THE PROFESSIONALIZED VIOLENCE OF PROSECUTORIAL POWER AND MISCONDUCT*

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ABSTRACT

The U.S. legal system is a colonizer's system constructed to uphold power and protect the powerful. For radical lawyers, it is the language of power we need to speak and understand to protect ourselves and our communities from this violence. As law enforcement actors, prosecutors are arguably the most powerful actors in our criminal legal system, able to ruin people's lives at will and with absolute immunity to protect them from any accountability for any misconduct. Even with professional attorney ethics rules and state bar grievance committees tasked with hold-

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* This article reflects the views and opinion of the author as an individual and does not necessarily represent the views of Civil Rights Corps ("CRC") or any individual or other organization involved in the work described.

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ing attorneys to these ethics rules, prosecutors are still rarely disciplined. This note argues that in addition to small-scale abolitionist reforms such as abolishing absolute immunity, we must go beyond this and shrink prosecutorial power, and make not only prosecutorial misconduct but the entire legal system accessible, transparent and open to the public.

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I. THE LAW AS A DELIBERATE TOOL OF WHITE SUPREMACY

Many attorneys decided to become lawyers because they believed they could do some good within our legal system. That the legal system was inherently good, or had at its core the ethics of protecting and helping others but had just gotten off the rails and been used in ways to harm people. Even more, many attorneys believe that this system has appropriate mechanisms in place to hold legal actors accountable, a self-policing checks and balances system meant to keep this ethical structure

on the right track. But for me, as the daughter of a refugee who survived British colonialism in India, the violent process of Partition[1] and decolonization, who had to learn English to survive and understand the colonial system being forced upon him,[2] the U.S. legal system was simply another occupier's language I needed to speak and understand.[3]

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[1] After over 200 years of British occupation and colonial rule of the Indian subcontinent and then India, the British left and partitioned India into Muslim-majority Pakistan and Hindu-majority India. William Dalrymple, *The Great Divide*, NEW YORKER, June 2015. This Partition resulted in unprecedented violence, with the killing of two million people, the rape and mutilation of tens of thousands, and the largest forced migration of human beings in recorded human history: over fifteen million people. *Id.*; (*Timeline: 75 Years of Partition and India-Pakistan Tensions*, AL JAZEERA (Aug. 12, 2022), https://perma.cc/V9VX-VPRL). The violence was so intense that author Nisid Hajari wrote in his Partition narrative history, *Midnight Furies*: "Gangs of killers set whole villages aflame, hacking to death men and children and the aged while carrying off young women to be raped. Some British soldiers and journalists who had witnessed the Nazi death camps claimed Partition's brutalities were worse: pregnant women had their breasts cut off and babies hacked out of their bellies; infants were found literally roasted on spits." *Id.* (citing NISID HAJARI, MIDNIGHT'S FURIES: THE DEADLY LEGACY OF INDIA'S PARTITION (2015)).
My father grew up under British Colonial rule and was ten-years-old when Partition happened. He fled barefoot and with just the shirt on his back with his family, all running for their lives, narrowly escaping death several times along the way. He and his family eventually made their way to a refugee camp, where they lived for a month before again attempting and finally succeeding in making the perilous journey to Pakistan.

[2] Under British Colonial rule, English was an official language of India, and it remains the language of power and access in the Indian subcontinent. Tarun Timalsina, *Redefining Colonial Legacies: India and the English Language*, HARV. POL. REV. (Mar. 18, 2021), https://harvardpolitics.com/redefining-colonial-legacies-india-and-the-english-language/ (on file with CUNY Law Review).

[3] Most legal systems in general are systems of power meant to protect those in power. For example, by constitutional amendment, Pakistan's legal system has declared my family's sect of Islam, Ahmadiyya, to officially be "non-Muslim." Press Release, Amnesty Int'l, Persecution of Ahmadis Must End as Authorities Attempt Shutdown of US Website (Feb. 3, 2021), https://perma.cc/XRH3-GK2W. This means that Ahmadis are second-class citizens who are legally discriminated against, have "non-Muslim" stamped on their Pakistani passports (when Pakistan is an Islamic republic), and are subject to the harsh blasphemy laws making it a criminal and capital offense to proclaim yourself Muslim as an Ahmadi. *'When the Blood Starts': Spike in Ahmadi Persecution in Pakistan*, AL JAZEERA (July 26, 2021), https://perma.cc/N3H2-YE43; U.S. Dep't of State, *Country Report on Human Rights Practices 1994 – Pakistan*, UNHCR (Jan. 30, 1995), https://perma.cc/V88W-KVPM. This state-sanctioned discrimination and violence has encouraged and led to abhorrent violence against Ahmadis, prompting many including my family to leave Pakistan. Abid Hussain, *Pakistan's Ahmadis Living in Fear as Graves, Religious Sites Attacked*, AL JAZEERA (Sept. 27, 2023), https://perma.cc/Z3HP-2R66; *see also* Press Release, U.N. Hum. Rts. Off. of the High Comm'r, International Community Must Pay Attention to the Persecution of Ahmadi Muslims Worldwide (July 13, 2021), https://ohchr.org/en/press-releases/2021/07/international-community-must-pay-attention-persecution-ahmadi-muslims (on file with CUNY Law Review); Amjad Mahmood Khan, *Persecution of the Ahmadiyya Community in Pakistan: An Analysis Under International Law and International Relations*, 16 HARV. HUM. RTS. J. 217, 218 (2003).

The U.S. legal system is the white supremacist European Christian occupier's system, violently forced upon Indigenous Peoples of this country and used to rob them of their lands, culture, and livelihoods, and ultimately to try to destroy them.[4] From the beginning, these colonizers used the legal system for centuries to justify the enslavement, murder, and decimation of African peoples.[5] As radical scholar and law professor Dean Spade argues, the U.S. legal system is "fundamentally structured to establish and uphold settler colonialism, white supremacy and capitalism—the legal system will not dismantle these things."[6] It was deliberately built as a weapon to legitimize and *professionalize* this violence in the form of seemingly neutral laws and systems whose real purpose was to advance the occupier's agenda.

Thus, choosing to become a lawyer in the U.S., I had no delusions about its overall ethics and goodness, nor any desire to advance my own personal interests or gain accolades from this violent system. Rather, I took inspiration from giants like Nelson Mandela, who was a lawyer under the South African Apartheid regime,[7] and Palestinian lawyers living under Israeli Apartheid who practice law in Israeli courts.[8] I viewed myself and other U.S. lawyers of color as simply learning the law out of necessity and adding a tool to our toolbox, and nothing more.

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[4] In addition to committing all-out genocide against Indigenous Peoples, European colonizers used the legal system via treaties by forcing Indigenous Nations to sign unfair treaties that facilitated their land theft, or by signing and then repeatedly breaking hundreds of treaties to steal Indigenous land. *See* Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 577-80 (1995); Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 203, 207 (1996). *See generally* Hannah Friedle, *Treaties as a Tool for Native American Land Reparations*, 21 NW. J. HUM. RTS. 239 (2023); Smithsonian Nat'l Museum of the Am. Indian, *Nation to Nation: Treaties Between the United States and American Indian Nations*, SMITHSONIAN INST., https://perma.cc/TCS8-N59Q (last visited May 5, 2024); Kimbra Cutlip, *In 1868, Two Nations Made a Treaty, the U.S. Broke It and Plains Indian Tribes Are Still Seeking Justice*, SMITHSONIAN MAG. (Nov. 7, 2018), https://perma.cc/BB86-SGSM; Alleen Brown, *Half of Oklahoma Is "Indian Country." What If All Native Treaties Were Upheld?*, INTERCEPT (July 17, 2020, 7:00 AM), https://perma.cc/XT56-2UN3.

