

THE CASE FOR ABOLISHING ABSOLUTE PROSECUTORIAL IMMUNITY ON EQUAL PROTECTION GROUNDS

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The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion tremendous. . . . While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.¹

The remarkable incarceration rate in the United States (which leads the world in per capita and absolute terms) has many costs, perhaps none greater than the imposition of punishment on the innocent by overzealous prosecutors. We can hope this happens only by chance: that prosecutors would follow their ethical duty to avoid prosecution where they see no probable cause or where they find a statute unconstitutional. This is especially true in the event of an emergency, such as the COVID-19 pandemic. Yet, when this hope proves unfounded, as it did for many during the pandemic, the prosecuted have little recourse against the prosecutors. This lack of civil remedies denies the innocent

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1. This quote is attributed to Robert H. Jackson, former United States Attorney General, United States Solicitor General, Associate Supreme Court Justice, and Chief Prosecutor for the United States of America at the Nuremberg Trials. Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

equal protection of the law simply because they had the misfortune of suffering malicious prosecution due to the misconduct of a prosecuting attorney rather than the misconduct of anyone else. Given no rational basis for treating victims of malicious prosecution differently based on the status of the malicious prosecutor, the absolute immunity judicially granted to prosecuting attorneys cannot survive equal protection scrutiny under the U.S. Constitution.

I. INTRODUCTION

There is an increasing sense that unrestrained prosecutors in the United States are a problem—“quite possibly the most pressing challenge in American criminal justice.”² The issue has received additional attention during the COVID-19 pandemic, as some individuals who committed serious crimes were released from jail and prison (actually encouraging some inmates to infect themselves) while otherwise innocent citizens suffered prosecution and incarceration for relatively innocent activities.³ This disparity tended to highlight the

2. David Alan Sklansky, *The Problem with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 452 (2018).

3. Allison Schaefer, *California Honeymooners Arrested for Violating Hawaii Mandatory Passenger Quarantine*, STAR ADVERTISER (May 1, 2020), <https://www.staradvertiser.com/2020/05/01/breaking-news/california-honeymooners-arrested-for-violating-hawaii-mandatory-passenger-quarantine>; Kevin Johnson & Richard Wolf, *Enforcing the Shutdown: Law Enforcement Grapples with Policing Stay-at-Home Orders, Social Distancing, Quarantines*, USA TODAY (Apr. 2, 2020, 2:44 PM), <https://www.usatoday.com/story/news/politics/2020/04/02/coronavirus-police-fines-jail-breaking-stay-home-orders/5104704002>; Robert Gearty, *3 Massachusetts Golfers Arrested for Violating Rhode Island Coronavirus Quarantine Order: Police*, FOX NEWS (Apr. 4, 2020), <https://www.foxnews.com/us/3-massachusetts-golfers-arrested-for-violating-rhode-island-coronavirus-quarantine-order-police>; Jason Murdock, *Florida Man Breaks Quarantine Order to Travel Around Hawaii, Is Arrested by Police*, NEWSWEEK (Apr. 2, 2020, 4:00 AM), <https://www.newsweek.com/florida-man-breaks-hawaii-coronavirus-quarantine-arrested-kauai-police-1495672>; Lee Brown, *SWAT Team Arrests Armed ‘Vigilantes’ Defying Lockdown in Texas Bar*, N.Y. POST (May 6, 2020, 10:49 AM), <https://nypost.com/2020/05/06/swat-team-arrests-armed-vigilantes-helping-bar-defy-lockdown>; David K. Li, *Dallas Salon Owner Gets 7 Days in Jail for Reopening During Coronavirus Lockdown*, NBC NEWS (May 6, 2020, 1:11 PM), <https://www.nbcnews.com/news/us-news/dallas-salon-owner-gets-7-days-jail-reopening-during-coronavirus-n1200836>; Fletcher Page, *Hamilton County Prosecutor Joe Deters on Stay-at-Home Violators: ‘Sit Your Butt in a Jail,’* FOX19 NOW (Apr. 5, 2020, 12:23 PM), <https://www.fox19.com/2020/04/05/hamilton-county-prosecutor-joe-deters-stay-at-home-violators-sit-your-butt-jail>; Cameron Knight, *Deters Hopes Felony Charge and High Bond for Corona-Order Violator Sets Example*, CINCINNATI.COM (Apr. 6, 2020, 1:27 PM), <https://www.cincinnati.com/story/news/2020/04/06/deters-hopes-felony-charge-and-high-bond-corona-order-violator-sets-example/2954955001>; Sharon Coolidge, *Court Filing: Man in OTR Gathering Video Punished More Harshly Because He’s Black*, CINCINNATI.COM (Apr. 14, 2020, 12:32 PM), <https://www.cincinnati.com/story/news/2020/04/14/court-filing-black-man-violating-stay-home-order-punished-unfairly/2982831001>; Dominick Mastrangelo, *‘Sit Your Butt in a Jail’: Ohio Prosecutor Has ‘No Patience for’ Violators of Stay-at-Home Order*, WASH. EXAMINER (Apr. 5,

complaints that prosecutors were overly zealous, though other news demonstrated that failure to prosecute could be equally problematic. As the pandemic raged through America, the shooting of Ahmaud Arbery came to light, showing two (and perhaps three) white men in a truck chasing a Black jogger and executing him.⁴ What stunned citizens is that

2020, 12:30 PM), <https://www.washingtonexaminer.com/news/sit-your-butt-in-a-jail-ohio-prosecutor-has-no-patience-for-violators-of-stay-at-home-order>; Scott Morefield, *Ohio Prosecutor to Stay-At-Home Violators: 'You Can Sit There and Kill Yourself' in Jail*, DAILY CALLER (Apr. 5, 2020, 3:42 PM), <https://dailycaller.com/2020/04/05/ohio-prosecutor-joe-deters-stay-at-home-kill-yourself-violators-coronavirus>; John Eligon, *'It's a Slap in the Face': Victims Are Angered as Jails Free Inmates*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/04/24/us/coronavirus-jail-inmates-released.html>; Ernesto Londoño et al., *As Coronavirus Strikes Prisons, Hundreds of Thousands Are Released*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/04/26/world/americas/coronavirus-brazil-prisons.html>; Timothy Bella, *Inmates Tried to Infect Themselves with the Coronavirus to Get Early Release, Los Angeles County Sheriff Says*, WASH. POST (May 12, 2020, 5:33 AM), <https://www.washingtonpost.com/nation/2020/05/12/inmates-coronavirus-infect-los-angeles/>; Nick Givas, *Over 16K US Inmates Have Been Released as Coronavirus Crisis Has Progressed*, FOX NEWS (Apr. 16, 2020), <https://www.foxnews.com/us/here-is-how-many-prisoners-have-been-released-covid-19>; Katelyn Newman, *For Prisoners Released Due to COVID-19, a Different World Awaits*, U.S. NEWS (Apr. 15, 2020, 10:13 AM), <https://www.usnews.com/news/healthiest-communities/articles/2020-04-15/prisoners-released-due-to-coronavirus-enter-a-different-world>; Jonathan Choe, *Prisoners Released from Facilities to Limit COVID-19 Spread Arrested Again for Crimes*, KOMO NEWS (May 8, 2020), <https://komonews.com/news/coronavirus/prisoners-released-from-facilities-to-limit-covid-19-spread-arrested-again-for-crimes>; Marisa Kendall & Robert Salonga, *Coronavirus: Mass Jail, Prison Releases Leave Some Bay Area Inmates on the Streets*, MERCURY NEWS (Apr. 27, 2020, 2:54 PM), <https://www.mercurynews.com/2020/04/27/coronavirus-mass-jail-prison-releases-leave-some-inmates-on-the-streets/>; Emily Hoerner, *Hundreds of Illinois Prisoners Released as COVID-19 Spreads, but Few Elderly See Reprieve*, INJUSTICEWATCH (May 6, 2020), <https://www.injusticewatch.org/news/prisoners-and-jails/2020/hundreds-of-illinois-prisoners-released-as-covid-19-spreads-but-few-elderly-see-reprieve>.

4. *Coronavirus: A Timeline of How the Deadly COVID-19 Outbreak Is Evolving*, PHARM. TECH., <https://www.pharmaceutical-technology.com/news/coronavirus-a-timeline-of-how-the-deadly-outbreak-evolved> (last visited Feb. 8, 2021); Caroline Kantis et al., *Updated: Timeline of the Coronavirus*, THINK GLOB. HEALTH, <https://www.thinkglobalhealth.org/article/updated-timeline-coronavirus> (last visited Feb. 8, 2021); Dakin Andone et al., *Georgia Attorney General Requests DOJ Investigation into the Handling of the Ahmaud Arbery Case*, CNN (May 11, 2020, 10:04 AM), <https://www.cnn.com/2020/05/10/us/ahmaud-arbery-surveillance-video/index.html>; Susan Miller & Grace Hauck, *Additional Video Shows Georgia Jogger Ahmaud Arbery Did Nothing Illegal Before Being Killed, Attorneys Say*, USA TODAY (May 10, 2020, 8:04 PM), <https://www.usatoday.com/story/news/nation/2020/05/10/ahmaud-arbery-shooting-new-video-shows-georgia-jogger-did-nothing-illegal/3105123001>; Anne Schindler & Troy Kless, *New Video in Ahmaud Arbery Case Offers a View of What Happened Moments Before the Deadly Shooting*, FIRST COAST NEWS (May 10, 2020, 3:43 PM), <https://www.firstcoastnews.com/article/news/crime/video-shows-person-in-vacant-home-in-ahmaud-arbery-case/77-990e647b-3493-49ab-88ec-3a3d517b19ed>; Cleve R. Wootson, Jr. & Colby Itkowitz, *New Video Said to Show Moments Leading up to Georgia Jogger Ahmaud Arbery's Death*, WASH. POST (May 10, 2020, 11:01 AM), <https://www.washingtonpost.com/nation/2020/05/09/georgia-attorney-general-investigate-local-officials-handling-ahmaud-arberys-murder/>; Natasha Lennard, *The Perversity of Needing to See Ahmaud Arbery Die on Video to Recognize that His Black Life Mattered*, INTERCEPT (May 9, 2020, 7:00 AM), <https://theintercept.com/2020/05/09/ahmaud-arbery-video/>; Khushbu Shah, *'Every Stone Will be Uncovered': How Georgia Officials Failed the Ahmaud Arbery Case*, GUARDIAN (May 9,

the video depicted a clear homicide, while the men involved, having connections to the prosecutor's office in the county in which the crime was committed, escaped indictment for months and were not placed under arrest until video of the crime became public.⁵ Additionally, early May 2020 saw the dismissal of charges against General Michael Flynn.⁶ The Justice Department, under a new Attorney General, determined that Flynn's prosecution was an error of judgment and that the actions of the prosecutors and investigators were subject to far more scrutiny than the actions of the defendant.⁷ Flynn's case drew ire from prosecutorial critics on both sides: some claiming Flynn should have been prosecuted to the full extent of the law while others claiming his case was a sign of prosecutorial and investigative misconduct.⁸

These events naturally raised general questions of whether prosecutors were acting properly and whether their misdeeds and the misconduct of law enforcement should be tolerated by society.⁹ Combined with national news of severe crackdowns on small business

2020, 8:03 AM), <https://www.theguardian.com/us-news/2020/may/09/every-stone-will-be-uncovered-how-georgia-officials-failed-the-ahmaud-arbery-case>; Brakkton Booker, *More Arrests Possible in the Killing of Ahmaud Arbery, Georgia Investigators Say*, NPR (May 8, 2020, 4:49 PM), <https://www.npr.org/2020/05/08/852719660/more-arrests-possible-in-the-killing-of-ahmaud-arbery-state-investigators-say>; Brie Stimson, *Ahmaud Arbery Case: Additional Video Being Reviewed, Authorities Say*, FOX NEWS (May 10, 2020), <https://www.foxnews.com/us/ahmaud-arbery-case-additional-video-being-reviewed-authorities-say>.

5. Andone et al., *supra* note 4; Miller & Hauck, *supra* note 4; Schindler & Kless, *supra* note 4; Wootson & Itkowitz, *supra* note 4; Lennard, *supra* note 4; Shah, *supra* note 4; Booker, *supra* note 4; Stimson, *supra* note 4.

6. Tim Hains, *Devin Nunes: "We Can't Find" FBI's Original Michael Flynn Interview 302 Report; "It's Gone, Poof,"* REALCLEARPOLITICS (May 10, 2020), https://www.realclearpolitics.com/video/2020/05/10/devin_nunes_we_cant_find_original_michael_flynn_interview_summary_its_gone_poof.html; Katelyn Polantz, *Justice Department Drops Criminal Case Against Michael Flynn*, CNN: POL., <https://www.cnn.com/2020/05/07/politics/michael-flynn-prosecution/index.html> (May 7, 2020, 7:47 PM); Danny Cevallos, *Defense Lawyers Rail About Unfair Prosecutions. Flynn's Case Shows Why.*, NBC NEWS (May 9, 2020, 4:09 PM), <https://www.nbcnews.com/politics/justice-department/defense-lawyers-rail-about-unfair-prosecutions-flynn-s-case-shows-n1203781>; Eric Tucker & Michael Balsamo, *Flynn Dismissal a Surprise? AG Barr in Sync with Trump*, ASSOCIATED PRESS (May 9, 2020), <https://apnews.com/ae1ad252bb13490db2ceffc5d17b6d92>; Aruna Viswanatha & Sadie Gurman, *Justice Department to Drop Case Against Michael Flynn*, WALL ST. J. (May 7, 2020, 10:38 PM), <https://www.wsj.com/articles/justice-department-to-drop-case-against-mike-flynn-11588878267>.

7. Hains, *supra* note 6; Polantz, *supra* note 6; Cevallos, *supra* note 6; Tucker & Balsamo, *supra* note 6; Viswanatha & Gurman, *supra* note 6.

8. Hains, *supra* note 6; Polantz, *supra* note 6; Cevallos, *supra* note 6; Tucker & Balsamo, *supra* note 6; Viswanatha & Gurman, *supra* note 6.

9. Hains, *supra* note 6; Polantz, *supra* note 6; Cevallos, *supra* note 6; Tucker & Balsamo, *supra* note 6; Viswanatha & Gurman, *supra* note 6; *see also* Andone et al., *supra* note 4; Miller & Hauck, *supra* note 4; Schindler & Kless, *supra* note 4; Wootson & Itkowitz, *supra* note 4; Lennard, *supra* note 4; Shah, *supra* note 4; Booker, *supra* note 4; Stimson, *supra* note 4.

operations based on somewhat arbitrary classifications of essential versus nonessential businesses, many questioned the roles of prosecutors and members of law enforcement, accusing them of using the crisis to seize power.¹⁰ This discussion of prosecutors seizing more and more power has been in the background of legal thought in the United States for at least the past several decades.¹¹

The additional national attention given to prosecutorial misconduct during the COVID-19 pandemic offers us an opportunity to reexamine the issue and suggest future empirical studies once the data concerning illegal prosecutions during the pandemic becomes available.¹² Specifically, we can use an unprecedented shock that leads to wrongful arrests *and* wrongful prosecutions. Then, we can track the civil recoveries obtained from the former as a proxy for the damages the prosecutors caused in the latter. An approach like this could help quantify the harm wrongful prosecutions cause and help answer an empirical question of whether malicious prosecution draws too little or too much attention from the public and politicians.

Moreover, this Article will also highlight the problems with current prosecutorial oversight in general, demonstrating that legal rules granting prosecutors immunity for their prosecutorial acts encourage misconduct and should be abandoned to prevent the misconduct highlighted in the COVID-19 response from occurring again in any context. Legal scholars often point the finger at prosecutors for congested prisons and racially disproportionate justice.¹³ Activists fault prosecutors for protecting violent law enforcement officers.¹⁴ The issue of prosecutors protecting violent law enforcement officers was a major issue in the case of Ahmaud Arbery, where prosecutors (at best) dragged their feet or (at worst) showed their will to look the other way when a former investigator with the office took part in the brutal slaying of a

10. See Schaefer, *supra* note 3; Johnson & Wolf, *supra* note 3; Gearty, *supra* note 3; Murdock, *supra* note 3; Brown, *supra* note 3; Li, *supra* note 3; Page, *supra* note 3; Knight, *supra* note 3; Coolidge, *supra* note 3; Mastrangelo, *supra* note 3; Morefield, *supra* note 3.

11. Comment, Briggs v. Goodwin: *Calling for Reappraisal of Prosecutorial Immunity from Constitutional Torts*, 19 WM. & MARY L. REV. 375, 385-86, 391-93 (1977) [hereinafter Briggs v. Goodwin].

12. See Schaefer, *supra* note 3; Johnson & Wolf, *supra* note 3; Gearty, *supra* note 3; Murdock, *supra* note 3; Brown, *supra* note 3; Li, *supra* note 3; Page, *supra* note 3; Knight, *supra* note 3; Coolidge, *supra* note 3; Mastrangelo, *supra* note 3; Morefield, *supra* note 3.

13. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION - AND HOW TO ACHIEVE REAL REFORM 5-7 (2017); *Racial Disparity*, SENT'G PROJECT, <https://www.sentencingproject.org/issues/racial-disparity> (last visited Feb. 8, 2021).

14. Taylor Pendergrass, *How Bad Prosecutors Cause Bad Policing*, SLATE (Aug. 16, 2016, 2:09 PM), <https://slate.com/news-and-politics/2016/08/how-bad-prosecutors-cause-bad-policing.html>.

young Black jogger under the likely false pretense of a citizen's arrest.¹⁵ On the other hand, prosecutors sometimes engage in overzealous prosecution of socially or politically unpopular defendants. This was apparently the case with General Michael Flynn.¹⁶ Less politicized problems may include procedural steps such as denying defense counsel access to discovery despite legal provisions to the contrary, making the defense of a potentially innocent defendant all the more difficult.

At least one federal appellate judge has stated that prosecutors often do not fully comply with their requirement to disclose exculpatory evidence in their possession to the defense.¹⁷ Many former prosecutors grow critical of the profession,¹⁸ though there are members of the profession who still remain faithful to their oaths.¹⁹ So far, despite all of the complaints, there is no reasonable recourse provided to those individuals targeted by unscrupulous prosecutors. A large, seemingly insurmountable barrier stands in the way of holding prosecutors responsible: the concept of absolute prosecutorial immunity.²⁰ This court-imposed doctrine holds that no matter how egregious his or her judicial acts are, the prosecutor can face no liability for them.²¹ Many scholars have addressed potential problems with absolute prosecutorial immunity.²² The wisdom of granting prosecutors full protections from suit when some have abused the privilege seems contrary to a common law concept dating back to the Magna Carta: that no one is above the law.²³ Yet, despite scholarly support for removing this bar to recovery,²⁴ the totality of the arguments remains incomplete.

15. See Andone et al., *supra* note 4; Miller & Hauck, *supra* note 4; Schindler & Kless, *supra* note 4; Wootson & Itkowitz, *supra* note 4; Lennard, *supra* note 4; Shah, *supra* note 4; Booker, *supra* note 4; Stimson, *supra* note 4.

16. Hains, *supra* note 6; Polantz, *supra* note 6; Cevallos, *supra* note 6; Tucker & Balsamo, *supra* note 6; Viswanatha & Gurman, *supra* note 6.

17. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxii-xxvi (2015).

18. Sklansky, *supra* note 2, at 452-53.

19. To fault all prosecutors is a mistake. Rather, we should endeavor sorting out the wheat from the chaff, holding those who engage in prosecutorial misconduct responsible while applauding those who resist the urge to abuse their power.

20. See Briggs v. Goodwin, *supra* note 11, at 376; Mark Niles, *A New Balance of Evils: Prosecutorial Misconduct, Iqbal, and the End of Absolute Immunity*, 13 STAN. J. C.R. & C.L. 137, 167 (2017); Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 516-20 (2011).

21. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

22. See Briggs v. Goodwin, *supra* note 11, at 391-92; Niles, *supra* note 20, at 169-72; Johns, *supra* note 20, at 516-21.

23. *Magna Carta: Muse and Mentor*, LIBR. CONG., <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/executive-power.html> (last visited Feb. 8, 2021).

24. See Briggs v. Goodwin, *supra* note 11; Niles, *supra* note 20, at 169-72; Johns, *supra* note 20, at 516-21.

It appears that advocates against absolute immunity leave unaddressed whether this policy can withstand equal protection scrutiny.²⁵ This question should flow naturally from the nature of prosecutorial immunity since this judicially-created rule treats individuals maliciously prosecuted by a prosecutor differently than those maliciously prosecuted by anyone else.²⁶ By doing so, the rule protects one class of people by allowing them civil remedies while denying another class the same protection.²⁷ In many instances, the application of this rule does so as a result of no action by the victim: since a malicious prosecution or a civil rights violation by governing authorities arises from no misconduct by the accused, he or she cannot truly control whether the perpetrator of the malicious action is a prosecutor or someone else.

