
THE RUTGERS UNIVERSITY LAW REVIEW
VOLUME 73 | ISSUE 5 FALL 2021

BREAKING THE BACKBONE OF UNLIMITED POWER: THE CASE FOR ABOLISHING ABSOLUTE IMMUNITY FOR PROSECUTORS IN CIVIL RIGHTS LAWSUITS

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ABSTRACT

There is an abundance of literature on prosecutorial misconduct: the power prosecutors have in the courtroom, the racially discriminatory ways that prosecutors yield that power, the plethora of instances in which they have abused such power, and the gross inadequacies of existing checks on said power. A major reason why prosecutorial misconduct is such a widespread problem is because prosecutors are absolutely immune from civil liability regarding any "quasi-judicial" decisions they make. Yet, while some law review articles have suggested, hinted at, or lightly discussed the need to end absolute immunity, we have found no law review article that has offered a forceful rebuke of both the doctrine and the case that gave rise to it. Our article will offer a full and critical analysis of Imbler v. Pachtman, the Supreme Court decision that created absolute immunity for prosecutors in civil rights lawsuits almost out of whole cloth, and it will explain why absolute immunity for prosecutors in civil rights lawsuits must be abolished if the ends of racial, social and criminal justice are to be realized.

Following the death of George Floyd in May 2020, there was much talk of holding police officers accountable for misconduct, and advocates specifically called for the doctrine of qualified immunity to be abolished in lawsuits against law enforcement

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officers.[1] *While such conversations are welcome, they are also incomplete. There can be no meaningful police accountability without addressing the role that other actors, especially prosecutors, play in enabling misconduct by law enforcement. Further, if there is to be any meaningful reform of the criminal judicial system, prosecutors more so than police officers should be chiefly targeted.*

In 1871, Congress created a federal right of action for persons who suffer constitutional deprivations at the hands of anyone acting under color of state law,[2] *which on its face would include prosecutors. Yet, the Supreme Court barred civil rights lawsuits against prosecutors acting in their traditional roles as advocates in the courtroom.*[3] *The Court's rationale for doing so was utterly invalid then, and excuses for preserving absolute immunity are even less legitimate today. Prosecutorial misconduct has been written about extensively and is well-documented.*[4] *Existing checks on misconduct have proven to be wholly ineffective in deterring the sins of prosecutors.*[5] *Those who demand that law enforcement officers should no longer have qualified immunity in their capacities as police officers should further call for an end of absolute immunity for prosecutors in actions pertaining to their traditional functions. Congress must abolish absolute immunity for prosecutors in civil rights lawsuits if the ends of racial, social, and criminal justice are to be realized.*

This article calls for prosecutorial accountability in the post-George Floyd era. Part I will offer a brief synopsis of the ubiquitous problem of prosecutorial misconduct and will conclude that allowing aggrieved citizens to sue prosecutors is necessary and, under the current construct of the justice system, the most effective deterrent. Part II will surveil the history of the Civil Rights Act of 1871, the first section of which is the precursor to 42 U.S.C. § 1983, and show that the law conceived of no immunity for any state officials, and certainly not prosecutors. It will then critically examine the Supreme Court decision that

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1. *See, e.g.*, Ed Yohnka et al., *Ending Qualified Immunity Once and for All is the Next Step in Holding Police Accountable*, *ACLU* (Mar. 23, 2021), https://www.aclu.org/news/criminal-law-reform/ending-qualified-immunity-once-and-for-all-is-the-next-step-in-holding-police-accountable/.

2. Act of April 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983).

3. Imbler v. Pachtman, 424 U.S. 409, 430–31 (1976).

4. *See, e.g.*, Rylee Broyles & Tamara J. Lynn, *Prosecutorial Misconduct: Typologies and Need for Policy Reform*, 5 ACAD. LEADERSHIP J. STUDENT RSCH. 1, 1–8 (2018).

5. *See* discussion *infra* Part I(D).

created absolute immunity for prosecutors, demonstrating both the lack of historical support for the doctrine and the lack of merit in the Court's policy considerations. It will conclude by placing the decision in its proper context, showing that it was part of a larger effort by the Court to assist in the racist War on Drugs and shield the judicial system from claims of racial bias. Part III will summarize the reasons why Congress should abolish absolute immunity for prosecutors acting as quasi-judicial officials. Part IV will conclude the article.

Before proceeding further, a few disclaimers are in order. First, the authors do not opine on whether prosecutors should have qualified immunity in their traditional functions. It is solely their position in this article that under no circumstances should prosecutors be absolutely immune from suit. Second, the authors recognize that prosecutors are not absolutely immune for actions undertaken in their investigative capacities, separate and apart from their roles as courtroom advocates. While beyond the scope of this note, it is the authors' position that to the extent Congress does decide to strip law enforcement officers of qualified immunity, prosecutors acting as investigators should be treated similarly.

TABLE OF CONTENTS

I. PROSECUTORIAL MISCONDUCT: A MAJOR PROBLEM

Plenty of literature has been written discussing prosecutorial misconduct, so there is no need for extensive commentary here. However, this Part will summarize four important observations that explain why civil actions against prosecutors must be permitted: 1) prosecutors have immense power in the criminal judicial system; 2) they abuse that power and frequently commit misconduct; 3) they exercise that power in racially discriminatory ways; and 4) existing checks are simply insufficient to curtail that abuse. Taken in turn:

A. Prosecutors Have Immense Power in the Criminal Judicial System.

Concerns about the unchecked power of prosecutors are not new. Studies done in the 1920s and 1930s left the commissions that undertook them "shocked by the extent of [the prosecutor's] power . . . ."[6] A lot was written about prosecutorial discretion during the early part of the twentieth century; much apprehension was expressed about having so much power concentrated in the hands of individuals, with two noting how it conflicted with traditional norms of American governance and

6. Joan E. Jacoby, *The American Prosecutor's Discretionary Power*, 31 PROSECUTOR 25, 26 (1997).

checks and balances.[7] One report from 1931 criticized prosecutorial practices in plea bargaining, which it "referred to as an 'abuse' of the process"; and it called for specific checks on their power.[8] Criticism of prosecutorial discretion continued leading up to the 1970's.[9] Nonetheless, that power remained unchecked, so much so that in 1971, the National Association of Attorneys General noted the unlikelihood that such power would be lessened and great likelihood that it would expand.[10]

Prosecutorial power has grown significantly over the past few decades.[11] From the 1970s to the 1990s alone, prosecutors conducted far more extensive investigations than they did in times prior.[12] While prosecutors have always weaponized the grand jury against accused persons and other targets, their aggressive use of the grand jury as a rubber stamp on their actions has only grown.[13] Legislatures across the country have expanded substantive criminal and evidentiary law to such a degree so as to provide prosecutors with a sizable arsenal at their disposal.[14] Such expansion includes new crimes,[15] more favorable evidentiary rules,[16] and statutory presumptions.[17]

Consequently, today's prosecutors are by far the most powerful of all actors in the criminal judicial system.[18] Prosecutors decide the fate of the accused, placing them at the prosecutors' mercy and making them subject to prosecutors' biases.[19] They decide whether to charge, who to charge, what charges to bring against the accused, whether they will offer a plea, what methods they will employ to attain a conviction, and what sentence they will recommend.[20] In many jurisdictions, prosecutors can even voluntarily dismiss charges and then reinstitute them at a later date.[21]

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7. *Id.* at 26–27.

8. *Id.* at 38 (discussing NAT'L COMM'N ON L. OBSERVANCE & ENF'T, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES (1931)).

9. Bennett L. Gershman, *The New Prosecutors*, 53 UNIV. PITT. L. REV. 393, 407–08 (1992).

10. *See* Jacoby, *supra* note 6, at 39 (citing NAT'L ASS'N OF ATT'YS GEN., REPORT ON THE OFFICE OF THE ATTORNEY GENERAL 103 (1971)).

11. Gershman, *supra* note 9, at 393.

12. *See id.* at 395–400.

13. *Id.* at 400–01.

14. *See, e.g.*, Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 104 (2013).

15. Gershman, *supra* note 9, at 406–07.

16. *Id.* at 412–15.

17. *Id.* at 417–18.

18. Angela J. Davis, *The Power and Discretion of the American Prosecutor*, 49 *DROIT ET CULTURES* 55 (2005).

19. *Id.*

20. Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. UNIV. L.Q. 713, 714 (1999).

21. *See* Joseph A. Thorp, *Nolle-and-Reinstitution: Opening the Door to Regulation of Charging Powers*, 71 N.Y.U. ANN. SURV. AM. L. 429, 430 (2016).

By deciding whether, what, and when to charge, the prosecutor defines the possibilities and limitations within a criminal case.[22] Prosecutors make these decisions in secret and without oversight,[23] and the independent judgment and discretion prosecutors are given, particularly in charging and plea bargaining, have no check and beg abuse.[24]

Other relevant actors in the criminal judicial system are either complacent with prosecutors' broad authority or powerless to curtail it. "Defense attorneys have no comparable power: their role consists largely in awaiting the prosecutor's decision and reacting to it."[25] While judges have substantial power of their own and can sometimes positively influence prosecutorial decision-making via soft power, they often align themselves with prosecutors and decline to hold them accountable for their misdeeds.[26] Judiciaries at all levels across the country have widened prosecutorial powers through their jurisprudence.[27] In fact, from as far back as the late 1800s, courts have consistently recognized the broad powers of prosecutors in charging decisions and have refused to constrain that power.[28] Legislatures have set no bounds on the discretion prosecutors have and are loath to do so.[29] Consequently, all involved in the judicial system are ultimately beholden to the prosecutor at the end of the day.[30] Unchecked prosecutorial power is inconsistent with the American tradition of government.[31]

B. Prosecutors Commonly Commit Misconduct and Abuse the Immense

22. Davis, *supra* note 18, at 55.

23. Abby L. Dennis, Note, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 136 (2007).

24. *Id.* at 139, 145.

25. Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1573 (2012).

26. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 15 (2007) ("In their effort to give prosecutors the freedom and independence to enforce the law, the judicial and legislative branches of government have failed to perform the kind of checks and balances essential to a fair and effective democracy. Consequently, prosecutors, unlike judges, parole boards, and even other entities within the executive branch such as police, presidents, and governors, have escaped the kind of scrutiny and accountability that we demand of public officials in a democratic society. Prosecutors have been left to regulate themselves, and, not surprisingly, such self-regulation has been either nonexistent or woefully inadequate.").

27. *See* Dennis, *supra* note 23, at 140–42.

28. Jacoby, *supra* note 6, at 25.

29. Dennis, *supra* note 23, at 135–36.

30. *See* Davis, *supra* note 18, at 55 n.1 (stating that the prosecutor's charging and plea-bargaining decisions are "totally discretionary and virtually unreviewable").

31. Dennis, *supra* note 23, at 133 ("Unbounded prosecutorial power is at odds with a government predicated on checks and balances and a legal system based on due process.").

Power They Have.

Particularly over the past few decades, prosecutors have been more disposed to obtaining convictions and winning at all costs rather than doing justice.[32] Convictions became the benchmark for measuring success amongst prosecutors.[33] Politics played a part in shaping this reality: most district attorneys are elected, and even the ones who are not are appointed by elected officials.[34] Another important part of the reason for that is the advent of crime stories and coverage by the media.[35] The War on Drugs was announced in the 1970s and was in full swing by the 1980s.[36] Twenty-four-hour news networks began to appear in the 1980s, and America was both inundated and obsessed with crime stories.[37] This exerted some pressure on prosecutors' offices to be "tough on crime" and merciless towards accused persons.[38] With the growth of prosecutorial power over the last few decades, complaints regarding prosecutor wrongdoings soared as well.[39]

Of course, external pressures are not the sole reason for prosecutorial misconduct. Persons with significant unchecked power are likely to abuse it, and prosecutors are no exception.[40] Prosecutors abuse their power and commit misconduct in a myriad of ways, including suborning perjury, tampering with evidence, and perverting grand jury processes.[41] One of the common ways prosecutors commit misconduct is through the practice of overcharging, the act of leveling excessive criminal charges against an accused person that the prosecutor either cannot prove at trial, is indifferent about, or has no intention of pursuing to conviction.[42] The purpose of overcharging a defendant is to coerce them to plead guilty instead of insisting on their right to a trial.[43] This practice is plainly unethical and has been for a long time: the American Bar Association expressly stated from as far back as 1980 that it is "unprofessional conduct for a prosecutor to institute or cause to be instituted criminal

32. Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 16–17 (2009).

33. Dennis, *supra* note 23, at 138.

34. Brink, *supra* note 32, at 13–16.

35. *Id.* at 9–13.

36. *A Brief History of the Drug War*, DRUG POL'Y ALL., https://drugpolicy.org/issues/brief-history-drug-war (last visited Aug. 1, 2021).

37. Brink, *supra* note 32, at 9–13.

38. *Id.* at 12–13.

39. Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS UNIV. L. REV. 623, 641 (2017).

40. *See* Gershman, *supra* note 9, at 408–09.

41. H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. UNIV. L. REV. 51, 63–68 (2013).

42. Kyle Graham, *Overcharging*, 11 OHIO STATE J. CRIM. L. 701, 704–05 (2014).

43. *Id.*

charges when he knows that charges are not supported by probable cause."[44] It further bars a prosecutor from levelling charges "greater in number or degree than he can reasonably support with evidence at trial."[45] Current ABA rules similarly forbid overcharging.[46]

A clear example of overcharging is the recent case of Glenn Broadnax, a mentally ill man who was charged with, among other offenses, the most serious felony assault offense in New York, for an incident in which he neither harmed anyone nor collaborated with anyone to do the same.[47] Mr. Broadnax was experiencing a mental health crisis in Times Square in September 2013 when NYPD officers arrived and, after a brief exchange, allegedly mistook Mr. Broadnax's wallet for a gun and fired three shots at him.[48] Mr. Broadnax was not hit, but two innocent bystanders were struck and severely injured.[49] Incredibly, Mr. Broadnax was arrested and subsequently charged with the shootings of both women.[50] There was no basis for charging him accordingly,[51] and the prosecution's actions were, as described by the attorney for one of the bystanders, "an incredibly unfortunate use of prosecutorial discretion . . . ."[52] Unethical as it likely was, it was also effective: after sitting on Rikers Island for over a year with bogus felony charges hanging over his head, Mr. Broadnax ultimately bowed to the pressure and took a misdemeanor plea.[53]

Another sin that prosecutors commit with alarming frequency is failing to disclose evidence favorable to the defense, otherwise known as *Brady* violations.[54] The Supreme Court's decision in *Brady v. Maryland*

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44. PAUL BENNETT, PROSECUTORIAL OVERCHARGING 2 (1979), available at https://www.ojp.gov/pdffiles1/Photocopy/67947NCJRS.pdf.