[5] *See* Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 85-94 (2020). *See generally* Jonathan A. Bush, *The First Slave (and Why He Matters)*, 18 CARDOZO L. REV. 599 (1996).

[6] Dean Spade, *For Those Considering Law School*, 6 UNBOUND: HARV. J. LEGAL LEFT 111 (2010).

[7] *Biography of Nelson Mandela*, NELSON MANDELA FOUND., https://perma.cc/J3FE-NKMF (last visited May 6, 2024).

[8] For example, the Palestinian human rights organization Adalah is the first Palestinian Arab-run legal center in Israel, whose mission is to promote the rights of the Palestinian minority citizens of Israel and human rights in Israel generally. *About*, ADALAH: THE LEGAL CTR. FOR ARAB MINORITY RTS. IN ISR., https://perma.cc/R76U-TUNY (last visited Apr. 27, 2024).

This political outlook is what led me to become a state public defender in New York and federal public defender in Los Angeles. As a public defender, my job was to fight against prosecutors and the immense power they wielded over my clients' lives. Among these prosecutors were those committing prosecutorial misconduct, meaning going beyond the vast array of powers they already have and violating the most basic attorney ethics rules. Yet this system is structured so that it is nearly impossible to stop this misconduct.

Given this political framing and experience, it should be no surprise that our legal system deliberately conspires to maintain its historically violent purpose and protect prosecutors and prosecutorial misconduct no matter the harm they inflict or lives they destroy. A key piece of the protection prosecutors enjoy is "absolute immunity,"[9] meaning they cannot be civilly liable for any acts they commit while on the job in their role as prosecutors. When the Supreme Court created absolute prosecutorial immunity in *Imbler v. Pachtman* in 1976, the Court justified giving prosecutors complete immunity by assuming that attorney professional ethics committees would discipline prosecutors for their misconduct.[10] Yet the Court's assumption has turned out to be at best naive, at worst a deliberate lie or obfuscation, and simply another excuse that insulates prosecutors from any accountability. As a former state and federal public defender, and currently as Senior Staff Attorney with the Prosecutor Accountability Project[11] filing ethics grievances against prosecutors, I along with my project partner, managing attorney Peter Santina, have seen firsthand this complete and deliberate protection against prosecutor accountability.

I must note that filing ethics grievances against prosecutors is not a radical act, nor even seeking true justice and accountability. Instead, it seeks to enforce the existing, base-level professional ethics rules against prosecutors. With the lack of grievance committees issuing any public discipline for the prosecutors we filed grievances against, the Project itself rather only demonstrates what a farce even these menial crumbs of accountability are, even when we seek to simply enforce existing ethics rules against prosecutors.

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[9] For a detailed discussion of absolute immunity, see *infra* Part II.A.

[10] Imbler v. Pachtman, 424 U.S. 409, 429-30 (1976). Ethics committees or grievance committees are state bar committees that monitor and discipline attorneys for violating the state's rules of professional conduct for attorneys. Comm. on Pro. Discipline, *Guide to Attorney Discipline*, N.Y. STATE BAR ASS'N, https://perma.cc/E2D3-3KQY (last visited May 10, 2024).

[11] Civil Rights Corps is a nonprofit legal organization engaged in civil impact litigation, policy, and advocacy aiming to dismantle the criminal punishment system. *See* C.R. CORPS., https://perma.cc/BP8N-6LHD.

These experiences have only confirmed what I have always known: that our legal system is built to protect wealth, state power, and white supremacist capitalism over all else. That it is not built to provide us with real justice. Rather, using the law is simply one tool in our toolbox to fight this larger oppressive system. It is simply the language of power, the occupiers' language in this land, a language that we must speak because we need to understand the system we are forced to live under. Like many other peoples struggling against oppression, power, and occupation, radical lawyers and advocates who learn to speak the language of power do not rely solely on the legal system to achieve true liberation.

In this article, Part II will discuss the power prosecutors hold, both the creation of this power and the difficulty in holding prosecutors accountable. Part III will discuss my and our project's firsthand experience seeking prosecutorial accountability, while Part IV analyzes a case study of egregious prosecutorial misconduct. Finally, Part V lays out abolitionist-oriented recommendations both small and large for addressing this issue.

II. THE POWER PROSECUTORS HOLD

The enormous concentration of prosecutorial power and the fact that prosecutors have "more control over life, liberty, and reputation than any other person in America" has been of public concern in the legal profession since at least 1940.[12] When then-Attorney General, and later Supreme Court Justice, Robert H. Jackson raised the issue in 1940, lawmakers were already concerned with prosecutors' power of discretion[13]—specifically, the discretion to choose who becomes a defendant, order investigations and arrests, present cases in secret to the grand jury, indict and try people, make and coerce plea offers with a wide range of sentencing recommendations, and determine whether someone is paroled.[14] And prosecutorial power has arguably only grown since then.[15]

One of the great powers of prosecutorial discretion is the power to plea bargain, with no required explanation, justification, or even oversight for these decisions.[16] This unchecked power of discretion to determine how harshly to charge and prosecute someone, and then what plea

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[12] Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

[13] *See* David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 481 (2016).

[14] Jackson, *supra* note 12, at 3.

[15] Sklansky, *supra* note 13, at 481.

[16] *Id.* at 498; *see also* Angela J. Davis, *Federal Prosecutors Have Way Too Much Power*, N.Y. TIMES, https://perma.cc/4Q5W-SPQT (Jan. 14, 2015, 11:57 AM).

deal to offer, grew even larger with the rise of mandatory minimum sentences.[17] Mandatory sentences increased a prosecutor's power by inflating their ability to control the outcome of criminal cases and by expanding their range and power of discretion.[18] This wide range of discretion was tested and demonstrated when a large group of prosecutors presented with the same case scenario returned with a wide range of plea offers from no charges at all to prison time.[19]

Finally, an often-overlooked aspect of prosecutorial power comes from their public high-power elected government position, and with it their ability to influence criminal legal policy.[20] In the policy arena, prosecutors have the power to influence investigatory government agencies and their focus, often have the political clout to block or advance legislation, and have access to a captive audience and platform from which to espouse their views.[21]

A. The Supreme Court's Creation of "Absolute Immunity" to Shield Prosecutors from Any Accountability

Qualified immunity for police officers has long shielded them from any legal accountability, even when they murder someone like Eric Garner, a Black man on Staten Island, for selling cigarettes, as he cried over a dozen times that he could not breathe, even when it is all caught on video.[22] The Supreme Court created the concept of qualified immunity in *Pierson v. Ray* in 1967, reasoning that "the defense of good faith

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[17] Sklansky, *supra* note 13, at 489.

[18] *Id.*

[19] Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1156-64 (2021) (describing a study these authors conducted in which they presented prosecutors with a hypothetical situation and hypothetical criminal code, and asked what charges they would bring, if any).

[20] Sklansky, *supra* note 13, at 490.