Some might argue that prosecutorial immunity, having been created by the courts, should inherently withstand an equal protection challenge. After all, if allowing prosecutors to invoke absolute immunity implied an equal protection violation, then courts would not have permitted it. However, courts have an evolving standard with respect to equal protection itself, and as recent cases have demonstrated, that which passed constitutional muster in the 1970s no longer satisfies equal protection principles.²⁸ Curiously, it was in the 1970s that the United States Supreme Court recognized the absolute immunity doctrine as applied to prosecutors.²⁹ Given the passage of time and the lessons it brings, perhaps judges and justices across the United States should consider giving the absolute immunity doctrine a second, more skeptical look.

Part II of this Article will outline the concepts and application of prosecutorial immunity.³⁰ Part III will note some particularly egregious prosecutorial violations that absolute immunity has shielded from prosecution, and Part IV will discuss the implications of such

25. See, e.g., Bidish Sarma, *Private: After 40 Years, Is It Time to Reconsider Absolute Immunity for Prosecutors?*, AM. CONST. SOC'Y (July 19, 2016), <https://www.acslaw.org/expertforum/after-40-years-is-it-time-to-reconsider-absolute-immunity-for-prosecutors>.

26. See *Malicious Prosecution - Other Considerations*, LAW LIBR.: AM. L. & LEGAL INFO., <https://law.jrank.org/pages/8405/Malicious-Prosecution-Other-Considerations.html> (last visited Feb. 8, 2021).

27. See *id.*

28. See, e.g., *Baker v. Nelson*, 409 U.S. 810, 810 (1972) (finding no constitutional question in a challenge to a state prohibition of same-sex marriage); *United States v. Windsor*, 570 U.S. 744, 775 (2013) (striking down a federal definition of marriage which excluded same-sex couples on constitutional grounds); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (explicitly reversing *Baker*).

29. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

30. See *infra* Part II.

prosecutorial misconduct.³¹ In Part V, this Article will demonstrate that allowing victims of malicious prosecution to recover should be mandated under the equal protection principles outlined in the U.S. Constitution.³² This Article concludes that permitting recovery against prosecutors under qualified rather than absolute immunity would properly expand the rights of victims and may help remedy the problem altogether.³³ Hence, the current absolute immunity doctrine should be set aside both as a result of constitutional mandate and as a matter of sound policy.

II. PROSECUTORIAL IMMUNITY

When government officers are sued in an individual capacity for monetary damages, they generally have either absolute or qualified immunity.³⁴ The United States Supreme Court has stated that qualified immunity is the default, and absolute immunity is the exception.³⁵ The immunity this Article targets is the one extended to prosecutors performing their prosecutorial duties. However, before explaining why this immunity should be abolished under equal protection principles, this Article should note the reason for its adoption in the first place.

A. Overview of Absolute Immunity

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.³⁶ For instance, if a prosecutor deliberately withholds significant exculpatory evidence in violation of the U.S. Constitution and the American Bar Association ("ABA") Model Rules, causing an innocent person to spend decades in prison, the prosecutor remains immune from civil liability regardless of the defendant's future exoneration.³⁷ The United States

31. See *infra* Part III; Part IV.

32. See *infra* Part V.

33. See *infra* Part V.

34. Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 *TOURO L. REV.* 473, 473 (2014).

35. *Id.* (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 810-11 (1982)).

36. *Prosecutorial Immunity*, FEDERALIST SOC'Y (Jan. 4, 2018, 2:00 PM), <https://fedsoc.org/events/prosecutorial-immunity>; *Briggs v. Goodwin*, *supra* note 11, at 386; Niles, *supra* note 20, at 147; Johns, *supra* note 20, at 521 ("When acting as advocates, prosecutors receive absolute immunity even when they have acted intentionally and maliciously."); Kate McClelland, Comment, "Somebody Help Me Understand This": *The Supreme Court's Interpretation of Prosecutorial Immunity and Liability Under § 1983*, 102 *J. CRIM. L. & CRIMINOLOGY* 1323, 1331 (2012).

37. *Prosecutorial Immunity*, *supra* note 36.

Supreme Court has approved absolute immunity in five contexts: for prosecutors performing prosecutorial acts (but not investigative or administrative tasks),³⁸ judges performing judicial tasks (but not administrative tasks),³⁹ legislators performing legislative tasks,⁴⁰ police officers who testify as witnesses (covering their testimony but not the actual investigation of the defendant),⁴¹ and the President of the United States for certain acts while in office.⁴²

Despite the serious consequences that can result from a prosecutor's misconduct, prosecutors are largely shielded from any liability that may result from their actions due to the 1976 United States Supreme Court ruling in *Imbler v. Pachtman*⁴³ granting them absolute immunity. Some scholars argue that this grant of immunity resulted in an era of mass incarceration and "eroded one of the few mechanisms available to hold prosecutors accountable."⁴⁴ In *Imbler*, a prosecutor knowingly used false testimony, causing an innocent person to be convicted and sentenced to nine years in prison.⁴⁵ The individual sued the prosecutor for monetary damages upon release, but the Court held that prosecutors are generally entitled to absolute immunity from any civil liability under the federal civil rights statute, 42 U.S.C. § 1983, for any actions taken in their role as prosecutors that may have violated a criminal defendant's constitutional rights.⁴⁶

Equally unsettling is the United States Supreme Court's ruling in *Burns v. Reed*.⁴⁷ In this case, a woman awoke one night to learn her two sons had been shot.⁴⁸ The police had no suspects so they instead focused on the mother, Cathy Burns.⁴⁹ After the shooting, Burns discovered a note in the bathroom, written in lipstick, which stated, "I took what you

38. *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976).

39. *Forrester v. White*, 484 U.S. 219, 220-21 (1988).

40. *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998).

41. *Briscoe v. LaHue*, 460 U.S. 325, 345-46 (1983).

42. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

43. 424 U.S. at 427-29; see also Matt Ferner, *Prosecutors Are Almost Never Disciplined for Misconduct*, HUFFPOST (Feb. 11, 2016, 4:16 PM), https://www.huffpost.com/entry/prosecutor-misconduct-justice_n_56bce00fe4b0c3c55050748a ("Prosecutors are rarely punished for misconduct, and the cases that have led to disbarment or even criminal charges are few and far between. When prosecutors do face severe consequences for breaking the law, it's when their behavior is deemed to be deliberate and seemingly indefensible. At the same time, their punishment may not be proportional to the damage they have inflicted upon innocent people, which illustrates the considerable latitude the legal process affords to prosecutors.").

44. Sarma, *supra* note 25.

45. *Imbler*, 424 U.S. at 414-16; Chemerinsky, *supra* note 34, at 477.

46. *Imbler*, 424 U.S. at 415-16.

47. 500 U.S. 478 (1991).

48. *Id.* at 481.

49. *Id.* at 481-82.

loved most.”⁵⁰ A left-handed person likely wrote the note, but Burns was right-handed.⁵¹ Burns also passed a lie detector test and a voice stress test.⁵² An officer believed that Burns had multiple personality disorder and that one of her alternative personalities committed the crime.⁵³ The officer called Rick Reed, the local prosecutor, to obtain permission to hypnotize Burns to determine whether she suffered from multiple personality disorder.⁵⁴ The police officer hired a friend who had just completed a course in hypnosis (and was a grocery store clerk at the time) to perform the analysis, and while under hypnosis, Burns referred to herself by another name in the third person.⁵⁵ Based on this disclosure, the officer concluded Burns suffered from multiple personality disorder and obtained a warrant for her arrest.⁵⁶ The prosecutor failed to disclose to the judge that hypnosis was used in the case, and as a result, Burns lost her job and custody of her child.⁵⁷ She was ultimately exonerated, as there was no evidence connecting her to the crimes, and she sued the prosecutor.⁵⁸ However, the United States Supreme Court once again held the prosecutor had absolute immunity for his prosecutorial act of requesting the arrest warrant and prosecuting the case in court.⁵⁹

These cases make one thing clear: a defendant wrongfully accused by a prosecutor cannot find relief in the form of civil monetary damages.⁶⁰ Under absolute prosecutorial immunity, it is theoretically possible for a prosecutor to draft an information or indictment charging an individual with capital murder, without any evidence or even an arrest, and avoid having to pay damages. The prosecutor would likely suffer severe scrutiny at the hand of his or her supervisors and perhaps even lose his or her license to practice law. However, to the individual charged with a serious crime completely out of the blue without any connection thereto, recovery would be unavailable. The existence of this theoretical possibility alone should be argument enough against an

50. *Burns v. Reed*, 894 F.2d 949, 950 (7th Cir. 1990).

51. *See Burns*, 500 U.S. at 482; Chemerinsky, *supra* note 34, at 478.

52. *Burns*, 500 U.S. at 481-82.

53. *Id.* at 482.

54. *Id.*

55. *Burns*, 894 F.2d at 951; *Burns*, 500 U.S. at 482.

56. *Burns*, 500 U.S. at 482.

57. *Id.* at 482-83, 482 n.1.

58. *Id.* at 483.

59. *Id.* at 487.

60. *See Imbler v. Pachtman*, 424 U.S. 409, 424-29 (1976) (describing how absolute immunity leaves the wronged criminal defendant without civil redress).

absolute bar to recovery. Making the privilege less absolute might be a possible remedy.

B. Overview of Qualified Immunity

Qualified immunity is a doctrine related to absolute immunity that protects government officials from liability, but only if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁶¹ Simply, qualified immunity protects government officials who follow the rules, whereas absolute immunity protects government officials from liability even when they break the rules.⁶² Qualified immunity only applies to lawsuits against government officials as individuals, not lawsuits against the government for damages caused by the officials’ actions.⁶³ Although qualified immunity often appears in cases involving police officers, it also applies to most other executive branch officials.⁶⁴ This Article will argue that this level of immunity is more appropriate for prosecutors.

III. PROSECUTORS

While most people are at least vaguely aware of the job the average prosecutor might do, many would be surprised to learn just how little recourse there is to being falsely accused by one of these public servants.⁶⁵ One might suspect that a prosecutor falsely accusing a citizen of a felony would be punished harshly (if not civilly, then at least ethically), given the harm that this would do to the citizen.⁶⁶ The reality proves murkier, since intentional violations are difficult to prove, and most monitoring bodies are unlikely to be particularly interested in doing the work to prove them.⁶⁷ After all, pursuing a prosecutor on behalf of the accused (who may or may not have several prior convictions) probably ranks low on the priority lists of most ethics monitors.⁶⁸ For

61. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

62. Sarma, *supra* note 25.

63. *Qualified Immunity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/qualified_immunity (last visited Feb. 8, 2021).

64. *Id.*

65. *Imbler*, 424 U.S. at 427 (stating that “this [absolute] immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty”).

66. GTCAdmin, *The Impact of a Felony Conviction*, HALSCOTT MEGARO (May 8, 2018), <https://www.appealslawgroup.com/the-impact-of-a-felony-conviction>.

67. Emma Zack, *Why Holding Prosecutors Accountable Is So Difficult*, INNOCENCE PROJECT (Apr. 23, 2020), <https://www.innocenceproject.org/why-holding-prosecutors-accountable-is-so-difficult>.

68. *Id.*

this reason, this Article will underscore just how many duties a prosecutor engages in as part of his or her profession to demonstrate just how many opportunities he or she has to inconvenience the average citizen, all while receiving absolute immunity due to the judicial nature of these acts.

A. Introduction

Prosecutors in the United States are the attorneys who charge defendants with crimes—the intermediaries between the police and the judiciary.⁶⁹ Prosecutors determine which offenses should be charged and against whom, and they present the cases in court.⁷⁰ In a criminal case brought pursuant to state law—the significant majority of criminal cases in the United States—the prosecutor generally works for a county-level office, run by an elected official commonly known as a district attorney or state attorney.⁷¹ Federal prosecutors typically work in an office overseen by a United States Attorney, who is appointed by the President.⁷²

Working as a prosecutor has long been a gateway to other prestigious jobs, such as judgeships, other elected offices, and senior positions in law firms.⁷³ Research suggests, perhaps not surprisingly, that the majority of prosecutors are primarily motivated by career considerations, which have often been thought to drive prosecutors to engage in unethical behavior.⁷⁴ When prosecutors obtain convictions, they are subject to several powerful incentives, including favorable media coverage, career promotions, appointment to judgeships, and the ability to run for political office.⁷⁵ A study demonstrated that obtaining longer sentences helps prosecutors secure other prestigious jobs when they leave their prosecutorial office.⁷⁶ Prosecutors are also sometimes motivated by “prosecutorial passion”—a desire to pursue justice,

69. Sklansky, *supra* note 2, at 452.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 453.

74. *Id.*; Michael Tonry, *Prosecutors and Politics: A Comparative Perspective*, 41 CRIME & JUST. 1, 27-28 (2012).

75. *An Epidemic of Prosecutor Misconduct*, CTR. FOR PROSECUTOR INTEGRITY, <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf> (last visited Feb. 8, 2021); Sklansky, *supra* note 2, at 453.

76. Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379, 385 (2005); Sklansky, *supra* note 2, at 453.

“framed by prosecutors’ self-image ‘as warriors in a fight between the good and the guilty.’”⁷⁷

B. Power

Prosecutors in the United States are more than just representatives of the state: top prosecutors in every county “typically have to run for the office, making them elected officials as well.”⁷⁸ Few nations elect their prosecutors, and few give them as much power as they wield in the United States.⁷⁹ American prosecutors have extremely broad discretion over how and when to prosecute their cases, meaning they often single-handedly control defendants’ fates, and “prosecutors are increasingly blamed for the problems that plague U.S. criminal justice—its excessive severity, its lopsided targeting of racial minorities, and its propensity for error.”⁸⁰

Part of the issue is, according to Stanford Law School Professor David Alan Sklansky, because “the checks on [prosecutor’s] actions are relatively weak.”⁸¹ Prosecutors are commonly described as the “most powerful figures in the criminal justice system,” and there are more than 2,300 prosecutors across the nation.⁸² Prosecutors have “complete and unrivaled access to evidence that can determine a person’s guilt or innocence.”⁸³ Former United States Attorney General Robert Jackson explained the prosecutor’s essentially unrestrained power as follows:

[A prosecutor] can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. . . . The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may then dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get

77. Sklansky, *supra* note 2, at 453 (quoting Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 187-88 (2007)).

78. Jessica Brown, *If It Pleases the Prosecution*, KNOWABLE MAG., May 22, 2019, <https://knowablemagazine.org/article/society/2019/if-it-pleases-prosecution>.

79. *Id.*

80. *Id.*

81. Sklansky, *supra* note 2, at 459.

82. Sklansky, *supra* note 2, at 453; Ferner, *supra* note 43.

83. Ferner, *supra* note 43.

probation or a suspended sentence, and after [the individual] is put away, as to whether [the individual] is a fit subject for parole.⁸⁴

Prosecutorial power has continued to increase since Jackson's speech in the 1940s.⁸⁵ The majority of criminal cases are resolved by plea bargains rather than trials, and the number of criminal charges imposing mandatory prison terms has increased.⁸⁶ Prosecutors also exercise immense power over criminal justice policies and strategies.⁸⁷ They often lobby for or against criminal justice legislation, exercising significant influence on the passage of laws they would later enforce.⁸⁸ When asked about why prosecutors do not use their powers more fairly, Professor Sklansky stated that "too often, convictions and long sentences get celebrated [by prosecutors], even if they are undeserved."⁸⁹ He elaborated further on how and why prosecutors abuse their power:

Prosecutors have vastly more investigative resources at their disposal than defense attorneys, so they often have more access to information and evidence. Prosecutors are required to share evidence with the defense only if it could help the defendant in [a] significant way. But because they're so motivated to win, it can be very hard for prosecutors to objectively decide whether the evidence they've uncovered is worth sharing. They have an incentive to convince themselves it isn't.⁹⁰

C. Discretion

Prosecutorial power and discretion are closely related, albeit they contain important differences. Power is defined as the ability to do something, such as impose consequences on an individual or influence an individual's actions.⁹¹ Discretion is defined as the freedom to decide whether to impose such consequences or influence an individual's actions.⁹² American prosecutors have extremely broad discretion regarding how and when to exercise their prosecutorial authority, which

84. Jackson, *supra* note 1, at 3.

85. See Sklansky, *supra* note 2, at 453-54.

86. See *id.*; see also Paige A. Nutini, *What Practitioners Should Know About Navigating the Prosecutor's "Trial Tax,"* A.B.A. (Apr. 25, 2019), <https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2019/operation-varsity-blues-plea-deals-trial-tax>.

87. See Sklansky, *supra* note 2, at 454.

88. *Id.*

89. Brown, *supra* note 78.

90. *Id.*

91. Sklansky, *supra* note 2, at 456.

92. See *id.*

strengthens their prosecutorial power.⁹³ This discretion extends to deciding which criminal cases to pursue, which crimes to charge in each case, and which charges to bargain away in exchange for a guilty plea.⁹⁴ Criminal statutes essentially function as “a menu from which the prosecutor may order as she wishes.”⁹⁵ Because potential penalties under many criminal statutes are severe, prosecutors’ “discretion to invoke these statutes or to take them off the table gives [them] great bargaining leverage, increasing [the prosecutor’s] power.”⁹⁶ Even charges that carry with them mandatory minimums for conviction may be circumvented by prosecutors as part of a guilty plea by simply waiving the mandatory minimum. Even if this might be contrary to the intent of the criminal statute, there is usually no one to raise the objection: the defendant, who is avoiding serving the mandatory minimum sentence, will certainly remain silent. Sklansky explains:

Prosecutors have no legal obligation to file charges that they believe are proportionate to the defendant’s culpability, nor is there any legal limit on the “discounts” prosecutors can offer in exchange for a defendant’s guilty plea—or, viewed another way, the penalty prosecutors can impose for a defendant’s insistence on going to trial.⁹⁷

The practice of imposing a greater sentence upon conviction after a trial is often referred to as the “trial tax.”⁹⁸

Prosecutors’ immense discretion has been deemed problematic because of the power it places in the hands of a single individual who can rarely be held accountable for negligent mistakes or outright willful malice.⁹⁹ This discretion increases prosecutorial power, which is already excessive.¹⁰⁰ Such discretion also undermines the predictability of criminal sanctions, resulting in arbitrary decision-making.¹⁰¹ Prosecutorial discretion further causes racial bias and other forms of discrimination, since even well-meaning prosecutors may suffer from some forms of unconscious bias.¹⁰² Evidence exists that part of the racial disparity in the criminal justice system arises from the ability to exercise prosecutorial discretion.¹⁰³

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Nutini, *supra* note 86.

99. Sklansky, *supra* note 2, at 456.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

D. *Misconduct*

There are many examples of prosecutorial misconduct, which are sufficiently numerous to avoid listing here.¹⁰⁴ However, this Article should include at least a few examples to demonstrate these are not merely harmless errors. In one unfortunate case, a man stood accused of stealing a laptop, but the prosecutor had a secret DNA report proving that a different man was responsible.¹⁰⁵ Regardless, the prosecutor withheld the report from the defense while the defendant received a wrongful conviction and served one year in jail.¹⁰⁶ We are aware of no way in which the prosecutor's office has compensated the defendant for the loss of liberty (which essentially resulted in false imprisonment), his lost wages, his mental and physical anguish, and the reputational harm. Clever plaintiff's lawyers could probably add other damages to this list.

In another case (with higher stakes), a defendant was convicted of murder, yet prosecutors never mentioned, neither during the proceedings nor during the discovery stage, that someone else confessed to the crime.¹⁰⁷ The confession was eventually discovered, and after nearly fourteen years in prison, the man was released.¹⁰⁸ Likewise, Anthony Graves, a twenty-six-year-old Black man in Texas, was wrongfully convicted of murdering a family of six in 1994.¹⁰⁹ He spent eighteen years of his life in prison, including twelve years on death row.¹¹⁰ Eventually, the real murderer, Robert Carter, confessed that he had acted alone.¹¹¹ Investigations proved that the prosecutor, Charles Sebesta, withheld testimony that would have cleared Graves.¹¹² To our knowledge, this defendant also received no restitution or other compensation from the prosecutors who ruined his life and whose actions resulted in his false imprisonment for years. Under the absolute immunity doctrine, none can be expected.¹¹³

104. *How Common Is Prosecutorial Misconduct?*, INNOCENCE PROJECT (Aug. 3, 2007), <https://www.innocenceproject.org/how-common-is-prosecutorial-misconduct>.

105. Jeff Adachi & Peter Calloway, *One Simple Way to Hold Bad Prosecutors Accountable*, APPEAL (Mar. 21, 2019), <https://theappeal.org/prosecutorial-misconduct-jeff-adachi-commentary>.

