



# Reform we can agree on: public opinion on prosecutorial liability

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## Abstract

**Objectives** The current study explores public opinion about civil liability for official misconduct by prosecutors by surveying a nationally representative sample of US adults ( $N=2000$ ).

**Method** Participants read a vignette describing a wrongful conviction and were randomly assigned to read a version where the prosecutor knew about exonerating DNA evidence before trial and did not disclose it or where the prosecutor was unaware of the exonerating evidence before trial. They then decided whether the prosecutor should be liable for money damages and explained their reasoning.

**Results** Results showed broad support for civil liability in both conditions. Support was consistent across demographic categories including race, age, and political affiliation. Responses also indicated support for liability for other government actors (e.g., police, prosecutors' offices).

**Conclusions** These results suggest there may be wide public support for policies and legislative initiatives that increase prosecutorial accountability through civil liability.

**Keywords** Prosecutorial misconduct · Absolute immunity · Wrongful convictions

If a person is hit by a driver who drove through a red light while texting, that person can sue the driver for their injuries. The notion that someone harmed by the negligence, recklessness, or intention of another should be able to seek legal redress for that harm is one of the oldest general principles in Common Law legal systems, including the USA (Dobbs et al., 2021). On the other hand, imagine someone incarcerated for a murder they did not commit after the prosecutor in charge of the case concealed evidence that proved that person's innocence. It is logical to expect that if a person can sue a

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careless driver for a simple collision, this person can certainly sue a prosecutor whose intentional withholding of evidence caused them to be wrongfully convicted of murder. In reality, they generally cannot. Under the current American legal doctrine of absolute immunity, a prosecutor cannot be sued for anything they do in their prosecutorial capacity, even when it is wrong, harmful, and intentional (Chemerinsky, 2014).

Absolute immunity was extended to prosecutors in the landmark U.S. Supreme Court case of *Imbler v. Pachtman* (1976). The Court favored broad legal protections for prosecutors, expressing concerns that, without the protection of absolute immunity “harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties” (p. 423). The Court seemed to acknowledge that some circumstances would still warrant liability, remarking that “immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty” (p. 427). However, the legacy and legal impact of *Imbler* is that any prosecutor acting in their prosecutorial capacity is broadly immune from civil suits of any kind (Chemerinsky, 2014).

Despite its embrace by courts, absolute immunity has clear drawbacks. Of the 3233 wrongful convictions the National Registry of Exonerations has identified to date, 981 of these cases include instances of prosecutorial misconduct.<sup>1</sup> Absolute immunity doctrine generally prevents holding these prosecutors civilly liable for this misconduct. Notably, the doctrine also removes the positive incentive effects of the tort system—which have been shown to improve safety and reduce injury in many other contexts (e.g., Schwartz, 1994)—from the prosecutorial context. Government misconduct, and wrongful convictions in particular, can erode public faith and trust in the criminal justice system (Gould & Leo, 2010; Ramsey & Frank, 2007). This lack of accountability may be particularly problematic given Americans declining trust in government over time (Pew Research Center, 2021).

In response to these concerns, numerous scholars (e.g., Johns, 2005; Murray et al., 2021; Niles, 2017) and activist groups (e.g., Sarma, 2016) have called for legislation that would curtail absolute prosecutorial immunity and allow for lawsuits for prosecutorial misconduct. Such a reform path might follow that seen for qualified immunity; a related doctrine that has recently been modified in several states in response to public concerns about police misconduct (*Colorado Senate Bill 20–217*, 2017; *N.M. Stat. § 41-4A-3*, 2021). A legislative remedy would likely require substantial public support to be enacted, yet to date, we know of no existing research that explores what the general public thinks about the doctrine of absolute immunity. Obtaining a credible, empirical evaluation of the public view of the doctrine of absolute immunity can help justice stakeholders, advocates, researchers, and policymakers better evaluate support for this policy. The goal of the current study is to explore whether the general public endorses civil liability for prosecutors and assess the universality of this support.