[21] *See id.*

[22] Opinion, *End the Court Doctrine That Enables Police Brutality*, N.Y. TIMES (May 22, 2021), https://www.nytimes.com/2021/05/22/opinion/qualified-immunity-police-brutality-misconduct.html (on file with CUNY Law Review); *see also* Adam Liptak, *In Two Rulings, Supreme Court Bolsters Legal Shield for Police*, N.Y. TIMES (Oct. 18, 2021), https://www.nytimes.com/2021/10/18/us/politics/supreme-court-qualified-immunity-police.html (on file with CUNY Law Review); Hailey Fuchs, *Qualified Immunity Protection for Police Emerges as Flash Point amid Protests*, N.Y. TIMES, https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html (Oct. 18, 2021) (on file with CUNY Law Review); as an attorney in the Legal Aid Staten Island office at the time of Mr. Garner's murder, my colleagues and I wrote about how prosecutors protect these officers as they work as a team in every criminal case, and organized a public defender march with his daughter Erica Garner: Joseph Doyle, Michael Rooney & Bina Ahmad, Eric Garner's Public Defender Says Cops and Prosecutors "Are a Team in Every Case," Vanity Fair (Dec. 8, 2014), https://perma.cc/SN6E-G525.

and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under Section 1983 [of the Ku Klux Klan Act]."[23] Thus, qualified immunity is

> the doctrine [that] provides that a police officer cannot be put on trial for unlawful conduct, including the use of excessive or deadly force, unless the person suing proves that: (1) the evidence shows that the conduct was unlawful; and (2) the officers should have known they were violating "clearly established" law, because a prior court case had already deemed similar police actions to be illegal.[24]

But apparently, qualified immunity was still not enough protection for prosecutors. In 1976, the Supreme Court created the even higher privilege of "absolute immunity" for prosecutors in *Imbler v. Pachtman*.[25] Unlike qualified immunity, absolute immunity protects prosecutors from *any* civil liability for acts committed while on the job and done within their prosecutorial role[26] or as part of the prosecutorial function. This means that so long as an act, no matter how egregious, was done as part of the powers prosecutors wield, such as charging powers or powers to prosecute a case in the manner they see fit, they cannot be sued civilly.[27]

Yet there is much less attention directed towards prosecutors and the silent violence they engage in protected by absolute immunity. One reason is that the concept of "law enforcement" thus far has only been understood to encompass police officers. But prosecutors and judges are also law enforcement, imposing the state's will and punishment bureaucracy on majority Black and Brown communities. Prosecutors have largely escaped the public outcry against law enforcement violence because their violence is not in the form of spectacular flashes of physical abuse, but rather done by "professionals" in suits claiming to enforce "neutral laws" meant to "protect the public." In addition, the violence of

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[23] Pierson v. Ray, 386 U.S. 547, 557 (1967); *see also* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) (noting that *Pierson v. Ray* established the modern qualified immunity doctrine). *See also* Green v. Thomas, No. 3:23-cv-126-CWR-ASH, at *10 (S.D. Miss. May 20, 2024) (order denying qualified immunity) (discussing Section 1983's history as the Ku Klux Klan Act, and not simply the Civil Rights Act of 1866).

[24] *Qualified Immunity*, EQUAL JUST. INITIATIVE, https://perma.cc/E6AD-KCGV (last visited May 6, 2024).

[25] 424 U.S. 409, 424 (1976).

[26] I use the word "prosecutor" synonymously with "district attorney" or "Assistant U.S. Attorney" ("AUSA").

[27] *See Imbler*, 424 U.S. at 431.

this enforcement is a slow, creeping violence, leading to death by incarceration or decades in prison, and thus more difficult to pinpoint. Finally, there is less public understanding of just how much the concept of absolute immunity shields prosecutors against any accountability.

In 1961, *Imbler v. Pachtman* petitioner Paul Kern Imbler was convicted of first-degree felony murder and sentenced to death.[28] Years later, Imbler filed a habeas corpus petition before the federal district court in the Central District of California alleging state misconduct, including prosecutor misconduct.[29] The district court found six instances of state misconduct attributable to the prosecutor during prosecution witness Costello's testimony, which in the court's view amounted to "the culpable use by the prosecution of misleading or false testimony."[30] The cumulative effect of the state misconduct led the court to grant the writ, releasing Imbler.[31] Specific to prosecution witness Costello, the district court found Costello gave ambiguous or misleading testimony, or flatly lied, about his criminal record, education, and income.[32] The court found prosecutor Pachtman had "cause to suspect" that Costello's testimony was false but did not find prosecutor Pachtman had actual knowledge of the falsehood.[33]

The Supreme Court granted certiorari to answer the question of whether a prosecutor acting within the scope of their duties initiating and prosecuting a criminal case is subject to suit under 42 U.S.C. § 1983 for deprivations of an accused's constitutional rights.[34] Disappointingly, but unsurprisingly, relying on precedent shielding egregious prosecutorial misconduct with absolute immunity, the Court held that prosecutors are not subject to suit or civil liability under Section 1983 for deprivations of an accused's constitutional rights.[35] The Court reasoned that Pachtman's acts were "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for

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[28] *Id.* at 411-12.

[29] *Id.* at 414; *see also* Imbler v. Craven, 298 F. Supp. 795 (C.D. Cal. 1969).

[30] *Imbler*, 424 U.S. at 414; *see also Imbler*, 298 F. Supp. at 802-03.

[31] *Imbler*, 298 F. Supp. at 812.

[32] *Id.* at 803.

[33] *Id.* at 807.

[34] *Imbler*, 424 U.S. at 409.

[35] *Id.* at 421-22 (citing Griffith v. Slinkard, 44 N.E. 1001, 1002 (Ind. 1896) (shielding prosecutor who maliciously and without probable cause added plaintiff's name to grand jury true bill after jurors refused to indict him); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926) (shielding Special Assistant to Attorney General of United States who maliciously and without probable cause obtained plaintiff's grand jury indictment by willfully introducing false and misleading evidence)).

absolute immunity apply with full force," so Pachtman was "immune from a civil suit for damages under § 1983."[36]

Further, the Court asserted, "[i]f a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of [their] duties no less than would the threat of common-law suits for malicious prosecution," and prosecutors and the public's trust "would suffer if [prosecutors] were constrained in making every decision by the consequences in terms of [their] own potential liability in a suit for damages."[37] Then, seemingly dismissing complaints from those whom prosecutors have convicted, the court reasoned that "[s]uch suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate."[38] To justify such an absolute shield against accountability, the Court reasoned that "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, *in his amenability to professional discipline by an association of his peers*."[39]

These professional discipline checks theoretically undermine the argument that imposing civil liability is the only way to ensure that prosecutors are mindful of the criminally accused's constitutional rights.[40] Yet for this assumption, the Court only cites to professional rules of conduct for attorneys, and not to any statistics, studies, procedures, or actual professional discipline that had been issued for prosecutorial misconduct.[41] In other words, the Court seemed to simply throw out this assumption that rogue prosecutors would be reined in and disciplined by professional attorney discipline committees with no support for the contention that this does or ever would happen.

As I will discuss below, the check against prosecutors via "professional discipline" has unsurprisingly not borne out. Instead, the court-created privilege of absolute immunity combined with the near complete lack of any professional discipline has resulted in a deliberate and total shield for prosecutors against any accountability.

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[36] *Id.* at 430-31.

[37] *Id.* at 424-25.

[38] *Id.* at 425.

[39] *Id.* at 429 (emphasis added).

[40] *Imbler*, 424 U.S. at 409 (citing MODEL CODE OF PRO. RESP. EC 7-13 (AM. BAR ASS'N 1969); AM. BAR ASS'N, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION § 1.1(c), (e) 44-45 cmts. (Approved Draft 1971)).

[41] *Id.*

B. Prosecutorial Misconduct is Rampant, While Discipline is Rare.

As a former state and federal public defender, my colleagues and I can testify to not only the obscene amount of power prosecutors have, but also how rampant prosecutorial misconduct is, and conversely how rare it is to not only obtain a judicial finding of misconduct, but to see any professional discipline against the prosecutor. This misconduct is particularly maddening when prosecutors already have an entire arsenal of legally sanctioned power to employ at will.

As discussed above, prosecutors are given the power to decide whom to prosecute, with what charges, whether to request bail and how much bail to request, how harshly or aggressively to prosecute, what plea offer to extend, and what sentence to seek. With the power to seek the death penalty in death penalty states and in federal jurisdictions, prosecutors literally hold people's lives in their hands.