106. *See id.*

107. *Id.*

108. *Id.*

109. Brown, *supra* note 78.

110. *Id.*

111. *Id.*

112. *Id.*

113. Briggs v. Goodwin, *supra* note 11, at 386; Niles, *supra* note 20, at 168; Johns, *supra* note 20, at 534; McClelland, *supra* note 36, at 1343; Chemerinsky, *supra* note 34, at 494; Imbler v. Pachtman, 424 U.S. 409, 431 (1976).

1. Prosecutorial Overreach During the COVID-19 Pandemic

Unfortunately, the above cases are not outliers.¹¹⁴ Rather, they are part of a serious epidemic of prosecutorial misconduct that plagues American courts, seriously undermining the rights of persons accused of crimes and increasing America's epidemic of overcrowding in jails and prisons.¹¹⁵ Recently, the United States has been struck by another epidemic: COVID-19. This exogenous shock actually provides an interesting opportunity to study phenomena such as prosecutorial misconduct due to the expansion of laws permitting the prosecution of mostly harmless acts across the United States and the differences among these laws across the country.¹¹⁶ While we will not be able to gather this data as of the writing of this Article, we are confident that data will emerge of prosecutors (and law enforcement) acting well outside of their authority given the risks of the virus.¹¹⁷ However, as this Article will make clear, only the law enforcement officers can be sued for such misconduct.¹¹⁸ If prosecutors follow through with charges after a wrongful arrest by law enforcement, it may imply similar or greater misconduct by prosecutors than their compatriots in law enforcement.

Some of this prosecutorial misconduct has already become apparent in certain places across the United States.¹¹⁹ With governors issuing stay-at-home orders to curb the spread of COVID-19, prosecutors found at their disposal both popular support and the apparent legal authority to hold people responsible for conduct that used to be quite legal: simply going outside the home and enjoying a walk in the park.¹²⁰ Ordinarily, restrictions limiting citizens' access to streets, public parks, roads, and

114. Adachi & Calloway, *supra* note 105.

115. *Id.*

116. See Schaefer, *supra* note 3; Johnson & Wolf, *supra* note 3; Gearty, *supra* note 3; Murdock, *supra* note 3; Brown, *supra* note 3; Li, *supra* note 3; Page, *supra* note 3; Knight, *supra* note 3; Coolidge, *supra* note 3; Mastrangelo, *supra* note 3; Morefield, *supra* note 3.

117. Page, *supra* note 3; Knight, *supra* note 3; Coolidge, *supra* note 3; Mastrangelo, *supra* note 3; Morefield, *supra* note 3.

118. Frederic Block, *Let's Put an End to Prosecutorial Immunity*, MARSHALL PROJECT (Mar. 13, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity>.

119. One example comes by way of an Ohio prosecutor who claimed that citizens breaking quarantine for relatively innocent activities such as gathering in a group with friends would be charged with felonious assault, raising the concern that the prosecutor's office at issue may encourage unconstitutional charging decisions by other prosecutors in other situations. Page, *supra* note 3; Knight, *supra* note 3; Coolidge, *supra* note 3; Mastrangelo, *supra* note 3; Morefield, *supra* note 3.

120. See, e.g., Herb Scribner, *Idaho Mother Arrested After She Refused to Leave a Playground Area Closed Because of Coronavirus*, DESERET NEWS (Apr. 23, 2020, 8:15 AM), <https://www.deseret.com/u-s-world/2020/4/23/21231395/idaho-sara-brady-playground-coronavirus-covid-19-pandemic-ban>.

other similar locations would be considered draconian and almost unquestionably unconstitutional.¹²¹ Nevertheless, following federal recommendations from the Trump Administration, along with several scholarly sources within the United States and abroad, many states have issued these regulations to slow the rate of a deadly disease spreading across America, enforcing them quite stringently in some cases.¹²²

a. Empirical Research Opportunities

The natural question, of course, is whether these restrictions are justified by rational, important, or compelling government purposes that would allow the government to limit constitutional rights.¹²³ It is in this balancing where many actions of law enforcement that result in detentions, arrests, and/or charges may be questioned as civil rights violations under the Civil Rights Act and perhaps various state statutes and common law principles.¹²⁴ Yet, the subsequent prosecutions that take place based on these arrests, no matter how misguided, will yield no liability for prosecutors.¹²⁵ Thus, empiricists might be able to calculate the cost of absolute immunity of prosecutors to those individuals who recover from police officer misconduct under the Civil Rights Act (and perhaps others) but who cannot recover from the prosecutor for similar or identical misconduct in proceedings with unjustified charges.

Let us assume that the misconduct of a prosecutor who refused to dismiss charges against a defendant that later recovered against the arresting officer is similar to the misconduct of the police officer. For example, the law enforcement officer makes a legal determination of whether the action(s) he or she observes is a crime for which the U.S. Constitution would permit an arrest.¹²⁶ The same example could encompass a police officer receiving a report of a crime. Similarly, a prosecutor must determine whether he or she can proceed with charges against the defendant on the basis of the probable cause submitted to the

121. *The Public Forum*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-onan/amendment-1/the-public-forum> (last visited Feb. 8, 2021).

122. See Schaefer, *supra* note 3; Johnson & Wolf, *supra* note 3; Gearty, *supra* note 3; Murdock, *supra* note 3; Brown, *supra* note 3; Li, *supra* note 3; Page, *supra* note 3; Knight, *supra* note 3; Coolidge, *supra* note 3; Mastrangelo, *supra* note 3; Morefield, *supra* note 3.

123. Mariam Morshedi, *Levels of Scrutiny*, SUBSCRIPT L. (Mar. 6, 2018), <https://subscriptlaw.com/levels-of-scrutiny>.

124. 42 U.S.C. § 1983; *Police Misconduct and Civil Rights*, FINDLAW (July 20, 2017), <https://civilrights.findlaw.com/civil-rights-overview/police-misconduct-and-civil-rights.html>.

125. *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

126. GEOFFREY P. ALPERT ET AL., NAT'L CRIM. JUST. REFERENCE SERV., POLICE OFFICERS' DECISION MAKING AND DISCRETION: FORMING SUSPICION AND MAKING A STOP (2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/213004.pdf>.

prosecutor (and to the court) by the law enforcement officer.¹²⁷ Roughly speaking, if a police officer and a prosecutor both proceed on a case where the U.S. Constitution would exonerate the defendant, they both make an identical error. The difference is, though, that the law enforcement officer can be held liable in civil proceedings for making an illegal arrest under an unconstitutional statute while the prosecutor, ordinarily, cannot.¹²⁸

We can then look to the wrongful acts of law enforcement that resulted in subsequent prosecution as a situation where, but for absolute immunity, the prosecutor would have been held liable as well.¹²⁹ While this will yield only a rough estimation, we can then sum the verdict amounts against misbehaving officers and estimate that victims failed to recover similar sums from prosecutors and thus could not be made whole. In the alternative, we might conclude that the prosecutor would have been jointly and severally liable for the amount, at least shifting the burden of making a legal miscalculation from the law enforcement officer (and the officer's department) to the prosecutor (and the prosecutor's office). These calculations may help policymakers see the true costs of allowing absolute immunity for prosecutors. However, because the data will only become available after lawsuits are filed and resolved, with filing dates delayed for as much as two years if not more (especially assuming the leeway the statutes of limitations provide), this cannot yet be accomplished.

b. Notorious COVID-19 Prosecutions

Unfortunately, we need not simply imagine potential prosecutorial misconduct during the COVID-19 pandemic.¹³⁰ An Ohio prosecutor, for example, remarked that congregating in a group outside, despite Ohio's shelter-in-place COVID-19 order, constituted felonious assault and therefore justified the arrest and prosecution of all individuals that do so for second-degree felony.¹³¹ This statement was made in a time when individuals were being released from incarceration due to the virus,

127. *Anatomy of a Criminal Case*, CNTY. SANTA CLARA OFF. DIST. ATT'Y (Aug. 16, 2018 12:08 PM), <https://www.sccgov.org/sites/da/prosecution/anatomyofcriminalcase>.

128. *Briscoe v. LaHue*, 460 U.S. 325, 334-35 (1983); *Imbler*, 424 U.S. at 427.

129. To uphold these assumptions, the researcher would eliminate cases where prosecution occurred due to error only attributable to the law enforcement officer, such as perjury under oath without the knowledge of the prosecutor.

130. Schaefer, *supra* note 3; Johnson & Wolf, *supra* note 3; Gearty, *supra* note 3; Murdock, *supra* note 3; Brown, *supra* note 3; Li, *supra* note 3; Page, *supra* note 3; Knight, *supra* note 3; Coolidge, *supra* note 3; Mastrangelo, *supra* note 3; Morefield, *supra* note 3.

131. Page, *supra* note 3; Knight, *supra* note 3; Coolidge, *supra* note 3; Mastrangelo, *supra* note 3; Morefield, *supra* note 3.

despite past acts that were significantly more repugnant to public order.¹³² What made the statement particularly remarkable is that the prosecutor likened gathering in a group to an action threatening the lives of his children, suggesting that he would ensure the offenders be arrested and receive no bond.¹³³

Felonious assault, as defined in Ohio statutes, can be applied to diseases (usually sexually transmitted diseases), but a look at the statute reveals the difficulties of succeeding on a felonious assault charge for violating the shelter-in-place order.¹³⁴ First, the prosecution would have to demonstrate that the individuals gathering outside of their homes for non-approved reasons under the quarantine order *actually had* the virus and *were contagious* at the time that they set foot outside.¹³⁵ After all, how can someone be charged with infecting others with a virus that the defendant has no way of spreading?

The statute also requires knowledge on the part of the quarantine violator that he or she has the disease.¹³⁶ That is the crux of appellate court precedent concerning the transfer of dangerous diseases such as HIV/AIDS and subsequent prosecution under the felonious assault statute.¹³⁷ Hence, unless the prosecution could establish that the individuals arrested and charged with felonious assault knew they had COVID-19, there would be no probable cause to back the charge.¹³⁸ At a time when tests for COVID-19 were difficult to obtain, and when evidence existed that many could be carriers prior to exhibiting symptoms (or without having any symptoms at any point), charging an individual with a serious felony when the individual was probably uninfected and when, even if the individual was infected, the individual probably did not know it, is almost by definition charging someone without probable cause.¹³⁹

Furthermore, the Ohio felonious assault statute requires that the *defendant* cause serious physical harm to another to be found guilty of

132. Eligon, *supra* note 3; Londoño et al., *supra* note 3; Bella, *supra* note 3; Givas, *supra* note 3; Newman, *supra* note 3; Choe, *supra* note 3; Kendall & Salonga, *supra* note 3; Hoerner, *supra* note 3.

133. Page, *supra* note 3; Knight, *supra* note 3; Coolidge, *supra* note 3; Mastrangelo, *supra* note 3; Morefield, *supra* note 3.

134. OHIO REV. CODE ANN. § 2903.11 (LexisNexis 2020); *see* State v. Davis, No. 2012-Ohio-5756, 2012 WL 6085366, at *5 (Ohio Ct. App. Dec. 7, 2012); *see, e.g.*, State v. Price, 834 N.E.2d 847, 848-49 (Ohio Ct. App. 2005).

135. § 2903.11; *see* Davis, 2012 WL 6085366, at *4-5; *see, e.g.*, Price, 834 N.E. 2d at 848-50.

136. § 2903.11.

137. *Id.*; *see* Davis, 2012 WL 6085366, at *4-5; *see, e.g.*, Price, 834 N.E.2d at 848-49.

138. § 2903.11; *see* Davis, 2012 WL 6085366, at *4-5; *see, e.g.*, Price, 834 N.E.2d at 848-49.

139. Page, *supra* note 3; Knight, *supra* note 3; Coolidge, *supra* note 3; Mastrangelo, *supra* note 3; Morefield, *supra* note 3.

the charge.¹⁴⁰ There are, of course, ample difficulties in proving, beyond a reasonable doubt, which person infected the victim in a potential felonious assault litigation arising out of COVID-19 and whether serious damage resulted from the infection. After all, contact tracing is not an exact science, especially given the prevalence of COVID-19 in the United States and the large amount of community spread exhibited by the virus.¹⁴¹ Various public figures have had contact with infected individuals without contracting the virus, including former President Donald Trump himself (who contracted the virus later via some other form of transmission).¹⁴² Hence, it should be almost impossible to prove to a jury that an individual spread the virus to someone else simply by gathering outside, given the multitude of alternative sources of infection.¹⁴³ In fact, it may be hard to even meet the probable cause bar on this prong of the statute alone, since infection from a person who is outside and not wearing a mask seems at least somewhat unlikely.¹⁴⁴ Rates of transmitting the disease are well below fifty percent, especially in unconfined spaces outdoors.¹⁴⁵ Thus, no matter the victim, it would be

140. § 2903.11.

141. Holly Yan & Scottie Andrew, *You Asked, We're Answering: Your Top Coronavirus Questions*, CNN (Jan. 27, 2021), <https://www.cnn.com/interactive/2020/health/coronavirus-questions-answers>; *Does Coronavirus Spread Outside?*, ROCHESTER REG'L HEALTH (May 29, 2020), <https://hive.rochesterregional.org/2020/05/coronavirus-spread-outside>.

142. Kaitlan Collins & Peter Morris, *One of Trump's Personal Valets Has Tested Positive for Coronavirus*, CNN (May 7, 2020, 6:09 PM), <https://www.cnn.com/2020/05/07/politics/trump-valet-tests-positive-covid-19/index.html>.

143. In fact, it may be hard to even qualify experts to testify about the virus, given the high error rates in prognosis, diagnosis, and treatment approaches. *See generally, e.g.*, Artem M. Joukov, *Who's the Expert? Frye and Daubert in Alabama*, 47 CUMB. L. REV. 275 (2017). It is still unclear whether the nation's leading experts have enough information to draw informed conclusions about the virus that would satisfy the *Frye* or the *Daubert* standard. Page, *supra* note 3; Knight, *supra* note 3.

144. Aylin Woodward, *You're Less Likely to Catch the Coronavirus Outdoors, but the Amount of Time You Spend near Other People Matters Most*, BUS. INSIDER (May 17, 2020, 9:02 AM), <https://www.businessinsider.com/risk-of-coronavirus-transmission-lower-outdoors-evidence-2020-5>; Julie Mazziotta, *The Risk of Getting Coronavirus Outdoors Is Low—If Precautions Are Taken*, PEOPLE (May 18, 2020, 1:27 PM), <https://people.com/health/risk-getting-coronavirus-outdoors-low-with-precautions>; Sigal Samuel, *Why You're Unlikely to Get the Coronavirus from Runners or Cyclists*, VOX (Aug. 13, 2020, 2:30 PM), <https://www.vox.com/future-perfect/2020/4/24/21233226/coronavirus-runners-cyclists-airborne-infectious-dose>; Erin Billups, *Risk of Coronavirus Transmission Is Lower Outdoors, Experts Say*, SPECTRUM BAY NEWS 9 (May 22, 2020, 10:25 AM), <https://www.baynews9.com/fl/tampa/coronavirus/2020/05/21/risk-of-coronavirus-transmission-is-lower-outdoors--experts-say>; Kea Wilson, *Chinese Study Finds Outdoor Activities Safe from COVID*, STREETS BLOG USA (May 15, 2020), <https://usa.streetsblog.org/2020/05/15/chinese-study-finds-outdoor-activities-safe-from-covid>; *Does Coronavirus Spread Outside?*, *supra* note 141; Yan & Andrew, *supra* note 141.

145. Woodward, *supra* note 144; Mazziotta, *supra* note 144; Samuel, *supra* note 144; Billups, *supra* note 144; Wilson, *supra* note 144; *Does Coronavirus Spread Outside?*, *supra* note 141; Yan & Andrew, *supra* note 141.

more probable that the defendant *did not* spread the virus to him or her than the opposite.¹⁴⁶ It would be more probable that the victim contracted the illness elsewhere, especially given the multitude of ways COVID-19 could be transmitted and the large number of individuals that possessed antibodies for the virus without any notable symptoms (suggesting that the virus spread to millions of citizens across the United States without being traceable to a particular source).¹⁴⁷

Even if a prosecutor could establish the probable transmission of the virus, it seems clear that the prosecutor would have difficulty meeting the requirement of “serious physical harm to another or to another’s unborn” in most instances.¹⁴⁸ COVID-19, while clearly extremely serious in some cases, is overwhelmingly not serious in many others.¹⁴⁹ In the United States, few cases result in death or even hospitalization compared to the number of people infected.¹⁵⁰ Antibody tests, which became available several months after the pandemic began, showed that a large percentage of the United States population had the virus without feeling particularly ill or visiting a doctor.¹⁵¹ These tests confirmed that the number of reported cases understated the number of actual infections by orders of magnitude, lowering the calculated death rate and also suggesting that a larger portion of the population than previously thought had already developed antibodies for the illness and may not be susceptible to infection from quarantine violators.¹⁵² These facts would suggest that the odds of COVID-19 passing from quarantine violators and doing serious physical harm were low.¹⁵³

Given all of the evidence that COVID-19 may be less harmful than previously thought, as well as significant scientific disagreement about

146. Woodward, *supra* note 144; Mazziotta, *supra* note 144; Samuel, *supra* note 144; Billups, *supra* note 144; Wilson, *supra* note 144; *Does Coronavirus Spread Outside?*, *supra* note 141; Yan & Andrew, *supra* note 141.

147. Woodward, *supra* note 144; Mazziotta, *supra* note 144; Samuel, *supra* note 144; Billups, *supra* note 144; Wilson, *supra* note 144; *Does Coronavirus Spread Outside?*, *supra* note 141; Yan & Andrew, *supra* note 141.

148. OHIO REV. CODE ANN. § 2903.11 (LexisNexis 2020).

149. Yan & Andrew, *supra* note 141; *Coronavirus: A Timeline of How the Deadly COVID-19 Outbreak Is Evolving*, *supra* note 4.

150. Yan & Andrew, *supra* note 141; *Coronavirus: A Timeline of How the Deadly COVID-19 Outbreak Is Evolving*, *supra* note 4.

151. Yan & Andrew, *supra* note 141; *Coronavirus: A Timeline of How the Deadly COVID-19 Outbreak Is Evolving*, *supra* note 4; Mark Terry, *FDA Approves 1st COVID-19 Antibody Test*, BIOSPACE (Apr. 3, 2020), <https://www.biospace.com/article/fda-approves-1st-covid-19-antibody-test>.

152. Jon Hamilton, *Antibody Tests Point to Lower Death Rate for the Coronavirus than First Thought*, NPR (May 28, 2020, 1:11 PM), <https://www.npr.org/sections/health-shots/2020/05/28/863944333/antibody-tests-point-to-lower-death-rate-for-the-coronavirus-than-first-thought>.

153. *Id.*

the scope and ultimate impact of the infection, ordinary citizens were free to form their own conclusions about the threat of COVID-19.¹⁵⁴ A perfectly reasonable conclusion, given the large rate of recovery and asymptomatic cases, would have been that the virus would not cause serious harm to most.¹⁵⁵ Therefore, it would be difficult for any prosecutor to prove that a defendant knew he or she would cause serious physical harm to another person when the defendant may have logically believed the opposite.

A person can be convicted of transmitting certain diseases to others under Ohio's felonious assault statute under a sub-portion of the law aimed particularly at a very narrowly-defined class of diseases.¹⁵⁶ At first glance, the narrow class of diseases discussed in the statute would probably exclude COVID-19, but since the symptoms are not yet fully understood within the medical and scientific community, let us assume that COVID-19 is a "virus that causes acquired immunodeficiency syndrome."¹⁵⁷ Under the statute, individuals who test positive for the virus and become aware of their positive test results must refrain from a list of activities that are permissible to everyone else.¹⁵⁸ For example, they may not engage in sexual conduct with others without warning them of their illness.¹⁵⁹ They must also avoid engaging in sexual conduct with individuals who are under eighteen unless bound by marriage, and they must avoid sexual contact with those who may lack the mental capacity to understand the seriousness of the communicable immunodeficiency syndrome which may be passed on to them as a result of sexual activity.¹⁶⁰ Generally speaking, this portion of the statute ordinarily pertains to people who have contracted HIV/AIDS.¹⁶¹

Let us assume, without evidence, that COVID-19 had an immunodeficiency syndrome component that became apparent later—perhaps several weeks or months after contracting and apparently overcoming the disease. Could a prosecutor justify his call for prosecuting individuals for felonious assault under this statute due to their choice to violate quarantine orders? The answer, once more, must be "no." Just as the more general portion of the felonious assault statute would require the defendant to have knowledge of infection, the same is

154. *Id.*

155. *Id.*

156. OHIO REV. CODE ANN. § 2903.11 (LexisNexis 2020).

157. *Id.* § 2903.11(B).

158. *Id.*

159. *Id.* § 2903.11(B)(1).

160. *Id.* § 2903.11(B)(2), (3).