To date, existing empirical research on absolute immunity has mainly focused on the doctrine’s effects. Some research shows how immunity for prosecutors has

<sup>1</sup> Data retrieved on 9/1/2022 from the National Registry of Exonerations detailed case view (<https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>).

problematic impacts on victims of violence (Goodmark, 2019), how it facilitates unethical and illegal conduct by prosecutors (Tolman, 2020), and that it creates “information asymmetries” that have deleterious effects on criminal defendants (Anderson & Stair, 2018, p. 27).

Understanding public opinions about government accountability is valuable as past research has largely shown a robust relationship between public opinion and public policy, although the strength and boundary conditions of this relationship continue to be explored (e.g., Burstein, 2003; Shapiro, 2011). Studying public opinion on absolute immunity not only signals whether the public may support legislative initiatives aimed at increasing prosecutorial accountability but may also inform the behavior of individual prosecutors or their offices. As prosecutors in the USA are largely elected (Ellis, 2012), prosecutorial behavior is often impacted by public opinion (Nelson, 2014; Pritchard, 1986).

## Public opinion on wrongful conviction reforms

Although this is the first study to specifically explore public attitudes towards absolute immunity, some indications about likely views may be inferred based on public support for other wrongful conviction reforms. One concept similar to absolute immunity is qualified immunity. The doctrine of qualified immunity provides that a public official (e.g., police officer) remains immune from suit unless their conduct violated a law or right that was clearly established at the time of the incident at issue (Gross, 2017). Qualified immunity has been a topic of public discourse in recent years and is frequently raised in litigation involving excessive force or other civil rights violations by police officers. A 2020 survey from the Pew Research Center showed that 66% of Americans believed that “civilians need to have the power to sue police officers in order to hold them accountable for excessive use of force or misconduct” (p. 1). A 2020 Cato Institute survey found similar results with 63% of Americans favoring eliminating qualified immunity for police. National surveys also indicate the public is in favor of monetary compensation for those wrongfully convicted (Nowotny et al., 2022). Thus, there is initial evidence that the public both supports holding government actors in the criminal system more accountable for misconduct and monetarily compensating those harmed by the system.

Support for wrongful conviction reforms often differs among demographic groups. Political liberalism and state electoral composition relate to states’ likelihood of adopting wrongful conviction legislation in general (Hicks et al., 2021). Support for qualified immunity for police is lowest among Black and Hispanic Americans, compared to white Americans, and among Democrats, compared to Republicans (Cato Institute, 2020; Pew Research Center, 2020). Gender, age, and political party are associated with support for exoneree compensation (Nowotny et al., 2022). Particularly relevant to the current study, perceptions of prosecutors differ based on demographic characteristics like race and marital status (Zalman et al., 2012). Thus, one of the goals of the current study was to explore whether attitudes towards absolute immunity differed based on demographic characteristics.

## Current study

In the current study, we explored public opinion for the doctrine of absolute immunity for prosecutors. To conduct this study, we designed an experiment in which participants read one of two narrative scenarios of a wrongful conviction, that differed only in the prosecutor's knowledge and intent to withhold exculpatory evidence. Participants then answered whether and why the wrongfully convicted individual in the story should be entitled to money damages. We specifically explored not only whether the prosecutor's knowledge about the exculpatory evidence impacted support for civil liability, but also whether demographic characteristics affected this pattern.

## Open science statement

The data and code for this study are publicly accessible at <https://osf.io/2mdwu/>. The materials for this study are available through the supplemental material associated with this article. This study was not pre-registered.

## Methods

### Participants

A nationally representative sample of American adults ( $N=2000$ ) was recruited from YouGov to participate in the current study (see supplemental material). The sample size was determined a priori with the goal of obtaining a large enough sample to test for differences among demographic groups. No participants were excluded from data analysis. The survey was fielded in October 2019. All statistics and analyses presented in the current paper are weighted (unless otherwise specified) to represent the US adult population in age, education, gender, race, political party affiliation, region, and income. This study was approved by the Human Research Ethics committee of the University of Pennsylvania.