As part of the Prosecutor Accountability Project, my colleague Peter Santina and I have extensively researched not only judicial findings of prosecutorial misconduct, but also any subsequent professional discipline against these prosecutors. And we have rarely found any professional discipline against prosecutors for on-the-job misconduct.[42] Confirming our findings, "[a] 2013 report from the Center for Prosecutor Integrity identified 3,625 cases of prosecutorial misconduct between 1963 and 2013. Of those, only 63 prosecutors—less than 2 percent—were ever publicly sanctioned."[43] In addition, the National Registry of Exonerations concluded 43% of wrongful convictions are attributable at least in part to official misconduct.[44] An analysis of ten years of New York state and federal decisions found thirty instances where "judges reversed convictions explicitly because of prosecutorial misconduct," but "the appellate courts did not routinely refer prosecutors for investi-

[42] *See The Problem: A Deeper Dive*, ACCOUNTABILITY NY, https://perma.cc/74BS-EW2J (last visited Apr. 28, 2024).

[43] Grievance Complaint Regarding Attorney Brad Leventhal, from Cynthia Godsoe, Professor, Brooklyn L. Sch., et al. to State of N.Y. Att'y Grievance Comm. for the 2d, 11th, & 13th Jud. Dists. 10 (May 3, 2021), https://perma.cc/GZ78-HLQC [hereinafter Leventhal Grievance] (citing CTR. FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT (2013), https://perma.cc/3LXX-A6ZQ); *see also* Nick Schwellenbach, *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards*, PROJECT ON GOV'T OVERSIGHT (Mar. 13, 2014), https://perma.cc/XZE2-FFX2; Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 WASHBURN L.J. 59, 81 (2012) (citing "the small number of sanctions against prosecutors, relative to lawyers as a whole"); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725 (2001) (describing the "rarity of discipline" of prosecutors).

[44] NAT'L REGISTRY OF EXONERATIONS, UPDATE: 2012 at 17 (2013), https://perma.cc/PA6C-RKV9.

gation, and the disciplinary committees almost never took serious action against prosecutors."[45] Of these thirty cases overturned due to prosecutorial misconduct, "only one prosecutor was publicly disciplined by a New York disciplinary committee. None of the other implicated prosecutors were disbarred, suspended or publicly censured . . . ."[46] In fact, "several prosecutors were promoted and given raises soon after courts cited them for abuses."[47]

C. Obtaining a Finding of Misconduct is Difficult, and Getting Bar Complaints Filed is Even More Difficult.

Adding to this deliberate layer of protection is the fact that when prosecutors violate ethical rules, "judges and appellate courts seemingly bend over backwards to excuse the conduct. Even in the most reprehensible cases, judges typically do not refer the case for disciplinary action and ethics boards fail to apply sanctions."[48] Judges often do not even make a recorded finding of prosecutorial misconduct, leaving a large portion of the misconduct undocumented and thus less ripe for an ethics complaint. Instead, judges and courts deflect by relying upon court-created doctrines such as "harmless error," meaning even if the court does find there was prosecutorial misconduct, it did not so infect the verdict as to require reversal, and thus the error was "harmless."[49] These court decisions rarely if ever name the actual prosecutor responsible, even when they do find prosecutorial misconduct occurred. In reality, the harmless error doctrine has instead become a "lie that the criminal justice system tells itself."[50]

In addition, these grievance committees that state bars task with investigating attorney misconduct and issuing appropriate discipline if they find the attorney violated the rules of professional conduct, rarely do so when it comes to prosecutors.[51] Even when a court makes a public,

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[45] Leventhal Grievance, *supra* note 43, at 4 (internal quotation marks omitted) (citing Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA (Apr. 3, 2013, 5:30 AM), https://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usually-nobody (on file with CUNY Law Review)).

[46] *Id.*

[47] *Id.* (citing Sapien & Hernandez, *supra* note 45).

[48] CTR. FOR PROSECUTOR INTEGRITY, *supra* note 43, at 8; *see also* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 65 (2016).

[49] CTR. FOR PROSECUTOR INTEGRITY, *supra* note 43, at 8 (citing Sapien & Hernandez, *supra* note 45).

[50] *Id.* (quoting JIM DWYER ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 225 (2003)).

[51] *See generally Grievances*, ACCOUNTABILITY NY, https://accountabilityny.org/grievances (last visited May 6, 2024) (maintaining dynamic database of individual griev-

on-the-record finding that there was prosecutorial misconduct, even when the misconduct is egregious and well documented, grievance committees almost never issue any public discipline against these prosecutors, essentially sanctioning this misconduct.[52]

Defense attorneys, and especially public defenders, though the ones closest to witnessing this prosecutorial misconduct, rarely if ever file ethics complaints against prosecutors.[53] This is mostly due to the fact that a defense attorney's main duty is to their clients, whom they know will likely suffer the prosecutor's retribution in current and future cases should the defense attorney file formal complaints against this very prosecutor from whom they are seeking a favorable plea.[54] This is not simple conjecture; in 2021, a Black defense attorney in Pittsburgh publicly called District Attorney Stephen Zappala's office "racist," and the DA's office responded immediately by issuing a staff memo halting any plea deal talks for the defense attorney's clients due to his "convoluted critical diatribe."[55] Zappala's actions represent the biggest concern for public defenders in holding prosecutors accountable. Though many public defenders know the wrongs prosecutors routinely commit, they realize that if they push too hard for accountability, this same prosecutor or prosecutor's office will make *their clients*—not them—suffer the consequences.

Judicial reluctance to make a finding of prosecutorial misconduct, combined with the sheer power prosecutors hold over the lives of the accused and a real ability to punish the accused for their attorney's actions, results in intimidation into silence.

III. OUR FIRSTHAND EXPERIENCE SEEKING ACCOUNTABILITY: ACCOUNTABILITY NY

Since we first began filing bar complaints in 2021 I have seen the retaliation and silencing attempts from the state and prosecutors when we try to hold prosecutors publicly accountable. In our project, we work with partners such as law professors, system-impacted constituents, and community groups to research and find instances of prosecutorial misconduct, and file bar complaints with attorney ethics committees seeking

ance summaries with descriptions of alleged misconduct, updates showing the grievance committees' lack of response, and full copies of each official complaint).

[52] *See id.*

[53] Jessica Brand, *When Prosecutors Bully*, SLATE (Aug. 4, 2017, 9:07 AM), https://perma.cc/9SDN-8AXT.

[54] *See id.*

[55] Mark Scolforo, *DA Defends Ending Deals with Lawyer Who Called Office Racist*, AP NEWS (June 3, 2021, 6:08 PM), https://perma.cc/G3KV-VNMT.

an investigation and appropriate public discipline against these prosecutors.[56]

The ethics rules we ask the grievance committees to enforce are embarrassingly simple and minimal. They are not "radical" rules by any stretch, and instead are the most basic professional conduct and ethics rules that attorneys are asked to follow[57]—rules like "don't lie," "don't cheat," "don't disobey court orders," "turn over evidence you are already obligated to turn over," "don't prosecute someone for whom you have factual evidence of innocence."[58] Yet even asking the grievance committees to enforce these incredibly low-bar, base-level rules of conduct appears to be too much to ask.

In New York during the summer of 2021, we formed the coalition Accountability NY, working with law professors and system-impacted people to research and file over forty ethics complaints against New York prosecutors for on-the-job misconduct, many of whom had several separate acts of misconduct.[59] We filed our ethics grievances with the appropriate grievance committees,[60] essentially doing the committee's investigations for them, asking them to do their job and hold prosecutors accountable for this misconduct.[61] Yet even here, where the vast majority of our complaints were based on public record and judicial findings of misconduct, as of the publication of this article the grievance committees to our knowledge still do not act.[62] Compounding the problem is the fact that many of these grievance committees are a black box, including in New York, so that even if discipline is issued, the public is almost

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[56] *See generally* ACCOUNTABILITY NY, AccountabilityNY.org.