45. *Id.*

46. ABA STANDARDS FOR CRIMINAL JUSTICE FOR THE PROSECUTION FUNCTION § 3-4.3 (4th ed. 2017) (describing the minimum requirements for filing and maintaining criminal charges).

47. Jon Campbell, *After the NYPD Opened Fire on an Unarmed, Mentally Ill Man in Times Square, Who Gets the Blame?*, VILLAGE VOICE (May 4, 2010), https://www.villagevoice.com/2016/08/10/after-the-nypd-opened-fire-on-an-unarmed-mentally-ill-man-in-times-square-who-gets-the-blame/.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* A trial judge dismissed the first-degree assault charge, finding that the evidence presented to the grand jury did not support it. *Id.*

52. James C. McKinley, Jr., *Unarmed Man is Charged with Wounding Bystanders Shot by Police Near Times Square*, N.Y. TIMES (Dec. 4, 2013), https://www.nytimes.com/2013/12/05/nyregion/unarmed-man-is-charged-with-wounding-bystanders-shot-by-police-near-times-square.html.

53. Campbell, *supra* note 47.

54. Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for* Brady *Violations*, HARV. C.R-C.L. L. REV. 4–5 (2010). Gershman concluded his introduction noting that "a large and growing body of empirical and anecdotal evidence

requires prosecutors to turn over favorable material evidence to the defense.[55] Due to the pervasiveness of the win-at-all-costs culture in prosecutor offices, this mandate is ignored far too often.[56] So widespread is the practice of suppressing evidence that at least one former judge declared there to be "an epidemic of *Brady* violations abroad in the land."[57] In other cases, prosecutors delay in turning over exculpatory evidence to the point of frustrating defense efforts to effectively make use of it.[58] Obviously, these violations can produce devastating results. A recent example of this surfaced in Queens, where three men served twenty-four years in prison before having their convictions thrown out because the prosecutor hid evidence that would have cast serious doubts on their guilt.[59]

It is virtually impossible to accurately quantify how often misconduct happens, because most instances of misconduct are never discovered.[60] To insist on empirical evidence to establish prosecutorial misconduct is to demand the impossible: because of how difficult it is to learn about misconduct after the fact, it is "impossible to set a baseline or account for any rise or fall."[61] Given the evidence that does exist, such as breakdowns of how many wrongful convictions were caused by prosecutorial misconduct, it is clear that prosecutor wrongdoing has been on the rise for decades.[62]

C. Prosecutors Exercise Their Power in Racially Discriminatory Ways.

The discretionary decisions prosecutors make are often tainted by racial bias. Studies have consistently shown that prosecutors are more likely to charge Black and Brown defendants than white defendants in similar situations; they are more likely to level more serious charges against Black and Brown defendants than similarly situated white defendants; and they are more likely to seek higher sentences against

exists suggesting that *Brady* violations are the most common type of prosecutorial misconduct." *Id.* at 12.

55. 373 U.S. 83 (1963).

56. *See* Adam M. Gershowitz, *The Challenge of Convincing Ethical Prosecutors That Their Profession Has a* Brady *Problem*, 16 OHIO ST. J. CRIM. L. 307, 310–13 (2019).

57. United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc).

58. Caldwell, *supra* note 41, at 61.

59. Troy Closson, *They Spent 24 Years Behind Bars. Then the Case Fell Apart.*, N.Y. TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/nyregion/queens-wrongful-convictions.html.

60. Thompson, *supra* note 39, at 653; Brink, *supra* note 32, at 19.

61. Brink, *supra* note 32, at 19.

62. *Id*.

Black and Brown defendants than against white defendants.[63] Other aspects of the prosecutor's job are often infected by racial bias as well. For example, prosecutors are racially discriminatory when it comes to jury selection.[64] It is also documented how prosecutors have used racial appeals at trial, largely getting away with it insofar as the appeals were not overtly racist.[65] Part of the reason for racial disparities in prosecutorial practices stems from the fact that prosecutors, like other Americans, have been conditioned to view people of color generally and African Americans in particular as criminals, and they make decisions with that perception in mind.[66] Another important consideration is how underrepresented Black and Brown people are in district attorney offices across America; the lack of diversity translates to unequal justice.[67]

Within the context of police brutality, prosecutors have routinely declined to pursue officers for killing unarmed Black and Brown people. In some cases, the prosecutor simply refused to bring charges, as in the case of the cop who killed Alton Sterling.[68] In other cases, prosecutors either made little effort to indict the case or actively labored to influence the grand jury proceedings in a manner that was favorable to the officer.[69] As easy as it is for prosecutors generally to procure an indictment,[70] prosecutors have failed to secure indictments against the

63. Nazgol Ghandnoosh, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*, SENT'G PROJECT (Feb. 3, 2015), https://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/.

64. Drew Findling, *From the President: Beyond Batson: Challenging Systemic Racism at Every Level*, NAT'L ASS'N CRIM. DEF. LAWS. (July 2019), https://www.nacdl.org/Article/July2019-FromthePresidentBeyondBatsonChallengingSy.

65. Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 337 (2006).

66. Murray, *supra* note 25, at 1544–45.

67. Dawn R. Wolfe, *Racial Disparity Among Prosecutors and Trial Judges Translates to Unequal Justice, Activists Say*, APPEAL (July 24, 2020), https://theappeal.org/racial-disparity-among-prosecutors-and-trial-judges-translates-to-unequal-justice-activists-say/.

68. Erik Ortiz, *Alton Sterling Killing: No State Criminal Charges Against 2 Baton Rouge Police Officers*, NBC NEWS (Mar. 27, 2018, 6:20 PM), https://www.nbcnews.com/news/us-news/alton-sterling-killing-no-state-criminal-charges-against-2-baton-n860391.

69. Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 899, 913 (2020).

70. Most criminal practitioners have heard some variation of the phrase that prosecutors "can indict a ham sandwich." This saying encapsulates the idea that securing an indictment is an easy feat if that's what the prosecutor wishes to do. *See, e.g.*, Reynolds, *supra* note 14, at 106.

killers of Eric Garner,[71] Michael Brown,[72] Tamir Rice[73] and a host of others. The prosecutor handling the investigation of Breonna Taylor's killers acted in a particularly disgraceful manner: he tried to make Ms. Taylor out to be a criminal so as to excuse the killing,[74] and then later refused to allow the grand jury to consider any homicide charges against the officers.[75]

In short, prosecutorial decision-making is often influenced by improper racial considerations; and the predominant victims of immoral and unethical prosecutorial actions are poor people and people of color.[76] Additionally, the perpetrators of wrongdoing are overwhelmingly white.[77] Given the race and class of the perpetrators versus the victims, there is no inherent incentive among state actors to correct the system or make it more equitable.[78]

D. Existing Checks on Prosecutorial Misconduct are Ineffective.

In theory, prosecutors that commit misconduct can either be criminally prosecuted or professionally disciplined, with sanctions including warnings, suspensions and disbarment.[79] In practice, both of these checks are wholly deficient. Criminal penalties for offending prosecutors are rare.[80] Federal prosecutors are empowered to bring charges against state officials for violating the constitutional rights of

71. Andrew Siff et al., *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC N.Y. (Dec. 4, 2014, 1:59 PM), https://www.nbcnewyork.com/news/local/grand-jury-decision-eric-garner-staten-island-chokehold-death-nypd/1427980/.

72. John Eligon, *No Charges for Ferguson Officer Who Killed Michael Brown, New Prosecutor Says*, N.Y. TIMES (July 30, 2020), https://www.nytimes.com/2020/07/30/us/michael-brown-darren-wilson-ferguson.html.

73. Mark Berman, *Grand Jurors in the Tamir Rice Case Voted that the Shooting Was Justified, Did Not Vote on Specific Criminal Charges*, WASH. POST (Jan. 20, 2016, 8:58 PM), https://www.washingtonpost.com/news/post-nation/wp/2016/01/20/grand-jurors-in-the-tamir-rice-case-voted-that-shooting-was-justified-did-not-vote-on-specific-criminal-charges/.

74. Elie Mystal, *The Authorities Are Still Gunning for Breonna Taylor*, NATION (Sept. 2, 2020), https://www.thenation.com/article/society/breonna-taylor-lawsuit/.

75. Will Wright, *Breonna Taylor Grand Juror Says Homicide Charges Were Not Presented*, N.Y. TIMES (Oct. 30, 2020), https://www.nytimes.com/2020/10/20/us/breonna-taylor-grand-jury.html?action=click&block=associated_collection_recirc&impression_id=ed5b0180-4ac1-11eb-8cbe-9b95eea09f7a&index=0&pgtype=Article&region=footer.

76. Thompson, *supra* note 39, at 645–46.

77. *Id*.

78. *Id*.

79. *See* Connick v. Thompson, 563 U.S. 51, 66 (2011).

80. Thompson, *supra* note 39, at 652.

citizens, but just about never do.[81] State prosecutors almost never pursue charges against their colleagues.[82] This is not new. Over twenty years ago, the Chicago Tribune published an exhaustive study examining nearly 400 homicide convictions across the country that were reversed since 1963 because of flagrant prosecutorial misconduct.[83] Of all the prosecutors involved in these cases, none of them were prosecuted.[84]

By and large, judges certainly do not address prosecutorial misconduct in any meaningful way. Judges shield prosecutors from either responsibility or potential embarrassment in the decisions they issue, routinely declining to either name or blame individual prosecutors and refraining from acknowledging the existence of a widespread problem.[85] Trial judges generally do not hold prosecutors in contempt,[86] and they further refrain from imposing any other sanctions.[87] Whether it be out of a desire to protect prosecutors, a wish to "maintain institutional comity," or a fear of political retaliation, judges often seek to divorce individual prosecutors and district attorneys from misconduct, egregious or otherwise.[88] Judges do not refer prosecutors who commit misconduct to the state bar for discipline, even where the misconduct is undeniable.[89] As former federal appeals judge Alex Kozinski succinctly stated, prosecutors get away with misconduct because "they have state judges who are willing to look the other way."[90] And some judges pretend as if professional discipline and ethics training are enough to deal with prosecutorial misconduct, despite substantial evidence that neither is sufficient.[91]

The threat of professional discipline has also been ineffective. The disciplinary process itself discourages the investigation of ethics complaints against prosecutors,[92] and defense attorneys are hesitant to file complaints for fear of retaliation in future cases.[93] Disciplinary

81. Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2094 (2010).

82. *Id*.

83. Ken Armstrong & Maurice Possley, *Part 1: The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999, 2:00 AM), https://www.chicagotribune.com/investigations/chi-020103trial1-story.html.

84. *Id*.

85. Thompson, *supra* note 39, at 655.

86. Barkow, *supra* note 81, at 2094.

87. Dennis, *supra* note 23, at 141–42.

88. Thompson, *supra* note 39, at 655–56.

89. *Id*. at 646.

90. Maura Dolan, *U.S. Judges See 'Epidemic' of Prosecutorial Misconduct in State*, L.A. TIMES (Jan. 31, 2015, 7:20 PM), http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html.

91. Thompson, *supra* note 39, at 647.

92. *Id*. at 650–52.

93. *Id*. at 651.

committees are apprehensive to find ethical violations against prosecutors for similar reasons as judges: they wish not to "interfer[e] with, or hav[e] an undue effect upon" the administration of criminal law.[94] Furthermore, existing ethical guidelines for prosecutors are oftentimes vague and aspirational,[95] presuming that prosecutors act in good faith and prioritize justice over convictions.[96] Moreover, sanctions against prosecutors for ethics violations can be—and *have been* on a number of occasions—viewed as violating the separation of powers doctrine, purportedly allowing professional defense committees to "subvert[] the will of the public . . . and the legislature . . . ."[97]

Even when ethics complaints are made against prosecutors, actual accountability seldom happens.[98] Studies have shown that prosecutors often go unpunished even in instances where their misconduct led to reversals of convictions.[99] With respect to homicide cases in particular, prosecutors are rarely sanctioned professionally for engaging in misconduct.[100] Even in cases where prosecutors committed the type of flagrant misconduct that shocks the conscience, such as hiding deals made to jailhouse informants in exchange for their testimony[101] or adding false testimony to an accused person's written statement to make it seem as if the person confessed to a crime that carried a life sentence,[102] prosecutors were either not punished or given lenient penalties that in no way fit their transgressions.[103]

To the extent that these two types of remedies can be strengthened and rendered effective, efforts should be accordingly made. However, the failure of these checks to rein in on prosecutorial misconduct demonstrates that neither prosecutors, disciplinary authorities nor government actors can be trusted to curtail the problem on their own. If prosecutors are to be held accountable, it will be through an empowered citizenry. Ordinary persons impacted by prosecutorial misdeeds must be

94. Brink, *supra* note 32, at 26–27.

95. Dennis, *supra* note 23, at 137–38.

96. *See, e.g.*, AM. BAR ASS'N, PROSECUTION FUNCTION: STANDARD 3-1.2 (A): FUNCTIONS AND DUTIES OF THE PROSECUTOR, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (4th ed. 2017).

97. Dennis, *supra* note 23, at 143–44.

98. *See* Brink, *supra* note 32, at 25–26.

99. Eric Hatfield, Case Comment, *Six Wrongs Take Away a Right: The Odyssey of Curtis Flowers and the Prosecutorial Misconduct that Caused It,* 47 S.U. L. REV. 347, 350–51 (2020); *see also* Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537, 542 (2011).

100. Rudin, *supra* note 99.

101. Hatfield, *supra* note 99, at 350.

102. *Id.*

103. *Id.* at 351–53.

allowed to use the civil suit to keep state officers honest.[104] Indeed, monetary damages are most often the only way that Americans get redress for constitutional wrongs committed by the state.[105]

II. ABSOLUTE IMMUNITY: FORECLOSING CITIZENS FROM HOLDING PROSECUTORS ACCOUNTABLE

Prosecutorial misconduct is a major problem that disproportionately impacts people of color.[106] Criminal sanctions and ethical complaints, the existing checks on prosecutorial power, are wholly ineffective. Short of abolition or some other structural transformation of the entire criminal judicial system, the only real way to keep prosecutors in check is to empower ordinary citizens through the use of the civil lawsuit. The first section of the Civil Rights Act of 1871, now known as 42 U.S.C. § 1983, could be a useful vehicle of citizen empowerment in this regard, but the United States Supreme Court shut this avenue down in a 1976 decision that essentially asserted two main ideas: 1) that absolute immunity for prosecutors was established at common law;[107] and 2) that allowing prosecutors to be sued would have a chilling effect on prosecutors and would thus disserve the public interest.[108]

This section forcefully refutes both arguments. More specifically, this section critically examines both the doctrine and the decision that gave rise to it, showing that absolute immunity for prosecutors is the product of the high court's own views of sound policy and little else. This section first examines in depth the history leading up to the Civil Rights Act of 1871, the plain language of the law, and the congressional record of the statute. It concludes from this examination that the law was meant to subject all state actors, prosecutors included and perhaps especially, to civil suit in federal court for abridgments of constitutional rights. It then critically examines the Court's decision, firmly asserting that the decision has no support in the history, legislative record or the language; and that its policy justifications lack merit. Finally, this section offers an alternative rationale for the Court's holding, showing that the decision was part of a larger effort to facilitate the racist War on Drugs by immunizing the criminal judicial system and its actors from claims of racial bias.

