

Who is Policing the Prosecutors?

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February 19, 2019

Five years after being released from death row for a crime he did not commit, a Louisiana jury awarded John Thompson \$14 million in damages—one million for every year of his incarceration—after private investigators discovered that prosecutors in the case had withheld exculpatory evidence.

But Thompson was never able to collect on his award, thanks to a little-known legal doctrine known as absolute immunity, which shields prosecutors from lawsuits.

“With a few very limited exceptions prosecutors cannot be sued even when there is evidence that they committed intentional and egregious violations of someone’s civil rights or broke the law. It’s like an invisibility cloak that protects them from lawsuits,” said Nina Morrison, an attorney with the Innocence Project.

“If I’d spilled hot coffee on myself, I could have sued the person who served me the coffee,” Thompson once said. “But I can’t sue the prosecutors who nearly murdered me.”

The decision against Thompson came from the highest court in the land in 2011, reaffirming a doctrine that goes back nearly half a century.

In effect, Clark Neily, the vice president for criminal justice at the Cato Institute, says prosecutors have been given a “hunting license.”

“So you have these officials who have extraordinary discretion and extraordinary power and instead of holding them to a correspondingly high standard ...they’re actually the least accountable public officials in the country,” Neily said. “It’s astonishing. They wield the most power and in a way that presents the greatest concerns and the Supreme Court’s response is to say ‘Oh and by the way we should hold them to the lowest standard ... of accountability.’”

The doctrine of absolute immunity, which was solidified in the 1976 Supreme Court case, *Imbler v. Pachtman*, is founded on good intentions: the general idea is to prevent a glut of lawsuits from people accused of crimes, choking the court system and having a chilling effect on prosecutors’ ability to do their job. (The immunity applies to both state and federal prosecutors.)

Legitimate as that concern may be, it doesn’t warrant absolute immunity. The same concerns could apply to a whole host of other high-stakes professions, Neily notes. “You could make pretty much the exact same argument with doctors, for example,” he said.

And the threat of lawsuits doesn’t seem to prevent other government officials who do not enjoy absolute immunity from doing their jobs, like police officers, Morrison notes. (Instead, they have

qualified immunity, which is still problematic.) “And the courts are actually very good at sorting out frivolous claims from non-frivolous ones early in the process,” he added.

In theory, of course, prosecutors are still open to professional discipline and criminal charges for truly egregious conduct like tampering with witnesses, altering physical evidence, and knowingly presenting false testimony. Except, professional and criminal sanctions are rare, according to Neily and Morrison.

“Who prosecutes the prosecutors? Other prosecutors,” Morrison said.

There has been only one instance of a prosecutor serving jail time for illegal conduct. In 2015 in Texas, former prosecutor Ken Anderson lost his law license and pled no contest to felony contempt of court for hiding evidence that cleared Michael Morton of guilt in his wife’s murder. The 10 days paled in comparison to the 25 years that Morton had spent in prison, but still, the case sent a message to other prosecutors, according to Morrison.

A ProPublica analysis identified two dozen cases in which ‘harmful misconduct’ by New York City prosecutors had later led to overturned convictions—though the errant prosecutors walked away with little harm to their legal careers. “Disciplinary committees, an arm of the appellate courts, almost never took serious action against prosecutors,” the report states. Just one of the prosecutors was disciplined by having his law license temporarily suspended. No one was disbarred.

Likewise, in Massachusetts, the state prosecutors who misled the court about the extent of a criminal lab employee’s misconduct have yet to be disciplined by the bar. The scandal involved a chemist, Sonja Farak, who stole drugs from the lab to feed her addiction, leading to thousands of wrongful convictions.

“Upon finding out about Farak’s wrongdoing, officials from the Massachusetts Attorney General’s Office covered it up, according to a judge’s report. Worse, when the evidence tampering and subsequent cover up came to light, our Massachusetts district attorneys refused to notify the thousands of people they helped wrongfully convict with this tainted evidence,” the state ACLU stated.

Rather than being a deterrent, absolute prosecutorial immunity creates a perverse incentive for prosecutors, according to Somil Trivedi, a staff attorney at the ACLU’s Trone Center for Justice and Equality. “Anecdotally, it certainly allows prosecutors to push the envelope to secure more convictions and longer sentences, whether through withholding discovery, intimidating witnesses, coercing confessions and pleas, and making inappropriate arguments at trial. All of this conduct is covered by immunity, and prosecutors know it,” Trivedi said.

“Prosecutorial immunity virtually eliminates accountability from the system,” Trivedi added. “So criminal defendants whose constitutional rights have been unquestionably violated cannot get justice or compensation, leading to disenchantment with and distrust of law enforcement and the criminal justice system as a whole.”

The irony is that the federal law upon which the Supreme Court based its doctrine was intended to do the opposite, Trivedi says. Known as Section 1983, the law, which was passed during the Reconstruction Era, declared that government officials, including police and prosecutors, could be sued for violating someone’s civil rights.

“Congress chose not to include any immunities or exceptions in that Act, and never wrote them in later. We have completely lost sight of the original intent of our civil rights laws, and immunity makes it infinitely worse,” Trivedi said.

Absolute prosecutorial misconduct plays a role in mass incarceration. Because the immunity shields prosecutors from the kind of lawsuits that would expose how extensive prosecutorial misconduct is, it ensures that we can’t really know for sure how many more people are wrongfully imprisoned thanks to overly zealous or unscrupulous prosecutors.

“We’ve basically created a situation where it is very, very difficult for a defendant to ever determine whether a prosecutor has engaged in misconduct because one of the most powerful tools for bringing that kind of a thing to light, which is a civil lawsuit, is something you can’t do because of absolute prosecutorial immunity. So you can’t sue the prosecutors which means you can’t get discovery, can’t dig into their files,” Neily said. “And so the question becomes, How much? We don’t know—that’s the point.”

But what evidence there is suggests that prosecutors are a big part of the problem. A 2010 Innocence Project report found that in about 30 of the first 255 cases where DNA exonerated a convict prosecutorial misconduct or error was a factor. “In 18 percent of the prosecutorial misconduct claims in wrongful conviction cases, courts overturned convictions or found harmful error—a rate nearly identical to harmful error findings in a larger study of misconduct allegations, including thousands of cases where defendants did not claim innocence,” the report stated.

The good news is that the path to reforming absolute immunity isn’t an impossible one. Neily identifies three approaches. One would be to convince the Supreme Court, where there has been an increase in self-identified originalists, to reverse itself. A second approach would be getting Congress to amend Section 1983, affirming its original intent of holding prosecutors accountable. Or, reformers could try to go state by state, passing local laws allowing prosecutors to be sued—though that wouldn’t address the issue at the federal level, Neily notes.

“At the very least prosecutors should have to play by the same rules that other law enforcement officials do and face the same liability when they commit serious misconduct and violate clearly established law. That seems to be the bare minimum to ensure fairness,” Morrison said.

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