests.[179] Prosecutors' role in imprisoning innocent Black men is no less impactful. In the 1,632 exonerations that resulted at least in part from prosecutorial misconduct since 1989, 52% of the victims are Black.[180] A 2017 report reviewed exonerations nationwide and found that Black people spent an average of three more years in prison than white people following exonerations.[181] There is even evidence of prosecutors going after Black men while hiding evidence that the real criminal was white.[182]

174. Melamed, *supra* note 158; Rachel D. Godsil & HaoYang (Carl) Jiang, *Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat*, 40 CAL. DIST. ATT'YS ASS'N PROSECUTOR'S BRIEF 142, 146 (2018).

175. Melamed, *supra* note 158.

176. Ortiz, *supra* note 31 (discussing POSSLEY ET AL., *supra* note 30).

177. Chokshi, *supra* note 172.

178. *Id.*

179. *See* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/Y9N2-783G] (describing significant public involvement in protesting police behavior).

180. *% of Exonerations*, *supra* note 27.

181. Chokshi, *supra* note 172.

182. Taddei, *supra* note 38, at 1897–98.

The criminal justice system is designed to oppress Black people.[183] Section 1983 was created as a direct response to combat those who use their authority under the law to oppress U.S. citizens—particularly newly free Black people in the wake of the Civil War.[184] Yet these are the civil-rights issues that continue to affect society today. The notion that the law is colorblind has always been a false narrative.[185] Many aspects of the criminal justice system need to go through a complete renovation, but remedying the part that prosecutors contribute is simple. Prosecutors do not need absolute immunity to do the same thing that every other lawyer does.

B. Eliminating Prosecutorial Immunity Does Not Threaten Honest Prosecutors

There are overwhelming policy considerations that far outweigh the negative effects that eliminating absolute immunity would have on prosecutors. Moreover, the Court greatly exaggerates the negative effects that eliminating absolute immunity would likely have on prosecutors.

The Court in *Imbler* was hyper-focused on the impact of misconduct suits on the "honest prosecutor."[186] In an effort to protect the honest prosecutor, the Court sacrificed the rights of people. Looking at the conduct and abuse of prosecutors, abolishing immunity is not a threat to honest prosecutors, it is a threat to those who violate the constitutional rights of others. The honest prosecutor is the same thing as the honest lawyer. There is no reason why people can sue a defense attorney for their actions in a courtroom but cannot sue a prosecutor for more egregious misconduct.

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183. Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ [https://perma.cc/D5XB-JA2W]. Balko notes that:

> When you consider that much of the criminal justice system was built, honed and firmly established during the Jim Crow era . . . this is pretty intuitive. The modern criminal justice system helped preserve racial order . . . . For much of the early 20th century, in some parts of the country, that was its primary function. That it might retain some of those proclivities today shouldn't be all that surprising.

Id.

184. *See supra* Part I(C).

185. *See* Janel George, *A Lesson on Critical Race Theory*, ABA (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/ [https://perma.cc/HZV6-XRFX].

186. Imbler v. Pachtman, 424 U.S. 409, 425, 427–28 (1976).

The Court based its decision to give prosecutors absolute immunity on its belief that anything short of absolute immunity would (1) lead to harassment in the form of unfounded litigation that would distract prosecutors from their jobs, and (2) compromise prosecutors' decisions and damage their ability to exercise the "independence of judgment required by public trust."[187] Neither of these policy reasons are serious enough issues that justify blocking the relief § 1983 can offer the prosecutorial-misconduct victims.

1. There Is No Flood That Our Current System Cannot Handle

There are already strong tools in place to minimize unmeritorious litigation. There is more research on eliminating qualified immunity than absolute immunity, but the logic applies equally. One of the country's leading experts on qualified immunity, Joanna C. Schwartz, analyzed the role qualified immunity played in 1,200 federal civil-rights cases and predicted that this doomsday scenario of flooding courts with frivolous litigation would not occur.[188]

Even if plaintiffs wanted to file frivolous litigation, they would be hard-pressed to find an attorney who would help them. Most civil-rights cases proceed on a contingency-fee basis, and an attorney would not take a case if she does not believe there is a legal case to make.[189] This also means that de minimis constitutional violations would likely not be litigated; attorneys usually take cases where the expected payout is "greater than the anticipated litigation costs."[190] The result is that attorneys will likely file only cases with teeth and merit. Of course, more cases to recover against individual prosecutors would survive a motion to dismiss because the current number is zero, but more § 1983 cases—which, as constitutional disputes, fall squarely within courts' competence—is not a reason to keep an unworkable precedent.

Even if a lawyer chose to take a meritless case, there are pleading requirements that would prevent the case from moving forward and wasting resources.[191] "Plaintiffs in these cases would still have to overcome the same burdens of pleading, discovery, and proof that are today the primary bases of dismissal."[192] To state a § 1983 action, the plaintiff must show that: (1) the individual was exonerated from the crime of prosecution;[193] and (2) the prosecutor violated a constitutional

187. *Id.* at 423–24.

188. Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 315–16 (2020).

189. *Id.* at 345.

190. *Id.* at 346.

191. *See* Taddei, *supra* note 38, at 1904–05; *see also* Schwartz, *supra* note 188, at 337.