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104. Brink, *supra* note 32, at 31 ("In contrast [to criminal sanctions and professional discipline], civil liability ensures that the person injured has some control over the process by which redress is sought and directly receives compensation for the harm.").

105. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); Butz v. Economou, 438 U.S. 478, 504–05 (1978).

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

107. Imbler v. Pachtman, 424 U.S. 409, 420–24 (1976).

108. *Id.* at 424–29.

A. The Civil Rights Act of 1871 Was Meant to Apply to State Prosecutors.

Following the end of the Civil War, the Republican Party was figuring out how to integrate newly freed Black people into society, with Radical Republicans leading the charge for full civil and political rights for African Americans.[109] The Democratic governments of the south, however, had other ideas. With President Andrew Johnson leading the way, just about every member of the confederacy was pardoned without penalty and allowed to return to government.[110] Lands that were given to African Americans, many of whom loyally served in the Union army during the war, were confiscated and returned to white insurrectionists.[111] President Johnson and Democratic governments in the south openly refused any efforts by Republicans to confer justice and equality on Black people.[112] Mississippi[113] and Kentucky[114] initially refused to recognize or ratify the Thirteenth Amendment, which banned slavery except for those duly convicted of a crime.[115] Further, as has been amply documented, the loophole in the amendment exempting those duly convicted from the prohibition against slavery became a vehicle for re-enslaving African Americans,[116] a vehicle that is still utilized to date.[117]

Meanwhile, the south was in a state of complete lawlessness. White mobs "freely roamed the Southern countryside preying upon [B]lacks and their white defenders."[118] In Hinds County, Mississippi, for example, Black people were killed at a rate of one person every day between 1865 and 1867.[119] In the spring of 1866, white rioters in Memphis, Tennessee killed forty-six Black people, raped five Black women, and burned down hundreds of Black-owned buildings.[120] Both white civilians and law enforcement officers perpetrated racial violence.[121] Black people could be

109. RICHARD WORMSER, THE RISE AND FALL OF JIM CROW 16 (2003).
110. *Id*. at 7.
111. *Id*. at 13–14.
112. *Id*. at 13.
113. Ben Waldron, *Mississippi Officially Abolishes Slavery, Ratifies 13th Amendment*, ABC NEWS (Feb. 19, 2013), https://abcnews.go.com/blogs/headlines/2013/02/mississippi-officially-abolishes-slavery-ratifies-13th-amendment/.
114. Greg Kocher, *Kentucky Supported Lincoln's Efforts to Abolish Slavery – 111 Years Late*, KENTUCKY.COM (Feb. 23, 2013), https://archive.vn/20140220035343/http://www.kentucky.com/2013/02/23/2528807/kentucky-supported-lincolns-efforts.html.
115. U.S. CONST. amend. XIII, § 1.
116. WORMSER, *supra* note 109, at 8.
117. 13TH (Kandoo Films 2016).
118. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION 22 (2005).
119. James W. Loewen, *Five Myths About Reconstruction*, WASH. POST (Jan. 21, 2016), https://www.washingtonpost.com/opinions/five-myths-about-reconstruction/2016/01/21/0719b324-bfc5-11e5-83d4-42e3bceea902_story.html.
120. WORMSER, *supra* note 109, at 17.
121. *Id*.

killed for any reason (or no reason at all), and their bodies were routinely mutilated, with "ears severed, tongues cut out, eyes gouged. Men were beheaded and skinned, the skin then nailed to [barns]."[122] Black schoolhouses were burned down and defaced, and teachers were intimidated, threatened and assaulted.[123] Judges and other state courts officials largely sat on their hands and did nothing, allowing the murderers to go unpunished.[124] Efforts by federal authorities to apprehend and prosecute offenders were met with violent resistance by white marauders.[125] The consequence of this reality was intimidation: African Americans and white Republicans reported few crimes, both because there was no hope for redress and out of fear of retaliation.[126] Thus, the south was "a milieu that was generally characterized by a disregard for law and order."[127]

In addition to the carnage, the criminal judicial system in the south was racially discriminatory to an extreme. Aside from not punishing crime committed by white people against Black people, many southern states rushed to institute sets of legal ordinances called Black Codes, which punished Black people for a host of offenses.[128] Through the Black Codes, slavery was reinstituted in the south, with the state as the "master" and the criminal judicial system as the method for re-enslavement.[129] Black people in the south found themselves "[a]rrested often for the most trivial offenses (for which whites would rarely be apprehended)[,] . . . in jail for months without a trial, denied the right to competent counsel . . . charged exorbitant legal fees, and sentenced as much for their race as for the nature of their crime."[130] Offenses that Black people were charged with included "using abusive language towards a white man . . . disorderly conduct, vagrancy, petty theft, and selling farm produce within the town limits . . . ."[131] There was an obvious double standard in the administration of justice in the south, and all participants in the respective judicial systems were to blame.

However, African Americans were not the only targets of abuses of the criminal judicial process. Federal officers tasked with enforcing the law and making arrests found themselves being prosecuted in state

122. *Id.* at 11.
123. *Id.* at 13.
124. *Id.* at 9–12.
125. KACZOROWSKI, *supra* note 118.
126. *Id.*
127. *Id.* at 22.
128. WORMSER, *supra* note 109, at 8.
129. *Id.*
130. LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 284 (1979).
131. *Id.*

courts for false arrest and other crimes, all for trying to perform their duties.[132] Union loyalists in southern states were also targeted with criminal prosecutions and civil suits, creating a massive amount of litigation that was mostly retaliatory and malicious.[133] Increasingly, state courts also frustrated the purposes of federal officials by "prosecuting" white terrorists in state courts and setting them free after sham judicial proceedings, or in rare instances imposing light punishments for serious crime.[134] Often, state trials would be had without even informing victims that they were happening,[135] and Black victims and witnesses were excluded from testifying.[136] This made it impossible for federal courts to try violators of the law because of how the Fifth Amendment's double jeopardy clause was interpreted back in the day.[137]

This first led then-general Ulysses Grant to impose General Order Number 3, which barred the prosecution of federal officials in state courts, as well the prosecution of union loyalists and the unequal prosecution of persons of color.[138] This order was issued in January 1866.[139] Two months later, Congress passed the Civil Rights Act of 1866 for the first time;[140] and in April 1866, Congress overrode President Andrew Johnson's veto with a two-thirds majority in both houses.[141] The first section of the statute declared persons born in the United States to be citizens and provided that citizens "of every race and color . . . shall be subject to like punishment, pains, and penalties, and to none other . . . ."[142] The second section of the law made state actors who violated the first section subject to federal prosecution.[143] The third section conferred

132. KACZOROWSKI, *supra* note 118, at 23.

133. CONG. GLOBE, 39th Cong., 1st. Sess. 1983 (1866) (statement of Sen. Lyman Trumbull) ("There are at this time, I understand, several thousand suits pending against loyal men who have committed no offense and done no act except in obedience to orders of superior officers. They are now being sued and prosecuted in the courts of Kentucky and other States, and this is a bill which . . . is due to the men who hazarded their all to save the country that we should protect them from prosecutions and suits for simply doing their duty.").

134. KACZOROWSKI, *supra* note 118, at 22–23.

135. *Id.* at 23.

136. *Id.* at 22.

137. *Id.* at 23.

138. General Orders, No. 3, Adjutant General's Office (Jan. 12, 1866), *in* 16 THE PAPERS OF ULYSSES S. GRANT, 1, 7–8 (John Y. Smith ed., 1988).

139. *Id.*

140. *Civil Rights Act of 1866*, BALLOTPEDIA, https://ballotpedia.org/Civil_Rights_Act_of_1866#:~:text=The%20Civil%20Rights%20Act%20of,39th%20United%20States%20Congress%20and (last visited July 3, 2021).

141. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27; WORMSER, *supra* note 109, at 16.

142. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

143. *Id.* § 2.

jurisdiction on federal courts to both prosecute and maintain civil actions deriving from any violations of the law.[144] It also empowered federal courts to remove from state courts any cases against federal officials being prosecuted for trying to enforce the Civil Rights Act of 1866.[145] It is clear from the language that state officials involved in the judicial process—judges, prosecutors and the like—were particular targets of this legislation.[146] Indeed, judges *were* hauled into federal court and prosecuted for violating the act,[147] with their legal defenses being financed by state legislatures using taxpayer dollars.[148]

Congress pressed on, passing the Fourteenth Amendment in June 1866 and ratifying it in July 1868.[149] Congress passed the Fifteenth Amendment in February 1869 and ratified it in 1870.[150] The Fourteenth Amendment specifically applied to states, and it elevated the right of equal protection under the laws to a constitutional dimension.[151] It also barred the taking of life, liberty or property without due process of law, and it forbade the abridgment of the privileges and immunities of citizens.[152] The Fifteenth Amendment constitutionalized the provision of the first section of the Civil Rights Act of 1866 that made all persons born in America citizens of the country.[153] These two amendments were particularly directed at state courts, because it was the respective criminal judicial processes in southern states that were religiously denying both due process and equal protection of the laws to persons that were legally American citizens.

Nonetheless, both the violence and the perversion of judicial processes not only continued in the southern states, but significantly

144. *Id.* § 3.

145. *Id.*

146. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1267 (1866) (statement of Rep. Raymond) ("[Section 2] provides that if a judge or sheriff or any other officer of a State court should take part in enforcing any State law making distinctions among the citizens of the State on account of race or color, he shall be deemed guilty of a misdemeanor and punished with fine and imprisonment under this bill. Is not this the plain intent and meaning of this section? Indeed, that is its express language, its specific provision, and this is declared in debate to be the only way in which the apprehended injustice can be warded off from the class of our fellow-citizens.").

147. *See* KACZOROWSKI, *supra* note 118, at 23.

148. *Id.*

149. *Citizenship Rights, Equal Protection, Apportionment, Civil War Debt*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendment/amendment-xiv (last visited Aug. 1, 2021).

150. *Right to Vote Not Denied by Race*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendment/amendment-xv (last visited Aug. 1, 2021).

151. U.S. CONST. amend. XIV.

152. *Id.*

153. U.S. CONST. amend. XV.

intensified during Ulysses Grant's first presidential administration.[154] By this time the Ku Klux Klan, founded in Tennessee in 1865, had become a powerful terrorist organization in a few short years and included politicians and state court officials.[155] The Klan continued the indiscriminate slaughter and intimidation of African Americans and white Republicans.[156] During the 1868 election, southern politicians used whatever means they could to both drive out white Republicans and deny African Americans access to the polls.[157] As one example, white supremacists in Louisiana killed 1,081 persons in the summer and fall of 1868; most were either African Americans or white Republicans.[158] The Democratic Party was intimately associated with the Klan,[159] and state court officials either protected the Klan from criminal prosecution or were powerless to hold them accountable.[160] In North Carolina, the Democratic-controlled legislature impeached and removed the sitting governor from office for forcibly arresting dozens of Klan members responsible for racial violence in two specific counties, marking the first time in American history that a governor was so impeached and removed.[161] State judges "declared the Civil Rights Act unconstitutional, or … simply ignored it."[162] The double standard in criminal prosecutions, as well as the complicity of state court officials with the crimes of the Klan and other white supremacist gangs, continued into the following decade.[163]

It was against this backdrop that Congress passed the Enforcement Act of May 1870,[164] the First Enforcement Act of 1871[165] and, more relevant for this article, the Enforcement Act of 1871 (hereinafter, "the Civil Rights Act of 1871").[166] The push to pass a second civil rights law was strengthened by President Ulysses Grant, who sent a message to

154. KACZOROWSKI, *supra* note 118, at xiv.
155. WORMSER, *supra* note 109, at 22.
156. *See id.* at 25; KACZOROWSKI, *supra* note 118, at xiv.
157. WORMSER, *supra* note 109, at 22–23.
158. Loewen, *supra* note 119.
159. KACZOROWSKI, *supra* note 118, at 42.
160. *See id*. at 43–44.
161. *The Declaration of Insurrection in the Impeachment Trial of Governor William Wood Holden, March 7, 1870*, CIVIL WAR ERA NC, https://cwnc.omeka.chass.ncsu.edu/items/show/54 (last visited Aug. 1, 2021); *William W. Holden 1818-1892*, N.C. HIGHWAY HISTORICAL MARKER PROGRAM, http://www.ncmarkers.com/Markers.aspx?MarkerId=H-92. (last visited Aug. 1, 2021).
162. KACZOROWSKI, *supra* note 118, at 22.
163. *Id.* at 24.
164. Act of May 31, 1870, ch. 114, 16 Stat. 140-146.
165. Act of February 25, 1871, ch. 99, 16 Stat. 433-440.
166. Senate Hist. Off., *The Enforcement Acts of 1870 and 1871*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm (last visited Aug. 1, 2021).

Congress on March 23, 1871 urging the body to pass legislation to stop the violence in the south because "the power to correct these evils is beyond the control of the State authorities . . . ."[167] The concern of both President Grant and the Republican Party at that time was clear: white supremacist persons and organizations were violating the constitutional rights of Black people and white Republicans through violence, and the states—law enforcement and state officials, especially those involved in the criminal judicial process—violated the constitutional rights of Black people and white Republicans by failing to adhere to the mandates of the Fourteenth Amendment.

It is evident from this history that state officials generally, and prosecuting agents specifically, were never meant to be barred from suit under the Civil Rights Act of 1871. In the next two subsections, we will analyze both the language of the statute and the congressional debates to show that there was no legislative intention to bar prosecutors from suit. As to the latter, the primary focus will be on speeches by Republicans, since the Democrats were not in favor of racial equality and therefore not in favor of the bill.