[57] *See generally* Leventhal Grievance, *supra* note 43.

[58] *See* MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2023) (requiring prosecutors to "(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to . . . counsel; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"), r. 3.3 (requiring all lawyers to show "[c]andor [t]oward the [t]ribunal" and "not knowingly . . . make a false statement of fact or law"), r. 8.4 (forbidding all lawyers from committing acts that "reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer"; engaging "in dishonesty, fraud, deceit or misrepresentation"; and engaging in "conduct that is prejudicial to the administration of justice").

[59] *See generally* ACCOUNTABILITY NY, *supra* note 56.

[60] In New York there are four judicial departments that handle attorney grievances, where one files grievances against an attorney based on where the attorney's office is located. *Lawyer Discipline*, N.Y. STATE COMM'N ON JUD. CONDUCT, https://perma.cc/H2P4-CRAK (last visited May 6, 2024).

[61] The majority of the complaints filed in New York partly rely on judicial findings of prosecutorial misconduct. *See Grievances*, *supra* note 51.

[62] *Id.*

never made aware.[63] When Accountability NY filed complaints to the New York grievance committees, to our knowledge, neither the public nor we the complainants were made aware of any grievance committee hearings and proceedings, nor were we told why discipline was not issued if indeed it was not.[64]

A. Silencing Attempts and Retaliation from the City and State of New York

The fears of retaliation that deter many people, particularly defense attorneys, from filing these prosecutor bar complaints are well founded. In our case, as the *New York Times* noted, the "blowback . . . was swift."[65] Following Accountability NY's filing of their first set of bar complaints against New York prosecutors on May 3, 2021 and the publicity this garnered, the signers or complainants received an ominous letter on June 2, 2021, on New York City Law Department letterhead, from the Law Department's corporation counsel, James Johnson.[66] Identifying himself as (then) "Chief Legal Officer of the City of New York" and "legal counsel to the Office [sic] the District Attorney for Queens County," Johnson sent identical letters to the various grievance committees the complaints were filed before and on behalf of various prosecutors subject to these complaints, cc'ing the professors who had filed the grievances.[67]

Johnson, on behalf of the City of New York, erroneously argued that the confidentiality guarantees in New York State Judiciary Law Section 90(10) applied not just to the internal disciplinary process but also to the complaints themselves.[68] Using this incorrect interpretation of the law,[69] Johnson, on behalf of the City, attempted via this letter to

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[63] *Id.*; *see also* N.Y. JUD. LAW § 90(10) (McKinney 2013) (stating that attorney grievance investigations are by default "deemed private and confidential"); *The Problem: A Deeper Dive*, *supra* note 42 (discussing how prosecutors in New York rarely receive public discipline for misconduct).

[64] *See Grievances*, *supra* note 51.

[65] Jonah E. Bromwich, *They Publicized Prosecutors' Misconduct. The Blowback Was Swift*, N.Y. TIMES (Nov. 10, 2021), https://www.nytimes.com/2021/11/10/nyregion/queens-prosecutors-misconduct.html (on file with CUNY Law Review).

[66] Letter from James E. Johnson, Corp. Counsel, City of N.Y. Law Dep't, to Grievance Comm. for the 9th Jud. Dist. (June 2, 2021) (on file with author) [hereinafter Corp. Counsel June 2 Letter]; *see also* Bromwich, *supra* note 65.

[67] *See, e.g.*, Corp. Counsel June 2 Letter, *supra* note 66, at 1, 4.

[68] *Id.* at 2.

[69] *See* C.R. Corps v. Pestana, No. 21-CV-1928, 2022 WL 2118191, at *8 (S.D.N.Y. June 13, 2022) (granting plaintiffs' motion for partial summary judgment and holding that "banning complainants from publishing their own attorney grievance complaints" violates the First Amendment).

stifle any publicity or public discussion of prosecutorial misconduct by arguing that the complainants publishing their *own* complaints and talking about them in the media was *itself* a violation of the law. He boldly stated:

> [T]he very public campaign surrounding this and other similar complaints is contrary to both the law and the principles on which the grievance process is based . . . . [I]n direct contravention of this legal directive and long-established public policy, the complainant law professors not only posted the complaints online, but designed a special website to host these and future grievance complaints.[70]

The letter evidences just how threatening any public accountability for prosecutorial misconduct is to prosecutors and the state. More broadly, Johnson, on behalf of the City, made clear that he and the City took issue not just with the publishing of the complaints, but with group's larger campaign and mission to hold prosecutors accountable:

> Moreover, the complainants' website demonstrates that their broader mission is to promote prosecutorial accountability generally and make the attorney disciplinary process public. . . . [T]his complaint is part of a broader and very public campaign involving multiple grievances sent *en masse* to four different committees, and a campaign which, I submit, runs afoul of the confidentiality provisions of the law and the purpose of the grievance process.[71]

Finally, though the first batch of complaints was against prosecutors in Queens, the letter makes certain the grievance committee and the complainants all know that it was not just the Queens District Attorney's Office ("QDAO") that took issue with the campaign. Rather, all of "New York City's five district attorneys and the Special Narcotics Prosecutor are concerned about this abuse of the grievance process, as all members of the legal profession should be."[72] In addition, on June 11, 2021 Chief Counsel to the Second, Eleventh, and Thirteenth Judicial Districts' grievance committeee, Diana Kearse, also sent the complainants a letter.[73] Representing the grievance committee, and thus a New York state actor, Kearse attempted to strip the grievance signers of their

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[70] Corp. Counsel June 2 Letter, *supra* note 66, at 1-2.
[71] *Id.* at 3-4.
[72] *Id.* at 4 n.5.
[73] Letter from Diana Maxfield Kearse, Chief Counsel, State of N.Y. Grievance Comm. for the 2d, 11th, and 13th Jud. Dists., to Professors, Accountability NY (June 11, 2021) (on file with author).

rights as complainants by declaring they were not complainants at all.[74] She argued that because the complainants' grievances were wholly based on publicly available information, "any investigations into these allegations would be initiated by the grievance committee, sua sponte, and remain confidential."[75] This meant the grievance committee would treat these complaints as if they were investigated on the committee's own accord, and complainants would have no right to know about any investigations into their complaints or why, or even if any investigation resulted in the complaints' dismissal.[76]

So, on November 4, 2021, represented by the law firm Patterson Belknap Webb & Tyler LLP, we filed a federal civil rights suit in the Southern District of New York for violation of our First Amendment rights to publish our own filed complaints.[77] The suit was filed against New York City and State defendants Georgia Pestana, Corporation Counsel of New York City; Melinda Katz, District Attorney for Queens County; Andrea Bonina, Chair of the New York State Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts; Diana Kearse, Chief Counsel of the New York State Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts; and Hector D. LaSalle, Presiding Justice of the New York State Supreme Court Appellate Division, Second Judicial Department.[78]

On June 13, 2022, the court ruled that the complainants had a constitutionally protected right to publish their own grievance complaints.[79] As the court made clear, "Section 90(10) Is Unconstitutional As Applied to Plaintiffs' Case. . . . In other words, a government official used Section 90(10) in an effort to prohibit the publication of grievance complaints publicly filed by the complainants themselves, an action this

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[74] *See id.*

[75] *Id.*

[76] *Id*. In her Memorandum of Law opposing Plaintiffs' Motion for Summary Judgment, Kearse argues that the "letters to counsel for Plaintiffs, dated June 11, 2021 and July 26, 2021 (Exhibits 3 and 8 to the Declaration of Gregory L. Diskant, respectively) (the "Letters"), were sent pursuant to standard operating procedure, which procedure is set forth in the Supreme Court Appellate Division, Second Judicial Department Grievance Committee Manual & Forms, revised as of April, 2019, and in the Rules for Attorney Disciplinary Matters." *See C.R. Corps v. Pestana*, No. 21-CV-1928, Dkt. 82 at 5.

