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ANALYSIS

Prosecutorial Immunity and the Framework for Its Death

This article proposes a solution to prosecutorial immunity for the civil rights plaintiffs' bar. It is a path that allows victims of prosecutorial misconduct to recover damages for malicious prosecutions while, at the same time, paying heed to the legitimate interest in allowing prosecutors to focus on their difficult jobs without being stymied by the fear of lawsuits.

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Civil Rights

By Alexander Klein | January 02, 2024 at 10:30 AM



Suppose it is two days before a murder trial, and a criminal case has recently been weakened by the suppression of valuable evidence. Without this physical evidence, the prosecution rests upon a witness who simply heard gunshots and saw a group of men scattering—hardly a fool proof case that one of the scatterers was the gunman. The prosecutors can and should dismiss the case pretrial, knowing they lack sufficient evidence to convict.

But fearing such a high stakes loss, the prosecutor concocts an idea. His earwitness is young, uneducated and highly impressionable. He will simply coerce this witness to take the stand and lie. Under his pressure, the witness will claim to not just hear gunshots but to see the chosen suspect fire the murder weapon.

And voila: the plan works. The jury believes the witness, the prosecutor secures a big stage win, and the suspect—who might be innocent—is sentenced to prison for the rest of his life.

The following fact might astound the layman or even the average lawyer, but the prosecutor's conduct in this case would be sheltered by "absolute immunity" from suit. Consider that again. A prosecutor can knowingly suborn perjury at a criminal trial without risk of civil liability at all. See, e.g., *Shmueli v. City of New York*, 424 F.3d 231, 237 (2d Cir. 2005); *Collins v. City of New York*, 923 F. Supp.2d 462, 472 (E.D.N.Y. 2013) ("No reasonable prosecutor could think it acceptable to submit false evidence or suborn perjury, yet prosecutorial immunity attaches to such acts"). This absolute immunity extends to all conduct performed in a prosecutorial capacity.

This article proposes a solution to prosecutorial immunity for the civil rights plaintiffs' bar. It is a path that allows victims of prosecutorial misconduct to recover damages for malicious prosecutions while, at the same time, paying heed to the legitimate interest in allowing prosecutors to focus on their difficult jobs without being stymied by the fear of lawsuits.

Any fair discussion of this topic requires a few simple recognitions.

First, absent special protections, prosecutors would face an unusually high risk of retaliatory lawsuits. The dynamics of a criminal prosecution are so emotionally fraught that, in cases where a defendant is found not guilty, a motivation to seek revenge against the prosecutor is often natural. *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976) (recognizing this public policy problem). Allowing suits against prosecutors could thus cause a public policy problem: if acquittals could open the door to prosecutor-liability, then prosecutors would be less inclined to drop charges or vacate improper convictions—and thus more inclined to double down on weak cases. Nobody in the criminal justice system would want this. They would also be less inclined to charge the criminal defendants most capable of defending themselves in court effectively—powerful defendants, or those with financial means—such that the risk of civil liability would incentivize prosecutors to give a free pass to the privileged but not the downtrodden. Social justice would not welcome this development.

Second, on the other hand, immunity is not the only tool available to safeguard prosecutors from financial disincentives. As with police, prosecutors are employed by cities and counties that will often indemnify them against any civil judgments that arise from the scope of their duties. See, e.g., Gen. Municipal Law §50-K (for New York City). Thus while immunity is often justified as a way to insulate prosecutors from the force of money, this justification proves more academic than real—as prosecutors would often not be the ones footing their bills anyway.

Third, the law enforcement and litigation dynamics facing prosecutors are similar to those facing police officers—yet the immunity for police is only "qualified," not "absolute." Under qualified immunity, the balance struck for police is that they are only liable for "obvious" wrongs or violating "clearly established" rights. *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5-6 (2021). At least in theory, the idea is to compensate victims of egregious misconduct while protecting officers who make reasonable mistakes in a tough job. If it's good enough for cops, shouldn't it be good enough for prosecutors?

Fourth, there is indeed a good explanation for the differential treatment between cops and prosecutors: tradition. The absolute immunity afforded to prosecutors is a function of common law that stretches back to the 19th century. See *Griffith v. Slinkard*, 146 Ind. 117 (1896) (the first known case to recognize the doctrine). Thus even in the most egregious circumstances, judges are beholden to an incredible weight of authority forcing them to immunize prosecutors even when they would not do so for a similarly situated cop.

With all of these forces in the background, there remains one solution that accounts for the legitimate interests of civil rights victims, the needs of prosecutors, the economic incentive structure, and the relationship between prosecutors and police. That solution is simple, but almost never tested in this context: vicarious liability.

In a landmark decision last year, the U.S. Court of Appeals for the Second Circuit held that when a police officer engages in misconduct that is sheltered by (qualified) immunity, such protection does not flow upstream to the employer city or county. See *Triolo v. Nassau County*, 24 F.4th 98, 110 (2d Cir. 2022) ("a municipal employer is vicariously liable for the wrongs of its employee, even when the employee is individually immune, so long as the wrong was committed within the scope of employment"). Thus in cases where a police officer's wrongdoing is committed in the scope of their employment—as it usually is—victims of their abuse can pursue state law claims against municipalities through respondeat superior, even when the claim against the underlying wrongdoer is buried under immunity.

The same principle should apply to prosecutors. When a prosecutor engages in conduct that would constitute, say, malicious prosecution or a related state civil rights claim, victims should allege state law violations by the prosecutor-agents and convert them into vicarious liability claims against their principals. At once, this will allow victims of some of the worst abuses in the criminal justice system to get recourse; it will keep prosecutors' names out of civil liability captions; it will protect prosecutors against the threat of bad monetary incentives; it will respect the long history of prosecutorial immunity; and it will treat prosecutors on a level playing field with police officers, where, under *Triolo*, vicarious liability against their principals—even in the face of agent immunity—is now already law.

One of the interesting facets of this solution is that a prosecutor's principal is not always their respective municipality. Prosecutors work for their counties with respect to certain components of their jobs, but when actually prosecuting cases in courtrooms they are considered agents of the state—not the county. See, e.g., *Bellamy v. City of New York*, 914 F.3d 727, 758 (2d Cir. 2019) (differentiating decisions about whether and what charges to prosecute, which are state functions, from other tasks which are municipal).

In the state of New York, therefore, a plausible vicarious liability claim against a prosecutor would not necessarily be litigated in Supreme Court or federal court—where the State enjoys immunity of a different type. See U.S. Constitution, Amendment XI. For New York claims arising out of purely prosecutorial conduct, they would be litigated in the only court with jurisdiction to hear claims against the state: the Court of Claims.

For a generation, the civil rights plaintiffs' bar has bemoaned the ill effects and unfairness of giving absolute immunity to prosecutors. Under *Triolo*, we now have the tools to do something about it.

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