161. *See* State v. Price, 834 N.E. 2d 847, 848-50 (Ohio App. Ct. 2005).

true regarding the law concerning immunodeficiency syndromes.¹⁶² It is unlikely that a prosecutor would have proof, in the vast majority of cases, that individuals tested positive for COVID-19 at any point prior to leaving their homes, that they were aware of their positive test results, or that the infected individuals knew COVID-19 was a type of immunodeficiency syndrome (since we do not know that, scientifically, even today). When it comes to the *mens rea* part of the statute, the prosecutor would have almost no way of establishing probable cause for his case, much less proving the case beyond a reasonable doubt. Even if knowledge could be established, the statute specifically bans sexual conduct, not any other type of activity that might spread the immunodeficiency syndrome.¹⁶³ Therefore, gathering with friends outside one's home during a quarantine does not meet this criteria.¹⁶⁴

After several weeks of watching individuals face fines, arrest, or both, the response to COVID-19 drew the ire of former Federal Attorney General William Barr, who directed federal prosecutors to be on the lookout for overbearing provisions, suggesting that despite the threat COVID-19 might pose, the solutions concocted by some states may violate the U.S. Constitution.¹⁶⁵ Of course, prosecutors should not be waiting for orders from the United States Attorney General in considering the constitutionality of various statutes, as Barr's directive at least implies certain statutes may not be constitutional.¹⁶⁶ The same can be true of various non-statutory lockdown orders across the United States, whether issued by mayors or governors. Perhaps most importantly, Barr alluded that a pandemic may not constitute a justification for perpetual restrictions on human rights that may arguably go beyond what is necessary to curtail its spread.¹⁶⁷

Take, for example, the case of the Dallas, Texas hairdresser who received a seven-day jail sentence following her conviction for opening her hair salon in violation of a stay-at-home order: she received a

162. See § 2903.11(B); *Price*, 834 N.E. 2d at 849-50.

163. See § 2903.11(B)(1), (2).

164. See *id.*; Page, *supra* note 3; Knight, *supra* note 3.

165. David Shortell, *Attorney General William Barr Tells Prosecutors to Be on Watch for 'Overbearing' Coronavirus Measures*, CNN (Apr. 27, 2020, 4:51 PM), <https://www.cnn.com/2020/04/27/politics/barr-prosecutors-coronavirus-civil-liberties/index.html>; Michael Balsamo, *Barr to Prosecutors: Look for Unconstitutional Virus Rules*, ASSOCIATED PRESS (Apr. 27, 2020), <https://apnews.com/article/c76e764141179075244ecfd5f1bb5e19>; Matt Zaposky, *Barr Tells Prosecutors to 'Be on the Lookout' for State, Local Coronavirus Orders that May Violate Constitution*, WASH. POST (Apr. 27, 2020, 5:00 PM), <https://www.washingtonpost.com/national/attorney-general-barr-coronavirus-state-restrictions/2020/04/27/0a5832ce-88b9-11ea-ac8a-fe9b8088e101>.

166. Shortell, *supra* note 165; Balsamo, *supra* note 165; Zaposky, *supra* note 165.

167. Shortell, *supra* note 165; Balsamo, *supra* note 165; Zaposky, *supra* note 165.

conviction for her actions almost immediately.¹⁶⁸ Even though there were few indicators that she had a criminal history or that she was endangering anyone, she received no deferred prosecution agreement from the prosecution.¹⁶⁹ She did not receive a short term of probation.¹⁷⁰ Instead, she received a penalty that few felons receive: actual loss of liberty for the duration of a week.¹⁷¹

While the prosecution, conviction, and sentence did occur under the color of Texas law, there were many obvious reasons why the prosecution was at worst, unconstitutional, and at best, an instance where the defendant should have received mercy when compared to similarly-situated cases (or even to instances where the defendant committed significantly graver offenses). First, whether governments can shutter businesses on the grounds of a disease that is not very deadly is now going to be an open question.¹⁷² The constitutionality of quarantines under various circumstances is going to be analyzed in courts for the better part of the next decade.¹⁷³ Second, there are no obvious reasons why the defendant's hair salon was any less essential than many of the other businesses permitted to operate during the same time across the nation and in Dallas particularly.¹⁷⁴ Third, given the fact that prosecutors frequently elect not to prosecute various offenses, why this particular defendant suffered prosecution may be a selective prosecution question.¹⁷⁵ Fourth, hairstyles are frequently considered an expressive activity with which the stylist assists, impairment of which

168. See Rebecca Lopez & Eline de Bruijn, *Dallas Salon Owner Who Refused to Close Sentenced to Seven Days in Jail, Ordered to Pay Fines*, TEX. TRIB. (May 5, 2020, 5:00 PM), <https://www.texastribune.org/2020/05/05/dallas-salon-owner-jail-sentence-reopening-shelley-luther-coronavirus>.

169. See Meagan Flynn & Hannah Knowles, *Dallas Hair Salon Owner Chose Jail Rather than Close Her Doors. She Was Just Released*, WASH. POST (May 7, 2020, 5:56 PM), <https://www.washingtonpost.com/nation/2020/05/06/dallas-salon-owner-jailed-coronavirus>; Nic Garcia et al., *Meet the Dallas Salon Owner Whose Decision to Reopen Put Her in the Middle of a National Debate*, DALL. MORNING NEWS (May 6, 2020, 9:03 PM), <https://www.dallasnews.com/news/politics/2020/05/06/meet-the-dallas-salon-owner-whose-rule-breaking-put-her-in-the-middle-of-a-national-debate> (acknowledging the salon owner's lack of a prior criminal history).

170. Lopez & de Bruijn, *supra* note 168.

171. *Id.*

172. See John Malcolm & Charles "Cully" Stimson, *"Constitution Isn't Suspended" for COVID-19, Attorney General Barr Warns Public Officials*, HERITAGE FOUND. (Apr. 28, 2020), <https://www.heritage.org/the-constitution/commentary/constitution-isnt-suspended-covid-19-attorney-general-barr-warns-public>.

173. *See id.*

174. Maria Halkias, *Still Not Sure if Your Business Is Essential? There's a Form for That*, DALL. MORNING NEWS (Apr. 14, 2020, 3:04 PM), <https://www.dallasnews.com/business/retail/2020/04/14/still-not-sure-whether-your-business-is-essential-theres-a-form-for-that>.

175. *See, e.g., Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974).

may constitute an impairment of the freedom of expression.¹⁷⁶ Fifth, the sentence sought by the prosecution and ultimately imposed by the judge was likely disparate compared to more serious crimes.

The response to the prosecution was highly negative.¹⁷⁷ Everyone from the Governor of Texas to the State Attorney General condemned the decision to sentence this business owner to seven days in jail.¹⁷⁸ This sentence, of course, could not have taken place at all but for the prosecution of the defendant by the local prosecutor.¹⁷⁹ The judge seemed to suffer far more backlash, though, for reprimanding the defendant as selfish and asking her to apologize for her conduct to avoid sentencing.¹⁸⁰ When the defendant refused to apologize for keeping her business open, the judge sentenced her to jail.¹⁸¹ The public response was so overwhelmingly in opposition to this decision that many voted with their wallets, despite the economic plight across the nation. The campaign to raise this business owner's legal fees crossed the \$500,000 mark almost immediately after her story hit the presses.¹⁸² Given the revealed preference of individuals struggling with the economic plight brought on by COVID-19 to spend precious funds on the legal fees of another suggests a strong objection from the American public to prosecutors targeting business owners under dubious legal authority.¹⁸³

The role of prosecutors, and state attorneys general who acted in their capacity as prosecutors, should not be overlooked in the wake of this pandemic. It is precisely these lawyers who should have at least suggested to governors and legislators that the laws they were seeking to promulgate might breach constitutional guarantees of freedom. In the event the state promulgated the laws anyway, these lawyers had the responsibility of refusing to enforce unconstitutional laws via their oath to protect and preserve the U.S. Constitution. While some law enforcement officers refused to enforce potentially unconstitutional

176. See, e.g., *Arnold v. Carpenter*, 459 F.2d 939, 941-43 (7th Cir. 1972).

177. Mary Claire Patton, *Texas Governor, Attorney General Call for Release of Dallas Salon Owner Jailed for Keeping Business Open*, KSAT (May 6, 2020, 1:39 PM), <https://www.ksat.com/news/texas/2020/05/06/texas-governor-attorney-general-call-for-release-of-dallas-salon-owner-jailed-for-keeping-business-open>.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. Emily Czachor, *GoFundMe Raises More than \$500,000 for Dallas Hair Salon Owner Arrested for Opening Business Despite Coronavirus Restrictions*, NEWSWEEK (May 12, 2020, 1:35 PM), <https://www.newsweek.com/gofundme-raises-more-500000-dallas-hair-salon-owner-arrested-opening-business-despite-1503496>.

183. *Id.*

regulations, we are less aware of similar refusals from lawyers.¹⁸⁴ Could it be because law enforcement officers knew they could be held liable while prosecutors cloaked themselves in absolute immunity?

2. Problems Unrelated to COVID-19

Prosecutorial misconduct, in the context of COVID-19 overreaching or otherwise, can comprise many different forms (in addition to those mentioned above), including: (1) charging a suspect with more offenses than warranted, (2) withholding or delaying the release of exculpatory evidence, (3) deliberately mishandling, mistreating, or destroying evidence, (4) permitting witnesses that prosecutors know or should know are not truthful to testify, (5) pressuring defense witnesses not to testify, (6) relying on fraudulent forensic experts, (7) overstating the strength of the evidence during plea negotiations, (8) making statements to the media designed to arouse public indignation, (9) making improper or misleading statements to the jury, and (10) failing to report prosecutorial misconduct when it is discovered.¹⁸⁵ However, because prosecutors are rarely held liable for any misconduct, prosecutors' offices have long been deemed to have a culture of infallibility.¹⁸⁶ This infallibility mindset gives rise to "practices that can only be termed bizarre, such as prosecutors who

184. Maurice Chammah, *The Rise of the Anti-Lockdown Sheriffs*, MARSHALL PROJECT (May 18, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/05/18/the-rise-of-the-anti-lockdown-sheriffs>; Zoe Nemerever, *Why 'Constitutionalist Sheriffs' Won't Enforce Coronavirus Restrictions*, WASH. POST (Apr. 23, 2020, 7:45 AM), <https://www.washingtonpost.com/politics/2020/04/23/why-constitutional-sheriffs-wont-enforce-coronavirus-restrictions/>; Hayley Fowler, *Some Cops, Sheriffs Won't Enforce 'Unconstitutional' COVID-19 Orders. Can They Do That?*, NEWS & OBSERVER (May 28, 2020, 6:55 PM), <https://www.newsobserver.com/news/coronavirus/article243054951.html>; Ray Stern, *Two Arizona County Sheriffs Are Refusing to Enforce Corona Emergency Orders*, PHX. NEW TIMES (May 1, 2020, 3:55 PM), <https://www.phoenixnewtimes.com/news/arizona-county-sheriffs-refuse-to-enforce-covid-19-coronavirus-lockdown-orders-pinal-mohave-11468354>; Will Sommer, *Sheriffs Buck the Law, Refuse to Enforce Lockdown Orders*, DAILY BEAST (Apr. 23, 2020, 10:36 AM), <https://www.thedailybeast.com/sheriffs-buck-the-law-refuse-to-enforce-lockdown-orders/>; Tracy Connor, *It's Not Just Sheriffs—Now Prosecutors Refuse to Enforce Illinois Lockdown*, DAILY BEAST (May 16, 2020, 2:59 PM), <https://www.thedailybeast.com/prosecutors-refuse-to-enforce-illinois-gov-jb-pritzkers-lockdown/>; Jonathan Oosting, *Police: Don't Expect Us to Enforce Michigan's Confusing Coronavirus Lockdown*, BRIDGE MICH. (Mar. 24, 2020), <https://www.bridgemi.com/michigan-government/police-dont-expect-us-enforce-michigans-confusing-coronavirus-lockdown/>; Maurice Chammah, *Anti-Lockdown Sheriffs Call on Constituent Power to Push Back on Coronavirus Restrictions*, USA TODAY (May 26, 2020, 12:00 PM), <https://www.usatoday.com/story/news/2020/05/24/coronavirus-anti-lockdown-sheriffs-defying-governors-orders/5247134002>.

185. *An Epidemic of Prosecutor Misconduct*, *supra* note 75.

186. *Id.*

reportedly wear neckties decorated with images of nooses or who throw a party after ‘winning’ a death sentence.’¹⁸⁷

The case of Anthony Graves serves as yet another example of such misconduct. The case is extremely unusual, unfortunately not because of the prosecutor’s egregious violation of the law, but because the prosecutor was actually disbarred by the State of Texas as a result.¹⁸⁸ Generally, when prosecutors break the law by concealing exculpatory evidence or engaging in other misconduct, a “slap-on-the-wrist” is the most severe punishment imposed.¹⁸⁹ According to United States Circuit Judge Alex Kozinski, it is “almost unheard of” that prosecutors are punished for their misconduct, and the cases that have led to punishment are extremely few and far between.¹⁹⁰ When prosecutors do face repercussions for misconduct, it is when their behavior is deemed to be egregious and deliberate—and even in such cases, the punishment they receive is rarely proportional to the significant damage they inflict upon innocent persons.¹⁹¹

Two other attorneys that have received some of the most severe sanctions ever inflicted on prosecutors are Mike Nifong and Ken Anderson.¹⁹² Nifong was involved in a case wherein three members of the Duke University lacrosse team were falsely accused of rape.¹⁹³ Nifong withheld DNA evidence, and as a result, was disbarred.¹⁹⁴ Anderson, a former Texas prosecutor and judge, intentionally withheld evidence in a case against an innocent man who wrongfully spent twenty-five years in prison for allegedly murdering his wife.¹⁹⁵ Anderson was disbarred, ordered to perform five hundred hours of community service, and spent ten days in jail in 2013.¹⁹⁶ Astonishingly, Anderson was the first prosecutor *ever* to go to jail for withholding evidence.¹⁹⁷ However, it is alarming that he successfully rose through

187. *Id.*

188. *DA Disbarred for Sending Texas Man to Death Row*, CBS NEWS (June 12, 2015, 6:05 PM), <https://www.cbsnews.com/news/charles-sebasta-prosecutor-of-wrongfully-convicted-man-anthony-graves-loses-law-license>.

189. See Peter B. Collins, *Prosecutors Who Break the Law Face No Punishment*, WHO WHAT WHY (July 3, 2018), <https://whowhatwhy.org/2018/07/03/prosecutors-who-break-the-law-face-no-punishment>.

190. Ferner, *supra* note 43.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

the legal ranks not only as a prosecutor, but also as a judge, before finally being held accountable.

Another example of prosecutorial misconduct might be the failure to prosecute offenders. Citizens rely on the criminal laws of their community to be enforced only to find out that the protections they relied on are illusory. This can be just as problematic as false prosecutions. In the Ahmaud Arbery case, for example, Georgia residents might have expected prosecutors to prosecute citizens for murder or similar violent offenses.¹⁹⁸ Yet residents were confronted with the reality that if the alleged murder was committed by someone well-known to the local prosecutor, the prosecution might never commence.¹⁹⁹ It is possible that if the video of the incident never leaked to the public, the perpetrators would never have been scrutinized for a homicide that will very likely lead to convictions.²⁰⁰ Similarly, the citizens of Chicago probably thought that providing false information to the police could be criminally punishable because it wastes taxpayer resources and prevents officers from being available to stop real crime. Yet, when Jussie Smollett hired two Nigerian men to “assault” him and then reported it to the police as a race-related attack by Trump supporters, the charges against him were mysteriously dismissed despite overwhelming evidence of guilt provided by the Chicago Police Department.²⁰¹ Prosecutorial acts like these are just as reprehensible to

198. Andone et al., *supra* note 4; Miller & Hauck, *supra* note 4; Schindler & Kless, *supra* note 4; Wootson & Itkowitz, *supra* note 4; Lennard, *supra* note 4; Shah, *supra* note 4; Booker, *supra* note 4; Stimson, *supra* note 4.

199. Andone et al., *supra* note 4; Miller & Hauck, *supra* note 4; Schindler & Kless, *supra* note 4; Wootson & Itkowitz, *supra* note 4; Lennard, *supra* note 4; Shah, *supra* note 4; Booker, *supra* note 4.

200. Andone et al., *supra* note 4; Miller & Hauck, *supra* note 4; Schindler & Kless, *supra* note 4; Wootson & Itkowitz, *supra* note 4; Lennard, *supra* note 4; Shah, *supra* note 4; Booker, *supra* note 4; Stimson, *supra* note 4.

201. Gabrielle Fonrouge, *Abel and Ola Osundairo Will Testify Against Jussie Smollett After All*, PAGE SIX (June 25, 2020, 4:00 PM), <https://pagesix.com/2020/06/25/abel-and-ola-osundairo-will-testify-against-jussie-smollett>; Sasha Savitsky, *Jussie Smollett's Alleged Attackers Now Say They Will Testify: We Will 'Continue to Tell the Truth,'* FOX NEWS (June 25, 2020), <https://www.foxnews.com/entertainment/jussie-smollett-alleged-attackers-now-say-they-will-testify>; Don Babwin & Herb McCann, *Actor Jussie Smollett Faces 6 New Charges in Chicago*, ASSOCIATED PRESS (Feb. 11, 2020), <https://apnews.com/ae6ecdc8dfa7b5af555071033b2b2a7b>; E. Jason Wambsgans, *Jussie Smollett Case: Special Prosecutor Named to Look into Why Prosecutors Dropped Charges*, NBC NEWS (Aug. 23, 2019, 11:32 AM), <https://www.nbcnews.com/news/us-news/jussie-smollett-case-special-prosecutor-named-look-why-prosecutors-dropped-n1045781>; Julie Bosman & Sopan Deb, *Jussie Smollett's Charges Are Dropped, Angering Mayor and Police*, N.Y. TIMES (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/arts/television/jussie-smollett-charges-dropped.html>; Adam Gabbatt, *Jussie Smollett: Why Were the Charges Dropped and What Happens Next?*, GUARDIAN (Mar. 27, 2019, 12:46 PM), <https://www.theguardian.com/us-news/2019/mar/27/jussie-smollett-why-were-the-charges-dropped-and-what-happens-next>; Deanna

the cause of justice, and they help perpetuate the harmful assumption of many that justice favors the wealthy and more well-connected.

In 2013, the Center for Prosecutor Integrity demonstrated the rarity of prosecutors facing punishment for their misconduct.²⁰² Using data from nine major studies that investigated prosecutorial misconduct at the state and national levels, the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct between 1963 and 2013.²⁰³ Astonishingly, of those cases, only sixty-three prosecutors—less than two percent—were ever sanctioned for their misconduct.²⁰⁴ When a sanction was imposed, the sanction largely represented minor disciplinary actions.²⁰⁵ For instance, the most common sanction was to assess disciplinary hearing costs on the prosecutor.²⁰⁶ Only in a mere fourteen instances was a prosecutor suspended or disbarred from practicing.²⁰⁷ Even then, it is unclear whether the punishment deprived the prosecutor of the fruits of his or her misconduct since the money and status he or she gained might well have exceeded what could have been if the prosecutor played by the rules. Moreover, because of absolute civil immunity, these decisions still cannot be used to compel prosecutors to pay for the damages of their actual victims.

Several additional studies show similar results. A 1987 study revealed that in a six-year period, disciplinary sanctions for prosecutors accused of suppressing evidence were in the single digits.²⁰⁸ In 1999, the Chicago Tribune studied 381 cases where courts overturned homicide convictions because of prosecutors hiding evidence or presenting false testimony, finding that none of the prosecutors involved faced disbarment or criminal sanctions.²⁰⁹ In 2010, the Northern California Innocence Project discovered that California State Bar officials publicly disciplined only one percent of prosecutors in the 600 cases where courts

Paul, *Why Prosecutors Dismissed the Charges Against Jussie Smollett*, WASH. POST (Mar. 28, 2019, 11:15 AM), <https://www.washingtonpost.com/arts-entertainment/2019/03/27/why-prosecutors-dismissed-charges-against-jussie-smollett/>; *Jussie Smollett: Prosecutors Drop All Charges Against Actor*, BBC NEWS (Mar. 26, 2019), <https://www.bbc.com/news/world-us-canada-47711535>; Nicole Chavez, *Why Did Prosecutors Drop All Charges Against Jussie Smollett*, CNN (Mar. 27, 2019, 3:58 AM), <https://www.cnn.com/2019/03/27/entertainment/experts-jussie-smollett-why-prosecutors-dropped-charges>.

202. *An Epidemic of Prosecutor Misconduct*, *supra* note 75.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. Sarma, *supra* note 25.

209. *Id.*

found prosecutorial misconduct.²¹⁰ Unfortunately, holding prosecutors responsible for blatant misconduct violations seems to be the exception rather than the rule.