192. Schwartz, *supra* note 188, at 337.

193. Heck v. Humphrey 512 U.S. 477, 484–87 (1994).

right with a culpable state of mind.[194] There is no consensus on how to satisfy the second prong, but it is likely to look like the common law malicious-prosecution cause of action described in *Imbler*.[195] In *Imbler*, the culpable state of mind had to be "malicious."[196] A prosecutor would not be held responsible for what they knew and failed to act on or what they should have known, they would only be held accountable for the acts they individually committed that violated the Constitution.[197]

2. The Only Independent Judgment That Is Compromised Is the Decision to Violate the Constitution

Claiming that the threat of litigation will cloud prosecutors' judgment is one of the weaker justifications the Court offered for prosecutorial immunity. Plaintiffs cannot sue a prosecutor just for bringing charges against them. The prosecutor has to do something that violates the Constitution before a person can file a § 1983 suit.[198] So if the "independent judgment" that is harmed by abolishing prosecutorial immunity is whether to hide the lab report that proves the defendant is not the perpetrator or to follow the rules and give the defendant a fair trial, then there is no hidden threat to democracy in removing immunity.

It is clear that some prosecutors are willing to do whatever they need to do in order to win. By giving defendants the option to hold them accountable, the only chilling effect would be that crooked prosecutors may actually start following the Constitution they have pledged to honor. If the "honest" prosecutor overcorrects by sharing too much evidence, that is not injurious to the judicial process.[199] These points were all brought up by Justice White in his concurrence in *Imbler*.[200] By ignoring Justice White's logic and creating absolute immunity, the majority in *Imbler* made a conscious decision to sacrifice the integrity of the justice system for the sake of efficiency.

194. Johns, *supra* note 169, at 128 (first citing County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998); and then citing Hope v. Pelzer, 536 U.S. 730, 736 (2002)); Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 405 (1997) ("In any § 1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying violation.").

195. Johns, *supra* note 169, at 130; Imbler v. Pachtman, 424 U.S. 409, 415–16 (1976).

196. *Imbler*, 424 U.S. at 427; *see also Imbler*. 424 U.S. at 438 (White, J., concurring).

197. *Imbler*, 424 U.S. at 427, 431 (majority opinion).

198. *See supra* notes 191–97 and accompanying text.

199. *Imbler*, 424 U.S. at 443 (White, J., concurring).

200. *Id.* at 439–40, 443–44.

CONCLUSION

Lack of accountability is a sign of an unfair practice. Absolute prosecutorial immunity runs completely contrary to the goals of the criminal justice system and must be eliminated.[201] This issue affects everyone, but it disproportionately affects Black people. Police destroy lives with little accountability and prosecutors destroy lives with no accountability. When it comes to prosecutors, the law is protecting state actors who do not need the protection. Prosecutors make their decisions with full awareness of the immunity they have and of the consequences their decisions have for others. Section 1983 does not punish prosecutors for strategic legal decisions—there is nothing wrong with smart legal tactics—only prosecutors who consider breaking the law to be a "smart legal tactic" will be affected by eliminating prosecutorial immunity.

The legislature created § 1983 as a way for people of color to hold the people in power accountable when they used that power to violate constitutional rights.[202] One hundred fifty-one years later and we still have a system that disproportionately mistreats people of color and a Court that has stripped away the only vehicle for damages, and the best deterrent against prosecutorial misconduct the people have.[203] Official misconduct echoes the conduct that prompted the legislature to pass the Ku Klux Klan Act.[204] The legislature should recognize absolute immunity for the injustice it is and abolish it.

201. *Imbler*, 424 U.S. at 442 (White. J., concurring). The issue of transparency is beyond the scope of this comment, but there are several well-thought out solutions addressing this issue, like open-evidence banks. *See* Eugene Volokh, *Judge Kozinski on Reforms that Can Help Prevent Prosecutorial Misconduct*, WASH. POST (Jul. 17, 2015, 2:05 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/17/judge-kozinski-on-reforms-that-can-help-prevent-prosecutorial-misconduct/ [https://perma.cc/N8QZ-8RT3].

202. *See supra* notes 60–63 and accompanying text.

203. *See supra* Part II(A).

204. *See supra* notes 60–63 and accompanying text.

The criminal justice system has changed since § 1983 originally passed; namely, prosecutors are now advocates trying to further their careers by winning every case they try, just like every other lawyer. Yet, these advocates have inequitable access to information and people. Not all prosecutors abuse their power, but abolishing absolute immunity will not harm the honest prosecutor—it will only punish those who have taken advantage of their power.

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† B.S., Molecular Biology, University of Kansas 2018; J.D., Case Western Reserve University School of Law 2022. I would like to thank Alexa Shook, Andy Rumschlag, and Erica Hudson for their comments and suggestions, Professor Michael Benza who gave me guidance after I chose a topic outside of my comfort zone, and my friends and family who supported me for the last three years and offered me insights and counterarguments that I used throughout this Comment. Lastly, I need to thank my lifelong friend Noor Mozaffar who spent hours helping me refine this Comment, and more importantly, offered me constant support as we both experienced law school from opposite sides of the country.