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End Prosecutorial Immunity. Period.

Prosecutors who willfully violate people's rights should be held personally accountable

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Prosecutorial misconduct is a reality. So is the lack of any meaningful legal recourse for its victims. Over at The Daily Beast, Jay Michaelson uses the one-year anniversary of the shooting death of Michael Brown in Ferguson, Missouri, to draw attention to this pressing and increasingly well-documented problem.

Michaelson notes that among the most important impediments to holding prosecutors accountable for abuses of their authority is the fact that "prosecutors are granted immunity for most kinds of misconduct."

While federal law authorizes civil suits against government officers who violate constitutional and statutory rights, the Supreme Court has insulated prosecutors against liability by holding that they are entitled to absolute immunity from civil damages for actions taken as advocates.

Prosecutors may use false evidence, suppress exculpatory evidence, and elicit misleading testimony in probable cause hearings, all without fear that they will be held personally liable, even if they intentionally and maliciously violate the rights of innocent people.

There is no place for unchecked government power in a constitutional republic dedicated to the protection of individual freedom, and the human costs of prosecutorial impunity have proven staggering. There is compelling evidence that significant numbers of innocent people have been convicted and even sent to death row as a result of prosecutorial misconduct that virtually always goes unsanctioned and unpunished.

Simply put, when prosecutors violate our rights, no judge-created rule should prevent them from being held civilly liable.

Where did absolute prosecutorial immunity come from? The Civil Rights Act of 1871, or "Section 1983," as it is commonly known, allows citizens to sue public officials for violating their legal rights, and it says nothing about immunity of any kind.

Instead, the law states says that "every person" who is acting under color of law who causes a "deprivation of any rights... secured by the Constitution and laws, shall be liable to the party injured."

In *Imbler v. Patchman* (1976), a case involving the deliberate introduction of false testimony by a prosecutor, the Supreme Court relied on historical understandings and policy reasons in creating a defense of absolute immunity for prosecutors for actions taken "in initiating a prosecution and in presenting the State's case."

The Court reasoned that Congress must have intended to retain well-established common-law immunities when it adopted Section 1983 as part of the Civil Rights Act of 1871, in part because the threat of civil liability would deter prosecutors from vigorously pursuing justice and because other remedies are (supposedly) available to keep prosecutors in check, including professional discipline and criminal prosecution.

None of these of these justifications are convincing.

The claim that Congress intended to retain existing common-law immunities in enacting Section 1983 is implausible, particularly given the conditions that prevailed in 1871 — conditions in which, as one congressmen put it at the time, "Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress."

The Civil Rights Act of 1871 was one of a series of Enforcement Acts pushed by Republican supporters of Reconstruction that sought to put an end to an unprecedented campaign of terror by the Ku Klux Klan — a campaign aided and abetted by state officials who were unable and often unwilling to protect black citizens and their white supporters.

Given the scope of the threat posed by the Klan — and the fact that much of the group's activity was sanctioned by officials who either belonged to it or were sympathetic to it — it is no surprise that, as the *Imbler* majority candidly observed, the Civil Rights Act of 1871, aka Section 1983, "creates a species of tort liability that on its face admits of no immunities."

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Further, even if Congress *did* intend to retain existing common-law immunities, absolute prosecutorial immunity was not among them. The first case affording prosecutors absolute immunity was not decided until 1896!

Nor are the policy justifications articulated for prosecutorial immunity compelling.

A policy of zero accountability for injustice is hardly calculated to encourage the pursuit of justice by prosecutors. Even assuming that there is a risk of over-deterring officials, governments could indemnify prosecutors if courts find that prosecutors have violated the Constitution.

It is difficult to think of a proposition more damaging to public perception of the criminal justice system than that prosecutors would not do their jobs at all if they had to face the same kind of liability for not merely negligent but *intentional* misconduct that other professionals face — misconduct that lands innocent people in jail for years and tears families apart.

Finally, none of the alternative remedies mentioned by the Court has proven remotely adequate.

Prosecutorial misconduct is rarely grounds for reversal of conviction — under the harmless error standard, a defendant who shows that a prosecutor failed to disclose exculpatory evidence in violation of his obligations under the rule set out by the Supreme Court in *Brady v. Maryland* (1963), must show "that there is a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed."

Even when a reversal is granted, prosecutors rarely face repercussions. Professional discipline of misbehaving prosecutors is exceedingly rare, and criminal charges against them are almost never brought, even in cases where they have suborned perjury from witnesses and committed perjury.

As Ninth Circuit Court of Appeals Judge Alex Kozinski recently put it in a provocative and incisive recent article, "Who exactly is going to prosecute prosecutors?"

More fundamentally, absolute immunity is at odds with the premises upon which the very authority of the Constitution rests.

According to the Framers' premises, government is not self-justifying — it is a means to an end, namely, the security of individual rights. But, as Chief Justice John Marshall explained in *Marbury v. Madison* (1803), this end cannot be realized "if the laws furnish no remedy for the violation of a vested legal right."

Civil actions against the government can help protect rights, not only by ensuring that government officials are held accountable for violating them, but by bringing information to light, through the discovery process and through impartial, evidence-based judicial engagement at trial, that makes broader, rights-protective policy changes possible. If immunity is granted, there is no discovery process and there is no trial.

Section 1983's language is broad, unequivocal, and unambiguous. Ensuring that prosecutors are held accountable for breaching their ethical duties and violating citizens' rights would not require a constitutional amendment. It would only require reading a duly enacted federal law to mean what it says and not reading into the law policy choices that Congress never made.

If the Supreme Court is unwilling to revisit *Imbler*, Congress can revise Section 1983 to specify that prosecutors who deprive citizens of constitutional or statutory rights are liable to those people just like the rest of us are when we injure someone through negligence or intentional misconduct.

It is time to abolish a rule that stands as an affront, not only to the letter of federal law, but to our aspirations towards a just legal order.

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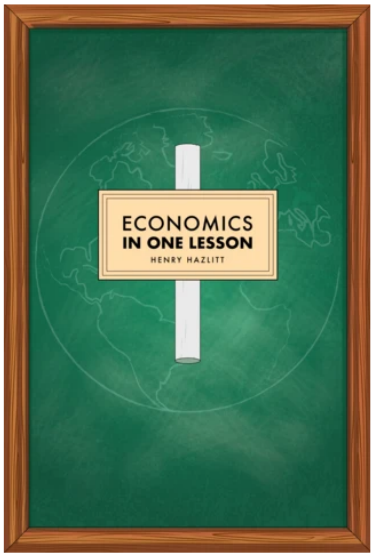

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