1. The Language of the Civil Rights Act of 1871

When the Civil Rights Act was approved on April 20, 1871, it had seven sections.[168] The first section of the Civil Rights Act granted a cause of action against "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States . . . ."[169] Nowhere in the first section is the phrase "any person" qualified in a manner that suggests that any state officials were to be exempt. In fact, the phrase "under color of any law, statute, ordinance, regulation, custom, or usage of any state" indicates that no state officials were exempt; a person who acts "under color of law" acts with authority conferred upon them by a government.[170] So, if anything, the language of the first section specifically targets state actors, and that makes sense. The Fourteenth Amendment of the Constitution, which was one major basis of this legislation,[171] expressly prohibited states from depriving any person of either the equal protection

167. Ulysses S. Grant, *Special Message*, AM. PRESIDENCY PROJECT (Mar. 23, 1871), https://www.presidency.ucsb.edu/documents/special-message-2176.

168. Act of April 20, 1871, *supra* note 2.

169. *Id*.

170. *Id*.

171. CONG. GLOBE, 42nd Cong., 1st. Sess. 67–69 (1871).

of the laws, or of life, liberty or property without due process of law.[172] Claiming that state officials, such as prosecutors, are exempt from suit under the first section is contrary to the plain language of that section and the spirit of the Fourteenth Amendment.

Other portions of the Civil Rights Act of 1871 further underscored what the federal government was trying to solve: the wholesale violation of constitutional rights with the complicity of state governments. The second section provided criminal penalties for conspiracies to deprive persons of their rights by murder or other specified actions.[173] The third section deemed it a denial of equal protection when domestic violence obstructed law enforcement, deprived citizens of their constitutional rights, and when state officials could not or would not protect those rights.[174] It further granted the federal government authority to suppress the violence by military force.[175] The fourth section conferred authority upon the federal government to suspend habeus corpus and institute martial law when state authorities colluded with organized groups to violate constitutional rights.[176] These three sections targeted two groups: ordinary citizens seeking to infringe on the rights of other citizens, and state government—be they members of law enforcement or state officials—who actively or through inaction violated the rights of others, particularly the rights guaranteed under the Fourteenth Amendment. There is no language anywhere in the Civil Rights Act of 1871 that exempts state officials from any portion of its reach.

Even the current language of the first section, now commonly known as 42 U.S.C. § 1983, has no blanket exemption for state officials on its face. The statute now bars injunctive relief against judicial officers in their official capacity if no declaratory decree was violated and declaratory relief is available,[177] a provision added to the statute in 1996.[178] Injunctive relief, however, is narrow relief sought long before the merits of a lawsuit are resolved.[179] On its face, any person, regardless of their position, can be made subject to suit for violating the constitutional rights of another person.[180]

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172. U.S. CONST. amend. XIV, §1.
173. Act of April 20, 1871, *supra* note 2.
174. *Id*.
175. *Id*.
176. *Id*.
177. 42 U.S.C. § 1983.
178. Federal Courts Improvement Act of 1996, Pub. L. 104-137, 110 Stat. 1847 (Oct. 19, 1996).
179. *Id*.
180. *Id*.

2. The Congressional Debates

The bill was first introduced by Republican Representative Samuel Shellabarger of Ohio.[181] Representative Shellabarger opened up his remarks on the first section of the act by defending its constitutionality, grounding its authority in the Civil Rights Act of 1866—which specifically targeted state officials that abused the criminal judicial processes in their respective states—and both the Thirteenth and Fourteenth Amendments.[182] He pointed out how the Fourteenth Amendment was specifically directed to the states, enjoining them from violating the rights and privileges contained therein.[183] He then asserted how "plainly and grossly absurd" it would be to enact all of these federal amendments and pieces of legislation designed to protect the constitutional rights of citizens, "but must leave all the protection and law-making to the very States which are denying the protection."[184] It is evident from his remarks that the states—state officials and law enforcement—were targets of the first section of the act. It would also logically follow that state prosecutors, who were as much responsible for the discriminatory administration of criminal justice as any other player, were meant to be subject to suit under this section.

Representative Shellabarger then averred that remedial statutory provisions like the first section "are liberally and beneficently construed."[185] He further stated that "the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people."[186] If remedial statutes are to be liberally construed, then the phrase "any person" should be construed as just that: *any person* can be liable under the statute. To absolutely exempt any group of state officials from liability is inconsistent with giving the first section "the largest latitude consistent with the words employed."[187] Members of law enforcement and state prosecutors are persons; and both classes of persons are more than capable of violating the constitutional rights of citizens in their official capacities. From the legislator who introduced the bill, the first section was designed to be a tool by which ordinary citizens could hold state actors, as well as other citizens, accountable for abridging their constitutional rights.

181. CONG. GLOBE, 42nd Cong., *supra* note 171, at 67.
182. *Id*. at 68.
183. *Id*.
184. *Id*.
185. *Id*.
186. *Id*.
187. *Id*.

Speeches by other Republicans further indicated an intent to make state officials such as public prosecutors liable for violating the Fourteenth Amendment. In support of the legislation, lawmaker George Hoar of Massachusetts alluded to the equal protection clause covering more than just "unlawful acts by state authorities,"[188] an indication that state authorities were within the ambit of the new law. He further argued that state inaction in the face of the violation of rights was unconstitutional behavior.[189] Representative John Bingham of Illinois argued that the power of Congress to ensure "the better protection of the rights [guaranteed] to them *against States and combinations of individuals* . . . is a closed question, absolutely closed."[190] He further asserted that Congress should intervene "against the denial of rights by States, whether the denial be acts of omission or commission."[191] Representative Lionel Sheldon of Louisiana advocated for federal action where "State governments criminally refuse or neglect those duties which are imposed upon them."[192] Representative David Lowe of Kansas advocated for federal intervention in situations where state officials "permit[ted] the rights of citizens to be systematically trampled upon."[193] Senator John Pool of North Carolina argued that the government was empowered to "intervene with its authority to extend…protection to the citizen which has been denied in many of the southern States by the State authorities."[194] Representative John Coburn of Indiana said the following:

> The failure to afford protection equally to all is a denial of it. Affirmative action or legislation is not the only method of a denial of equal protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or ask for redress of wrongs in court … and many other things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his persecutor, and treat the one as a nonentity and the other as a good citizen.…[195]

188. *Id*. at 334.
189. *Id*. at 333–34.
190. CONG. GLOBE, 42nd Cong., 1st. Sess. app. 82 (1871) (emphasis added).
191. *Id*. at 85.
192. CONG. GLOBE, 42nd Cong., *supra* note 169, at 368.
193. *Id*. at 374–75.
194. *Id*. at 607.
195. *Id*. at 459.

Republican James A. Garfield, congressman from Ohio and a future president, asserted that the first section of the bill was "a wise and salutary provision" that provided a remedy where "by a systematic maladministration of [laws], or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them."[196] As Representative Garfield envisioned it, the first section of the law made state officials that violated the Fourteenth Amendment rights of people in America liable to the injured parties; as he saw it, state officials were be to blame for "a systematic maladministration of [laws], or a neglect or refusal to enforce their provisions."[197] Representative Horace Maynard of Tennessee noted how there was apparently "not much objection" to the first section because it "simply declares in substance that whoever interferes with the rights and immunities granted to the citizen by the Constitution of the United States, though it may be under State law or State regulation, shall not be exempt from responsibility to the party injured . . . ."[198] There was no qualification of the term "whoever" to exclude state prosecutors; and the language "shall not be exempt from responsibility to the party injured" is a clear indication that the statute conceived of no immunities.

In his speech supporting the bill, Representative Aaron Perry of Ohio stated that the violative actions in question "are injuries, denials and privations of rights and immunities under the Constitution and laws of the United States. They are not injuries inflicted by mere individuals or upon ordinary rights of individuals.... They are inflicted *under color of State authority* or by conspiracies and unlawful combinations *with at least the tacit acquiescence of the State authorities*."[199] (Emphasis added). His phrasing here demonstrates the harms the bill was designed to address: persons empowered by state law—such as state prosecutors—who violate the constitutional rights of citizens, and unlawful organizations of individuals doing the same with the complicity of state authorities, like prosecutors who refuse to bring charges against those individuals. He immediately followed this portion with a defense of the first section of the bill, asserting that the federal constitution obviously provided support for it.[200] Like other supporters of the bill, he offered no qualification that the rights under the first section only apply when the party to be sued was not a prosecutor; and when read in context with his speech, it is plainly evident that state actors, including prosecutors, were meant to be liable under the first section.

196. CONG. GLOBE, 42nd Cong., *supra* note 190, at 153.
197. *Id.*
198. CONG. GLOBE, 42nd Cong., *supra* note 171, at 310.
199. CONG. GLOBE, 42nd Cong., *supra* note 190, at 79.
200. *Id*.

Speaking particularly about the right to vote, Senator Oliver Morton of Indiana asserted that Congress was empowered to protect individual rights "against a mob, against any lawless individual, against the unauthorized act of any public officer or election board…Congress had the power to protect and enforce this right against individuals or organizations, whether acting in open violence or under color of state authority."[201] Those statements, uttered without equivocations or qualifications, are yet further indication that state officials were intended to be made liable for violating the civil rights of civilians. Senator Frederick Frelinghuysen of New Jersey, whose speech focused on state violations of constitutional rights, stated the following regarding the first section:

> As to the civil remedies, for a violation of these privileges, we know that when the courts of a state violate the provisions of the Constitution or the law of the United States there is now relief afforded by a review in the Federal courts. And since the fourteenth amendment forbids any State from making or enforcing any law abridging these privileges and immunities, as you cannot reach the legislatures, the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of law is guilty of infringing his rights. As to the civil remedy no one, I think, can object.[202]

In this portion, Senator Frelinghuysen did not even mention "unlawful combinations" or anything related to ordinary citizens.[203] That the senator spoke of injured parties having causes of action while speaking of "courts of a State" and those acting "under color of law" further establishes the same conclusion: supporters of the bill intended to make state court officials that violated the civil rights of others—like prosecutors—liable to those persons.

Of particular concern to Republicans was the ineffectiveness of state actors involved in the criminal judicial process. Republican lawmaker William Stoughton of Michigan noted how equal protection was clearly denied where "thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice . . . ."[204] Republican lawmaker George Hoar of Massachusetts noted how the criminal law was not being enforced when it came to prosecuting people

201. CONG. GLOBE, 42nd Cong., *supra* note 171, at 251.
202. *Id*. at 501.
203. *Id*.
204. *Id*. at 322.

for committing crimes against Republicans, Black and white.[205] Republican lawmaker Austin Blair of Michigan noted how the courts were "powerless to redress these wrongs, and the State governments fail to afford protection to the people. The Klans are powerful enough to defy the State authorities. In many instances they *are* the State authorities."[206] (Emphasis supplied). Representative Bingham referenced how states "denied trial by jury, and [the citizen] had no remedy."[207] Representative Perry spoke of criminals going "unhindered and unpunished by state authorities."[208] He continued:

> Where these gangs of assassins show themselves the rest of the people look on, if not with sympathy, at least with forbearance…. Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished. Such is a brief outline of the condition of things which we are called upon to meet . . . .[209]

Representative Lowe asserted that despite widespread violence, local governments "have been found inadequate or unwilling to apply the proper corrective. Combinations, … wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress."[210] John Beatty, another congressman from Ohio, recounted the crimes of the Ku Klux Klan and noted how state governments "made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons."[211] Representative Joseph H. Rainey, an African American congressman from South Carolina, was even more direct:

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205. *Id*. at 333–34.
206. CONG. GLOBE, 42nd Cong., *supra* note 190, at 72.
207. *Id*. at 85.
208. *Id*. at 78.
209. *Id*. at 79.
210. CONG. GLOBE, 42nd Cong., *supra* note 171, at 374.
211. *Id*. at 428.

> The question is sometimes asked, [w]hy do not the courts of law afford redress? Why the necessity of appealing to Congress? We answer that the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?[212]

Representative Rainey also noted that the problems were "usually in sections in which the Democrats have a predominance in power . . . ."[213] In other words, the Democratic Party controlled the governments—and consequently, the judicial processes—where the violence was at its worst. Representative William Williams of Indiana spoke of how regularly "the courts of these States and officers of the law and juries [would] conspire to defeat justice."[214] Prosecutors would certainly constitute "officers of the law."

In the senate, lawmaker George Edmunds of Vermont argued that the federal government had a duty to act where "criminals go unpunished by the score, by the hundred, and by the thousand, when justice sits silent in her temple in the States . . . ."[215] Senator Pool made references to state violence "unchecked by State authority" and argued that "[a] failure to punish the offender is not only to deny to the person injured the protection of laws, but to deprive him, in effect, of the rights themselves."[216] Senator Oliver Morton of Indiana noted how people were being "murdered with impunity in many parts of the South every day, and yet no attempt has been made to bring these murderers to punishment."[217] In essence, these lawmakers averred that prosecuting attorneys and judges throughout the south were either powerless to stop white supremacists from committing acts of violence against Black people and white Republicans, or were complicit and even facilitative. Either way (although especially in the latter way), they violated the Fourteenth Amendment rights of Black people and white Republicans. Nowhere is it even hinted by supporters of the bill that prosecutors were to be exempt from suit;[218] in fact, it is evident that prosecutors and other state officials involved in the criminal judicial process were special targets of the Civil Rights Act of 1871, including the first section.

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212. *Id*. at 394.
213. *Id*. at 395.
214. *Id*. at 167.
215. *Id*. at 697.
216. *Id*. at 608.
217. *Id*. at 251.
218. *See generally Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969).

Much of the opposition from the Democrats in Congress centered around the dangers of big government, states' rights, and a denial or minimization of the carnage the Klan was wreaking in the south.[219] However, three Democratic opponents deserve mention. Representative William Arthur of Kentucky lamented that the first section of the bill would make legislators, governors, judges, sheriffs and other state officers liable for what he characterized as "mere error[s] of judgment."[220] Another Kentucky congressman, Joseph Lewis, expressly noted that under the first section, a "judge of a State court…and a ministerial officer [are] subject to the same pains and penalties, though simply executing the process of a state court, about which he has no discretion, and the legality of which he has no right to question."[221] Senator Allen Thurman of Ohio attacked the first section of the bill on multiple grounds, although he did concede that it was constitutional.[222] One of his final arguments against that section was that state officials such as legislators and judges could be sued.[223] These arguments indicate that absolute immunity for state officials such as prosecutors and judges did not exist in April 1871. Indeed, the Supreme Court of the United States did not recognize absolute immunity for judges until December of that year.[224]

It is further telling that no lawmaker refuted these arguments, Representative Shellabarger included.[225] Further, the first section of the bill approved by both houses included the phrase "any person" without qualifications or limitations; and that language was left intact.[226] Thus, even the speeches of some of the opponents of the bill provide further indication that supporters of the law had no intention of exempting state officials such as prosecutors from suit. This makes sense given that Republicans blamed state officials throughout the south for not holding the Klan and other white supremacists accountable through the criminal judicial system, as well as for their own violations of the constitution. Representative Perry, for example, noted how the legislatures and governors in the south "were in open complicity with [the violence]. If intervention depended on their consent nothing could have been done."[227] It is illogical that supporters of the bill would focus extensively on state-

219. Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L.J. 331, 333–34, 336, 341, 345 (1967).
220. CONG. GLOBE, 42nd Cong., *supra* note 171, at 365–66.
221. *Id*. at 385.
222. *See id*. at 216–17.
223. *Id*. at 217.
224. *See* Bradley v. Fisher, 80 U.S. 335 (1871).
225. *Liability of Judicial Officers Under Section 1983*, *supra* note 218, at 328 n.40.
226. CONG. GLOBE, 42nd Cong., *supra* note 171, at 335–36, 709.
227. CONG. GLOBE, 42nd Cong., *supra* note 171, at 80.

sponsored violence and unconstitutional state action and inaction, but then immunize some the key persons responsible from civil liability.

