

A RULE 11 FOR PROSECUTORS

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This Article suggests a novel approach to allow victims of frivolous prosecutions to hold prosecutors accountable. Unique among American lawyers, prosecutors enjoy absolute immunity from civil suits alleging professional misconduct. In cases of frivolous prosecutions, where charges are dismissed by the judge or the defendants are acquitted, the former defendants are prevented from seeking damages. This is so despite former defendants often suffering significant consequences—from legal fees to loss of employment. Victims of frivolous prosecutions should be afforded a mechanism to seek redress against prosecutors who bring or maintain meritless actions.

By enacting a rule of criminal procedure that mirrors Federal Rule of Civil Procedure 11, wrongfully accused defendants can obtain redress. At the same time, the reasoning behind prosecutorial immunity—that the fear of civil suits could have a chilling effect on prosecutors’ exercise of discretion—is undisturbed. Under this proposed rule, prosecutors could be held accountable for failing to conduct legal research or review available evidence to form a reasonable belief that the defendant’s conduct violates existing law. In cases that lack support in fact or law, the trial judge is empowered to sanction prosecutors’ frivolous conduct. Such sanctions are meant to deter future misconduct and compensate wrongfully accused defendants.

INTRODUCTION

A police dispatcher lost his job and incurred over \$10,000 in attorney’s fees after a prosecutor indicted him on twenty-seven felony counts for taking online police training courses.¹ A young activist was arrested and prosecuted for insulting his local police department on his parody Facebook page.² A first-year college student faced jail time based on evidence obtained in a patently illegal search.³ All of these prosecutions were frivolous. And each of the defendants suffered damages.⁴ But because of the unique

1. See *infra* Section I.A.

2. See *infra* Section I.B.

3. See *infra* Section I.C.

4. See *infra* Part I.

immunity the American justice system affords to prosecutors, there is no legal mechanism for these defendants to seek redress.⁵ This Article proposes a new rule of criminal procedure, modeled on Federal Rule of Civil Procedure 11.⁶ It would empower judges to hold prosecutors accountable for bringing or maintaining cases that do not have adequate support in fact or law.

State and federal prosecutors hold an important and powerful position in the criminal justice system.⁷ While law enforcement officers have initial discretion in whom to arrest and what charges to propose, it is ultimately prosecutors who hold the power and discretion to determine what charges, if any, to bring before the court.⁸ It has been argued that law enforcement officers—many of whom lack a college degree, let alone a law degree—need to be better trained in their understanding and application of statutory law and constitutional safeguards in order to better protect citizens from unlawful arrest.⁹ But prosecutors do have law degrees and are licensed to practice law in their respective jurisdictions. They serve as the initial gatekeepers in determining what police actions proceed to arraignment, preliminary hearing, or indictment, and what charges should be quickly dismissed.¹⁰ And while judges or magistrates (or grand juries) make probable cause determinations early in the process, the probable cause hurdle is low, and prosecutors often control the information presented.¹¹ Furthermore, in misdemeanor cases—some of which carry the threat of significant jail time and fines—no such determinations of probable cause are made by a judge until trial.¹²

5. *See Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (though the court ultimately holds that qualified immunity in all cases violates public policy, it concedes that absolute immunity “does leave the genuinely wronged defendant without civil redress”).

6. FED. R. CIV. P. 11.

7. *See, e.g.*, NAT’L ACAD. PRESS, WHAT’S CHANGING IN PROSECUTION? 7 (Philip Heymann & Carol Petrie eds., 2001).

8. *Id.* at 8; *see* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION r. 3-4.2(a) (AM. BAR ASS’N 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

9. *See, e.g.*, Yuri R. Linetsky, *What the Police Don’t Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. REV. 1, 3 (2018).

10. *See* Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 263 (2001).

11. *See id.*; *see also infra* Section II.D.

12. *See, e.g.*, *Lem Woon v. Oregon*, 229 U.S. 586, 590 (1913) (holding there is no due process violation when state courts do not provide for preliminary hearings).