We would hope that the majority of prosecutors likely behave ethically.²¹¹ However, even one unethical prosecutor in a prosecutor's office can inflict significant harm on defendants and their cases.²¹² Regrettably, based upon the data currently available, it is clear that there are more than just a few unethical prosecutors.²¹³ According to Judge Kozinski, prosecutorial misconduct "ranges from misleading the jury, to outright lying in court and tacitly acquiescing or actively participating in the presentation of false evidence by police."²¹⁴ Moreover, it is difficult to identify the misconduct, because the majority of prosecutors' conduct is behind the scenes, such as gathering evidence and working with police and investigators.²¹⁵ As a result, misconduct often goes undiscovered until years after a person has been convicted and his or her life considerably impacted.²¹⁶ In many cases, prosecutorial misbehavior is never discovered at all.²¹⁷ However, misconduct by prosecutors occurs so often that it has been deemed one of the primary causes of wrongful convictions.²¹⁸

There are several ethical standards governing the practices of prosecutors that are supposed to hold prosecutors responsible for misconduct. Theoretically, violations of these standards should either prevent misconduct by resulting in disbarment or other discipline, which would serve both as a specific deterrent to a lawyer from engaging in future misconduct and a general deterrent to others by his example. One of the more important and well-known of these is ABA Model Rule 3.8, Special Responsibilities of a Prosecutor.²¹⁹ Most states adopt the ABA Model Rules of Professional Conduct (sometimes with minor modifications), which the ABA House of Delegates adopted in 1983, so this rule applies to many (if not all) prosecutors across the United States.²²⁰ The Model Rules of Professional Conduct require individuals

210. *Id.*

211. Ferner, *supra* note 43.

212. *Id.*

213. *Id.*

214. Kozinski, *supra* note 17, at xxii-xxiii (internal footnotes omitted).

215. *Id.* at xxiii; Ferner, *supra* note 43.

216. Ferner, *supra* note 43.

217. *Id.*

218. *Id.*

219. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2019).

220. *Model Rules of Professional Conduct*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct (last visited Feb. 8, 2021); *see, e.g.*, RULES REGULATING FLA. BAR 4-3.8 (the version of ABA Model Rule 3.8

to comply with several restrictions, including rules concerning client confidentiality, solicitation and advertising, the report of misconduct by other attorneys, and the prohibition of certain conflicts of interest.²²¹ Attorneys who violate these rules may face disciplinary action ranging from private reprimand to disbarment.²²²

Given the broad requirements under ABA Model Rule 3.8, the oath of all lawyers to protect and defend the U.S. Constitution, and other ethical guidelines to which prosecutors are subject,²²³ the issue of prosecutorial misconduct cannot be blamed on a lack of ethical guidance.²²⁴ Rather, prosecutorial misconduct can be based, in part, on the failure to discipline prosecutors when they do engage in misconduct and, in part, by refusing to allow affected parties to seek redress in the courts, as discussed throughout this Article.²²⁵ While it may be unpopular to take the side of a defendant accused of a serious crime, one would think that state bars would take this issue more seriously. Unfortunately, we find no evidence that this is so.²²⁶

IV. CONSEQUENCES OF PROSECUTORIAL MISCONDUCT

There are many consequences of the use of government power to prosecute the innocent.²²⁷ Unfortunately, the judicially-created rule preventing victims from civil recovery results in defendants, not prosecutors, facing the consequences of prosecutors' misdeeds.²²⁸ Of course, there are externalities as well: society bears a cost for increased incarceration, probation, and other types of monitoring, and wrongfully prosecuting an innocent person results in the potential loss of a productive member of society to jail or prison.²²⁹ Even if the wrongly

applicable in Florida); ALA. RULES OF PRO. CONDUCT r. 3.8 (the version of ABA Model Rule 3.8 applicable in Alabama); MODEL RULES OF PRO. CONDUCT tbl. of contents (AM. BAR ASS'N 2019).

221. MODEL RULES OF PRO. CONDUCT tbl. of contents (AM. BAR ASS'N 2019).

222. *Rule 10: Model Rules for Lawyer Disciplinary Enforcement*, A.B.A. (July 20, 2020), https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_10.

223. Prosecutors are also required or encouraged to follow the ABA Standards for Criminal Justice, entitled the "Prosecution Function," the United States Attorneys' Manual, and The National Prosecution Standards.

224. *An Epidemic of Prosecutor Misconduct*, *supra* note 75.

225. *Id.*

226. Ferner, *supra* note 43.

227. *What Long-Term Consequences Could a Criminal Conviction Have on My Life?*, GREENSPUN SHAPIRO PC, <https://www.greenspunlaw.com/faqs/life-long-costs-of-a-criminal-conviction.cfm> (last visited Feb. 11, 2021).

228. *See id.*

229. *See Prosecutorial Misconduct*, CAL. INNOCENCE PROJECT, <https://californiainnocenceproject.org/issues-we-face/prosecutorial-misconduct> (last visited Feb. 8, 2021).

accused finds himself or herself exonerated at the end of the proceedings, the cost of bringing the case and diminishing the defendant's reputation is borne by society (including the defendant), not by a prosecutor responsible for the frivolous criminal litigation in the first place.²³⁰ The defendant often bears the burden of the legal and emotional costs of facing the chance of imprisonment, or perhaps the death penalty, despite having done nothing wrong. In instances where the defendant cannot afford an attorney, taxpayers pay for the costs of representation and the associated investigative expenses.²³¹

A. Overcrowding in Jails and Prisons

One of the many consequences that results from prosecutorial misconduct is severe overcrowding in jails and prisons.²³² While the overuse of imprisonment is a serious problem around the world, the "human rights violations associated with this practice are particularly egregious in the context of the United States."²³³ With an incarceration rate of five to ten times that of other western democracies, the United States has the highest incarceration rate of any nation.²³⁴ Perhaps more surprisingly, the United States has less than five percent of the world's population, but prisoners in the United States account for an astonishing one-quarter of the global prison population.²³⁵ The United States incarcerates more individuals—both in absolute terms and per capita—than any other nation in the world, including significantly-more-populated China, which rates second, and Russia, which rates third.²³⁶ Either Americans are truly the least law-abiding citizens in the world, or we should consider making changes to the

230. *Who Pays the Legal Fees and Court Costs in a Lawsuit?*, DOUGLAS HAUN HEIDEMANN PC (Sept. 14, 2017), <https://www.dhhlawfirm.com/win-case-will-defendant-pay-attorney-fees>.

231. See ERINN HERBERMAN & TRACEY KYCKELHAHN, U.S. DEP'T JUST., STATE GOVERNMENT INDIGENT DEFENSE EXPENDITURES, FY 2008–2012 - UPDATED 1-3 (2015), <https://www.bjs.gov/content/pub/pdf/sgide0812.pdf>.

232. Samantha M. Caspar & Artem M. Joukov, *Mental Health and the Constitution: How Incarcerating the Mentally Ill Might Pave the Way to Treatment*, 20 NEV. L.J. 547, 563-64 (2020).

233. ACLU, OVERCROWDING AND OVERUSE OF IMPRISONMENT IN THE UNITED STATES (2015), <https://www.ohchr.org/Documents/Issues/RuleOfLaw/OverIncarceration/ACLU.pdf>.

234. *Id.*; Brown, *supra* note 78; William N. Clark & Artem M. Joukov, *The Criminalization of America*, 76 ALA. LAW. 225 (2015); see also Artem M. Joukov & Samantha M. Caspar, *Wherefore is Fortunato? How the Corpus Delicti Rule Excludes Reliable Confessions, Helps the Guilty Avoid Responsibility, and Proves Inconsistent with Basic Evidence Principles*, 41 AM. J. TRIAL ADV. 459, 481, 522 (2018) (noting the large number of state and federal statutes that may lead to prosecution and discussing the possibility that confessions to crime may be easier to secure from a mentally ill defendant even when that defendant did not commit the crime).

235. *Overcrowding and Overuse of Imprisonment in the United States*, *supra* note 233.

236. *Id.*

system and restraining prosecutors from being so willing to incarcerate their fellow citizens.

During the past forty years, the number of persons held in American prisons and jails has more than quadrupled, and the total number of individuals incarcerated in the United States is greater than 2.3 million.²³⁷ Since 1970, the U.S. prison population has increased 700%, which is far greater than any increases in U.S. population and crime rates.²³⁸ One in ninety-nine American adults now lives in a jail or prison, and one in thirty-one U.S. adults is under correctional control, which includes prison, jail, parole, and probation.²³⁹ Stated differently, approximately 2.3 million persons are in jails or prisons at any given moment, and nearly 4.5 million more are on probation or parole.²⁴⁰ One in two American adults has had a family member in jail or prison.²⁴¹ Existing jail and prison facilities are extremely overcrowded, with prisoners forced to sleep in gyms, hallways, or quadruple-bunked in cells.²⁴²

The extreme increase in jail and prison populations has consequences that resonate far outside of jail or prison walls: one in four Americans has a criminal record, which often imposes significant obstacles to securing loans, obtaining housing, securing professional licenses, and finding employment, as discussed in more detail below.²⁴³ Across the United States, young Black men are disproportionately incarcerated and under correctional control.²⁴⁴ More than seventy-five percent of United States residents are White, and approximately thirteen percent of United States residents are Black.²⁴⁵ At the end of 2016, however, Black inmates outnumbered White inmates by 487,000 to 440,000.²⁴⁶ Black men also receive federal prison sentences that are, on average, nearly twenty percent longer than those of White men who commit the same crime.²⁴⁷ Some of this may be the responsibility of judges, but there is no question that prosecutors play an important part in the sentencing process by advocating for (usually) a stricter punishment

237. *Id.*

238. *Id.*

239. *Id.*

240. Adachi & Calloway, *supra* note 105.

241. *Id.*

242. *Overcrowding and Overuse of Imprisonment in the United States*, *supra* note 233.

243. *Id.*; Artem M. Joukov & Samantha M. Caspar, *Who Watches the Watchmen? Character and Fitness Panels and the Onerous Demands Imposed on Bar Applicants*, 50 N.M. L. REV. 383, 394 (2020).

244. *Overcrowding and Overuse of Imprisonment in the United States*, *supra* note 233.

245. Brown, *supra* note 78.

246. *Id.*

247. *Id.*

than suggested by the defense. In addition, when prosecutors offer a plea deal, White defendants are twenty-five percent more likely than Black defendants to have their most serious initial charge dropped or reduced to a less severe charge.²⁴⁸ The excessive use of incarceration and correctional control—especially among poor persons and persons of color—is often referred to as mass incarceration.²⁴⁹

Mass incarceration raises serious constitutional and human rights concerns. The human rights violations inherent in the United States system of mass incarceration reverberate on a number of fronts: from racial disparities in arrests, convictions, and sentencing; to oppressive and inhumane sentencing mandating non-violent offenders to serve extreme sentences in prison; to increased impacts on vulnerable populations including mentally ill individuals.²⁵⁰ Unsurprisingly, in almost every one of these areas, a prosecutor's role can be essential to preventing injustice. A prosecutor's role can also be essential for that injustice to flourish.

B. Wrongful Convictions

Wrongful convictions were once thought to be very rare, even non-existent, in the United States criminal justice system.²⁵¹ However, the invention of DNA analysis in the late 1980s created the possibility of post-conviction DNA testing, which often served to exonerate the person convicted of a crime.²⁵² Since 1989, 2,732 persons have been exonerated following DNA analysis, confession by the actual offender, or by other means.²⁵³ Estimates of the full extent of wrongful convictions vary.²⁵⁴ A 2007 study of persons sentenced to death from 1973 to 2004 resulted in a 2.3% exoneration rate.²⁵⁵ However, a later study in Virginia discovered that the wrongful conviction rate was fifteen percent for persons

248. *Id.*

249. *Overcrowding and Overuse of Imprisonment in the United States*, *supra* note 233.

250. *Id.*

251. *An Epidemic of Prosecutor Misconduct*, *supra* note 75; *Overcrowding and Overuse of Imprisonment in the United States*, *supra* note 233.

252. *An Epidemic of Prosecutor Misconduct*, *supra* note 75.

253. *National Registry of Exonerations*, UNIV. MICH. L. SCH., <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Feb. 8, 2021). These exonerated individuals have lost a combined 24,770 years of their lives due to wrongful convictions. *Id.*

254. KELLY WALSH ET AL., NAT'L CRIM. JUST. REF. SERV., ESTIMATING THE PREVALENCE OF WRONGFUL CONVICTIONS (2017), <https://www.ncjrs.gov/pdffiles1/nij/grants/251115.pdf>; David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91, 91 (2000).

255. Samuel R. Gross, *Convicting the Innocent* 6 (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 103, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100011.

convicted of sexual assault.²⁵⁶ Regardless of whether the actual percentage is two or fifteen, it is clear that each year, thousands, or tens of thousands, of innocent Americans are deemed to be criminals and sent to jail or prison for offenses that they did not commit.²⁵⁷ Some of these individuals may be incarcerated for crimes that *no one* committed. The exact extent of prosecutorial misconduct is unknown, but a ballpark understanding of the issue comes from the National Registry of Exonerations, which has concluded that an astonishing forty-three percent of wrongful convictions are attributable to official prosecution misconduct.²⁵⁸

The costs to incarcerate wrongfully convicted inmates can also be substantial. In 2013, 160,800 prisoners nationwide who were convicted of rape or other sexual assaults were under state jurisdiction.²⁵⁹ If the fifteen percent wrongful conviction rate from the Virginia study described above was accurate nationwide, 24,120 inmates would have been wrongfully convicted and imprisoned.²⁶⁰ The average state corrections expenditure per inmate is approximately \$28,323, which translates into an annual expenditure of more than \$683,000,000 just to house those wrongfully convicted of sexual assault alone.²⁶¹ However, this number is an underestimate, as it fails to include defendants wrongfully detained in local jails or in military or federal prisons, or detained persons awaiting trial.²⁶²

C. *A Lifetime of Hardships*

When an individual is convicted—or even accused—of a crime, the individual's criminal history becomes public record.²⁶³ Running a background check on the individual can reveal his or her entire criminal history—from a small, marijuana-related misdemeanor to more serious

256. JOHN ROMAN ET AL., URB. INST., POST-CONVICTION DNA TESTING AND WRONGFUL CONVICTION 5-6 (2012), <http://www.urban.org/UploadedPDF/412589-Post-Conviction-DNA-Testing-and-Wrongful-Conviction.pdf>. The fifteen percent statistic likely underestimates the actual extent of wrongful convictions, as even in many cases where a DNA match is present, the sexual encounter may have been consensual and therefore non-criminal.

257. *An Epidemic of Prosecutor Misconduct*, *supra* note 75.

258. NAT'L REGISTRY OF EXONERATIONS, UPDATE: 2012, THE NATIONAL REGISTRY OF EXONERATIONS (2013), http://www.law.umich.edu/special/exoneration/Documents/NRE2012UPDATE4_1_13_FINAL.pdf.

259. *An Epidemic of Prosecutor Misconduct*, *supra* note 75.

260. *Id.*

261. *Id.*

262. *Id.*

263. *5 Ways a Criminal Record Hurts Your Future*, LAW OFF. NED BARNETT (Feb. 10, 2020), <https://www.nedbarnett.com/5-disadvantages-criminal-record>.

felonies.²⁶⁴ Because several organizations run background checks—including potential employers, rental housing providers, and loan providers—having any criminal record creates significant obstacles for criminal offenders.²⁶⁵

Three in four people found it difficult to find work after being released from prison, and only forty percent of those surveyed were working full-time after five years.²⁶⁶ The inability to find work once a person has a criminal record makes it difficult for individuals to pay child support or to contribute to housing or food costs.²⁶⁷ Individuals with criminal records often have to find employers willing to take a chance on them or accept work far below their education levels or previous pay levels.²⁶⁸ Additionally, those with criminal records may find it difficult to become a lawyer, doctor, nurse, or other professional that requires a professional license with a character and fitness component.²⁶⁹

Individuals with criminal records also find it difficult to further their education, one of a handful of things that could improve their financial situation.²⁷⁰ Those with criminal records are often barred from receiving grants or loans for schooling.²⁷¹ The inability to receive federal student aid may not last indefinitely, but it can delay the individual's education and make it less likely the individual will return to school.²⁷²

Those with criminal records can also be denied public housing due to their criminal history, and their families can be removed from public housing if they have an individual living with them who has a criminal record.²⁷³ These individuals can also be denied private housing.²⁷⁴ Being unable to find decent housing can make it difficult for the person to maintain child custody or visitation, and it is not uncommon for individuals with criminal records to experience homelessness.²⁷⁵

264. *Id.*; The presence of convictions related to marijuana possession on background checks is particularly cumbersome on a national level due to the prevalence of their use. *See, e.g.,* Samantha M. Caspar & Artem M. Joukov, *The Implications of Marijuana Legalization on the Prevalence and Severity of Schizophrenia*, 28 HEALTH MATRIX 175, 178 (2018).

265. *5 Ways a Criminal Record Hurts Your Future*, *supra* note 263.

266. Alana Semuels, *What Incarceration Costs American Families*, ATLANTIC (Sept. 15, 2015), <https://www.theatlantic.com/business/archive/2015/09/the-true-costs-of-mass-incarceration/405412>.

267. *Id.*

268. *5 Ways a Criminal Record Hurts Your Future*, *supra* note 263.

269. *Id.*

270. Semuels, *supra* note 266.

271. *5 Ways a Criminal Record Hurts Your Future*, *supra* note 263.

272. *Id.*

273. Semuels, *supra* note 266.

274. *5 Ways a Criminal Record Hurts Your Future*, *supra* note 263.

275. *Id.*

V. A NEW ARGUMENT TO ABOLISH ABSOLUTE PROSECUTORIAL IMMUNITY

The United States Supreme Court in *Imbler v. Pachtman* held that absolute immunity for prosecutors was necessary due to public policy considerations (among other considerations).²⁷⁶ However, these considerations have not withstood the test of time and are no longer persuasive justifications for absolute prosecutorial immunity. In *Imbler*, the Court suggested that abolishing absolute immunity would lead to a floodgate of litigation against prosecutors, as “a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State’s advocate.”²⁷⁷ This claim ignores the possibility that other remedies exist for prosecutors faced with wrongful lawsuits.²⁷⁸ The Court apparently discounts in its analysis the fact that courts have long had doctrines in place to prevent frivolous lawsuits, which are subject to dismissal for a variety of reasons.²⁷⁹ Additionally, in 1994, the United States Supreme Court held that a defendant must prevail in proving his or her conviction wrongful or his or her trial unfair before the defendant can attempt to file a lawsuit under 42 U.S.C. § 1983,²⁸⁰ which further limits the number of potential lawsuits against prosecutors by eliminating claims arising from law enforcement actions that were likely proper (as indicated by past proceedings).²⁸¹

The United States Supreme Court also held that absolute immunity was vital because other avenues for prosecutorial accountability exist.²⁸² While other means of prosecutorial accountability do exist (such as the ABA Model Rules of Professional Conduct), this Article has already demonstrated that these avenues are not sufficient to address prosecutorial misconduct.²⁸³ Study after study has shown professional disciplinary organizations failing to hold prosecutors accountable, even for the most blatant prosecutorial misconduct.²⁸⁴

Another major reason for the implementation of absolute immunity to prosecutors was the United States Supreme Court’s belief that civil suits would result in prosecutors incurring a financial burden and

276. 424 U.S. 409, 424-25 (1976).

277. *Id.* at 425.

278. Sarma, *supra* note 25.

279. *Id.*

280. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); Sarma, *supra* note 25.

281. Sarma, *supra* note 25.

282. *Imbler*, 424 U.S. at 427-29.

283. *See supra* Part III.D.2.

284. *An Epidemic of Prosecutor Misconduct*, *supra* note 75; Sarma, *supra* note 25.

possibly dismissing cases that should not otherwise be dismissed due to fear of potential litigation.²⁸⁵ These concerns should be moderated. If prosecutors were found liable, it is likely that their employers—the Government—would be the party bearing any financial burden.²⁸⁶ Additionally, prosecutors could avoid dismissing a case that merits prosecution, instead choosing to dismiss frivolous cases or cases where the punishment may be disproportional to the crime—which is a benefit, not a drawback. This may also lead to an increase in the number of settlements between the Government and various defendants, reducing risks to both parties by encouraging prosecutors to be more reasonable in plea bargaining.²⁸⁷ Moreover, prosecutors could ensure against the risk of litigation from their misconduct in the same way as civil practitioners and privately practicing defense lawyers: by purchasing malpractice insurance.

Other public employees responsible for law enforcement, like police officers, do not have absolute immunity and are held accountable in court for egregious behavior.²⁸⁸ Updating the absolute immunity doctrine does not require a constitutional change but simply requires the United States Supreme Court to update its view on absolute immunity's applicability.²⁸⁹ If the United States is serious about decreasing mass incarceration, or at least improving the criminal justice system's fairness, it is vital to hold accountable those actors authorized to charge, try, and convict individuals. This means that civil lawsuits under 42 U.S.C. § 1983 and the common law tort of malicious prosecution should permit recovery against unscrupulous prosecutors in some instances.