The history of the Civil Rights Act of 1871, the language of both the original text and the current statute, and the legislative record all demonstrate congressional intent to make state officials, including prosecutors, subject to suit for violating the constitutional rights of others. The purpose of the bill in large part was to put a stop to constitutional abridgements by the states and their representatives, and the first section in particular was designed to give citizens an alternative means of recourse.[228] Absolute immunity for prosecutors in civil rights lawsuits has no grounding in the history, the language or the legislative record of the statute.

B. State Prosecutors Continued to Violate the Constitutional Rights of Citizens After the Civil Rights Act of 1871.

After the passage of the Civil Rights Act of 1871, the federal government proceeded to crack down on the Klan. Within a year, federal prosecutions successfully reduced violence in the south and had broken the Klan for the time being.[229] While hundreds of Klansmen were arrested, the leaders of the movement were singled out for the most aggressive prosecution.[230] African Americans consequently made much progress in the early 1870s, having ascended to hundreds of political offices throughout the north and the south.[231] Integration efforts were under way in public accommodations, and African Americans had successfully brought about the establishment of public education in the south.[232] Racial discrimination lessened in the north as well during this period.[233]

Despite their triumphs, federal officials warned against letting up on white supremacists in the south, firmly believing that any leniency would cause the rampant violence and lawlessness to return.[234] Democratic politicians in the south never wavered in their support for the Klan—and their opposition to federal intervention in their respective states.[235] They denied the sins of white supremacists and blamed the federal government for the violence in the south, to which the Klan "was reacting

228. *See* Alfred Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L.J. 331 (1967).
229. KACZOROWSKI, *supra* note 118, at 76.
230. *See id*. at 77.
231. WORMSER, *supra* note 109, at 26–27.
232. *Id*.
233. *Id*. at 28.
234. KACZOROWSKI, *supra* note 118, at 77.
235. *Id*. at 78.

defensively."[236] Thus, federal officials firmly believed that they needed to remain vigilant to maintain peace and prevent a revival and resurgence of the Klan.[237] Nonetheless, President Grant's administration "abandoned civil rights enforcement in the summer of 1873" mainly for political reasons.[238]

Along with the economic collapse that came in 1873, the political tide had turned.[239] In that year, the Democratic Party captured the state governments in four southern states.[240] The following year, Democrats made monstrous gains in Congress, gaining a majority in the House of Representatives and narrowing the lead that Republicans had in the senate.[241] They also took over Arkansas and won the Florida legislature.[242] Violence resurged throughout the south with a vengeance, and both the Grant administration and Republican politicians generally, now disinterested in civil rights enforcement, declined to intervene to curtail the violence.[243] The Supreme Court dulled the impact of the 14th Amendment, empowering state inaction in the face of crimes by private actors.[244] Both presidential candidates in the 1876 election opposed federal intervention in southern states.[245] And when the election that November had no clear winner, a compromise was worked out: the Republican candidate, Rutherford B. Hayes, would get the presidency; and in exchange, the north would fully withdraw from the south and end Reconstruction.[246] President Hayes made good on his promise in April 1877.[247]

Thus, the Reconstruction Era came to an end within the same decade that the Civil Rights Act of 1871 was passed. The Supreme Court both preceded and followed the end of Reconstruction with a host of decisions that gutted civil rights legislation and watered down the protections of the Reconstruction amendments.[248] In 1894, Congress repealed much of the Enforcement Acts of 1870 and 1871.[249] The Ku Klux Klan and other

236. *Id*.
237. *See id*. at 77–79.
238. *Id*. at 91–92.
239. *See* WORMSER, *supra* note 109, at 28–29.
240. *Id*. at 29.
241. *Id*.
242. *Id*.
243. *Id*. at 29–30.
244. United States v. Cruikshank, 92 U.S. 547 (1875).
245. *Id*. at 30.
246. *Id*. at 32.
247. *Id*.
248. *See* CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 32–38 (2016).
249. *Civil Rights Repeal Act 28 Stat. 36 (1894),* ENCYCLOPEDIA.COM, https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/civil-rights-repeal-act-28-stat-36-1894 (last visited July 3, 2021).

white supremacist organizations continued slaughtering and intimidating people throughout the south; and by the 1890's, more Black people were being lynched than white people.[250] Between 1889 and 1929, a Black person was lynched once every four days.[251] Between just 1891 and 1894, 526 Black people were lynched.[252] These extrajudicial killings were "often marked by an unprecedented level of sadism[,]"[253] with Black victims being horrifically tortured for the pleasure of white audiences and then dismembered, with "teeth, ears, toes, fingers, nails, kneecaps, bits of charred skin and bones" and other body-parts taken and displayed as souvenirs.[254] Attempts to enact federal anti-lynching legislation never succeeded,[255] and those responsible for lynchings throughout the country were never prosecuted even though lynchings were planned in advance, announced in newspapers, and memorialized by photographs of the persons involved.[256] Race riots, mostly consisting of whites slaughtering Black people, persisted into the twentieth century, and entire Black communities were destroyed.[257] There were approximately a hundred race riots between 1913 and 1923 alone.[258] African Americans were chased out of towns and communities under a threat of violence.[259] The Klan greatly expanded in size and had over four million members at its peak during the early twentieth century.[260]

Within the criminal judicial systems in the southern states, court officials—judges, prosecutors, sheriffs and the like—could not make the administration of justice any more discriminatory after Reconstruction. Black jurors—in the South and in many jurisdictions in the North—vanished after reconstruction, as did Black judges and police officers.[261] Black witnesses were barred from testifying in court, unless they were testifying against other Black people.[262] Black persons accused of crime

250. JAMES ALLEN ET AL., WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA 13 (2000).

251. ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION 39 (2010).

252. WORMSER, *supra* note 109, at 74.

253. *Id*. at 74–75.

254. ALLEN ET AL., *supra* note 250, at 14.

255. *See Anti-Lynching Legislation Renewed*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Temporary-Farewell/Anti-Lynching-Legislation/ (last visited July 3, 2021).

256. ALLEN ET AL., *supra* note 250, at 8–11, 17–18; JAMES LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG 167 (2d ed. 2007).

257. LOEWEN, *supra* note 256, at 165–66.

258. *Id*.

259. *Id*. at 166.

260. *Id*. at 165.

261. *Id*. at 167; *see* LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 248–49 (1998).

262. LITWACK, *supra* note 261, at 249, 253.

were presumed guilty, often denied their right to counsel and other constitutional entitlements, and prosecuted and convicted regardless of how much evidence of guilt existed.[263] African American attorneys were heavily discriminated against and wildly disrespected, especially defense attorneys.[264] Black people were often arrested for offenses that white people were not charged with,[265] and they almost always received harsher sentences than white people for identical crimes.[266] Black people were punished especially harshly when the victim was white, but white criminals went unpunished when the victim of their crimes was Black.[267] In Mississippi particularly, it was said that attorneys need to familiarize themselves with "negro law," or an understanding that law was to be selectively enforced.[268] As one lawyer observed: "The judges, lawyers and jurors all know that some of our laws are to be enforced against everybody, while others are to be enforced against the white people, and others are to be enforced only against the negroes . . . ."[269] As one clear example of how perverted justice was:

> Some years later, [B]lack cynicism about the judicial system was summed up in the story of the white man driving a convertible in Mississippi and running into two [B]lacks, hitting them so hard they flew up into the air. One landed in the backseat of the convertible (he was charged with illegal entry); the other landed about 150 feet down the road (he was charged with leaving the scene of a crime).[270]

Public servants involved in the criminal judicial system, from judges to prosecutors to police,[271] religiously conspired to arrest African Americans for all kinds of offenses, have them convicted of crimes, and re-enslave them through the convict leasing system.[272] Black children were prosecuted and sentenced like adults, and they made up a quarter of all Black people who were "condemned to hard labor in convict lease camps."[273] Police brutality against Black people was common, as was the

263. *Id.* at 248, 257–58.
264. *Id.* at 249–51.
265. *Id.* at 252.
266. WORMSER, *supra* note 109, at 54.
267. LITWACK, *supra* note 261, at 253.
268. *Id.* at 258.
269. *Id.*
270. *Id.* at 261–62.
271. *Id.* at 249.
272. *See* WORMSER, *supra* note 109, at 54–57.
273. *Id.* at 57.

resulting Black distrust of law enforcement.[274] The overcriminalization of Black people through Black Codes, vagrancy laws, convict leasing, Jim Crow and other methods and apparatuses continued into and throughout the twentieth century.[275]

Often overlooked in this history is the obvious role that prosecutors played in the racist administration of American justice.[276] Prosecutors have always played a role in deciding whether to charge, what charges to bring, what evidence to present, what sentences to seek, etc.[277] Historically, prosecutors steadfastly declined to charge lynchers for murder or any other crimes.[278] White men who raped Black women consistently went unpunished,[279] and racially biased attitudes have impacted prosecutorial decision-making throughout the twentieth century.[280] White persons routinely went uncharged for offenses that landed Black people in prison; and when white defendants were prosecuted, particularly for petty offenses and misdemeanors, it was never to the same extent as criminally accused Black persons.[281] Prosecutors effectively played a major role in helping the criminal judicial system "operate[] with particular efficiency in upholding the absolute power of white people to demand and obtain the submission and labor of black men and women."[282]

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274. LITWACK, *supra* note 261, at 263–65. A local Black newspaper in Atlanta remarked as follows, "We have lived in Atlanta twenty-seven years . . . and we have heard the lash resounding from the cabins of the slaves . . . but we have never seen a meaner set of low down cut throats, scrapes and murderers than the city of Atlanta has to protect the peace." *Id.* at 264.

275. WORMSER, *supra* note 109, at 54–57.

276. *See generally* Robynn J.A. Cox, *Where Do We Go From Here? Mass Incarceration and the Struggle for Civil Rights*, ECON. POL'Y INST. (Jan. 16, 2015), https://www.epi.org/publication/where-do-we-go-from-here-mass-incarceration-and-the-struggle-for-civil-rights/.

277. *See* Cox, *supra* note 273; Jacoby, *supra* note 6, at 25; Vada Berger et al., *Too Much Justice: A Legislative Response to* McClesky v. Kemp, 24 HARV. C.R.-C.L. L. REV. 437, 445 (1989).

278. Berger et al., *supra* note 276, at 444–45; *see also generally* Alex Smith, *Nearly 2,000 Black Americans were Lynched During Reconstruction*, SMITHSONIAN MAG. (June 18, 2020), https://www.smithsonianmag.com/smart-news/nearly-2000-black-americans-were-lynched-during-reconstruction-180975120/ ("Reconstruction-era lynchings, as well as thousands of largely unprosecuted acts of assault and terrorism during the period, 'were used to intimidate, coerce and control Black communities with the impunity of local, state and federal officials—a legacy that has once again boiled over, as nationwide protests sparked by multiple police killings and extrajudicial violence against Black Americans call for an end to centuries of hostility and persecution.'")

279. Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 22 (2007).

280. *Id.* at 35–36.

281. WORMSER, *supra* note 109, at 54; LITWACK, *supra* note 261, at 253.

282. LITWACK, *supra* note 261, at 248.

On the flip side, they religiously prosecuted Black people for even minor offenses, seeking the harshest of punishments.[283] Prosecutors rushed to convict Black people of serious crimes[284] and have them condemned to death; for as many Black people that were lynched, just as many or more were "legal[ly] lynch[ed]" by the judicial system, of which prosecutors were a part.[285] In particular, prosecutors routinely sought the death penalty against Black men charged with raping white women.[286] They pandered to white juries by invoking racial stereotypes of Black people,[287] behavior which persisted well into the 1980's.[288] In the North, prosecutors initiated bogus prosecutions against Black people who tried to move into white neighborhoods.[289] They exercised their peremptory challenges in racially discriminatory ways, which the Supreme Court sanctioned in 1965[290] and would not abolish until 1986.[291] When the contemporary civil rights movement progressed in the 1950's and 1960's, prosecutors routinely targeted activists and protest leaders.[292] Prosecutors were united with law enforcement in persecuting key figures in the fight for Black liberation and pursued convictions of serious charges with flimsy evidence,[293] hid evidence from defense attorneys,[294] and even participated in a raid in which law enforcement killed a prominent activist and his comrade in his own home.[295]

Prosecutors, in short, continued to violate the constitutional rights of Black people by abridging their privileges and immunities, denying them due process of law, and applying laws unequally compared to their white counterparts. This was certainly true in 1976, when the Supreme Court

283. WORMSER, *supra* note 109, at 54.

284. In jurisdictions throughout the country, burglary, arson and rape were capital offenses when Black people committed them. *See* Berger et al., *supra* note 278, at 445.

285. ALLEN ET AL., *supra* note 250, at 12.

286. Pokorak, *supra* note 279, at 25–35.

287. LITWACK, *supra* note 261, at 267 (regarding a Black person charged with murder of another Black person, the prosecutor told a jury that they "ought to convict him . . . because he might rape some of the white women of the country."). Although Black people did not usually receive the death penalty for killing other Black persons, the defendant here was condemned to die. *Id.* at 264–67.

288. *See generally* Alford, *supra* note 65; Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212 (1992).

289. *See, e.g.*, ANDERSON, *supra* note 248, at 57–66.

290. *See* Swain v. Alabama, 380 U.S. 202, 227 (1965).

291. *See* Batson v. Kentucky, 476 U.S. 79, 100 (1986).