Consequently, prosecutors have a duty to pursue only those criminal charges that are supported by sufficient verifiable facts and a reasonable application of criminal statutes as those laws have been interpreted by courts to protect constitutional safeguards.¹³

Much of the scholarship regarding prosecutorial misconduct has focused on prosecutors' abuses of power during the pretrial and trial process, misconduct that leads to convictions of factually innocent defendants: prosecutors who fail to disclose potentially exculpatory evidence,¹⁴ actively suppress evidence of innocence,¹⁵ or make improper arguments that lead jurors to convict based on emotion rather than fact.¹⁶ Stories of exonerations from convictions facilitated in large part by prosecutorial misconduct abound.¹⁷ But frivolous felony and misdemeanor prosecutions that often lead to acquittals are rarely considered, even though they exert great costs on defendants and on the criminal justice system as a whole.¹⁸

Under current law, defendants who are subjected to frivolous prosecutions have practically no recourse against prosecutors who initiate or maintain meritless proceedings.¹⁹ While the criminal case may end in a dismissal or acquittal, the defendant often still suffers significant collateral consequences: legal fees, loss of liberty, loss of employment, and loss of reputation (especially in the internet age).²⁰ And while many legal scholars have suggested an end to prosecutors'

13. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 8, at r. 3-4.3(a).

14. See Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, and the System that Protects Them*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.

15. *Id.*; see, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the prosecutor's suppression of exculpatory evidence violates due process).

16. See George A. Weiss, *Prosecutorial Accountability After Connick v. Thompson*, 60 DRAKE L. REV. 199, 213 (2011).

17. See, e.g., Jordan Smith, *21,000 Years Lost and Counting: Prosecutors Are Working to Clear Wrongful Convictions, but Their Record Is Mixed*, INTERCEPT (Apr. 24, 2019, 1:43 PM), <https://theintercept.com/2019/04/24/wrongful-convictions-prosecutors-innocence-organizations/>; see also Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 19 (2009) ("[T]he number of uncovered cases of misconduct seems to be growing, and the misconduct itself is increasingly brazen.").

18. See Ira P. Robbins, *The Price Is Wrong: Reimbursement of Expenses for Acquitted Criminal Defendants*, 2014 MICH. ST. L. REV. 1251, 1281-82 (discussing the costs to acquitted defendants and the variability in state statutes providing for reimbursement of costs).

19. See Balko, *supra* note 14.

20. See Robbins, *supra* note 18, at 1275, 1281-82.

almost absolute immunity from civil misconduct suits,²¹ courts and legislatures have been reluctant to expand civil liability for prosecutorial misconduct.²²

This Article proposes a novel approach to holding prosecutors accountable for frivolous conduct, especially in less serious cases—enacting a rule of criminal procedure similar to the Federal Rule of Civil Procedure 11.²³ Like its civil counterpart, a “criminal Rule 11” would allow courts to sanction prosecutorial misconduct, both in bringing and maintaining frivolous prosecutions and for frivolous conduct during the pendency of the case. As in civil cases, lawyers who run afoul of criminal Rule 11 (or the office that employs them) may be required to reimburse defendants for their legal fees, associated expenses, and other related damages.²⁴

This Article will proceed in four parts: first, I will provide examples of the type of prosecutorial misconduct a proposed criminal Rule 11 would seek to address; next, I will discuss the current state of the law with regard to prosecutorial accountability; third, I will discuss the scope of civil Rule 11 in state and federal courts; and finally, I will propose a workable version of a Rule 11 for criminal cases.

I. FROM POLICE MISTAKES TO FRIVOLOUS PROSECUTIONS

In most cases, a criminal prosecution begins with an arrest by, or summons from, a law enforcement officer.²⁵ While police officers enjoy wide discretion in the performance of their duties, they are not, with very few exceptions, lawyers.²⁶ Moreover, many officers

21. See, e.g., Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 534 (2011); Mark C. Niles, *A New Balance of Evils: Prosecutorial Misconduct, Iqbal, and the End of Absolute Immunity*, 13 STAN. J. C.R. & C.L. 137, 137 (2017).

22. See *Imbler v. Pachtman*, 424 U.S. 409, 427–28 (1976) (holding that under federal civil rights law, prosecutors enjoy absolute immunity from any civil lawsuit over any action undertaken as a prosecutor); see also Balko, *supra* note 14 (stating that “[t]he court later extended this personal immunity to cover supervisory prosecutors who fail to properly train their subordinates”).