285. *Imbler*, 424 U.S. at 426-27.

286. Sarma, *supra* note 25.

287. Arguments can be made that more settlements replacing trials should not be the goal of the criminal justice system. We do not engage these arguments here. Yet, if the United States Supreme Court or other policymaking body considers plea bargains a positive force that increases judicial efficiency, then eliminating absolute prosecutorial immunity could be one way to enhance that efficiency.

288. Block, *supra* note 118.

289. Sarma, *supra* note 25. This would add clarity and consistency within the law, permitting liability for prosecutors and eliminating a court-created provision of non-statutory law that treats prosecuting attorneys differently from everyone else and might stun the ordinary citizen when confronted by it. See generally Artem M. Joukov, *Isn't That Hearsay Anyway? How the Federal Hearsay Rule Can Serve as a Map to the Confrontation Clause*, 63 WAYNE L. REV. 337, 380 (2018) (emphasizing the importance of legal clarity); Artem M. Joukov & Samantha M. Caspar, *Comrades or Foes: Did the Russians Break the Law or New Ground for the First Amendment?*, 39 PACE L. REV. 43, 99 n.326 (2018) (emphasizing the same).

A. *Using the Equal Protection Clause to Remove Absolute Prosecutorial Immunity*

In evaluating whether a legal provision is constitutional under the Equal Protection Clause and the equal protection principles implicit in the Due Process Clause of the Fifth and Fourteenth Amendments, courts consider whether the distinction is based on a suspect classification, such as race or gender.²⁹⁰ In the absence of this classification, courts apply rational basis review.²⁹¹ Since absolute prosecutorial immunity does not appear to be imposed primarily on the basis of race and gender (at least not on its face), it is likely that it would receive the least amount of scrutiny under equal protection principles.²⁹² However, recent decisions have shown that even rational basis scrutiny is not without bite.²⁹³ Applying the more stringent rational basis review could (and should) lead courts to reconsider their position on prosecutorial immunity just as they did on the equal protection merits of a challenge to the prohibition of same-sex marriage (both of which were first litigated around the same time decades ago).²⁹⁴

290. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746-48 (2007); *Shelby Cnty. v. Holder*, 570 U.S. 529, 556-57 (2013); *Palmore v. Sidoti*, 466 U.S. 429, 432-34 (1984); *Miller v. Johnson*, 515 U.S. 900, 920-21 (1995); *Reed v. Reed*, 404 U.S. 71, 74-77 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973); *United States v. Virginia*, 518 U.S. 515, 555-56 (1996); *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (demonstrating that non-statutory government decisions about something as basic as awarding a government contract are subject to equal protection scrutiny); U.S. CONST. amend. XIV; U.S. CONST. amend. V.

291. *United States v. Maryland Sav.-Share Ins.*, 400 U.S. 4, 6 (1970); *United States v. Windsor*, 570 U.S. 744, 774-75 (2013); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (explaining the departure from the default rational basis standard in favor of heightened scrutiny); *Williams v. Vermont*, 472 U.S. 14, 23 (1985); *Metro. Life Ins. v. Ward*, 470 U.S. 869, 882-83 (1985); *Northeast Bancorp, Inc. v. Bd. of Governors of the Federal Reserve System*, 472 U.S. 159, 178 (1985); *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970); U.S. CONST. amend. XIV; U.S. CONST. amend. V; Artem M. Joukov, *A Second Opinion: Can Windsor v. United States Survive President Trump's Supreme Court?*, 27 J.L. & POL'Y 327, 352-59 (2019).

292. *Washington*, 426 U.S. at 239; *Hogan*, 458 U.S. at 731; U.S. CONST. amend. XIV; U.S. CONST. amend. V.

293. *Windsor*, 570 U.S. at 768-70; *Romer v. Evans*, 517 U.S. 620, 633 (1996); *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2770, 2774 (2005); Kevin H. Lewis, Note, *Equal Protection in the Wake of Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 *HASTINGS L.J.* 175, 180 (1997); see also *Williams*, 472 U.S. at 22-23. See generally *Ward*, 470 U.S. at 881-83.

294. See, e.g., *Baker v. Nelson*, 409 U.S. 810, 810 (1972) (finding no constitutional question in a challenge to a state prohibition of same-sex marriage); *Windsor*, 570 U.S. at 774-75 (invalidating on constitutional grounds a federal definition of marriage which excluded same-sex couples from the institution); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (explicitly reversing *Baker*).

The rational basis inquiry would reveal that an individual maliciously prosecuted due to the actions of a lay witness or a law enforcement officer suffers the same or similar harm if he or she is maliciously prosecuted by a prosecutor. There is little difference between facing prison (or in some cases, the death penalty) because a witness is lying, a police officer is lying, or a prosecutor is lying. From the perspective of the defendant, the harmful outcome is identical. What rational basis, then, exists to prevent recovery by those wrongfully accused and prosecuted by prosecutors compared to everyone else? Certainly, the class of people wrongfully accused by prosecutors should not be materially different than the class of people wrongfully accused by everyone else.

Perhaps prosecutors are so different from other accusers that they deserve extra protections? As we discussed, this was perhaps the assumption behind applying absolute immunity to prosecutors in the first place. As we demonstrated above, many of the reasons for treating prosecutors differently do not apply either in logic or in practice.²⁹⁵ Hence, it should be challenging for this judicial rule to survive constitutional scrutiny on those bases. Perhaps additional reasons for maintaining prosecutorial immunity have emerged or will emerge in the future. It is difficult to make such predictions, so it may be more illustrative to show what a malicious prosecution claim looks like and why applying such a claim to prosecutors (just like to other parties involved) should neither break our legal system nor greatly interrupt prosecutorial functions.

Consider the case of *Colonial Stores, Inc. v. Scarbrough*,²⁹⁶ where a gentleman successfully sued his accusers (a business employee and the business itself) for falsely identifying him as the perpetrator of a robbery.²⁹⁷ In that case, Scarbrough found himself behind bars while awaiting trial for a robbery he did not commit due to a false eyewitness identification.²⁹⁸ Despite his exoneration and release upon additional investigation that led to a dismissal of the charges, Scarbrough suffered reputational damages (as many falsely-accused individuals do, similar to defamation damages), and experienced a deterioration of his psychological health to the point of attempting suicide.²⁹⁹ Even though

295. See *supra* Part V.

296. 355 So. 2d 1181 (Fla. 1977).

297. *Id.* at 1183. He did so through claims of false imprisonment and malicious prosecution. *Id.* at 1183, 1186 (affirming a general verdict for respondent, sustaining the judgment upon the sufficient evidence of the malicious prosecution claim, alone, and thus not finding it necessary to decide the sufficiency of the alternative false imprisonment claim).

298. *Id.*

299. *Id.*

his misidentification could have been an honest mistake, the law of the State of Florida permitted him to sue his private party accusers and recover damages.³⁰⁰ Yet, if the misidentification or some other impropriety within the case had come by way of prosecutorial action (such as the prosecutor continuing to argue for the defendant's detention in jail after learning Scarbrough had been misidentified), an individual in Scarbrough's position could find no vehicle for recovery in the law despite identical damages. This Article proposes to rectify this discrepancy by simply allowing individuals like Scarbrough to add one more party to his lawsuit: the prosecutor.

Some arguments might exist for why protections should extend to the prosecutor rather than to Scarbrough's accusers. After all, a prosecutor may be reluctant to bring criminal charges against anyone for fear of revenge without at least some legal protections. Yet, the same could have been true of citizens just like Scarbrough's accusers: prosecuting them would reduce the plausibility of subsequent citizens coming forward to report crime.³⁰¹ However, the Florida Supreme Court specifically considered this possibility when asked to protect Scarbrough's malicious prosecutors from liability, rejecting it as a sound reason to deny the plaintiff recovery.³⁰²

The same has been true of other state courts as well: the chilling effect on reporting crime does not eliminate the tort of malicious prosecution.³⁰³ The tort even extends to legal authorities, such as police officers, which combines with actions under the Civil Rights Act, such as 42 U.S.C. § 1983.³⁰⁴ It is true that officers receive qualified immunity, but as many case examples demonstrate, this immunity is far from absolute.³⁰⁵ Police officers have been held liable for illegal arrests and prosecutions initiated against the innocent.³⁰⁶ Courts have allowed this despite the potentially chilling effects on police reporting crime.³⁰⁷

Yet, lawyers working as state attorneys, district attorneys, or United States attorneys (and sometimes working at offices of the state attorney

300. *Id.*

301. *Id.* at 1185.

302. *Id.*

303. *See, e.g.*, GA. CODE ANN. § 51-7-40 (2020) ("Right of action for malicious prosecution."); ALA. CODE § 6-5-550 (2020) ("Cause of action for malicious prosecution of civil action against health care provider.").

304. 42 U.S.C. § 1983; *see Police Misconduct and Civil Rights, supra* note 124.

305. *Qualified Immunity, supra* note 63.

306. *See, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 343 (1986) (ruling that a police officer is liable in a wrongful arrest); *Manuel v. City of Joliet*, 137 S Ct. 911, 919 (2017) (permitting a malicious prosecution claim against a police officer).

307. *Malley*, 475 U.S. at 343.

general) still escape this brand of lawsuit under the doctrine of absolute immunity.³⁰⁸ Without any statutory basis or legislative permission, courts have recognized certain privileges that extend to members of the judicial branch, such as judges, and advocates before the court, such as prosecutors, while withholding these privileges from more “blue-collar” workers.³⁰⁹ Among these privileges is the apparent right to be above the law: the right to commit even the most egregious acts of malicious prosecution and still escape without civil liability.³¹⁰

An innocent person who finds herself in the crosshairs of an overzealous criminal prosecution is inherently in a precarious position, regardless of whether a police officer or an overzealous prosecutor caused the problem: through no fault of her own, she finds herself pursued by the powers of the state criminal justice system. Being innocent, she has done nothing to incur the wrath of the police or of the witnesses against her that would justify the prosecution. Yet, despite the harm to her reputation and the physical and emotional stress of being accused and potentially imprisoned in anticipation of trial, the law limits her recovery against some parties more than against others.³¹¹ So, if she finds herself in the class of people prosecuted due to malicious prosecution, she has the full right to sue her accusers, granted they are the individuals who pressed charges against her, without fear of judicial bars.³¹² If she finds herself in the class of people prosecuted due to false police testimony, the bar becomes higher: she must establish that the police acted in contravention of well-established law in testifying against her.³¹³ If she finds herself in the class of people harmed by a prosecutor who brought a case the prosecutor knew had no evidentiary basis, she has no legal recourse at all.³¹⁴

This discrepancy raises the obvious question: Why would a criminal defendant in one circumstance have greater limitations on her rights to recover for the harm done to her than all the others? How does this discrepancy provide her with equal protection of the laws permitting civil recovery for damages, and if there is some rational basis for treating her differently when she is the victim of a prosecutor’s actions,

308. Chemerinsky, *supra* note 34, at 477; *Connick v. Thompson*, 563 U.S. 51, 54 (2011).

309. *Bradley v. Fisher*, 80 U.S. 335, 347 (1871); *Imbler v. Pachtman*, 424 U.S. 409, 427-31 (1976).

310. *Connick*, 563 U.S. at 54, 71-72.

311. *Basic Guide to Immunity for Government Officials*, HELBRAUN L. FIRM, <https://www.helbraunlaw.com/basic-guide-to-immunity-for-government-officials> (last visited Feb. 8, 2021).

312. *Colonial Stores, Inc. v. Scarbrough*, 355 So. 2d 1181, 1183, 1185 (Fla. 1977).

313. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982).

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

does that rational basis survive decisions like *United States v. Windsor*³¹⁵ and the heightened rational basis scrutiny that case imposes? Another important question is why do prosecutors receive greater protections than police? A police officer must often make swift decisions about who to arrest and subject to prosecution.³¹⁶ These decisions may be rendered under heavy duress, with the officer's life or health in danger, which might affect decisions about *how* to make the arrest in the first place.³¹⁷ These decisions may also be made in instances where civilian lives are at stake.³¹⁸ Yet, incorrect decisions can still subject the officer to civil suit.³¹⁹ If the action contravenes one of many "clearly" established laws or constitutional provisions (and their legal interpretation by any number of courts) that lawyers expect officers to remember, the officer and his department may be subject to lawsuit and may be liable for millions of dollars in damages.³²⁰ However, a lawyer, having the opportunity to consider and reflect on a criminal case without any physical or mental duress, can make a decision that also contravenes clearly established law and suffer no civil liability whatsoever.³²¹

This is a remarkable set of rules. The legal system in its current state would absolve the lawyer of responsibility, while refusing to do so for the police officer, in instances where the harder decision clearly lies in the officer's hands. The duress of a rapid decision to make an arrest that leads to prosecution in a life-or-death situation is not the only consideration that should lead to undo this distinction.³²² Given that law enforcement officers and prosecutors both make legal evaluations in reaching their final decisions,³²³ why is the prosecutor held to no standard of accountability while the police officer must face the possibility of a lawsuit? Most prosecutors have attended law school and passed the bar examination.³²⁴ Arguably, this additional level of

315. 570 U.S. 744 (2013).

316. Matthijs J. Verhulst & Anne-Françoise Rutkowski, *Decision-Making in the Police Work Force: Affordances Explained in Practice*, 27 GRP. DECISION & NEGOT. 827, 832 (2018).

317. *Id.*

318. *Id.*

319. Nina Totenberg, *Supreme Court Weighs Qualified Immunity for Police Accused of Misconduct*, NPR (June 8, 2020, 5:00 AM), <https://www.npr.org/2020/06/08/870165744/supreme-court-weighs-qualified-immunity-for-police-accused-of-misconduct>.

320. *Qualified Immunity*, *supra* note 63; *Police Misconduct and Civil Rights*, *supra* note 124.

321. *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976).

322. Verhulst & Rutkowski, *supra* note 316, at 832.

323. *See, e.g.*, Lance Eldridge, *Understanding the Officer-Prosecutor Divide*, POLICE1 (Oct. 15, 2010), <https://www.policeone.com/legal/articles/understanding-the-officer-prosecutor-divide-NKLsp5aiNjBDLCyr>.

324. *How to Become a Prosecutor*, CRIM. JUST. PROGRAMS, <https://www.criminaljusticeprograms.com/specialty/prosecutor> (last visited Feb. 8, 2021).

expertise should place them in a better position to make accurate decisions than law enforcement officers who often lack the same rigorous legal training.³²⁵

Even if some law enforcement officers gain additional knowledge as a result of long tenure with the police department (perhaps even exceeding the criminal law knowledge of young prosecutors), less experienced prosecutors often have the ability to consult more experienced members of their office for help or conduct intense legal research prior to reaching a decision to prosecute.³²⁶ This option may be unavailable to a law enforcement officer who must make a split-second decision between life and death.³²⁷ So what can justify this distinction of opening a police officer to a large amount of civil liability while shielding a prosecutor entirely? If anything, it is the lawyers that should face additional legal scrutiny for pursuing malicious or unconstitutional prosecutions rather than law enforcement personnel. The additional training lawyers receive should make their mistakes all the more inexcusable.³²⁸ If the elements of the charge can be established against a prosecutor, why should the victim of the malicious or unconstitutional prosecution fail to recover? In addition, with several protests recently rocking the United States, many American citizens support stripping police officers of their qualified immunity altogether, and there are currently eight qualified immunity cases now pending before the United States Supreme Court.³²⁹ If the United States Supreme Court banishes qualified immunity for police officers, despite their inherently dangerous jobs, why should prosecutors, who risk far less and do not experience life-or-death decisions the way that police officers do, receive absolute immunity while police might receive no immunity at all?

The current policy of absolving criminal prosecutors from liability for malicious prosecution also makes little sense when comparing the harms the accused actually suffers.³³⁰ If falsely accused by a lay witness in civil court, then at least the unpleasant experience ends without any criminal charges. The defendant successfully defends himself or herself

325. Christine Gardiner, *How Educated Should Police Be?*, NAT'L POLICE FOUND., <https://www.policefoundation.org/study-examines-higher-education-in-policing> (last visited Feb. 8, 2021).

326. HENRY F. FRADELLA & DAVID W. NEUBAUER, *AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM* 165-66 (12th ed. 2017).

327. Verhulst & Rutkowski, *supra* note 316, at 832.

328. *How to Become a Prosecutor*, *supra* note 324.

329. Totenberg, *supra* note 319.

330. *Serious Long-Term Consequences Often Come with Arrest Records*, GROSHEK L., <https://www.christagrosheklaw.com/Articles/Serious-long-term-consequences-often-come-with-arrest-records.shtml> (last visited Feb. 8, 2021).

from false allegations, potentially recovers his or her legal fees (plus other damages in the event of a malicious prosecution civil claim), and continues on with his or her life.³³¹ The same is true if a law enforcement officer gives false testimony to implicate the defendant in a civil context.³³² False statements that lead to criminal prosecution may be more troubling, given that a conviction could potentially lead to criminal liability, a criminal record, and a preclusive effect in subsequent civil litigation that might arise.³³³ Yet, thankfully for the falsely accused, recovery against lying police officers is at least cognizable under the law, and recovery against lying lay witnesses is even easier.³³⁴ However, once a prosecutor becomes involved, the impact of the case on the defendant rises exponentially.³³⁵

The moment a prosecutor puts pen to paper, initiating the prosecution of the accused, he or she certifies, in a highly official capacity, that probable cause has been found that the defendant committed a crime.³³⁶ If the crime is a felony, the risks for the defendant increase significantly, and even if ultimately acquitted, the defendant may be forced to disclose that he or she has been so charged on job applications, applications to join a professional body (such as the legal bar of a particular state), and in other matters.³³⁷ This effect is now beginning to apply to misdemeanors as well, with employers sometimes requiring applicants to disclose any formal charges whatsoever.³³⁸ Perhaps even more concerning, the criminal charge becomes a part of the publicly-accessible court record, backed by the authority and impressive credentials of the prosecutor bringing the charge.³³⁹ This

331. Puja Sachdev, *Four Things to Remember if You're Being Falsely Accused in Court*, SACHDEV LEGAL GRP. (Dec. 31, 2019), <https://www.sachdevfamilylaw.com/blog/four-things-to-remember-if-youre-being-falsely-accused-in-court>.

332. *See id.*

333. Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805, 830 (1985).

334. *Qualified Immunity*, *supra* note 63.

335. Off. of the U.S. Att'ys, *Charging*, U.S. DEP'T JUST., <https://www.justice.gov/usao/justice-101/charging> (last visited Feb. 8, 2021).

336. U.S. Att'y Off. Dist. of Minn., *Criminal Procedures*, U.S. DEP'T JUST. (May 1, 2015), <https://www.justice.gov/usao-mn/criminal-procedures>.

337. *What Long-Term Consequences Could a Criminal Conviction Have on My Life?*, *supra* note 227.

338. J.E. Cornett, *Necessity of Disclosing a Misdemeanor for Employment*, CHRON, <https://work.chron.com/can-still-job-got-arrested-but-not-convicted-21382.html> (last visited Feb. 8, 2021).

339. *Expungement and Record Sealing*, JUSTIA, <https://www.justia.com/criminal/expungement-record-sealing> (last visited Feb. 8, 2021).

consequence can be far more damaging to a defendant's life and career than mere false testimony by a police officer in a civil case.³⁴⁰

Even an acquittal would not indicate a triumph for the person accused, since overcoming criminal charges might not imply innocence, but merely a lack of admitted evidence demonstrating guilt beyond a reasonable doubt.³⁴¹ Hence, rumors of alleged misconduct will always inevitably hover over the accused, regardless of how innocent he or she might have really been.³⁴² Therefore, refusing to permit an individual so harmed to recover for the harm she suffers simply because she was harmed by a prosecutor rather than a law enforcement agent makes little sense from an equal protection perspective.³⁴³ By limiting the rights of the wrongly accused to fight back, the judicial rule puts such individuals in a disadvantageous position and emboldens wrongful prosecution by members of a state or federal prosecuting office.

Another approach to the disparate treatment afforded to police officers and prosecutors is from the perspective of the police officer under Equal Protection Clause scrutiny.³⁴⁴ The officer might argue that he did not receive equal protection of the law compared to the prosecutor despite similar circumstances.³⁴⁵ After all, if prosecutors receive absolute immunity despite their legal training and the extensive time they have to make a decision, then so should law enforcement officers.³⁴⁶ The rational basis for the distinction might be present in some instances: maybe the creation of the judicial rule properly accounts for a greater number of cases that might be brought against the average prosecutor than the average police officer.³⁴⁷ After all, statistics in some areas may suggest that the prosecutor would encounter far more defendants in his or her practice than the average police officer, resulting in a far greater number of potential plaintiffs.³⁴⁸ On the other hand, it seems like a grim legal outcome that a civil defendant's potential to harm far more people than other defendants would absolve him of responsibility rather than exposing him thereto. Nevertheless, a facial

340. *Id.*

341. *The Burden of Proof in Criminal and Civil Cases*, LAW OFF. VIKAS BAJAJ (Dec. 17, 2018), <https://www.bajajdefense.com/the-burden-of-proof-in-criminal-and-civil-cases>.