292. *Race and the Criminal Justice System*, EQUAL JUST. INITIATIVE (Oct. 1, 2014), https://eji.org/news/history-racial-injustice-race-and-criminal-justice/.

293. *See, e.g.*, MARSHALL "EDDIE" CONWAY & DOMINIQUE STEVENSON, MARSHALL LAW: THE LIFE & TIMES OF A BALTIMORE BLACK PANTHER 56–57 (2011).

294. *See, e.g.*, *In re* Pratt, 82 Cal. Rptr. 2d 260, 278 (1999).

295. KENNETH O'REILLY, "RACIAL MATTERS": THE FBI'S SECRET FILE ON BLACK AMERICA, 1960-1972, 310–12 (1989).

absolutely immunized prosecutors from civil liability for actions undertaken as part of their "traditional official functions,"[296] and, as demonstrated in Part I(C), it continues today.

C. The Supreme Court's Decision in Imbler v. Pachtman *Was Wrongly Decided.*

The Civil Rights Act of 1871 was designed to empower citizens to hold state officials accountable who abridged their rights.[297] Nothing in the language, the history or the congressional record of the Act even suggests that prosecutors should be exempted. Yet in 1976, the Supreme Court held that prosecutors acting within the scope of their "prosecutorial duties" were exempt from suit.[298] The high court's decision ignored the history and legislative intent of the act, disregarded its own rules of statutory interpretation, substituted its own judgment for that of the Forty-Second Congress, and ultimately created a safeguard for prosecutors almost out of whole cloth. This subsection will explore the court's decision in *Imbler* and critique the Court's rationale.

1. The Facts and Holding

At the center of the case was Paul Kern Imbler, a man accused in 1961 of the murder of a market owner during an attempted robbery in Los Angeles, California.[299] The primary identification at trial of Imbler was from a passerby that stated he had a view of the gunman on the day in question. .[300] The jury discredited Imbler's alibi defense and found him guilty of the murder.[301] Soon after the conviction, Deputy District Attorney Richard Pachtman, the prosecutor in the case, wrote a letter to the governor of California regarding evidence he discovered after trial, including "newly discovered corroborating witnesses for Imbler's alibi, as well as new revelations about [the prime witness'] background which indicated that he was less trustworthy than he had represented originally to Pachtman and in his testimony."[302] Armed with this information, Imbler filed a state habeus corpus petition that the Supreme Court of California ultimately dismissed in 1963.[303] About four years

296. Imbler v. Pachtman, 424 U.S. 409, 415, 431 (1976).
297. *Civil Rights Act of 1871*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/civil-rights-act-1871 (last visited Aug. 5, 2021).
298. *Imbler*, 424 U.S. at 421, 431.
299. *Id.* at 411.
300. *Id.*
301. *Id.* at 412.
302. *Id.* at 412–13.
303. *Id.* at 413–14; *In re* Imbler, 387 P.2d 6 (Cal. 1963).

later, Imbler filed a federal habeus petition.[304] In 1969, the District Court issued an opinion finding eight instances of misconduct at Imbler's trial and granted the writ based on "the cumulative effect" of the misconduct.[305] The Ninth Circuit Court of Appeals affirmed the district court's decision,[306] and the Supreme Court denied certiorari.[307]

In 1972, eleven years after he was first accused of murder, Imbler filed suit against several persons, include the prosecutor.[308] Among other things, Imbler accused the prosecution of intentionally and negligently eliciting false testimony from the prime witness, as well as altering and using a police artist's sketch to resemble Imbler more closely when he became the prime suspect.[309] The district court dismissed the lawsuit, holding that Pachtman was absolutely immune from suit in performance of his prosecutorial duties.[310] In 1974, the Ninth Circuit Court of Appeals affirmed the district court with one judge dissenting.[311] The following year, the Supreme Court affirmed the dismissal of the lawsuit and held that prosecutors were entitled to absolute immunity for any of their traditionally official functions.[312] Three judges concurred with the majority opinion, finding that absolute immunity would not be appropriate where prosecutors violated their *Brady* obligations, but was appropriate on the facts of this case.[313] There were no dissenting opinions.[314]

2. *Imbler*'s Faulty Rationale

It should first be noted that the Supreme Court's decision in *Imbler* barely mentioned the statutory language of the Civil Rights Act of 1871 and featured *no* discussion of its legislative history. The court's cursory review of the language and dismissal of the history violates its own precedents regarding statutory construction. When construing federal statutes, courts are supposed to begin with the plain language of the statute, and must cease if "the statutory language is unambiguous and

304. *Imbler*, 424 U.S. at 414.
305. *Id.*; Imbler v. Craven, 298 F. Supp. 795, 805 (C.D. Cal. 1969).
306. Imbler v. Pachtman, 424 U.S. 409, 415 (1976); Imbler v. California, 424 F.2d 631, 632 (9th Cir. 1970).
307. Imbler v. California, 400 U.S. 865 (1970).
308. *Imbler*, 424 U.S. at 415.
309. *Id*. at 416.
310. *Id*.; Imbler v. Pachtman, 500 F.2d 1301, 1302 (9th Cir. 1974).
311. *Imbler*, 424 U.S. at 416; *Imbler*, 500 F.2d at 1303–04.
312. *Imbler*, 424 U.S. at 431.
313. *Id*. at 432–47.
314. *See id*. at 447.

'the statutory scheme is coherent and consistent.'"[315] In making these determinations, courts are to examine "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[316] In addition, courts examine the legislative history to see what issues Congress intended to address with the legislation in question.[317] These were certainly the rules of statutory construction prior to *Imbler*.[318] Applying the high court's own rules of statutory construction, it is plainly evident that state officials—and prosecutors more specifically—were not to be immunized from suit under this statute. The language is unambiguous; the context in which the language was used is clear; the broader context of the statute was also clear; and the legislative history of the statute plainly demonstrates a desire to hold state officials and private citizens accountable for violating the civil rights of Americans. The Supreme Court itself said so a mere fifteen years prior to *Imbler*.[319] Yet, the court did not even bother to offer *any* analysis of the statute's language or history in *Imbler*, which is quite disturbing considering that it was an issue of first impression for the court.

The high court ruled that 42 U.S.C. § 1983 should "be read in harmony with general principles of tort immunities and defenses . . . ."[320] The court later made reference to an alleged history of prosecutors being absolutely exempted from suit for malicious prosecution.[321] Even accepting that history as real, however, there is a marked difference between common-law torts relating to abridgement of state rights and violations of the supreme body of law of the land.[322] More importantly, had the Court examined the congressional record honestly, it would have seen that Congress had no intention of making "general principles of tort

315. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)).

316. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

317. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 422, 424, 434–35 (1987).

318. *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 366–71 (1974) (discussing how the Court examined the language and legislative history of the amendment to the statute in question); United States v. Khan, 415 U.S. 143, 151 (1974) ("[T]he starting point, as in all statutory construction, is the precise wording chosen by Congress . . . ."); Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88–89 (1973) (examining the language of the statute and the legislative history in interpreting the statute in question).

319. *See* Monroe v. Pape, 365 U.S. 167, 172 (1961) ("The question with which we now deal is the narrower one of whether Congress, in enacting s 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. We conclude that it did so intend."), *overruled on different grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

320. Imbler v. Pachtman, 424 U.S. 409, 418 (1976).

321. *Id*. at 421.

322. Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring).

immunities" applicable to the Civil Rights Act of 1871.[323] If it did, there would have been no reason for Congressman Arthur, Congressman Lewis and Senator Thurman to complain that state officials would be hauled into federal court;[324] and if they had nonetheless, certainly a legislator in support of the bill would have corrected them.

The Court referenced *Tenney v. Brandhove*,[325] an older decision granting absolute immunity to state legislators under 42 U.S.C. § 1983, as support for its holding.[326] That decision was also made in disregard of the legislative history of the statute, as observed by Justice William O. Douglas in the dissent.[327] Justice Douglas, seemingly the only judge interested in examining that history,[328] opined that when a legislative committee "perverts its power, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends. It was indeed the purpose of this civil rights legislation to secure federal rights against invasion by officers and agents of the state."[329] Beyond that, however, legislators and prosecutors are not similarly situated in function, or even in terms of the history of immunity. Leading up to the founding of the republic, both individual states and the emerging federal government sought to afford legislative freedom the highest levels of protection against civil suits and criminal prosecutions.[330] No similar constitutional history exists for prosecutors.[331] So even if *Tenney* was correctly decided, it does not militate the conclusion the Court reached in *Imbler*.

The Court accused Imbler of taking "an overly simplistic approach to the issue of prosecutorial liability" and professed the importance of examining "the immunity historically accorded the relevant official at common law and the interests behind it."[332] Yet the Court disregarded the considerable differences between English prosecutors at common law and American prosecutors at the time of the decision. At common law,

323. *Imbler*, 424 U.S. at 418.
324. *See supra* notes 219–24 and accompanying text.
325. Tenney v. Brandhove, 341 U.S. 367 (1951).
326. *Imbler*, 424 U.S. at 418.
327. *Id.* at 383.
328. Justice Douglas offered a detailed history of the Civil Rights Act of 1871 in his powerful dissent in Pierson v. Ray, 386 U.S. 547, 558–67 (1967). He also wrote the majority decision in Monroe v. Pape, 365 U.S. 167 (1961).
329. *Tenney*, 341 U.S. at 383.
330. *Id.* at 373–75.
331. *See* Imbler v. Pachtman, 424 U.S. 409, 437–38 (1976); Anthony Meier, Note, *Prosecutorial Immunity: Can § 1983 Provide an Effective Deterrent to Prosecutorial Misconduct?*, 30 ARIZ. ST. L.J. 1167, 1172 (1998).
332. Imbler v. Pachtman, 424 U.S. 409, 421 (1976).

prosecutors were private actors, not public servants.[333] There were instances in English history of justices of the peace serving as prosecutors in certain respects, but justices of the peace were actual judges empowered to make judicial determinations, such as decisions on bail.[334] Nevertheless, not even justices of the peace were entitled to absolute immunity.[335] As for private prosecutors, they were not even lawyers at first,[336] and when attorneys became prosecutors, they represented and initiated actions on behalf of individuals, not for the public good.[337] They initiated both civil and criminal actions against others private parties.[338] There is no indication that they were exempt from suit for willful violations of the law,[339] and in fact, private prosecutors in England sued for malicious prosecution did *not* enjoy absolute immunity.[340] The American prosecutor cannot be compared to justices of the peace, because it is an office separate and apart from the judiciary—or at least it is supposed to be. Nonetheless, even if they were comparable, if justices of the peace did not enjoy absolute immunity, then prosecutors should not either. And if the American prosecutor is to be accorded the same immunities as the English prosecutor at common law, then there is no historical basis for exempting the American prosecutor from civil liability either for malicious prosecution or for knowing violations of the Constitution.

Moreover, and more importantly, there was no absolute immunity in existence for American prosecutors at the time the Civil Rights Act of 1871 was enacted.[341] Even with the existence of the public prosecutor in the 1800's, many jurisdictions in America still had private prosecutors.[342] Prior to 1871, a number of courts held that prosecuting attorneys could be made liable for malicious prosecution.[343] In 1854, the Supreme

333. Joan E. Jacoby, *The American Prosecutor in Historical Context*, 44 PROSECUTOR 38, 40–41 (2010); John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 317–18 (1973).

334. Langbein, *supra* note 333, at 318–23.

335. *Liability of Judicial Officers Under Section 1983*, *supra* note 218, at 325.

336. Langbein, *supra* note 333, at 318.

337. Jacoby, *supra* note 6, at 40–41.

338. *Id*. at 41.

339. *See* Imbler v. Pachtman, 424 U.S. 409, 441 (1976).

340. Meier, *supra* note 331, at 1170–71.

341. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 108–123 (2005).

342. *See* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515–20 (1994).

343. *See, e.g.,* Warfield v. Campbell, 35 Ala. 349 (1859); Burnap v. Marsh, 13 Ill. 535, 538 (1852) ("[W]hen an attorney submits to be made the instrument of prosecuting and imprisoning a party against whom he knows his client has no just claim or cause of arrest, and that the plaintiff is actuated by illegal or malicious motives, he is morally and legally just as much liable as if he were prompted by his own malice against the injured party. If

Judicial Court of Massachusetts specifically held that a public prosecutor could be sued for knowingly using perjured testimony to convict another person.[344] Notably, the prosecutor did *not* seek dismissal on any grounds resembling absolute immunity, which he certainly would have done had that defense existed for district attorneys in 1854.[345] Nowhere in America was absolute immunity for prosecutors even recognized until 1896, when the Indiana Supreme Court first declared that the district attorney was completely exempt from civil suit;[346] and no federal court recognized absolute immunity for prosecutors until 1925.[347] Between 1896 and 1925, state courts split over the question of whether prosecutors were entitled to absolute immunity in the performance of their traditional functions, with courts in California,[348] Minnesota,[349] Kentucky,[350] Michigan[351] and Hawaii[352] all answering in the negative. So once again, the Court disregarded history, but deceptively so here: the Court claimed that the law regarding immunity for prosecutors was "thus well settled" when it clearly was not.[353] To the extent that the Court analogizes prosecutorial

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he will knowingly sell himself to work out the malicious purposes of another, he is a partaker of that malice as much as if it originated in his own bosom."); Wood v. Weir, 44 Ky. 544, 547 (1845) ("It would be strange, therefore, if the attorney, by art and contrivance, the abuse of the confidence reposed, and prostitution of his profession, should *procure* from the Justices, from *malicious motives* to the defendant, an illegal and oppressive order by which injury accrues to the defendant, if the attorney could not be made liable for the wrong. It is contended, that *this rule* will expose attorneys to perplexing litigation, to the manifest injury of the profession. If it should, the law knows no distinction of persons; a different rule cannot, as to them, be recognized by this Court, from that which is applicable to others. Besides, this is a numerous class, powerful for good or evil. and [sic] holding them to a strict accountability, will have the effect to exalt and dignify the profession, by purging it of ignorant, meretricious and reckless members.").

344. Parker v. Huntington, 68 Mass. 124 (1854).

345. *See id*. at 126 (stating the public prosecutor being sued only sought to dismiss the claim against him on the grounds that it did not plead the existence of a conspiracy).

346. Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896).

347. Yaselli v. Goff, 8 F.2d 161 (S.D.N.Y. 1925).

348. *Cf.* Carpenter v. Sibley, 94 P. 879 (Cal. 1908) (holding the district attorney and assistant district attorney liable for malicious prosecution).

349. *Cf.* Buhner v. Reusse, 175 N.W. 1005 (Minn. 1920) (suggesting that had plaintiff proved the requisite elements, the village attorney could have been held liable for malicious prosecution); Skeffington v. Eylward, 105 N.W. 638 (Minn. 1906) (holding county attorney liable for malicious prosecution).