[77] Complaint and Demand for Jury Trial at 1-2, C.R. Corps v. Pestana, No. 21-CV-9128 (S.D.N.Y. Nov. 4, 2021).

[78] *Id.* at 1.

[79] C.R. Corps v. Pestana, No. 21-CV-9128, 2022 WL 2118191, at *8 (S.D.N.Y. June 13, 2022); *see also* Hassan Kanu, *Law Profs Prevail over Backlash to Publishing Prosecutor Misconduct Cases*, REUTERS (June 22, 2022, 2:09 PM), https://www.reuters.com/legal/government/law-profs-prevail-over-backlash-publishing-prosecutor-misconduct-cases-2022-06-22/ (on file with CUNY Law Review).

Court finds contrary to the First Amendment."[80] The court also ruled that the City's and State's actions towards the complainants were sufficient to support the plaintiffs' First Amendment retaliation claim, stating:

> The alleged retaliatory acts here entail (1) City Defendants sending letters to the Grievance Committee stating that Plaintiffs were violating Section 90(10) and, allegedly, threatening Plaintiffs; and (2) Kearse and the Grievance Committee removing Plaintiffs as grievance complainants and denying them the benefits accorded to individuals who file attorney grievance complaints. The Court finds that these alleged retaliatory acts constitute adverse actions sufficient to support a claim for First Amendment retaliation.[81]

As part of its justification for ruling in the plaintiffs' favor, the court laid bare the silencing and deterrent impact the City's and State's actions have upon the public and attorneys as well:

> The Court is persuaded that individuals of ordinary firmness would be deterred from exercising their constitutional right to publish their own grievance complaints if they knew that exercise could result in losing their status as complainants or being charged with violating the law and potentially being subjected to consequential legal proceedings. The Court is persuaded that attorneys of ordinary firmness would be deterred from publishing grievance complaints if they knew that publication would lead to a government official informing the Grievance Committee that they were violating New York law, possibly risking their status as attorneys in good standing.[82]

Though the court's ruling vindicated our claim that the City's and State's actions were retaliation against us for speaking out and constituted attempts to silence us, it must be noted that it took filing a federal lawsuit against the City and the State of New York to affirm something so basic as the right to speak publicly about prosecutorial misconduct.

B. To Our Knowledge, the Grievance Committees Still Do Nothing With Our Complaints.

Of the over forty ethics grievances we filed in New York between 2021 and 2023, to our knowledge, not a single one resulted in any public

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80 *C.R. Corps*, 2022 WL 2118191, at *6, *8.

81 *Id.* at *11 (citation omitted).

82 *Id.*

discipline against any of the prosecutors—not disbarment nor even a mere suspension. In fact, according to our research, there has not been a single instance where New York has *ever* disbarred a prosecutor for on-the-job misconduct,[83] no matter the misconduct. This is so even where, as in most of these complaints, the investigation was essentially already done for the grievance committees, both by the courts making their on-the-record finding of prosecutorial misconduct and by our research and detailed complaints. Even then, when a court said the prosecutor did something improper—which we consider prosecutorial misconduct—and we submitted these findings to grievance committees, the committees did nothing.

In addition, for the vast majority of the grievances we filed (including ones we filed back in 2021), we have no update on what has happened to our complaints, whether an investigation took place, if our complaints were dismissed, and why. For three of our complaints, we received letters stating the dockets were being closed as the appellate reversals had already drawn the committee's attention and consideration, or that upon review, the main issue had already been addressed by the Second Circuit Court of Appeals.[84] And yet, as of May 16, 2024, not a single one has resulted in any public finding of misconduct.

IV. A Case Study of Egregious Prosecutorial Misconduct: Charles Testagrossa and Brad Leventhal

For me, the most egregious instance of prosecutorial misconduct in New York for which we filed ethics grievances was that of prosecutors Charles Testagrossa[85] and Brad Leventhal.[86] The fact that there has been

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[83] *See, e.g.*, Grievance Complaint Regarding Attorney Charles Testagrossa, from Cynthia Godsoe, Professor, Brooklyn L. Sch., et al. to State of N.Y. Att'y Grievance Comm. for the 10th Jud. Dist. 19 (May 3, 2021), https://perma.cc/7D8R-ZM3R [hereinafter Testagrossa Grievance] (citing our research finding not a single instance of New York disbarring a prosecutor for on-the-job misconduct); *see also The Problem: A Deeper Dive*, *supra* note 42; Ctr. for Prosecutor Integrity, *supra* note 43.

[84] *See* Letter from Jorge Dopico, Chief Att'y, State of N.Y. Att'y Grievance Comm. for the App. Div. 1st Jud. Dep't, to Cynthia Godsoe, Professor, Brooklyn L. Sch., et al. (Nov. 21, 2022) (on file with author) (stating to Accountability NY professors that the grievance committee would be closing the dockets on Dustin Chao and Margaret Finerty because "appellate reversals [in these cases] have already drawn Committee attention and consideration"); Letter from Kelly A. Page, Investigator, State of N.Y. Att'y Grievance Comm. for the 7th Jud. Dist., to C.R. Corps (Apr. 28, 2023) (on file with author) (closing investigation into Joseph Curran on the basis that our "complaint [sought] a legal remedy more appropriately obtained in another forum," due to the Second Circuit's and Appellate Division of the Fourth Department's review of Curran's conduct).

[85] *See* Testagrossa Grievance, *supra* note 83.

[86] *See* Leventhal Grievance, *supra* note 43.

no public discipline or professional accountability for these two prosecutors is the final nail in the coffin showing our legal system deliberately conspires to protect this type of professional violence at all costs. If after what these two prosecutors did there is still no professional discipline, then there is frankly almost no situation in which there will be.

Testagrossa and Leventhal prosecuted and wrongfully convicted George Bell, Rohan Bolt, and Gary Johnson, imprisoning the three men for twenty-four years.[87] Leventhal and Testagrossa tried Bell together in 1999 and sought the death penalty, but the jurors declined to impose this sentence, and the judge sentenced Bell to life without parole.[88] Leventhal alone tried Johnson and Bolt in 1999 and 2000. Both men were sentenced to fifty years to life in prison.[89]

In 1996, several men attempted a robbery of a check cashing business in Queens, killing the owner and an off-duty police officer.[90] Eerily similar to the circumstances surrounding the horrific wrongful conviction of the Central Park Five,[91] this case sparked a similar political frenzy and "ferocious manhunt."[92] With no physical evidence tying the three men to the case, police arrested and prosecutors charged Bell, a nineteen-year-old stock boy at Old Navy with no criminal record; his friend, twenty-two-year-old Gary Johnson, who worked as a store clerk with no criminal record; and Rohan Bolt, a thirty-five-year-old Caribbean restaurant owner who did not even know Bell and Johnson; with the murders.[93] Yet *around the same time*, police and the QDAO were investigating, arresting, and prosecuting members of the "Speedstick" crew for a string of crimes including *robbery and murder*.[94] Charles Testagrossa, then-head of the QDAO's Career Criminal/Major Case Bureau, led these investigations at the time.[95] However, it was the press and the defense who recognized and raised the connection between the check-cashing

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[87] *See* Testagrossa Grievance, *supra* note 83.

[88] People v. Bell, 143 N.Y.S.3d 840, 847-48 (Sup. Ct. 2021).

[89] *Id.* at 848.

[90] *Id*. at 842; Leventhal Grievance, *supra* note 43; Testagrossa Grievance, *supra* note 83.