### Materials and procedure

At the start of the study, participants were randomly assigned to one of two conditions: *intentional* withholding of exculpatory evidence or *unintentional* withholding of exculpatory evidence. Participants in both conditions read a short vignette about a criminal case, patterned after the case of John Thompson (The National Registry of Exonerations, 2017). As a young man, Thompson was convicted of robbery and murder and sentenced to death. When the robbery was originally investigated, blood evidence from the robber was found on the victim's clothing. Trial prosecutors had the blood tested and results showed it did not match Thompson. Instead of stopping the

prosecution or turning over the information to defense attorneys—as is constitutionally required (*Brady v. Maryland*, 1963)—the prosecutors hid the evidence and went forward with the trial. Thompson’s case is particularly relevant in this context because, although Thomson was initially awarded \$14 million by a jury after suing the office for his wrongful prosecution, ultimately the U.S. Supreme Court overturned the award, ruling that the DA’s office could not be held liable for the acts of its prosecutors (*Connick v. Thompson*, 2011).

Our vignette described a man walking in his neighborhood when he was approached by a stranger who demanded his wallet and cell phone. The man resisted and struck the robber with his umbrella. The robber was eventually convicted and sentenced to 50 years in prison. Many years after the crime, an investigator researched the details of the case.

In the intentional condition, the investigator discovered that blood evidence on the umbrella was found before the original trial. The investigator also learned that the blood had been tested for DNA, and the tests conclusively showed the blood did not come from the convicted man. When the investigator asked the prosecutor about this evidence, the prosecutor admitted that he learned of the test results before the original trial but hid the evidence and moved forward with the trial anyways.

In the unintentional condition, the investigator also discovered that blood evidence on the umbrella was found before the original trial. Participants in this condition were told that no one had informed the prosecutor about this evidence before trial and the prosecutor did not know about the blood evidence during the original trial. In both conditions, the convicted man was exonerated after spending 15 years in prison.

After reading the vignette, all participants were asked a yes or no question about whether they believed the exonerated man should be able to sue the prosecutor for money damages. Following this, participants explained the reasons for their choice using a free-response box.

To understand the explanations participants gave for their decision, the content of the free responses was initially reviewed by two study authors and common themes were identified. Responses were reviewed separately based on condition and response (i.e., intentional/yes, intentional/no, unintentional/yes, unintentional/no). Two coders independently evaluated all responses and indicated whether each theme was present. The two coders were reliable (all  $\alpha$ s > 0.750). Disagreements were resolved via discussion between the two coders. More detailed information about the coding scheme, reliability information, and sample responses can be found in the supplemental material.

Demographic information including age, race, education, and political affiliation was collected by YouGov when participants initially entered the panel.

## Results

### Analysis plan

We first tested for the effect of the manipulation by comparing support for liability between the intentional and unintentional conditions using a chi-square test. The manipulation served several purposes. Under general tort principles, there is a stronger basis for liability of the prosecutor in the intentional condition than the

unintentional condition. The manipulation thus permits us to examine whether support for liability is largely driven by basic attitudes towards prosecutors or lawsuits or instead reflects more nuanced judgments about culpability consistent with tort principles. Ultimately, any relaxation of absolute immunity would expand the role of civil juries in assessing liability for alleged wrongful acts by prosecutors, and the manipulation also demonstrates whether the general public would be sensitive to a factor important for properly assessing tort liability. Finally, establishing conditions under which lawsuits are widely endorsed could also be valuable for appropriately scoping any proposed statutory remedy. We predicted that support for liability would be stronger in the intentional compared to the unintentional condition.

Next, we explored whether the level of support varied by participant demographic characteristics (Cato Institute, 2020; Nowotny et al., 2022). Our hypothesis regarding demographic differences was largely exploratory. Thus, we began by comparing support for monetary damages between the intentional and unintentional conditions at each level of each demographic characteristic measured. Finally, we conducted a “market segments” analysis by comparing support for liability in each three-wise combination of measured demographic characteristics. Examining narrower intersectional groups allowed us to test the degree to which majority support for tort reform might be universal.

### Support for monetary liability

Across conditions, 76.5% of participants supported monetary compensation for the wrongfully convicted individual in the vignette. Table 1 shows majority support occurred in both conditions. However, participants were 20 percentage points more likely to support a lawsuit in the intentional condition ( $\chi^2=110.30$ ,  $p<0.001$ ,  $\phi=0.24$ ). Apparently, in the specific context of prosecutorial behavior, members of the general public are attuned to factors that are relevant to liability according to general tort principles. Nevertheless, a large majority of respondents reject the current approach which would not permit the prosecutor to be sued in either condition.