350. *Cf.* Arnold v. Hubble, 38 S.W. 1041 (Ky. 1897) (suggesting that had plaintiff alleged the city attorney's malicious or corrupt motives, the city attorney could have been held liable for malicious prosecution).

351. *Cf.* Schneider v. Shepherd, 158 N.W. 182 (Mich. 1916) (holding prosecutor liable for false imprisonment).

352. *Cf.* Yau v. Carden, 23 Haw. 362 (1916) (finding that the deputy city and county attorney could be held liable for malice prosecution).

353. Imbler v. Pachtman, 424 U.S. 409, 424 (1976). The Court cited no cases prior to 1871 that support or suggest the existence of absolute immunity for prosecutors. Further, the Court cursorily mentioned Parker v. Huntington, 68 Mass. 124 (1854), before

immunity with judicial immunity,[354] judicial immunity was not well settled either in 1871,[355] and the Court itself did *not* fully exempt judges from civil suit prior to 1871.[356] The Forty-Second Congress could not have intended to retain an immunity that did not even exist in American jurisprudence as of 1871.

The Court advanced several doomsday prophecies to justify cloaking prosecutors with absolute immunity. The Court referenced the concern of "harassment by unfounded litigation . . . caus[ing] a deflection of the prosecutor's energies from his public duties . . . ."[357] The Court noted how the prosecutor's office "must be administered with courage and independence" and then asked, "how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict?"[358] The Court worried that public trust would be undermined if prosecutors were "constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."[359] The Court noted how allowing lawsuits would place "unique and intolerable burdens" on prosecutors.[360] The Court even went as far as to posit that not granting absolute immunity would cause "the triers of fact in criminal cases . . . [to] be denied relevant evidence."[361] Essentially, the Court's biggest reason for shutting down the federal courts to civil actions against prosecutors is that prosecutors will not zealously do their jobs out of fear of being sued.

As an initial matter, these end-of-civilization scenarios were already considered and evidently rejected by Congress when they passed the Civil Rights Act of 1871. Congressman Arthur and Senator Thurmond in

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disregarding the obvious significance of the case: that prosecutorial immunity was not a recognized defense at the time. *See id.* at 421 n.18.

354. *Imbler*, 424 U.S. at 420–23.

355. *Liability of Judicial Officers Under Section 1983*, *supra* note 218, at 326–27.

356. Randall v. Brigham, 74 U.S. 523, 526 (1868) ("All judicial officers are exempt from liability, in a civil action, for their judicial acts, done within their jurisdiction; and judges of superior or general authority, are exempt from such liability, even when their judicial acts are in excess of their jurisdiction, *unless perhaps where the acts in excess of their jurisdiction are done maliciously or corruptly*.") (emphasis added); White v. Nicholls, 44 U.S. 266, 287 (1845) ("But the term 'exceptions.' [sic] . . . could never be interpreted to mean that there is a class of actors or transactions placed above the cognisance of the law, absolved from the commands of justice. It is difficult to conceive how, in society where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury *legibus soluti;* and still more difficult to imagine, how such a privilege could be instituted or tolerated upon the principles of social good. The privilege spoken of in the books should, in our opinion, be taken with strong and well-defined qualifications. It properly signifies this, and nothing more.").

357. *Imbler*, 424 U.S. at 423.

358. *Id*. (quoting Pearson v. Reed, 44 P.2d 592, 597 (1935)).

359. *Id*. at 424–25.

360. *Id*. at 425–26.

361. *Id*. at 426.

particular raised identical concerns regarding judges, politicians, sheriffs and other state officials being subject to suit. Congressman Arthur complained that under section one,

> every judge in the State court and every other officer thereof, great or small, will enter upon and pursue the call of official duty with the sword of Damocles[362] suspended over him by a silken thread, and bent upon him the scowl of unbridled power, the forerunner of the impending wrath, which is gathering itself to burst upon its victim.[363]

Senator Thurmond questioned whether it was intended "that every judge of a State may be liable to be dragged before some Federal judge to vindicate his opinion and to be mulcted in damages if that Federal judge shall think the opinion was erroneous? That is the language of this bill."[364] While the supporters of the bill likely declined to adopt Senator Thurman's and Congressman Arthur's fanciful exaggerations, these opponents plainly felt that the danger of allowing state officials who willfully violate the constitutional rights of others outweighed whatever detriments that may come from those officials being subject to suit by civilians.[365] So the Court did not simply disregard the legislative history; it effectively substituted its own judgment for that of the Forty-Second Congress and resurrected arguments Congress rejected.

Further, as the Forty-Second Congress demonstrated by passing the Civil Rights Act of 1871, it is wholly illogical to posit that the public interest would be best served by barring citizens from suing corrupt prosecutors that have no regard for the constitutional rights of others. The language of the bill notwithstanding, the congressional record does not support an intention to subject state officials to liability for innocent mistakes and errors.[366] One of the two major problems Congress sought to remedy then was willful constitutional abridgements by state officials, a problem that persists with more ferocity today with respect to prosecutors.[367] A prosecutor that does his or her best to act in accordance with his or her responsibilities has nothing to fear, because it is certainly not within their responsibilities to knowingly violate the Constitution. Applying 42 U.S.C. § 1983 to prosecutors is unlikely to lead to a flood of meritless litigation, and in the few instances where honest prosecutors

362. Evan Andrews, *What Was the Sword of Damocles?*, HISTORY (Aug. 22, 2018), https://www.history.com/news/what-was-the-sword-of-damocles.

363. CONG. GLOBE, 42nd Cong., *supra* note 171, at 366.

364. *Id*. at app. 217.

365. Pierson v. Ray, 386 U.S. 547, 562 (1967) (Douglas, J., dissenting).

366. *See generally* CONG. GLOBE, 42nd Cong., *supra* note 171.

367. *See generally id.*

are sued, there are mechanisms within the civil process by which meritless cases would be disposed of before trial.[368] However, prosecutors *should* be fearful of consciously disregarding the constitution and laws of the country in the same respect that any person in America would be fearful of purposely committing tortious conduct. Further, liability would not attach because prosecutors lost or dismissed a case; it would attach in cases where the prosecutor willfully violated the constitutional rights of civilians. To strip the public of such a potentially powerful deterrence tool can only serve to encourage prosecutorial misconduct, which is clearly *not* in the best interest of the public.

Additionally, some of the Court's other precedents undermine its logic with respect to the need to immunize prosecutors. What about governors of a state? Could not the same be said of governors, that they play such an important role as the chief executive officer and need to act independently and free of the fear of civil action? Yet, governors and state executives do not have absolute immunity with respect to civil rights lawsuits.[369] What about police officers and sheriffs? As venerated as they have been in American society, would not the fear of lawsuits deter them from engaging in "the often competitive enterprise of ferreting out crime"?[370] Yet, law enforcement officers do not have absolute immunity with respect to civil rights lawsuits.[371] How about public defenders? Certainly, declining to grant public defenders absolute immunity could negatively impact the independence and judgment of public defenders. Yet, the Court declined to grant absolute immunity to public defenders, ironically writing as follows:

> Petitioners' concerns may be well founded, but the remedy petitioners urge is not for us to adopt. We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate. We conclude that state public defenders are not immune from liability under § 1983 for intentional misconduct, "under color of" state law, by virtue of alleged conspiratorial action with state officials that deprives their clients of federal rights.[372]

368. *See Pierson*, 386 U.S. at 566; *see also* FED. R. CIV. P. 12(b)(6), 56.

369. Scheuer v. Rhodes, 416 U.S. 232, 248 (1974), *overruled on different grounds by* Davis v. Scherer, 468 U.S. 183 (1984).

370. Johnson v. United States, 333 U.S. 10, 14 (1948).

371. *Pierson*, 386 U.S. at 555–57.

372. Tower v. Glover, 467 U.S. 914, 922–23 (1984).

Even more illogical, the Court in *Imbler* suggested towards the end of the decision that prosecutors might not be absolutely immune from actions as "an administrator or investigative officer rather than that of advocate."[373] Are not the two functions (investigations and advocacy) related? Wouldn't prosecutors need to investigate their cases in order to serve as effective and honest advocates? Wouldn't allowing civil actions against prosecutors in their investigative capacities "cause a deflection of the prosecutor's energies from his public duties" and cause him to "shade his decisions instead of exercising the independence of judgment required by his public trust"?[374] That the Court hasn't conferred absolutely immunity upon every state official for those reasons speaks to how specious the argument is.

The Court claimed that its decision "does not leave the public powerless to deter misconduct" because prosecutors that knowingly deprive others of their constitutional rights can either be prosecuted under 18 U.S.C. § 242 or professionally disciplined by their respective legal bars.[375] Neither of these "solutions," however, empower the citizens themselves, those most likely to be affected—and injured—by the prosecution's willful actions. Both of these alleged remedies depend on government officials to seek them, and as history has shown us, government officials rarely pursue them. With respect to 18 U.S.C. § 242, there is only one recorded case of a prosecutor being punished pursuant to that section since the statute was enacted in 1866, and that case came after *Imbler* had been decided.[376] So, the Court trumpeted criminal sanctions as an effective check despite no recorded cases of prosecutors being charged. As far as professional discipline serving as a check, this essentially amounts to state authorities within the legal profession holding other state actors accountable for federal violations. This is the exact scenario that Congressman Shellabarger characterized as "plainly and grossly absurd."[377] History has proven Congressman Shellabarger correct in this regard, as discussed in Part I(D).[378]

Additionally, with specific respect to 18 U.S.C. § 242, how is it that "the threat of § 1983 suits would undermine performance of [a prosecutor's] duties"[379] but the threat of federal prosecutions would not? If the threat of civil liability was too great for prosecutors to be subjected

373. Imbler v. Pachtman, 424 U.S. 409, 430–31 (1976).
374. *Id*. at 423.
375. *Id*. at 429.
376. George A. Weiss, *Prosecutorial Accountability After* Connick v. Thompson, 60 DRAKE L. REV. 199, 220 (2012); Brophy v. Comm. on Pro. Standards, 83 A.D.2d 975 (N.Y. App. Div. 1981).
377. CONG. GLOBE, 42nd Cong., *supra* note 171, at 68.
378. *See supra* Part I(D).
379. *Imbler*, 424 U.S. at 424.

to, certainly the threat of criminal culpability would be just as great, if not worse. By the court's logic, making a prosecutor potentially subject to criminal penalties would be "making every decision by the consequences in terms of his own potential [culpability] in a [criminal] case."[380] Some would argue that it would be more reasonable to impose criminal liability because decisions to bring charges would be properly exercised by federal officials, whereas with civil lawsuits, there would be a flood of endless litigation. The *Imbler* court would have certainly endorsed that argument, opining that civil actions "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious action to the State's advocate."[381] Assuming this to be true, however, the proper solution is not to shut down the court system to such claims, but to provide judicial guidance regarding what constitutes a meritorious constitutional claim and what does not. This is especially true given how state prosecutors have almost never been criminally charged in federal court; again, there has been only one recorded case of a successful prosecution since 1866, and it came after *Imbler*.[382]

The Court complained that making prosecutors liable in civil actions "would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice."[383] This is a curious claim that bears repeating: the Supreme Court opined that allowing civil actions against prosecutors would be bad for convicted persons because it would impact how judges decide appeals. Impact and skew post-conviction decisions *how*? Would judges try to protect and shield prosecutors from civil liability? Would judges purposely misinterpret the constitution for fear that a state's attorney could get sued? Would judges decline to find constitutional violations where the prosecutor's behavior was clearly unconstitutional? While the authors would answer "yes" to all of these questions,[384] this tacit admission from the Supreme Court is rather shocking—and is also a very poor reflection of judiciaries across the country. It is also all the more reason why citizens should be empowered to hold state officials—such as prosecutors, and judges as well—accountable using the remedy Congress provided to them over a century prior.

380. *Id*. at 424–25.
381. *Id*. at 425.
382. Weiss, *supra* note 376, at 220.
383. *Imbler*, 424 U.S. at 428.
384. *See* discussion *supra* Part I(D).

3. Justice White's Concurring Opinion

Justice Byron White authored an opinion concurring in the judgment, joined by Justice Thurgood Marshall and Justice William Brennan.[385] His basis for authoring a concurrence was out of concern that the majority opinion "may be read as extending to a prosecutor an immunity broader than that to which he was entitled at common law; broader than is necessary to decide this case; and broader than is necessary to protect the judicial process."[386] He refuted the majority's policy arguments that allowing civil suits would make prosecutors afraid to do their jobs, pointing out how "these adverse consequences are present with respect to suits against policemen, school teachers, and other executives, and have never before been thought sufficient to immunize an official absolutely no matter how outrageous his conduct."[387] He claimed that prosecutors had absolute immunity in common law only with respect to two specific types of suits: malicious prosecution and defamatory remarks.[388] With respect to malicious prosecution, he noted how prosecutors, like grand jurors, were immune from suit with respect to decisions regarding whether or not to bring charges.[389] Regarding defamatory remarks, he explained that attorneys generally, and not just prosecutors, were exempt from lawsuits for statements made in the course of judicial proceedings.[390] After recounting history and policy reasons for completely immunizing prosecutors in those specific contexts, he agreed with the majority that prosecutors should be absolutely immune from civil actions on the basis that "they knew or should have known that the testimony of a witness called by the prosecution was false . . . ."[391]

By contrast, Justice White disagreed with completely exempting prosecutors from civil suit for most constitutional violations, averring that "liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct."[392] Specifically, he took issue with any reading of the case that ascribed absolute immunity to prosecutors who committed *Brady* violations, saying that such a construction "would stand this immunity rule on its head . . . ."[393] He described a case where a woman was convicted for

385. *Imbler*, 424 U.S. at 432 (White, J., concurring).
386. *Id*. at 432–33 (White, J., concurring).
387. *Id*. at 436 (White, J., concurring).
388. *Id*. at 437–41 (White, J., concurring).
389. *Id*. at 437–38 (White, J., concurring).
390. *Id*. at 439–40 (White, J., concurring).
391. *Id*. at 440 (White, J., concurring).
392. *Id*. at 441–42 (White, J., concurring).
393. *Id*. at 441–43 (White, J., concurring).

murder before learning of an exculpatory FBI report the prosecutor withheld.[394] He concluded the recounting of the case by stating as follows: "It is virtually impossible to identify [a]ny injury to the judicial process resulting from a rule permitting suits for such unconstitutional conduct, and it is very easy to identify an injury to the process resulting from a rule which do not permit such suits."[395]

Justice White is correct to argue that barring prosecutors from suit for unconstitutionally suppressing evidence would "threaten to injure the judicial process."[396] However, his stance is inconsistent with his dismissal of the idea that prosecutors should be subject to civil action for knowingly using perjured testimony.[397] His claim that prosecutors were immune from liability for malicious prosecution at common law is ahistorical, as previously discussed,[398] and the sources he cites for his contention regarding absolute immunity for malicious prosecution are all dated after 1911,[399] forty years after the Civil Rights Act of 1871 was passed. Further, the knowing use of perjured testimony is not comparable to making defamatory remarks. A suit based on an attorney making defamatory remarks focuses on the speech of the attorney, which is not evidence;[400] a suit based on the knowing use of perjured testimony focuses on the evidence the attorney offers as proof of his or her case. There is no real difference between a prosecutor offering perjured testimony and a prosecutor offering fabricated physical evidence; in both circumstances, the prosecutor is using falsehoods to seek a conviction and potentially deprive a person of his or her liberty. The knowing use of perjured testimony to obtain a conviction is a clear violation of the Fourteenth Amendment.[401] Therefore, prosecutors who knowingly use perjured testimony to obtain a conviction should be liable for the same reasons as prosecutors who violated their *Brady* obligations.