[91] *See* Monica Hesse, *The Slippery Moral Calculus of Linda Fairstein*, WASH. POST (June 5, 2019, 1:05 PM), https://www.washingtonpost.com/lifestyle/style/the-slippery-moral-calculus-of-linda-fairstein/2019/06/05/f7ff1aac-86d4-11e9-98c1-e945ae5db8fb_story.html (on file with CUNY Law Review).

[92] 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 (on file with CUNY Law Review); *see also* George Joseph, *He Spent 24 Years Behind Bars Because Queens Prosecutors Broke the Rules. Was This Their Only Wrongful Conviction?*, GOTHAMIST (Apr. 5, 2021), https://perma.cc/CD72-JDPY.

[93] *Bell*, 143 N.Y.S.3d at 842-43; Leventhal Grievance, *supra* note 43.

[94] *Bell*, 143 N.Y.S.3d at 844-45; Leventhal Grievance, *supra* note 43.

[95] *Bell*, 143 N.Y.S.3d at 845.

incident Bell, Bolt, and Johnson were falsely charged with and the potential actual perpetrators, the Speedstick crew.[96] Recognizing the exculpatory significance of this connection, the defense filed several discovery demands regarding the QDAO's Speedstick investigations.[97]

In response, Leventhal and Testagrossa outright denied any connection between the Speedstick investigations and the instant case, with Leventhal calling the defense's requests a "fishing expedition" and Testagrossa saying the Speedstick robbery was a "completely different case" with "no connection" to the check-cashing murder.[98] But Leventhal's and Testagrossa's claims and denials turned out to be *completely false*. In its March 2021 brief, *twenty-four years later*, the QDAO conceded that they had suppressed both the Speedstick investigation and information relating to a key prosecution witness, both exculpatory and material under *Brady v. Maryland*.[99] The QDAO also conceded that had this information been turned over when it should have been, there was a "reasonable possibility" that the three men would not have been convicted.[100]

In a blistering opinion, the Queens County Supreme Court found that the extensive record made clear the prosecution "deliberately withheld" a significant amount of exculpatory evidence from the defense and "completely abdicated [their] truth-seeking role.[101] The deliberately suppressed evidence included material implicating the Speedstick crew in the check-cashing murder, police reports tying the Speedstick crew to the murder, psychiatric records and initial cooperation agreement for one of their key witnesses, and exculpatory interviews with five witnesses.[102]

The court went even further and found that Testagrossa knowingly suppressed the exculpatory evidence related to Speedstick, and that it was "clear . . . that Testagrossa had knowledge of this information" and "unquestionably knew" about the Speedstick connection.[103] As then-chief of the bureau that prosecuted the Speedstick crew, Testagrossa

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[96] *Id.* at 846.

[97] *Id.*

[98] *Id.* at 847.

[99] *Id.* at 849-50; Brady v. Maryland, 373 U.S. 83 (1963). *Brady* information is any evidence that is favorable to the accused and material to guilt or punishment. A violation of *Brady* is, as the Supreme Court held, "the suppression by the prosecution of evidence favorable to an accused upon request, [which] violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

[100] *Bell*, 143 N.Y.S.3d at 853.

[101] *Id.* at 850-51.

[102] *Id.* at 853; Leventhal Grievance, *supra* note 43, at 13.

[103] *Bell*, 143 N.Y.S.3d at 851-52.

personally "investigated, and documented in *handwritten notes*," information tying the Speedstick crew to the check-cashing murder, and was briefed about the connection by detectives.[104] As the court emphasized, the prosecutors'

> repeated denial of any connection between the perpetrators of the [Speedstick crimes] and [the check-cashing murder] was a complete misrepresentation. Most troublingly, it was a misrepresentation made by a prosecutor, ADA Testagrossa, whose own handwritten notes refuted it. This was, in short, not a good faith misstatement; it was a deliberate falsehood.[105]

The court described both Leventhal's and Testagrossa's "performances" as "clearly delivered with aplomb; they certainly convinced [the trial judge] that the defense's refusal to drop the issue was an utter waste of everyone's time. Testagrossa's and Leventhal's vociferous denials, however, were *completely false*."[106] This "deliberate suppression" was rather "part of a larger pattern of behavior that was calculated to deprive the defendants of fair trials."[107] Particularly shocking and outrageous is that even though Testagrossa had actual evidence pointing to the three men's innocence, which he suppressed and lied about, the prosecution still vigorously prosecuted these men and sought for nineteen-year-old no-criminal-record Bell to be *sentenced to death*.[108]

All of this was presented to the grievance committees in the ethics complaints we filed against both Leventhal and Testagrossa, and yet there is still no public discipline for either of these prosecutors, even in this rare case where the court so clearly declares that these prosecutors deliberately and repeatedly lied in a death penalty case and goes so far as to name the prosecutors in its opinion. In fact, in Bell's, Bolt's, and Johnson's lawsuits against Testagrossa, Testagrossa's attorney disclosed in a letter to the court that both Testagrossa and Leventhal had been cleared of any misconduct through the grievance committee's investigation.[109] The signers of Testagrossa's and Leventhal's grievances were not made aware of any investigation, nor the fact that these prosecutors had been cleared of any misconduct. It is unclear when this investigation and finding of no misconduct took place, or whether it even took place as a result of Accountability NY's grievance. But it should be noted that

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[104] *Id.* at 850-51 (emphasis added).
[105] *Id.* at 853.
[106] *Id.* at 851 (emphasis added).
[107] *Id.* at 854.
[108] *Id.*
[109] Letter from John M. Leventhal and Barry Kamins, Bell v. City of New York, et. al., (No. 22-3251) (DG)(PK), (E.D.N.Y. Sept. 1, 2023).

we filed the grievances in May 2021, and the letter disclosing that these prosecutors were exonerated is dated June 26, 2023.

A. The Predictable Result: Absolute Immunity with No Grievance Committee Accountability Means Prosecutors Have Absolute Power to Do Basically Anything.

Absolute prosecutorial immunity and grievance committees' refusal to do their jobs and act, with almost no publicly available information on their investigations of prosecutorial misconduct, has unsurprisingly created a black box of secrecy and impunity for prosecutors, no matter the severity of their misconduct. As Marvin Schechter, then-chairman of the New York State Bar Association's criminal justice section, said, "[i]t's an insidious system . . . . Prosecutors engage in misconduct because they know they can get away with it."[110]

This result is not at all shocking, and it is in fact deliberately built into the sheer power of our legal system to destroy lives at will, with no consequences. Even if we were to give the Supreme Court the benefit of the doubt for its ruling in *Imbler*, since the *Imbler* ruling, more and more statistics[111] and public discussions[112] on the lack of any professional discipline for prosecutors have made it clear that the Court's assumption was wrong and change is necessary. The Supreme Court has had the opportunity many times to revisit the absolute immunity doctrine well after facts and patterns came to light of the grievance committees doing essentially nothing to hold prosecutors accountable.[113] Yet each time, the

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[110] Sapien & Hernandez, *supra* note 45.

[111] For example, a 2020 study by the National Registry of Exonerations of 2,400 exonerations found that 30% included prosecutorial misconduct. NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT iv (2020), https://perma.cc/PT3F-PLT9. The report further notes, "Prosecutors who committed misconduct in criminal cases that led to exonerations were rarely disciplined; it happened only 4% of the time. Police officers who committed misconduct were disciplined almost five times as often as prosecutors, in 19% of the cases . . . ." *Id*. at 115; *see also* CTR. FOR PROSECUTOR INTEGRITY, *supra* note 43, at 8 (finding that of 3,625 cases of prosecutorial misconduct between 1963 and 2013, only sixty-three prosecutors—*less than two percent*—were ever publicly disciplined).