Table 2 reports the percentage of participants in both conditions that supported a tort remedy broken down by each demographic group. Across all demographic subgroups considered, a clear majority endorsed a tort remedy following intentional withholding of exculpatory evidence, with 95% confidence intervals narrow enough to statistically reject non-majority approval. Support in the unintentional condition, although high on average, is lower, and we are unable to definitively reject the

**Table 1** Percent supporting tort remedy by survey condition

	Intentional	Unintentional
% supporting monetary damages	86.5%	66.6%
95% CI	(84.0%, 89.0%)	(63.3%, 69.8%)
<i>N</i>	1000	1000

hypothesis of majority disapproval for a few demographic groups (very conservative, ages 65+, graduate degree education).

These results indicate support for a tort remedy occurs across all demographic groups. To further examine whether tort remedy support truly was universally endorsed, we divided our sample into “market segments” defined by a three-wise combination of characteristics listed in Table 2. As an example, a market segment might consist of all females with very liberal ideology who have a 4-year degree, or all White Trump voters living in the South. The segments are not mutually exclusive in the sense that a respondent who is, for example, a White male aged 23 living in the South might be included in the calculations for the White/male/ages 18–25 segment and also in the Southern/White/male segment. We considered all possible combinations of the listed characteristics in Table 2, and, for each combination yielding at least 30 respondents on a given version of the survey, calculated the average approval rate for a tort remedy within that segment. This analysis allowed us to test the breadth of support for a tort remedy across a rich and disparate set of intersectional demographic groups.

Among 363 distinct market segments identified through this process, there was majority support for a tort remedy following intentional withholding of evidence in all 363 segments (Fig. 1). Segments with the lowest support for a remedy include Hispanic females ages 25–39 (51%) and southern female non-voters (61%). Members of four segments expressed complete support (100%). In over 90% of the market segments, more than 75% of the segment supported a remedy. Majority support for a tort remedy following intentional withholding of exculpatory evidence thus appears to be nearly universal. The figure also shows that support for a tort remedy following unintentional withholding of evidence, while high, is not as ubiquitous, with 34 of 360 segments (9.4%) failing to achieve majority approval. When we expand the analysis more finely to include four-characteristic market segments, we obtain similar results (see Fig. S1).

## Explanations for liability preferences

After responding to whether they support civil liability, participants answered a free response question explaining the reasons for their choice. These responses were evaluated for common themes by condition and response (i.e., intentional/yes, intentional/no, unintentional/yes, unintentional/no). Given that each theme was only mentioned by a minority of the overall sample, we present these results without data weights.

Table S2 displays the full results. In the intentional condition, the most common themes mentioned by those who endorsed civil liability were that the prosecutor’s actions were intentional (38%), and that the prosecutor withheld evidence (34%). In the unintentional condition, the most common themes mentioned by those who endorsed civil liability were the length of time the exoneree served in prison (32%), and the exoneree’s innocence (17%). Although innocence was one of the most common themes among the unintentional/yes group, this theme occurred more often in the intentional/yes than in the unintentional/yes group,  $\chi^2(1, N=1533)=4.34$ ,