23. See *infra* Part IV.

24. See FED. R. CIV. P. 11 (discussing the potential sanctions for a violation of the rule).

25. See, e.g., *Anatomy of a Criminal Case*, COUNTY SANTA CLARA OFF. DISTRICT ATTY, <https://www.sccgov.org/sites/da/prosecution/anatomyofcriminalcase/Pages/default.aspx> (last updated Aug. 16, 2018, 12:08 PM).

26. The author is both a licensed attorney and a certified, active police officer. While the author is acquainted with a handful of police officers who hold law

receive inadequate legal training before beginning active duty.²⁷ Still, frontline police officers often make the initial determination as to what crime a suspect is charged.²⁸ Thus, after the initial arrest and filing of charges, the American criminal justice system rightly shifts the prosecution of the case to trained lawyers.²⁹ And while these attorneys go by different names—U.S. attorney, district attorney, prosecuting attorney, or state attorney—all represent the governmental interest in the criminal justice system.³⁰ Unlike criminal defense attorneys, a prosecutor's duty is not to the “client,” rather it is only to ensure justice.³¹

Prosecutors must act as a check against mistakes made by police officers by ensuring the cases they bring have merit. In their attempt to “do justice,” prosecuting attorneys, like all other attorneys, sometimes fall short of their mission—whether intentionally, recklessly, or negligently. As described in the following examples, when prosecutors pursue meritless cases or fail to immediately terminate frivolous criminal proceedings, the cost to defendants is often high and without recourse.

A. *The Prosecution of John McClane for Non-Criminal Conduct*

Growing up, John McClane³² always wanted to pursue a career in law enforcement. He worked as a cellular phone store manager

degrees, they make up a miniscule percentage of the nation's estimated 800,000 police officers. *See Occupational Outlook Handbook, Police and Detectives*, BUREAU LAB. STAT., <https://www.bls.gov/ooh/protective-service/police-and-detectives.htm#tab-1> (last visited Mar. 4, 2020).

27. *See* Linetsky, *supra* note 9, at 11–12.

28. *See generally* Alexandra Natapoff, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html> (discussing the role that police can play in the process). In some instances where a very serious crime, like homicide or rape, is alleged, frontline officers or investigators may consult with a prosecutor before filing charges. *See, e.g., Anatomy of a Criminal Case*, *supra* note 25.

29. *See, e.g., Anatomy of a Criminal Case*, *supra* note 25.

30. *See, e.g., Prosecutor*, VOCABULARY.COM, <https://www.vocabulary.com/dictionary/prosecutor> (last visited Mar. 4, 2020) (defining prosecutor and listing various titles of prosecutors throughout the country).

31. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 8, at r. 3-1.2(b) (stating that “the primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict”).

32. “John McClane” is a pseudonym chosen by the individual described in this section, based on the name of the protagonist in the *Die Hard* series of movies. *See DIE HARD* (20th Century Fox 1988). Because McClane is currently a police officer and all records pertaining to his prosecution have been sealed, he agreed to discuss

and part-time realtor until finding work as a security guard at a hospital.³³ At the same time, beginning in September 2012, he also started work as a part-time police dispatcher for a community college police department in Cleveland, Ohio.³⁴

As a police dispatcher, McClane was granted access to the online Ohio Law Enforcement Gateway (OHLEG).³⁵ The Ohio Attorney General’s website describes OHLEG as “a state-of-the-art electronic information network that allows Ohio law enforcement agencies to share criminal justice data efficiently and securely,” providing “law enforcement with dozens of investigative tools and training applications to help solve and prevent crime, including data from a wide range of topics.”³⁶ Within OHLEG, there are sixteen “applications,” access to law-enforcement-related forms and publications, a directory of certified instructors, and a copy of Ohio Peace Officer Training Commission curricula.³⁷ The “applications” include a search engine through which officers can search for records of individuals and vehicles, a report management system that allows police departments to electronically complete and manage reports, school safety plans for every Ohio school district, and—most pertinent to this Article—the Ohio Attorney General’s Electronic Ohio Peace Officer Training Academy (eOPOTA).³⁸

eOPOTA provides “on-line training opportunities for career development and compliance with annual Continuing Professional

this matter and provide relevant documents to the author on the condition that he would be referred to pseudonymously.