[112] *See* Opinion, *Prosecutors Need a Watchdog*, N.Y. TIMES (Aug. 14, 2018), https://www.nytimes.com/2018/08/14/opinion/new-york-prosecutors-cuomo-district-attorneys-watchdog.html (on file with CUNY Law Review). *See generally* Green & Yaroshefsky, *supra* note 48; Sapien & Hernandez, *supra* note 45; DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 103-118 (2012); Zacharias, *supra* note 43.

[113] *See generally, e.g.*, Van de Kamp v. Goldstein, 555 U.S. 335 (2009); Kalina v. Fletcher, 522 U.S. 118 (1997). Lower courts have analyzed *Imbler*, but the most negative treatment merely clarifies that prosecutors are absolutely immune for acts intimately associated with their prosecutorial function in initiating and prosecuting a case, and not administra-

Court has either refused to overturn *Imbler* and dispose of absolute immunity, or refused to even grant certiorari to hear the case and issue.[114] Thus, the Court is doing what many of us know and have experienced to be the Court's, and our legal system's, true mission: to protect the wealthy and powerful, to be the legal enforcement arm of white supremacist capitalism, and to uphold it at all costs.

V. WHAT NEEDS TO BE DONE: SMALL- AND LARGE-SCALE ABOLITIONIST-ORIENTED REFORMS

The fact that even holding prosecutors accountable for the most base-level professional ethics rules is so controversial should be downright embarrassing for the profession. And the fact that I have to write a law review article to discuss the absolute power prosecutors have and how they operate with complete and total impunity is an indictment of not just prosecutors but our entire legal system.

To address this complete lack of accountability, I propose both small- and large-scale abolitionist-oriented reforms. Generally, abolitionist-oriented reforms are measures that do not grow, feed, or strengthen the carceral system and state. Reformist reforms would be asking for more funding, training, or supervision, which simply give more resources and power to these actors who also do not need more training on what is right and wrong. Abolitionist-oriented reforms instead seek accountability, discipline, and shrinking of these carceral powers.

The small reforms I suggest are basic and minimal, and not radical by any stretch. First, we of course need to get rid of absolute immunity for prosecutors. The overwhelming evidence that grievance committees in fact routinely decline to discipline prosecutors for anything should alone undermine *Imbler*'s justification for establishing absolute immunity. Second, judges should be required to inquire into and, when appropriate, make public findings of prosecutorial misconduct naming the prosecutor, and then automatically refer these prosecutors to the grievance committees for discipline. Third, grievance committees must be mandated to do their jobs and enforce the most basic attorney ethics rules against prosecutors. We already have these basic ethics rules and measures of accountability, but they are simply rarely used. Fourth, the grievance committees' accountability and disciplinary process must be transparent, open to the public, and easily accessible.

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tive or investigative tasks. *See* Houston v. Partee, 978 F.2d 362, 365 (7th Cir. 1992); Lucas v. Parish of Jefferson, 999 F. Supp. 839, 843 (E.D. La. 1998).

[114] *See, e.g.*, Petition for Writ of Certiorari, Anilao v. Spota, 27 F.5th 855 (2d Cir. 2022) (No. 19-3949-CV), *cert. denied*, 143 S. Ct 1781 (2023).

When we are considering large-scale abolitionist-oriented reforms, we must attack and shrink the vast array of powers prosecutors already have, outside of them committing misconduct by going beyond these sanctioned powers. Prosecutors already possess the power to determine whom to prosecute, with what charges, how harsh or lenient a plea to offer them, and how harsh a sentence to seek upon conviction. These powers alone give prosecutors the ability to destroy lives at will. No one position or institution should ever have this power. We can shrink this power by defunding prosecutors, and the police who act as the prosecutor's free investigators. We follow organizers' lead in opposing building new jails as the solution to human rights crises such as Riker's Island,[115] because as organizers say, if you build it, the prosecutors will fill it.[116] Similar to campaigns to ban the military from recruiting on college campuses, we push law schools where prosecutors recruit their next generation and reach students to expose prosecutors and the criminal system for what it is and that this recruitment to violence should have no part in higher education.[117] We make access to the courts, court records, court transcripts, cases, and case searching software such as PACER, Lexis and Westlaw, free and open to the public. This last piece is especially critical, because while our courts are technically "public," in reality, beyond being able to attend a public trial, the general public does not have free and open access to these court records or research tools. With this lack of access, prosecutors' actions take place mostly in the dark, making it difficult to even alert the public about what is happening, and even more difficult to hold prosecutors accountable.

But how do we actually try to implement these small- and large-scale abolitionist-oriented reforms? Abolitionist approaches teach us to look beyond prosecutors and recognize that we will not win true liberation or justice from the courts or legal system. Abolition pushes us to question our entire legal system and what it really values and protects—and, more importantly, that much of this fight for justice and liberation is outside the courtrooms and instead in our organizing, advocacy, and people power. Lawyers have litigated for years to get rid of absolute immunity, unsurprisingly with no success. As Dean Spade teaches us, even when we have legal victories, "that law is often quickly repealed, or it is never enforced, or it is twisted through administrative or judicial

[115] Matt Katz, *Never-Before-Seen Images Show Rikers Inmates Locked in Caged Showers, Left in Soiled Pants, More Poor Conditions*, THE GOTHAMIST (Sept. 28, 2022), https://gothamist.com/news/rikers-images-shower-cages-poor-conditions.

[116] No New Jails NYC, https://www.nonewjailsnyc.com/followthemoney.

[117] Roberto Camacho, *Marginalized Students Pay the Price of Military Recruitment Efforts*, PRISM (Apr. 18, 2022), https://prismreports.org/2022/04/18/marginalized-students-military-recruitment/.

interpretation to do the reverse. . . ."[118] These professional ethics rules have existed for decades, yet prosecutors know these rules essentially do not apply to them. In addition, while there have been legislative efforts to end qualified immunity,[119] there have been no large legislative efforts to end absolute immunity, because of how little attention is paid to the problem. Many of our legal struggles and victories have sadly not changed reality on the ground, and "we can see that . . . [radical] movements' most transformative demands were/are never met by law."[120] Rather, studying history and the forces that have pushed for change and justice, it is large radical movements and public pressure on the issue that ultimately move the needle, not the courts' vindication.[121]

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[118] Spade, *supra* note 6, at 112.

[119] *See, e.g.*, Cheyanne M. Daniels, *Pressley, Markey Reintroduce Bill to End Qualified Immunity*, THE HILL (Apr. 19, 2023), https://perma.cc/YKZ9-SWDW (citing Ending Qualified Immunity Act, H.R. 1470, 117th Cong. (2023)).

[120] Spade, *supra* note 6, at 112.

[121] *See, e.g.*, Steven H. Hobbs, *Alabama's Mirror: The People's Crusade for Civil Rights*, 6 ALA. C.R. & C.L.L. REV. 1, 2 (2014) ("This introduction begins from the premise that we can make the teleological connection between the Civil Rights Act of 1964 and the events that transpired in Birmingham and in Alabama in 1963. Certainly, as the articles in this issue so ably demonstrate, the 1964 Act was the result of a struggle for human dignity and equal rights going back to the founding of this country. The articles also make plain that the Civil Rights Act of 1964 came about from a massive effort by organizations committed to achieving basic civil rights, and by individuals making monumental personal sacrifices. This introduction reflects on the organizations and people in Alabama who played a critical role in shifting the tide of history towards justice and situates the heart and soul of the Civil Rights Movement in Alabama.") (footnotes omitted); Thomas Kleven, *Separate and Unequal: The Institutional Racism of the Supreme Court*, 12 ALA. C.R. & C.L.L. REV. 276, 292 (2021) ("[W]hile resort to the judiciary can contribute at times to the struggle for racial justice, ultimately a grassroots political movement that does not depend on a convergence of interests with, but that challenges the status of, the power elite is necessary to advance the cause.").