Not Above the Law: Thoughts on Prosecutorial Immunity and Public Trust

BY JENNIFER P. NOBLE, ESQ.

> *"My job as a prosecutor is to do justice. And justice is served when a guilty man is convicted and an innocent man is not."*
> — U.S. Supreme Court Justice Sonia Sotomayor

Recently, our national discourse has been flooded with discussion of criminal justice reform. Naturally, questions about prosecutorial power and its limitations have followed. The public should expect that prosecutors hold themselves to the highest of ethical standards.

When prosecutors fail to meet this expectation, intentionally or unintentionally, they risk compromising the integrity of criminal convictions, eroding public trust, and increasing the anguish of victims who have put their faith in the criminal justice system. Much of the current debate regarding prosecutors reveals a common misconception that they have unchecked, unlimited power. Additionally, a developing narrative suggests that wrongful convictions primarily occur due to prosecutorial misconduct by officials who believe they are above the law—but the numbers say otherwise. Prosecutors who violate their oath by acting unethically can and should be held accountable. And Nevada's leading prosecutors are continuously striving to improve transparency, ensure accountability, and promote best practices.

Origin and Purpose of Prosecutorial Immunity

From the Middle Ages through the 19th century, prosecutions in England were conducted by private citizens. Communities primarily relied on a victim's friends and family to hire an attorney to pursue a prosecution. Often, this meant that access to justice was limited by economic status. Private prosecutors for hire could seek imprisonment on their clients' behalf, but they could also be sued by the people they prosecuted, for any reason. Soon after establishment of the American colonies, public prosecutions began to replace the private system. Prosecutors came to be viewed as owing a fiduciary duty to the public at large, rather than as attorneys functioning as agents of an individual victim.[1] The U.S. Supreme Court was mindful of this shift when it considered the application of 42 U.S.C. 1983 civil suits to prosecutors in *Imbler v. Pachtman*, 424 U.S. 409 (1976).

The *Imbler* Court explained that prosecutorial immunity is favored based upon long-established public policy that protected judges and grand jurors from civil suit

when they acted in the scope of their duties. It recognized that even the most conscientious prosecutors would be unable to exercise impartial, independent judgment if they had to worry about the possibility of civil suit whenever a jury found a defendant not guilty:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunity of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.
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> *Imbler*, 424 U.S. 409 at 423.

The *Imbler* Court also recognized prosecutors are often required to act swiftly, under considerable pressure, and upon information received from law enforcement and third parties. Application of civil liability based on 20/20 hindsight years after trial could lead to fundamentally unfair results. But the court also recognized that application of absolute immunity could leave a genuinely wronged criminal defendant without civil redress. Quoting Judge Learned Hand, it recognized the lesser of two evils was to limit a prosecutor's civil liability, rather than to "subject those who try to do their duty to the constant dread of retaliation." *Id*. at 429.

Forms and Limitations of Prosecutorial Immunity

Courts may find that a prosecutor's actions are protected by either qualified or absolute immunity. In deciding which type of immunity applies, courts use what is commonly known as the functional approach. This approach focuses on the character of the challenged conduct.

Absolute immunity applies when prosecutors perform an advocacy function, insulating them from civil liability. Courts have found that a prosecutor's advocacy function encompasses a variety of activities, including:

- The decision whether to file charges;
- Presenting a case to the grand jury and securing an indictment;
- Preservation of evidence;
- Plea bargaining;
- Jury selection;
- Securing a material witness warrant; and
- Seeking increased bail.

> "Courts try to balance the competing interests of a plaintiff's right to recover damages versus the risk that prosecutors will be so worried about personal monetary liability and harassing litigation that it impedes their ability to perform their duties."

But when prosecutors act outside their advocacy function, they are not entitled to absolute immunity. Instead, courts may apply qualified immunity. Under this form of immunity, prosecutors are not liable for civil damages for performance of discretionary functions only if they have not violated clearly established statutory or constitutional rights. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). Essentially, in deciding whether a prosecutor may successfully raise a defense of qualified immunity, the relevant question is: how would a reasonable prosecutor act?

Courts try to balance the competing interests of a plaintiff's right to recover damages versus the risk that prosecutors will be so worried about personal monetary liability and harassing litigation that it impedes their ability to perform their duties. In determining whether qualified immunity applies, courts generally allow prosecutors breathing room to make reasonable mistakes about open legal questions.

Courts have found numerous acts are entitled to qualified, rather than absolute, immunity. Examples of actions falling

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outside a prosecutor's advocacy role include:

- Participating in an illegal search;
- Holding a press conference;
- Questioning a suspect;
- Destroying exculpatory evidence;
- Ordering a warrantless arrest; and
- Advising police during the course of an investigation.