342. *Expungement and Record Sealing*, *supra* note 339.

343. *See, e.g.*, Sarma, *supra* note 25.

344. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976).

345. *Imbler*, 424 U.S. at 430-31.

346. *Equal Protection*, ENCYC. BRITANNICA (June 18, 2004), <https://www.britannica.com/topic/equal-protection>.

347. *See Adam M. Gershowitz & Laura R. Killinger, The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 262-63 (2011).

348. *Id.*

challenge to the rule would surely run into at least some examples of a potential need for prosecutorial absolute immunity that cannot be universally declared as failing to rise to the level of rational basis.³⁴⁹

A facial challenge to the judicial construction may fail, but a challenge as-applied might be quite successful.³⁵⁰ This would be particularly true in instances where extenuating circumstances may truly suggest that the officer should receive the benefit of the doubt where a barred lawyer should not. For example, if a law enforcement officer discharges her firearm in a highly dangerous situation requiring a lightning-fast decision, and subsequently finds herself sued for unconstitutional use of force, she may be able to argue that prosecutors receive absolute immunity in instances where no swift decision needs to be made, and, therefore, she should receive similar immunity given the circumstances of her case. Because she is in a similar crime-fighting role to the attorneys, and facing far greater danger, perhaps the protections extended to lawyers should also be extended to her as a matter of equal protection.³⁵¹ Why should she receive any less legal protection for pulling the trigger in an instance where she felt confident that her life and the lives of other citizens were in danger, compared to a lawyer who falsely charged someone with a crime from the comfort and safety of his office? To the extent that the officer's role is different than that of the prosecutor, it seems that the prosecutor's role is far less demanding of fast, life-or-death decisions and hence should receive fewer protections from civil liability, not more.³⁵² Therefore, the dissimilarity should strike in favor of protecting the officer *more* than the prosecutor, not the other way around.

More importantly, though, such a challenge to a distinction between judicial rules should receive particular attention in light of a bigger question: Whether qualified immunity and absolute immunity should be assigned on the basis of class. Perhaps the most important objection to treating lawyers and members of law enforcement differently is the

349. Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010).

350. *Id.*

351. *Equal Protection*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/equal-protection> (last visited Feb. 8, 2021); see also Samantha M. Caspar & Artem M. Joukov, *Worse than Punishment: How the Involuntary Commitment of Persons with Mental Illness Violates the United States Constitution*, 47 HASTINGS CONST. L.Q. 499, 525-26 (2020).

352. Michael B. Sauter & Charles Stockdale, *The Most Dangerous Jobs in the US Include Electricians, Firefighters and Police Officers*, USA TODAY (Jan. 8, 2019, 12:53 PM), <https://www.usatoday.com/story/money/2019/01/08/most-dangerous-jobs-us-where-fatal-injuries-happen-most-often/38832907>.

difference in their socioeconomic circumstances.³⁵³ This is a crucial question, because an examination of the socioeconomic circumstances of the average police officer and the average lawyer reveal differences in family wealth,³⁵⁴ education,³⁵⁵ prestige,³⁵⁶ race and ethnicity,³⁵⁷ gender,³⁵⁸ and a host of other characteristics that may underscore a sinister intent behind granting absolute immunity to the lawyer and only qualified immunity to the police officer.³⁵⁹

The average police officer may come from a family in which parents have received a lower level of education compared to a lawyer's family (perhaps leading to reduced access to legal education for the officer himself), and law enforcement officers are less likely than lawyers to come from wealthier families.³⁶⁰ The average law enforcement officer has received less legal education than the average lawyer.³⁶¹ Most lawyers, as a matter of requirement in most states, hold a JD as well as an undergraduate degree of some kind.³⁶² Some may even hold additional graduate degrees, such as an LLM, a PhD, or a JSD. Some law enforcement officers do hold a JD, but this is the exception, not the rule, and far from a requirement to be a law enforcement

353. The average salary for a police officer is approximately \$54,000. *Average Police Officer Salary*, Payscale (Jan. 31, 2021), https://www.payscale.com/research/US/Job=Police_Officer/Salary. The median salary of a lawyer was \$122,960 in 2019. *How Much Does a Lawyer Make?*, U.S. NEWS, <https://money.usnews.com/careers/best-jobs/lawyer/salary> (last visited Feb. 8, 2021).

354. Susanna Rustin, *Household Income Plays Crucial Role in Determining a Child's Prospects - Report*, GUARDIAN (July 12, 2017, 4:30 PM), <https://www.theguardian.com/inequality/2017/jul/12/household-income-crucial-role-children-life-prospects-lse-report>.

355. *How to Become a Prosecutor*, *supra* note 324; Gardiner, *supra* note 325.

356. Johnny Wood, *These Are the World's Most Respected Professions*, WORLD ECON. F. (Jan 15, 2019), <https://www.weforum.org/agenda/2019/01/these-are-the-world-s-most-respected-professions>.

357. 65.5% of police officers are White, whereas 85% of lawyers are White. *Police Officers*, DATA USA, <https://datausa.io/profile/soc/police-officers> (last visited Feb. 8, 2021); Debra Cassens Weiss, *Lawyer Population 15% Higher than 10 Years Ago, New ABA Data Shows*, A.B.A. J. (May 3, 2018, 2:31 PM), https://www.abajournal.com/news/article/lawyer_population_15_higher_than_10_years_ago_new_aba_data_shows.

358. 12.8% of full-time law enforcement officers in the United States are female whereas more than one in three lawyers are women. Erin Duffin, *Gender Distribution of Full-Time Law Enforcement Employees in the United States in 2019*, STATISTA (Oct. 1, 2020), <https://www.statista.com/statistics/195324/gender-distribution-of-full-time-law-enforcement-employees-in-the-us>; Jennifer Cheeseman Day, *Number of Women Lawyers at Record High but Men Still Highest Earners*, U.S. CENSUS BUREAU (May 8, 2018), <https://www.census.gov/library/stories/2018/05/women-lawyers.html>.

359. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Imbler v. Pachtman*, 424 U.S. 409, 424-27 (1976).

360. Rustin, *supra* note 354.

361. *How to Become a Prosecutor*, *supra* note 324; Gardiner, *supra* note 325.

362. *How to Become a Prosecutor*, *supra* note 324.

officer.³⁶³ Many police departments and sheriff's departments do not require a degree beyond a high school diploma (or its equivalent) to become a law enforcement officer.³⁶⁴

Police do receive training at police academies, though much of this is physical training to fulfill the requirements of the job rather than the type of legal training a lawyer receives in law school, which might help him or her understand when he or she is on the verge of engaging in unconstitutional or otherwise illegal conduct.³⁶⁵ This is not to say that police are not trained in the law—they certainly are.³⁶⁶ Law enforcement officers must often make the initial determination of probable cause to arrest an individual when they observe the commission of a crime and in situations where there may be no opportunity to obtain a warrant.³⁶⁷ There is no question that such a determination requires applying the criminal code and the U.S. Constitution to observed (or otherwise ascertained) facts. This determination does require serious training, which applies even in a circumstance where police officers have the time to apply for a warrant, since a proper affidavit of probable cause must be submitted with such an application by the law enforcement officer.³⁶⁸ However, we doubt that any amount of training can adequately prepare a law enforcement officer to make perfect, split-second decisions regarding arrest and detention. Yet, unlike a lawyer, law enforcement officers can theoretically be held liable for being wrong about the tasks they perform in the field of duty, regardless of its hazardous nature.³⁶⁹

This apparently illogical distinction between law enforcement officers and prosecutors appears to be based highly on class. Law enforcement officers are generally considered “grey-collar” workers, a term used to describe individuals classified somewhere between blue-collar and white-collar workers.³⁷⁰ Prosecutors, though, are white-collar workers.³⁷¹ Some prosecutors ultimately become judges

363. Gardiner, *supra* note 325.

364. *Id.*

365. Rosa Brooks, *Stop Training Police Like They're Joining the Military*, ATLANTIC (June 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/police-academies-paramilitary/612859>.

366. Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 795-97 (2013).

367. *Id.*

368. Sara J. Berman, *Arrest Warrants: What's in Them, How Police Get Them*, NOLO, <https://www.nolo.com/legal-encyclopedia/arrest-warrants-how-when-police-get-them.html> (last visited Feb. 8, 2021).

369. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Imbler v. Pachtman, 424 U.S. 409, 427-30 (1976).

370. Hassan Choughari, *Types of Collar Workers! (Updated)*, LINKEDIN (Apr. 18, 2016), <https://www.linkedin.com/pulse/whats-types-collar-workers-hassan-choughari>.

371. Rob Berger, *The Difference Between White Collar and Blue Collar*, DOUGHROLLER (Dec.

through the use of the political connections they gain during their prosecutorial service to the state or federal government.³⁷² And, ironically, it is judges that craft these judicial exemptions from liability for prosecutors that practice before them and likely share their social circles.³⁷³ It is judges who find far more in common with lawyers than law enforcement officers, that exempt the former from liability while imposing the prospect of liability on the latter.³⁷⁴ While it may be that law enforcement officers can attend law school, earn a law degree, pass the bar, and then also become a judge, this is the exception rather than the rule.³⁷⁵

As it is, the protections judges offer prosecuting attorneys are superior to those available for law enforcement despite the fact that a prosecuting lawyer generally has more legal knowledge with which to defend himself or herself in the event of a lawsuit,³⁷⁶ earns more,³⁷⁷ has greater access to legal representation as a result of those earnings,³⁷⁸ and would be far more likely to recover financially given an unfavorable verdict.³⁷⁹ The fact that the law currently gives the advantage to prosecutors seems untenable in this light. It almost appears as if lawyers seized control of the entire court system and unilaterally gave themselves a free pass. This distinction hardly upholds the impartiality that judicial bodies are supposed to maintain and hardly avoids the appearance of impropriety that judges are supposed to avoid.³⁸⁰

What is more, we should consider the class comparison between a malicious prosecutor and the unjustly prosecuted. Here, there may also

5, 2019), <https://www.doughroller.net/personal-finance/the-difference-between-white-collar-and-blue-collar>.

372. Opinion, *Too Many Prosecutors Become Judges*, N.Y. TIMES, Oct. 23, 1986, at A26.

373. Fredric N. Tulsy, *Part Four: How Judges Favor the Prosecution*, MERCURY NEWS (Jan. 31, 2007, 10:36 AM), <https://www.mercurynews.com/2007/01/31/part-four-how-judges-favor-the-prosecution>.

374. Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (Sept. 18, 2019), <https://www.cato.org/publications/studies/are-disproportionate-number-federal-judges-former-government-advocates>.

375. Gardiner, *supra* note 325.

376. *Id.*; *How to Become a Prosecutor*, *supra* note 324.

377. The national average annual wage of a police officer is approximately \$54,000. *Average Police Officer Salary*, *supra* note 353. The average annual salary of a prosecutor is approximately \$66,000. *Average Prosecutor Salary*, Payscale (Jan. 12, 2021), <https://www.payscale.com/research/US/Job=Prosecutor/Salary>.

378. Sarah Lustbader, *Wealthy and Connected Defendants Like Roger Stone Get off Easy All the Time*, WASH. POST (Feb. 14, 2020, 10:47 AM), <https://www.washingtonpost.com/outlook/2020/02/14/wealthy-connected-defendants-like-roger-stone-get-off-easy-all-time/>; Arpit Gupta & Ethan Frenchman, *The US Bail System Punishes the Poor and Rewards the Rich*, QUARTZ (Feb. 2, 2017), <https://qz.com/900777/the-us-bail-system-punishes-the-poor-and-rewards-the-rich>.

379. Lustbader, *supra* note 378; Gupta & Frenchman, *supra* note 378.

380. MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS'N 2010).

be a significant socioeconomic gap that manifests itself in differences in upbringing,³⁸¹ family wealth,³⁸² education,³⁸³ race and ethnicity,³⁸⁴ and many other factors. Given that a disproportionate amount of individuals who find themselves in the crosshairs of the legal system are of minority descent,³⁸⁵ the racial and ethnic differences between the prosecutor and the prosecuted are non-trivial.³⁸⁶ With this practical reality in mind, the law currently allows the predominantly White, educated, and wealthy to attack others with impunity.³⁸⁷ Given that a false criminal accusation is a significant attack due to the costs associated with a criminal conviction, or even the threat of one, the idea that the falsely accused have no recourse against their prosecutors has the flavor of class warfare.³⁸⁸

There is not much that equal protection principles can do to correct the socioeconomic imbalance between the malicious prosecutor and the prosecuted: the Equal Protection Clause obviously cannot render a defense or civil cause of action just because the prosecutor differs from the plaintiff. However, equal protection principles may provide the necessary foundation for a citizen to challenge the bar on his or her civil recovery simply because he or she fell victim to malicious prosecution perpetrated by a prosecutor rather than a police officer or lay witness. Curiously, an Equal Protection Clause challenge might also be raised by a law enforcement officer, citing the unjust unavailability of the absolute immunity defense for the officer's actions while the same defense is available to a prosecutor. This challenge may be unlikely to succeed if raised by the police officer, given recent cases indicating the need to hold law enforcement accountable.³⁸⁹ If anything, such a challenge

381. KEVIN N. WRIGHT & KAREN E. WRIGHT, FAMILY LIFE AND DELINQUENCY AND CRIME: A POLICYMAKERS' GUIDE TO THE LITERATURE i-ii (1996), <https://www.ncjrs.gov/pdffiles1/Digitization/140517NCJRS.pdf>

382. *Id.*

383. *Crime Rates Linked to Educational Attainment, 2013 Alliance Report Finds*, ALL. FOR EXCELLENT EDUC. (Sept. 12, 2013), <https://all4ed.org/press/crime-rates-linked-to-educational-attainment-new-alliance-report-finds>.

384. Timothy Williams, *Black People Are Charged at a Higher Rate than Whites. What if Prosecutors Didn't Know Their Race?*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html>.

385. *Id.*

386. *See* Weiss, *supra* note 357.

387. Lustbader, *supra* note 378; Gupta & Frenchman, *supra* note 378.

388. Breanne Pleggenkuhle, *The Financial Cost of a Criminal Conviction: Context and Consequences*, 45 CRIM. JUST. & BEHAV. 121, 130-32 (2018).

389. Recently, on May 25, 2020, police responded to a call regarding a man who allegedly used a counterfeit \$20 bill to buy cigarettes. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>. Seventeen minutes later, the man—George Floyd—was dead, after former police officer Derek Chauvin murdered him by pinning Floyd down, with his knee to Floyd's neck, for over eight minutes, resulting in Floyd's inability to breathe. *Id.*

might underscore the need to eliminate absolute immunity for prosecutors rather than raising law enforcement to an equal degree of legal infallibility.

While the comparison between the treatment of malicious prosecution victims of law enforcement and prosecutors seems to have the starkest difference in the context of judicially granted immunities, we should not forget that another comparison may be relevant: the treatment of a misbehaving prosecutor compared to a civil practitioner engaged in plaintiff's work. For those finding law enforcement investigative functions and prosecutorial judicial functions too distinct for a proper equal protection comparison, this should help allay at least some of the opposition to our argument. After all, plaintiff's lawyers engage in work quite similar to the work of the prosecutors, yet they suffer significantly greater reprimand for doing so callously.³⁹⁰

First, plaintiff's lawyers may find themselves on the hook for their opponent's attorney's fees and costs if their conduct in a civil or administrative proceeding was in bad faith or carried out for an improper purpose.³⁹¹ The conduct can include filing a lawsuit or administrative action that the plaintiff's lawyer knew or should have known would not succeed. Other remedies available to the wrongfully sued are quite expansive. Rule 11 of the Federal Rules of Civil Procedure serves as a good, though rarely used, example. Filing frivolous claims can result in penalties imposed by the very court where the claims are filed within that very case.³⁹² Notably, the wronged party need not even initiate a separate proceeding to recover for some of the damages incurred.³⁹³

Furthermore, it may even be possible to hold a plaintiff's lawyer, rather than just the plaintiff, responsible for a malicious prosecution claim.³⁹⁴ It is certainly not inconceivable that lawyers, not just their clients, may have personal animosity against a civil defendant and therefore may launch a legal action they know cannot succeed with the intent of pestering or embarrassing the defendant.³⁹⁵ In such a situation,

390. *Legal Malpractice Law - Plaintiffs*, U.S. NEWS & WORLD REP., <https://bestlawfirms.usnews.com/legal-malpractice-law-plaintiffs/overview> (last visited Feb. 8, 2021).

391. See, e.g., FLA. STAT. § 120.595 (2019); *id.* § 120.569(2)(e), (k)(2); *id.* § 57.111; *id.* § 57.105; *Bitterman v. Bitterman*, 714 So.2d 356, 365 (Fla. 1998).

392. FED. R. CIV. P. 11. An interesting Article exists suggesting that something similar to the Federal Rule 11 should be adopted for prosecutors. Yuri R. Linetsky, *A Rule 11 for Prosecutors*, 87 TENN. L. REV. 1, 57-62 (2019).

393. FED. R. CIV. P. 11.

394. John H. Beers, Note, *Attorney's Liability to Client's Adversaries for Instituting Frivolous Lawsuits: A Reassertion of Old Values*, 53 ST. JOHN'S L. REV. 775, 796-80 (1979).

395. *Id.* at 776.

we are aware of no immunity (not even qualified immunity) that would protect the plaintiff's lawyer from lawsuit. Yet, courts nevertheless extend absolute immunity to the prosecutor.³⁹⁶ The availability of this remedy also does not negate the professional sanctions a plaintiff's lawyer might suffer as a result of legal misconduct for violating bar rules.³⁹⁷ This allows civil lawyers to be held responsible both ethically and civilly, while prosecutors need only fear ethical actions.³⁹⁸

There is an important difference between lawyers in civil practice and prosecutors and law enforcement officers that some may cite to justify the distinction: civil practitioners are generally unelected private individuals while prosecutors and sheriffs are generally elected (and police chiefs are ordinarily appointed by an elected mayor of a municipality).³⁹⁹ Arguably, then, if a prosecutor or his deputies act inappropriately and bring wrongful prosecutions against members of the community, those members can find justice at the ballot box (one might advance a similar argument about the sheriff and the police chief).⁴⁰⁰ Therefore, one might argue that the immunities extending to prosecutors (and law enforcement officers) are properly applied since their acts are partially political and should have a political rather than a civil remedy. Hence, similar to absolute immunities from lawsuits set aside for legislators and executives acting in their political capacity, the average prosecutor should receive protections.⁴⁰¹

The problem with this conclusion is that the amount of exposure to political correction prosecutors face is apparently insufficient to curb some of the bad habits they exhibit.⁴⁰² Many prosecutors run for re-election every six years, which can be a remarkably long time for an unscrupulous elected prosecutor with equally unscrupulous deputies to engage in malicious prosecution.⁴⁰³ Even at the end of the six years,

396. *Imbler v. Pachtman*, 424 U.S. 409, 427-31 (1976).

397. See, e.g., SARAH DIANE MCSHEA, N.Y. LEGAL ETHICS REP., *GUARD AGAINST CRIMINAL, CIVIL & DISCIPLINARY LIABILITY: A PRACTICAL GUIDE* (1998), <http://www.newyorklegalethics.com/guard-against-criminal-civil-disciplinary-liability-a-practical-guide>.

398. *Id.*; *Briggs v. Goodwin*, *supra* note 11, at 378; *Niles*, *supra* note 20, at 147-48; *Johns*, *supra* note 20, at 516-17; *McClelland*, *supra* note 36, at 1329-31.

399. *FAQ*, NAT'L SHERIFFS' ASS'N, <https://www.sheriffs.org/about-nsa/faq> (last visited Feb. 8, 2021).

400. *Id.*

401. *Nixon v. Fitzgerald*, 457 U.S. 731, 748-49 (1982) (extending absolute immunity to the President); *Bogan v. Scott-Harris*, 523 U.S. 44, 53-54 (1998) (extending absolute immunity to legislators).

402. *How Common Is Prosecutorial Misconduct?*, *supra* note 104.