**Table 2** Support for tort remedy across demographic subgroups

	Intentional	Unintentional
<b>Political ideology</b>		
Very liberal	94.0% (89.7%, 98.3%)	78.4% (70.3%, 86.6%)
Liberal	88.7% (83.6%, 93.8%)	73.2% (65.6%, 80.9%)
Moderate	89.1% (84.9%, 93.3%)	67.6% (61.9%, 73.3%)
Conservative	87.9% (82.7%, 93.2%)	64.7% (56.2%, 73.2%)
Very conservative	79.5% (71.3%, 87.7%)	50.5% <sup>†</sup> (42.3%, 58.7%)
Not sure	75.2% (65.6%, 84.8%)	69.6% (58.9%, 80.4%)
<b>Gender</b>		
Male	88.8% (85.4%, 92.1%)	66.1% (61.3%, 70.9%)
Female	84.4% (80.7%, 88.0%)	67.0% (62.7%, 71.3%)
<b>Education</b>		
High school or less	84.3% (80.1%, 88.6%)	68.9% (63.6%, 74.1%)
Some college, < 4 years	83.9% (79.3%, 88.6%)	67.9% (62.2%, 73.5%)
4-year college grad	92.8% (88.6%, 97.1%)	67.1% (60.2%, 74.1%)
Graduate degree	92.1% (86.2%, 98.1%)	52.5% <sup>†</sup> (42.5%, 62.5%)
<b>Race/ethnicity</b>		
White	89.3% (86.8%, 91.8%)	61.4% (57.5%, 65.4%)
Black	84.4% (75.3%, 93.4%)	84.4% (77.5%, 91.3%)
Hispanic	78.2% (69.8%, 86.5%)	71.5% (62.6%, 80.5%)
Asian	82.1% (68.0%, 96.3%)	76.5% (56.2%, 96.9%)
Other	85.7% (71.8%, 99.5%)	67.3% (52.1%, 82.5%)
<b>Age</b>		
18–24	82.3% (73.9%, 90.8%)	66.8% (56.2%, 77.3%)
25–39	81.5% (75.9%, 87.0%)	74.5% (69.0%, 80.1%)



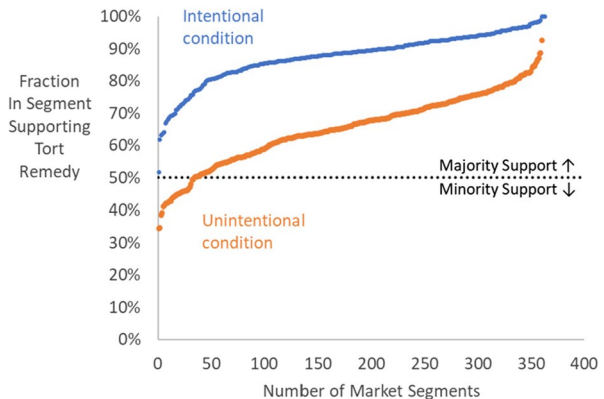
**Table 2** (continued)

	Intentional	Unintentional
40–64	89.4%	67.8%
	(85.9%, 92.9%)	(62.9%, 72.7%)
65 +	89.8%	52.8% <sup>†</sup>
	(85.3%, 94.4%)	(45.2%, 60.4%)
<b>Region</b>		
Northeast	84.7%	70.3%
	(78.9%, 90.4%)	(63.1%, 77.6%)
Midwest	91.7%	61.3%
	(87.8%, 95.6%)	(53.4%, 69.3%)
South	86.5%	69.0%
	(82.3%, 90.8%)	(64.0%, 74.0%)
West	82.9%	64.3%
	(77.1%, 88.7%)	(57.7%, 71.0%)
<b>2016 voting behavior</b>		
Clinton	92.5%	69.3%
	(89.5%, 95.5%)	(63.6%, 74.9%)
Trump	88.4%	58.8%
	(84.7%, 92.1%)	(53.0%, 64.5%)
Other	85.8%	74.9%
	(78.1%, 93.5%)	(64.7%, 85.2%)
Did not vote	77.8%	70.8%
	(71.7%, 83.8%)	(65.0%, 76.5%)

<sup>†</sup> Indicates groups for which 95% confidence intervals indicate support for civil liability includes values of less than 50%

The table displays the percentage of participants supporting civil liability in each condition and each demographic group. The percentages in parentheses list the corresponding 95% confidence intervals for each point estimate.

**Fig. 1** Distribution of support for a tort remedy across market segments



$p=0.037$ ,  $\varphi=0.05$ . This is notable given that the exoneree's actions in both conditions were identical; nonetheless, fewer people spontaneously mention his innocence when the prosecutors' withholding of evidence was unintentional.

The responses of those who did not favor civil liability are of particular interest in further understanding public opinions about absolute immunity. Of those who did not endorse civil liability, 7% of those in the intentional condition and 13% in the unintentional condition mentioned that another government agency should be held liable for the wrongful conviction. For example, participants wrote "he should sue the city or county government, not the prosecutor" and "I don't believe the prosecutor should be held personally liable, but he should sue the prosecutors office."