The doctrines of absolute and qualified immunity do not allow prosecutors to evade responsibility for misconduct. Instead, they are narrowly tailored safeguards designed to preserve a prosecutor's independent judgment. Prosecutors who abuse their power or violate the law are still subject to criminal prosecution under the laws of their jurisdiction, and by their state ethics boards.

Misconduct and Consequences: The Duke Lacrosse Case

In 2006, a former North Carolina district attorney Michael Nifong became the subject of national attention due to his unethical conduct while investigating sexual assaults allegedly committed by several Duke University lacrosse players. The North Carolina State Bar filed an ethics complaint against Nifong for more than 50 highly questionable statements he made to the press during the pendency of the investigation. Nifong's ethical gaffes included telling the press that the defendants would not need an attorney if they had not done anything wrong, making inaccurate insinuations about forensic testing, and stating his personal opinions about the players' guilt. He also disparaged the alleged victim, commenting that "probably an exotic dancer would not be your first choice for unprotected sex."[2] As a result of his actions, Nifong was removed from the case, found guilty of criminal contempt, and lost his license to practice law altogether.

Policy Considerations and Unintended Consequences

Bad actors like Nifong do substantial, lasting harm to the public's confidence in prosecutors, and to the justice system in general. Their actions erode the public's confidence in criminal convictions, raising valid concerns about prosecutorial accountability. Some have called for the elimination of prosecutorial immunity altogether. But leaving prosecutors unconditionally vulnerable to civil lawsuits would likely have unforeseen and unintended consequences.

A prosecutor's primary focus must not be to secure a conviction, but instead to see that justice is done and the constitution upheld. If charging decisions were no longer protected by absolute immunity, prosecutorial focus would inevitably shift to the very distracting possibility of civil suit and personal liability. This would be true regardless of whether a prosecutor decided to file charges or declined to do so; either way, dissatisfied defendants or alleged victims would have little reason not to pursue civil damages. Similarly, prosecutors acting in good faith to provide police officers with constitutionally sound guidance during an investigation would be perpetually intimidated by looming threats of civil litigation. The result would cripple the justice system, resulting in a disservice to victims and offenders alike.

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Contributing Factors to Unjust Outcomes

As our national conversation regarding criminal justice reform continues, critics of the current prosecutorial immunity model sometimes cite wrongful convictions as a basis to overturn *Imbler* and its progeny. However, in the vast majority of overturned convictions, prosecutorial misconduct has not been to blame. According to the Innocence Project, the top contributing causes of wrongful convictions are eyewitness misidentification, faulty forensics, false confessions, and false jailhouse informant testimony.[3] This is particularly true where exoneration has been the result of advances in DNA technology.[4] And according to a study conducted by the Center for Public Integrity, between 1970 and 2003, prosecutorial misconduct led to dismissal, sentence reduction, or reversal in only about 2,000 cases. For some context, in 2007 alone, there were more than 2 million felony convictions in the U.S. Accepting CPI's statistics, this means that in a 33-year period, 99.73 percent of all felony convictions were unrelated to prosecutorial misconduct.[5]

Working to Increase Public Confidence

Across the state, Nevada's district attorneys are taking proactive steps to improve public confidence in the justice system. For example, the Nevada District Attorneys Association (NDAA), an organization consisting of all 17 elected Nevada district attorneys, voluntarily adopted a uniform policy regarding the use of jailhouse informants and supported legislation requiring the electronic recording of interrogations. The NDAA has also appointed a Best Practices Subcommittee that continuously works to ensure that district attorneys across Nevada are provided with evidence-based recommendations designed to promote transparency, efficiency, and fairness. And in larger offices, such as the Washoe County and Clark County District Attorney's offices, Conviction Integrity Units have been established to review credible claims of actual innocence.

Prosecutorial immunity should have a continuing place in our national

conversation about providing equal access to justice for all. To effectively pursue just outcomes, prosecutors must be unencumbered by fear of frivolous civil litigation. As we move into the future, Nevada's prosecutors will continue to look for ways to improve their practice, enhance transparency, and ensure accountability while protecting our communities.

ENDNOTES:

1. Bruce A. Green and Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 Am. U. L. Rev 805 (2020).
2. Van Kirk McCombs II, *2007 Annual Report*. ABAEERLYR 351 (2007).
3. The Innocence Project, *The Causes of Wrongful Conviction,* https://innocenceproject.org/causes-wrongful-conviction.
4. Charles E. MacLean, James Berles, and Adam Lamparello, *Stop Blaming the Prosecutors: The Real Causes of Wrongful Convictions and Rightful Exonerations*, Hofstra Law Review, Volume 44. January 1, 2015.
5. Harker, Timothy, *The Nation's Prosecutors Uphold Their Sworn Oaths*, National Attorneys General Training Research Institute Journal, Volume 3, Number 4 (2018).

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