403. See THE PROSECUTORS & POL. PROJECT, NATIONAL STUDY PROSECUTOR ELECTIONS 9, 11, 117, 125 (2020), <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf>.

many prosecutors face no opposition at the ballot box, seemingly guaranteeing re-election regardless of the misconduct during their terms in office.⁴⁰⁴ Even if they did face opposition, individuals who they have prosecuted, however unjustly, may lack recourse at the ballot box because being convicted of certain crimes often relieves the convict of the right to vote.⁴⁰⁵ Federal prosecutors serve essentially at the pleasure of the President of the United States, which allows even less monitoring by voters and almost guarantees long tenures.⁴⁰⁶ Some might argue that the large caseload of prosecutors entitles them to greater protections than civil practitioners.⁴⁰⁷ While some prosecutors may be busier than their civil practice counterparts, which may lead to more errors suggesting the need for immunity, this is not uniformly the case.⁴⁰⁸

Yet, as with all equal protection analyses, this one cannot be complete without a balancing test.⁴⁰⁹ The Equal Protection Clause would not come into play on account of gender or race in this setting.⁴¹⁰ It is true that malicious prosecution might disproportionately affect minorities and males, since they are most often prosecuted on average, but it seems unlikely that malicious prosecution occurs with sufficient disproportion to justify a race-based or sex-based challenge.⁴¹¹ To do so, a plaintiff would have to establish that absolute prosecutorial immunity so pervasively deprives males or Black people of their right to recovery for damages (compared to other genders or sexes), that it constitutes de facto discrimination.⁴¹² We are not certain that the evidence of this is quite strong enough. However, it is always possible for individuals whose rights to recovery have been judicially curtailed to argue that their

404. See Rory Fleming, *Why So Many Prosecutors Enjoy Uncontested Re-Election*, FILTER (Jan. 21, 2020), <https://filtermag.org/prosecutors-uncontested-elections>.

405. *Felon Voting Rights*, NAT'L CONF. STATE LEGIS. (Jan. 8, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>. While it is true that those actually convicted cannot bring a malicious prosecution claim (perhaps the prosecution was not malicious if it yielded a conviction), it is possible for individuals to be properly prosecuted for some crimes and then improperly prosecuted for others. In fact, experiences with the justice system that lead to convictions can "inspire" prosecutors to view certain defendants as a target in the future, regardless of the impropriety of bringing cases against them. It would not be uncommon for a prosecutor wavering between charging criminal conduct and filing a *nolle prosequi* to look at the defendant's record and let that serve as a tiebreaker on probable cause decisions.

406. See 28 U.S.C. § 541.

407. Gershowitz & Killinger, *supra* note 347, at 267-70.

408. See *id.* at 283-85, 288-92.

409. See *Equal Protection of the Laws*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/equal-protection-of-the-laws> (last visited Feb. 8, 2021).

410. *Id.*

411. NAT'L ACADS. SCIS., *THE CRIMINAL JUSTICE SYSTEM AND SOCIAL EXCLUSION: RACE, ETHNICITY, AND GENDER: PROCEEDINGS OF A WORKSHOP IN BRIEF*, (2018), <https://www.nap.edu/read/25247/chapter/1>.

412. *Equal Protection of the Laws*, *supra* note 409.

differential treatment compared to other similarly-situated plaintiffs has no rational basis in law.⁴¹³ Then, courts would have to consider the rational basis for allowing prosecutors to escape civil liability no matter how egregious their conduct.⁴¹⁴ This requires us to address in additional detail the reasoning behind the courts granting absolute immunity to prosecutors.

The reasoning behind absolute prosecutorial immunity might include the need to protect prosecutors from endless lawsuits by hundreds of potential litigants that prosecutors face on a yearly basis.⁴¹⁵ Additionally, it may be that permitting lawsuits for mistaken prosecutions would have a chilling effect on prosecutions.⁴¹⁶ In either situation, courts may be seeking to reduce not only the burden on prosecutors and their respective offices but also the burden additional lawsuits would place on the court system as a whole.⁴¹⁷ The trouble with these reasons is that they can apply almost equally to law enforcement officers, yet those harmed by law enforcement officers have a path to recovery while those harmed by prosecutors have none.

For example, reducing lawsuits against police officers would undoubtedly lower the strain on the court system.⁴¹⁸ However, in a society intent upon justice, it seems strange and grotesque to limit who may recover simply to avoid burdening the court system. If the limiting principle does not permit the elimination of lawsuits against law enforcement personnel working in an investigative capacity,⁴¹⁹ why should it limit recovery for prosecutors executing their judicial duties? It appears rather hypocritical of the legal profession to hold that the harms caused by any other professionals are subject to suit while the harms caused by prosecuting attorneys remain without redress.⁴²⁰ Perhaps errors made by judges do not leave sufficient legal avenues for redress, since there you would ask the judiciary to police itself with respect to civil liability, a move that undoubtedly creates a long list of interest conflicts.⁴²¹ However, when a civil lawsuit concerns prosecutors, who

413. *Id.*

414. *Id.*

415. Gershowitz & Killinger, *supra* note 347, at 278-79.

416. *Prosecutorial Immunity*, *supra* note 36.

417. *Id.*

418. Herbert Brownell, Jr., *The Problem of Backlogs: A National Shortcoming in Our Courts*, 42 A.B.A. J. 1032, 1032-33.

419. *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982).

420. *Imbler v. Pachtman*, 424 U.S. 409, 427-31 (1976); *Forrester v. White*, 484 U.S. 219, 229-30 (1988).

421. Kimberly Strawbridge Robinson, *Judges Policing Judges: True Disciplinary Actions Are Rare (I)*, BLOOMBERG L. (Sept. 26, 2019, 1:21 PM), <https://news.bloomberglaw.com/us-law-week/judges-policing-judges-true-disciplinary-actions-are-rare>.

are members of the executive branch of the state and federal government, such conflicts disappear. In fact, if prosecutors can be held in civil and criminal contempt by members of the judiciary for acting disrespectfully or dishonestly toward the court or its officers,⁴²² why limit their liability to innocent victims harmed by the same or similar conduct? The current state of the law makes it appear that judges recognize prosecutorial misconduct and refuse to permit it in their courtroom. Yet, when the prosecutorial misconduct impacts someone else, they have continuously shielded the prosecutors responsible from a civil lawsuit.

B. Is the Cure Worse than the Disease?

Of course, the changes we and our fellow scholars propose may have externalities. The reason for opening prosecutors up to liability is to allow recovery to victims of their misconduct and to eliminate the apparent distinction on the basis of class between prosecutors, law enforcement, and common citizens that act maliciously to bring the innocent before a court. Primarily, we argue for this change on equal protection principles because the judicial rules allowing prosecutors to escape liability appear to limit recovery for some victims but not others without a rational basis.⁴²³ However, in allowing actions to proceed against prosecutors, we might create, or rather exacerbate, another class distinction: that between rich and poor defendants.

The literature on how the impoverished favor in court compared to their wealthier counterparts can be summarized quickly—not well.⁴²⁴ Unsurprisingly, wealth can buy many advantages, including access to bail,⁴²⁵ better counsel,⁴²⁶ placement on probation rather than being sent to prison,⁴²⁷ the ability to file for sealing or expungement of the case,⁴²⁸

422. See *Imbler*, 424 U.S. at 429.

423. *Equal Protection of the Laws*, *supra* note 409.

424. *You're Better Off 'Rich and Guilty than Poor and Innocent,' Panel Told*, CRIME REP. (Mar. 8, 2019), <https://thecrimereport.org/2019/03/08/youre-better-off-rich-and-guilty-than-poor-and-innocent-panel-told>.

425. *Id.*

426. Chloe Della Costa, *In America, Only Rich People Get a Fair Trial*, SHOWBIZ CHEAT SHEET (June 2, 2015), <https://www.cheatsheet.com/money-career/in-america-only-the-rich-get-a-fair-trial.html>.

427. *Equal Justice for the Poor, Too; Far Too Often, Money—or the Lack of It—Can Be the Deciding Factor in the Courtroom, Says Justice Goldberg, Who Calls for a Program to Insure Justice for All Americans*, N.Y. TIMES, Mar. 15, 1964, at SM24 <https://www.nytimes.com/1964/03/15/archives/equal-justice-for-the-poor-too-far-too-often-money-or-the-lack-of.html> [hereinafter *Equal Justice for the Poor*].

428. Kenny Lo, *Expunging and Sealing Criminal Records*, CTR. AM. PROGRESS (Apr. 23, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/04/15/483264/>

and the possibility of influence or bribery with the judge or threatening (implicitly or explicitly) to contribute to the campaign of an opposing judge at the next election, among other potential benefits.⁴²⁹ Some of these potential benefits are legal and likely happen much more often than the rest, but it is difficult to believe that illegal methods are never employed to gain the upper hand in a criminal trial.⁴³⁰ Hence, it is not difficult to see why the wealthy have a much better chance of escaping both conviction and punishment in court.⁴³¹

Yet the one weapon that the wealthy do not yet have is the actual ability to sue the prosecutor who brings charges against them.⁴³² This power might be too great indeed. Even a prosecutor acting in good faith might become intimidated by the concept of being sued and losing significant amounts of money on the chance the criminal jury and the subsequent civil jury side with the plaintiff. We might suspect that if a prosecutor truly acts in good faith, a plaintiff's lawyer contacted by a defendant without great means (but with an axe to grind) would refuse to take the case on a contingency basis because the attorney might believe

expunging-clearing-criminal-records.

429. Faith Karimi, *A Former Texas Judge Is Sentenced for Accepting Cash Bribes Stashed in Beer Boxes*, CNN (Sept. 26, 2019, 3:46 AM), <https://www.cnn.com/2019/09/26/us/texas-judge-cash-bribes/index.html>; Norm Ornstein, *Courting Corruption: The Auctioning of the Judicial System*, ATLANTIC (Oct. 15, 2014), <https://www.theatlantic.com/politics/archive/2014/10/courting-corruption-the-auctioning-of-the-judicial-system/381524/>; Stratos Pahis, Note, *Corruption in Our Courts: What It Looks Like and Where It Is Hidden*, 118 YALE L.J. 1900, 1925-27 (2009); *Kids for Cash Scandal*, WIKIPEDIA, https://en.wikipedia.org/wiki/Kids_for_cash_scandal (last visited Feb. 8, 2021); Emily Hoerner, *Appellate Court Denies New Trial for Chicago Man Convicted Months After Judge Accepted a Bribe in Mob Case*, INJUSTICE WATCH (Apr. 8, 2020), <https://www.injusticewatch.org/news/2020/appellate-court-denies-new-trial-for-chicago-man-convicted-months-after-judge-accepted-a-bribe-in-mob-case>; William K. Rashbaum, *Judge Accused of Taking \$18,000 Bribe*, N.Y. TIMES, Jan. 23, 2002, at B1; Bradford Betz, *Philadelphia Dem Elections Judge Admits Taking Bribes to Inflate Vote Counts*, FOX NEWS (May 21, 2020), <https://www.foxnews.com/us/philadelphia-dem-elections-judge-admits-taking-bribes-inflate-vote-counts>; *5 Corrupt Judges & the Countless Lives They Tried to Destroy*, INVESTIGATION DISCOVERY: CRIMEFEED, <https://www.investigationdiscovery.com/crimefeed/bad-behavior/5-corrupt-judges-the-countless-lives-they-tried-to-destroy> (last visited Feb. 8, 2021); Tony Perry & Alan Abrahamson, *Former Judge Pleads Guilty to Taking Bribes*, L.A. TIMES (Mar. 12, 1996, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1996-03-12-mn-46098-story.html>; *NJ Prosecutor and Judge Guilty of Accepting Bribes*, EHRlich L. OFFS., <http://www.notguiltynj.com/nj-prosecutor-and-judge-guilty-of-accepting-bribes> (last visited Feb. 8, 2021).

430. See Karimi, *supra* note 429; Pahis, *supra* note 429, at 1925-26; *Kids for Cash Scandal*, *supra* note 429; Hoerner, *supra* note 429; Rashbaum, *supra* note 429; Betz, *supra* note 429; *5 Corrupt Judges & the Countless Lives They Tried to Destroy*, *supra* note 429; Perry & Abrahamson, *supra* note 429; *NJ Prosecutor and Judge Guilty of Accepting Bribes*, *supra* note 429.

431. *You're Better Off 'Rich and Guilty than Poor and Innocent,' Panel Told*, *supra* note 424; Michael Gordon, *Yes, Rich People Have a Better Chance of Getting off in Court, Public Defender Says*, CHARLOTTE OBSERVER (Sept. 22, 10:56 AM), <https://www.charlotteobserver.com/news/politics-government/article174707216.html>.

432. *Imbler v. Pachtman*, 424 U.S. 409, 427-31 (1976).

the case would be unlikely to succeed.⁴³³ However, the stakes change when the defendant is a millionaire who would be able to pay the lawyer by the hour just to pester the prosecutor. Then, the threat of what is essentially counter-prosecution becomes quite real. This would make the prosecution of wealthy criminals more expensive and burdensome for prosecutors, which, in turn, would reduce prosecution in that area and focus it on the impoverished.

Of course, a prosecutor maliciously prosecuted in civil court for bringing a valid case in good faith may herself have a civil remedy against the criminal defendant under the same tort: malicious prosecution.⁴³⁴ Given sufficiently committed parties, we could theoretically envision an infinite spiral of litigation arising from two parties suing each other perpetually for malicious prosecution.⁴³⁵ Prosecutor prosecutes Defendant criminally, and Defendant prevails. Defendant then sues Prosecutor civilly for malicious prosecution, and Prosecutor prevails. Prosecutor then sues Defendant civilly for malicious prosecution for *Defendant's* malicious prosecution lawsuit. Defendant prevails and returns to court to sue Prosecutor again, this time for the malicious civil prosecution of the Defendant. The cycle could continue perpetually, but of course, this is true in cases not involving prosecutors as well. Moreover, the plausibility of malicious prosecution *ad infinitum* can always be reduced by the prosecutor simply not filing his or her own lawsuit for recovery after succeeding in the initial malicious prosecution trial.

Furthermore, the threat of civil retaliation by the wealthy does not loom so large when considering that, prior to bringing a malicious prosecution action against the prosecutor, the wealthy criminal defendant must first prevail in his or her criminal case. Given that the prosecutor is supposed to act in good faith in bringing the criminal charges to begin with, the odds of this outcome should be low.⁴³⁶ Overall, preventing the average innocent person accused of a crime from recovery simply because the wealthy may exploit the system would not conform to general legal principles.

433. Peter Lamont, *Why Won't an Attorney Take My Case on a Contingency Fee Basis?*, LAW OFFS. PETER J. LAMONT (Feb. 26, 2019), <https://www.pjlesq.com/post/why-wont-an-attorney-take-my-case-on-a-contingency-fee-basis>.

434. *Malicious Prosecution*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/malicious_prosecution (last visited Feb. 8, 2021).

435. See *Zamos v. Stroud*, 87 P.3d 802, 807 (Cal. 2004).

436. *Anatomy of a Criminal Case*, CNTY. OF SANTA CLARA OFF. DIST. ATT'Y (Aug. 16, 2018, 12:08 PM), <https://www.sccgov.org/sites/da/prosecution/anatomyofcriminalcase/Pages/default.aspx>; *Malicious Prosecution*, L. LIBR. - AM. L. & LEGAL INFO., <https://law.jrank.org/pages/8405/Malicious-Prosecution-Other-Considerations.html> (last visited Feb. 8, 2021).

The wealthy have an advantage in many areas of life.⁴³⁷ Those who are wealthy generally receive better medical care,⁴³⁸ live longer,⁴³⁹ have access to healthier foods,⁴⁴⁰ live in less crime-ridden neighborhoods (which may receive less attention from the police and lower the odds of apprehension),⁴⁴¹ may get favors from the police in criminal investigations,⁴⁴² may not be charged at the same rate as individuals living in impoverished neighborhoods,⁴⁴³ and are generally more successful in navigating the legal system,⁴⁴⁴ due in part to access to better counsel (and perhaps due to the fact that attorneys are often members of the wealthy class themselves).⁴⁴⁵ The fact that the wealthy may receive advantages within the legal system due to the availability of certain legal remedies seems like a poor justification to deprive everyone else of those remedies. This justification would only further disadvantage those who are less wealthy within our courts by depriving them of the little protection that the availability of a malicious prosecution claim can provide them. Since it is primarily the less wealthy that are in court, we should not fear to extend to them the right to sue an unscrupulous prosecutor just because a small subset of criminal defendants may be wealthy enough to abuse the right.

Furthermore, it would be inconsistent to withdraw rights from all Americans to prevent the wealthy from exploiting those rights. After all, in the most basic instance of affording the right to counsel in criminal proceedings, there is almost no question that a privately retained lawyer (or lawyers) would provide a superior defense.⁴⁴⁶ Private counsel has certainly been the revealed preference of criminal defendants that could afford one.⁴⁴⁷ However, we do not deprive all citizens of the right to

437. Heather Murphy, *Rich People Don't Just Live Longer. They Also Get More Healthy Years*, N.Y. TIMES (Jan. 16, 2020), <https://www.nytimes.com/2020/01/16/science/rich-people-longer-life-study.html>.

438. Chris Tomlinson, *Wealthy Get More Health Care than Other Americans*, HOUS. CHRON. (July 12, 2016), <https://pnhp.org/news/wealthy-get-more-health-care-than-other-americans>.

439. Murphy, *supra* note 437.

440. Anna Vlasits, *The Growing Diet Divide Between Rich and Poor in America*, STAT NEWS (June 21, 2016), <https://www.statnews.com/2016/06/21/growing-diet-divide>.

441. *Equal Justice for the Poor*, *supra* note 427.

442. See Jim Douglas, "The Divide:" *A Criminal Justice System that Targets the Poor and Favors the Wealthy*, STREET ROOTS (Feb. 27, 2015), <https://news.streetroots.org/2015/02/27/divide-criminal-justice-system-targets-poor-and-favors-wealthy>.

443. *Equal Justice for the Poor*, *supra* note 427.

444. See Gordon, *supra* note 431.

445. *See id.*

446. *You're Better Off 'Rich and Guilty than Poor and Innocent,' Panel Told*, *supra* note 424.

447. Tim Lynch & Adam Bates, *Poor Defendants Should Get to Choose Their Lawyers Too*, CATO INST. (Apr. 6, 2017, 10:01 AM), <https://www.cato.org/blog/poor-defendants-should-get-choose-their-lawyers-too>.

counsel simply because some may afford better counsel than others.⁴⁴⁸ Rather, we appoint counsel for the indigent even though we recognize such counsel may have less time to tend to their case than a privately hired attorney.⁴⁴⁹ We endeavor to provide the rights to everyone, even pro se litigants, and then permit free exercise of that right even if the wealth of individuals impacts the extent to which the right can be exercised. The economic reality that wealthy individuals can exercise their rights more readily should not prevent the extension of those rights to everyone.

VI. CONCLUSION

This Article has surveyed the problems with granting prosecutors absolute immunity from suit and has discussed the potential equal protection implications of this judicial rule. This Article demonstrates that if a statute promulgated by a state or federal legislature took the position advocated by the judiciary, it would almost certainly face a challenge under the federal Equal Protection Clause.⁴⁵⁰ The same would be true of an order issued by the state or federal executive branch, and in the case of the states, the attempt to limit prosecutor liability absolutely could face a challenge under the state constitution as well (since state constitutions often contain a due process clause and at least an aspirational statement about equal protection).⁴⁵¹

The fact that what we challenge is a judicially created rule does not mean it cannot unjustly deprive citizens of legal protections from malicious prosecution. In light of the United States Supreme Court's more stringent requirements of rational basis review that were adopted in *United States v. Windsor*, we do not see this judicial standard surviving much longer given the dissipation of the public image of the average prosecutor.⁴⁵² Although in the past prosecutors were viewed as those who "wear the white hats," the actions of many of them, now coming into the public light, prove this image false in many circumstances.⁴⁵³ Prosecutors are, by all accounts, just as human as anyone else. Permitting them to practice without any liability for their actions does not make for good policy and invites misconduct.

What we propose is a small change in the law that sets prosecutors on a more equal footing with others who practice similar roles: changing

448. *See id.*

449. *See id.*

450. U.S. CONST. amend. XIV.

451. *See, e.g.*, FLA. CONST. art. I, § 9.

452. Block, *supra* note 118.

453. *Id.*

absolute prosecutorial immunity into qualified prosecutorial immunity. Based on their similarity to other lawyers and law enforcement personnel, it seems entirely proper that prosecutors should receive qualified rather than absolute immunity. Granting prosecutors a more limited range of protections while still imposing a higher standard that the plaintiff must satisfy will strike a better balance between limiting frivolous suits against prosecutors by angered defendants and permitting those who were truly harmed by a prosecutor's misconduct to recover for the damages they suffered.

We should not expect prosecutors to simply fall in line without any true impediment to their actions: the evidence shows they have failed to do so until now, and there is no apparent change on the horizon.⁴⁵⁴ Instead, we should provide the parties particularly motivated by the misconduct of prosecutors the right to pursue their case against the individual that may have destroyed a life, a career, and/or a person's reputation. The motivation to find the truth and hold a bad prosecutor responsible that manifests within the victim of malicious prosecution will prove a far greater check on misuse of prosecutorial power than anything state bars and other enforcement agencies have been able to do. More importantly, it will allow the individual actually harmed by the prosecutor to recover for their harm, something bar sanctions and other enforcement of legal norms cannot achieve.

454. *Id.*