## Discussion

Results from the current study show broad public support for the notion that prosecutors should be able to be held civilly liable when they withhold exculpatory evidence. Notably, support for civil liability was consistent across nearly all demographic groups. Changing liability rules for prosecutors is seemingly a rare point of agreement in an increasingly polarized political climate (Dimock & Wike, 2020).

One potential solution that would change prosecutorial accountability to be more in line with public opinion, as seen through the present results, would be a statutory change that creates a tort remedy for those who have been harmed by prosecutors withholding exonerating evidence (Murray et al., 2021). This could not only offer redress to those impacted by prosecutorial misconduct but also create incentives for prosecutor's offices to develop or update procedures to proactively reduce misconduct.

## Limitations

The current study used a large, nationally representative sample maximizing the generalizability of the results. However, the data was collected in late 2019 and public opinion towards government accountability, particularly with discussions surrounding police and qualified immunity, may have changed over time. Public opinion in the current study was measured through a vignette of a wrongful conviction case. Public opinion measured through general, aggregate questions tends to produce more conservative opinions than when measured through specific questions, or case studies (Pickett, 2019). Thus, the current results may underestimate support for absolute immunity.

Empirical research regarding public opinion on absolute immunity is scarce and future research is warranted on both views on the doctrine and potential impacts of reforms. We studied opinions on prosecutorial immunity framed through harm to defendants because of *Brady* violations. We focused on *Brady* violations both because they commonly occur in the field (Quattrone Center for the Fair Administration of Justice, 2021) and because they are widely recognized as a clear

and egregious example of misconduct, including by prosecutors (National District Attorneys Association, 2009). As this was the first study assessing public opinions on prosecutorial liability, we chose a case with an unambiguous and obvious form of misconduct. Given the lack of research in this area, future research should consider exploring other aspects of prosecutorial immunity including different types of misconduct, concerns the majority expressed in *Imbler* expressed about the negative effects of lawsuits on prosecutorial behavior, and opinions regarding potential alternatives to absolute immunity.

## Conclusion

Despite widespread political polarization in the USA (Dimock & Wike, 2020), the current results highlight an unrecognized opportunity for consensus to reform the doctrine of absolute immunity. Absolute immunity causes harm to defendants, as evidenced by the fact that prosecutorial misconduct factored into 30% of the exonerations to date recorded by the National Registry of Exonerations. Prosecutorial misconduct and absolute immunity can reduce public trust in government, particularly concerning given that overall trust in government has been declining over the past 20 years (Pew Research Center, 2021). Holding prosecutors accountable for misconduct they commit as a part of their duties is widely endorsed by the public and may be one way to address this trend.

**Supplementary information** The online version contains supplementary material available at <https://doi.org/10.1007/s11292-022-09533-x>.

**Author contribution** Conceptualization: PH & RM.

Ideas; formulation or evolution of overarching research goals and aims.

Methodology: PH, RM & RG.

Development or design of methodology; creation of models.

Formal Analysis: PH & RG.

Application of statistical, mathematical, computational, or other formal techniques to analyze or synthesize study data.

Investigation: PH & RM.

Conducting a research and investigation process, specifically performing the experiments, or data/evidence collection.

Data Curation: PH, RM & RG.

Management activities to annotate (produce metadata), scrub data and maintain research data (including software code, where it is necessary for interpreting the data itself) for initial use and later reuse.

Writing – Original Draft: PH, RM & RG.

Preparation, creation and/or presentation of the published work, specifically writing the initial draft (including substantive translation).

Writing – Review & Editing: PH, RM & RG.

Preparation, creation and/or presentation of the published work by those from the original research group, specifically critical review, commentary or revision—including pre- or postpublication stages.

Visualization: PH, RM & RG.

Preparation, creation and/or presentation of the published work, specifically visualization/ data presentation.

Project Administration: PH, RM & RG.

Management and coordination responsibility for the research activity planning and execution.

## Declarations

**Conflict of interest** The authors declare no competing interests.

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