4. Final Thoughts on *Imbler*

All in all, the Supreme Court's decision in *Imbler* is destructive. It is contrary to the language, the history and the congressional record of the statute. The Court ignored its own rules of statutory interpretation and

394. *Id*. at 444 (White, J., concurring).
395. *Id*. at 444–45 (White, J., concurring).
396. *Id*. at 433 (White, J., concurring).
397. *Id*. at 432 (White, J., concurring).
398. *See* discussion *supra* Part II(C)(2).
399. *Imbler*, 424 U.S. at 437–38 (White, J., concurring).
400. *See, e.g.*, *Index to Judge Pechman Preliminary Civil Jury Instructions*, U.S. COURTS, https://www.wawd.uscourts.gov/sites/wawd/files/PechmanCivilPreliminaryInstructions.pdf (last visited June 19, 2021).
401. Napue v. Illinois, 360 U.S. 264, 269–70 (1959).

injected its own opinions regarding the sanctity of the prosecutor's office. It offered remedies that have been and remain ineffective deterrents of constitutional wrongs by prosecutors, and it has sent litigators down a fuzzy rabbit hole to figure out what prosecutors can and cannot be sued for.[402] Crucially, it is one of the most important reasons why prosecutorial misconduct is a widespread problem: it has denied citizens the only tool at their disposal to seek redress and hold prosecutors accountable.

Why would the Supreme Court ignore the legislative intent and language of the act, distort history and create absolute immunity for American prosecutors in civil rights lawsuits out of whole cloth? Historical context is important. In the 1970's, subtle racism had begun to replace overt racism in American society.[403] Richard Nixon, the sitting president at the time, was determined to use the criminal judicial system as a weapon against Black people.[404] President Nixon started a lasting right-wing shift of the Supreme Court with four appointments,[405] including ultra-racist William Rehnquist.[406] The War on Drugs had been announced earlier in the decade, and both the federal government and state government officials began touting "law and order" in response to the protests, demonstrations and rebellions during the civil rights movement.[407] Thus, while the criminal judicial system had always been designed to surveil and ruin the lives of Black people, in that decade it was especially primed to become an unprecedented tool of mass incarceration and, ultimately, slavery by yet another name.[408]

Therefore, the *Imbler* decision is part of a large and sinister effort by the Supreme Court, beginning in the 1970's and continuing to this day,

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402. Kate McClelland, *"Somebody Help Me Understand This": The Supreme Court's Interpretation of Prosecutorial Immunity and Liability Under § 1983*, 102 J. CRIM. L. & CRIMINOLOGY 1323, 1330–34 (2012). McClelland writes: "The Supreme Court began in *Imbler* with a functional test that seemed clear and simple to apply. With each subsequent case, the Court chipped away at the advocatory, investigative, and administrative distinctions. After *Van de Kamp*, the Court had determined that so many prosecutorial functions were intimately associated with the conduct of the trial that the functional test had lost its meaning." *Id.* at 1334.

403. IAN HANEY LOPEZ, DOG WHISTLE POLITICS 16–17, 22–29, 46–50 (2014).

404. Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016, 3:14 PM), https://www.cnn.com/2016/03/23/politics/john-ehrlichman-richard-nixon-drug-war-blacks-hippie/index.html.

405. S. Sidney Ulmer & John A. Stookey, *Nixon's Legacy to the Supreme Court: A Statistical Analysis of Judicial Behavior*, 3 FLA. ST. UNIV. L. REV. 331, 331 (1975); *see generally* Lucius J. Barker, *Black Americans and the Burger Court: Implications for the Political System*, 1973 WASH. U. L. REV. 747 (1973).

406. *See generally* Paul Butler, *Rehnquist, Racism, and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019 (2006) ("This [e]ssay describes the evidence of [Justice] Rehnquist's alleged bias . . . .").

407. MICHELLE ALEXANDER, THE NEW JIM CROW 40, 48 (2010).

408. *Id.* at 1–12; LOPEZ, *supra* note 403, at 50–53.

to both narrow the rights of persons charged with crimes and immunize the criminal judicial system—and prosecutors in particular—from any claims of racial bias.[409] In the same year that *Imbler* was decided, the Court ruled in *Washington v. Davis* that a plaintiff alleging racial discrimination must prove purposeful discriminatory intent and cannot solely demonstrate a racially disparate impact,[410] thereby resurrecting its anti-Black, post-Reconstruction jurisprudence.[411] The high court used the *Davis* rule to dramatically raise the bar on selective prosecution claims in 1985.[412] Invoking that same rule two years later, the Court rejected a comprehensive constitutional challenge to Georgia's death penalty statute and the racially discriminatory ways that prosecutors used them, finding that the exhaustive and comprehensive evidence of racial discrimination provided to the Court did not "demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."[413] This decision effectively shut down challenges of racial bias in the judicial system.[414]

In 1994, the Court expressly barred civil rights actions for convicted persons.[415] Two years later, the Court barred plaintiffs from even getting access to prosecutors' files for purposes of discovery, ruling that plaintiffs must first "produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not."[416] Legal scholar Michelle Alexander explained the sheer absurdity of the Court's holding:

> With no trace of irony, the Court demanded that Armstrong produce in advance the very thing he sought in discovery: information regarding white defendants who should have been charged in federal court. That information, of course, was in the prosecution's possession and control, which is why Armstrong filed a discovery motion in the first place. As a result of the *Armstrong* decision, defendants who suspect racial bias on the part of prosecutors are trapped in a classic catch-22. In order to state a claim of selective prosecution, they are required to offer

409. ALEXANDER, *supra* note 407, at 61–69, 108–23.
410. 426 U.S. 229 (1976).
411. *See, e.g.*, Virginia v. Rives, 100 U.S. 313, 322 (1879) ("The assertions in the petition for removal, that the grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white race, and that their race had never been allowed to serve as jurors in the county of Patrick in any case in which a colored man was interested, fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race.").
412. *See* Wayte v. United States, 470 U.S. 598, 607–10 (1985).
413. *See* McCleskey v. Kemp, 481 U.S. 279, 313 (1987).
414. ALEXANDER, *supra* note 407, at 139; LOPEZ, *supra* note 403, at 86.
415. Heck v. Humphrey, 512 U.S. 477, 489–90 (1994).
416. United States v. Armstrong, 517 U.S. 456, 469 (1996).

> *in advance* the very evidence that generally can be obtained only through discovery of the prosecutor's files.[417]

The Court's protection of prosecutors continued into the twenty-first century. In 2009, the Court granted absolute immunity to supervising prosecutors for the performance of certain administrative functions, extending the rationale in *Imbler* to cover claims regarding: "(1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, [and] (3) a failure to establish an information system containing potential impeachment material about informants."[418] And in 2011, the Court rejected claims of municipal liability for *Brady* violations in a case[419] described as "one of the meanest Supreme Court decisions ever."[420] Thus, the *Imbler* decision is emblematic of the Supreme Court's jurisprudence prioritizing prosecutorial deference and independence over racial justice and the constitutional rights of persons charged with crimes.

III. WHY ABSOLUTE IMMUNITY MUST GO

The prosecutor is the most powerful person in the courtroom. They have more influence over the outcomes of individual cases than any other court player, judges included. The power prosecutors possess is an awesome power that has gone virtually unchecked for far too long, making widespread prosecutorial misconduct the predictable result. Existing checks on prosecutorial power are plainly inept. Absent a complete overhaul of judicial processes and institutions in America, citizens should be empowered to hold prosecutors accountable when they violate the rights of individual persons. In this section, we will summarize in five reasons why Congress should abolish absolute immunity for prosecutors in lawsuits pursuant to 42 U.S.C. § 1983.

1. Absolute prosecutorial immunity contravenes both the letter and the spirit of the Civil Rights Act of 1871.

The second section of the Civil Rights Act of 1866 was designed to make state actors criminally culpable for violating the constitutional rights of citizens. The first section of the Civil Rights Act of 1871 derived from the Civil Rights Act of 1866 and was designed to create a civil cause

417. ALEXANDER, *supra* note 407, at 147 (emphasis added).
418. Van de Kamp v. Goldstein, 555 U.S. 335, 339 (2009).
419. *See generally* Connick v. Thompson, 563 U.S. 51 (2011).
420. Dahlia Lithwick, *Cruel But Not Unusual: Clarence Thomas Writes One of the Meanest Supreme Court Decisions Ever*, SLATE (Apr. 1, 2011, 7:43 PM), https://www.supremecourt.gov/opinions/URLs_Cited/OT2014/14-7955/14-7955-10.pdf.

of action against state officials for violating the rights of others. There was never any language that barred suits against prosecutors, or judges, or anyone else for that matter. An examination of the history and the legislative record not only indicates no congressional intent to exempt prosecutors from suit, but supports the conclusion that prosecutors, judges and other state court officials were particularly targeted by the act. There is no evidence that prosecutorial immunity from suit existed in 1871; in fact, several courts found that prosecutors—both public and private—could be sued.

It is the job of the courts to interpret the law based on what Congress intended to bring about and the problems Congress was looking to solve. It is *not* the job of the courts to substitute its own judgement for that of Congress. Yet, that is exactly what the Supreme Court did in *Imbler*: it established an immunity not grounded in common law based on its perception of sound public policy. Absolute prosecutorial immunity does not square with the history, statutory text or congressional record of the Civil Rights Act of 1871.

2. Abolishing absolute immunity is the only way errant prosecutors can be held accountable.

As explained in Part I(D), none of the other checks on prosecutorial power work. Prosecutors are rarely criminally charged for their behavior at either the state or federal level. The threat of professional discipline has not been an effective deterrent. These "checks" rely upon persons in government to act and do not empower the citizen to hold state officials accountable, which is what the precursor to 42 U.S.C. § 1983 was designed to do. This is problematic because, as discussed above, the judges, disciplinary authorities and federal prosecutors are not inclined to hold state prosecutors accountable for misconduct. Particularly because of the unwillingness by these parties, citizens should be permitted to hold prosecutors and other state officials liable for abridging their rights under the federal constitution.

3. Abolishing absolute immunity will force prosecutors to be more conscientious in the performance of their duties.

The reason why prosecutorial misconduct is a major problem is because there is no incentive to discourage the dishonest prosecutor. Abolishing absolute immunity will likely change that, providing particular motivation to prosecutors to seek justice and not just convictions. Prosecutors will likely take care to adhere to their *Brady* obligations and will err on the side of additional disclosure. They will evaluate their cases with an eye towards ensuring that only the guilty

are prosecuted and convicted, while innocent persons are vindicated. They will more objectively evaluate both the evidence and the witnesses before them and refrain from either creating false evidence or suborning perjury. Corrupt prosecutors will likely be inclined to leave. Making prosecutors subject to civil suit pursuant to 42 U.S.C. § 1983, in short, is likely to sharply reduce prosecutorial misconduct.

4. Abolishing absolute immunity will force prosecutors to reckon with, and seek to reduce, racial bias in their practices.

As demonstrated above, prosecutors have problems with racial bias. Decisions regarding whether to charge, what charges to bring, and the prosecution of said charges from beginning to end are infected with racial bias. Of course, the Supreme Court has made it virtually impossible to successfully challenge racial discrimination, an altogether separate problem that needs to be addressed. However, making prosecutors amenable to suit simply adds insult to injury. Prosecutors should be taken to task when they make decisions that effectively treat one group of persons differently from another based upon race. The fear of civil liability will likely provide incentive for them to act appropriately.

5. Police accountability cannot happen without prosecutor accountability, and prosecutor accountability cannot happen without abolishing absolute immunity.

After the death of George Floyd at the hands of police, there was extensive talk of the need for police reform and racial justice. However, police officers have historically been enabled to brutalize Black and Brown people because prosecutors would not pursue charges against them.[421] In this respect, there is a striking similarity between recent prosecutors and state attorneys back in 1871: both groups regularly declined to use the criminal judicial system as a tool for holding a particular group accountable for slaughtering Black and Brown people. Beyond that, prosecutors and police officers have a symbiotic relationship,[422] and prosecutors regularly protect police officers from being held responsible for their misdeeds.[423] Part of the reason why

421. Nicole Gonzalez Van Cleve & Somil Trivedi, *Why Prosecutors Keep Letting Police Get Away with Murder*, SLATE (June 5, 2020, 5.50 AM), https://slate.com/news-and-politics/2020/06/why-prosecutors-keep-letting-police-get-away-with-murder.html.

422. Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885, 899 (2018).

423. *See generally* Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895 (2020).

testifying—the police term for police perjury—is a major problem is because prosecutors ignore or even suborn police perjury to win hearings and trials.[424] Prosecutors will have less incentive to act this way if they could be sued and held personally liable for it.

CONCLUSION

Absolute immunity for prosecutors has been wholly unjustified since 1976 and remains so today. It is not supported by the history, language or congressional record of the Civil Rights Act of 1871. It is not supported by common law, either the English or the American. The Supreme Court's decision establishing it, therefore, is improper; as the Court itself stated, it does not "have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy."[425] At a time when America is reckoning with its legacy of racism, at a time when cries for police reform and accountability have never been louder, it is imperative that Congress abolish absolute immunity for prosecutors and cease to leave "the genuinely wronged . . . defendant without civil redress against [a] prosecutor whose malicious or dishonest action deprives him of liberty . . . ."[426]

424. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 476–77, 480 (1999).

425. Tower v. Glover, 467 U.S. 914, 922–23 (1984).

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