33. Resume of John McClane (on file with author).

34. *See id.*; *see also* Memorandum of Internal Affairs Investigation #15-001 (Mar. 16, 2015) (on file with author) (providing background on the police department’s internal affairs investigation).

35. Request for Access to OHLEG (Oct. 26, 2012) (on file with author); *see also* *OHLEG Login*, OHIO L. ENFORCEMENT AGENCY, <https://www.ohleg.org> (last visited Mar. 20, 2020) (describing OHLEG and obtaining access).

36. *Ohio Law Enforcement Gateway*, OHIO ATT’Y GEN., <https://www.ohioattorneygeneral.gov/Law-Enforcement/Ohio-Law-Enforcement-Gateway> (last visited Mar. 4, 2020).

37. *See* sources cited *supra* note 35; *see also* *Course Catalog*, OHIO ATT’Y GEN., <https://www.ohioattorneygeneral.gov/Law-Enforcement/Ohio-Peace-Officer-Training-Academy/Course-Catalog> (last visited Mar. 20, 2020) (providing a list of various trainings offered). As a certified Ohio police officer, the author has access to the password-protected site.

38. *See* sources cited *supra* note 35; *see also* *eOPOTA Courses*, OHIO ATT’Y GEN., <https://www.ohioattorneygeneral.gov/Law-Enforcement/Ohio-Peace-Officer-Training-Academy/EOPOTA-Courses> (last visited Mar. 20, 2020) (outlining the eOPOTA courses offered).

Training (CPT) and Statutorily Mandated Training requirements.”³⁹ It contains over 100 video training modules on subjects relevant to the law enforcement community, from legal issues to dealing with stress.⁴⁰ eOPOTA is also used by officers to complete state-required annual training and learn about topics a department may not cover through in-house training.⁴¹

At the end of 2013, John McClane enrolled in a part-time Ohio Basic Police Academy⁴² and in classes at a local community college, working toward a degree in criminal justice.⁴³ In 2014, he attended police academy classes during the day and continued working as a part-time dispatcher in the evenings and on weekends.⁴⁴ As a dispatcher for a small community college police department, McClane found that he had a lot of down-time when there were few calls for service.⁴⁵ Instead of reading or watching television, McClane decided to use the eOPOTA system to watch training videos between answering calls from citizens and department officers.⁴⁶ Knowing he would soon be applying for police jobs, McClane thought that the more training he had, the better he would perform, not only at his current job, but also as a future police officer.⁴⁷

Between the end of 2013 and the beginning of 2015, McClane took seventeen online eOPOTA courses.⁴⁸ The course topics included: “Animal Encounters,” “Understanding Stress,” “Automobile Searches,” “Miranda Rights,” “Policing Diverse Communities,” “Ethics and Professionalism,” “Cultural Diversity,” and “Credit Card Fraud.”⁴⁹ McClane received electronic completion certificates⁵⁰ and

39. *eOPOTA Courses*, *supra* note 38.

40. *Id.*

41. *See id.*

42. The author of this Article was one of John McClane’s police academy instructors.

43. *See* Telephone Interview with John McClane, Ohio Police Officer (July 1, 2019); *see also* Resume of John McClane, *supra* note 33.

44. *See* sources cited *supra* note 43.

45. *See* Telephone Interview with John McClane, *supra* note 43.

46. *See id.*

47. *See id.*

48. Memorandum of Internal Affairs Investigation #15-001, *supra* note 34, at 2; *see* Ohio Attorney General OHLEG Audit Report (undated) (on file with author).

49. Memorandum of Internal Affairs Investigation #15-001, *supra* note 34, at 2–3.

50. *See* Ohio Attorney General’s Online Training Certificates (on file with author).

dutifully listed each completed course on his resume.⁵¹

After completing the police academy and passing the State certification examination, John McClane began applying for police officer jobs.⁵² With many of his applications, McClane—without a second thought—included his resume and copies of certificates for all of the law-enforcement-related courses he had completed.⁵³ In February 2015, a background investigator from one of the police departments to which McClane had applied came to the community college to talk to McClane’s supervisor as part of the routine background investigation.⁵⁴ It was at that meeting that McClane’s community college supervisors learned that McClane had taken eOPOTA courses while working as a dispatcher.⁵⁵ Believing that taking these free online law enforcement courses without permission and “for personal reasons beyond the scope of his official duties with Campus Police and Security Services” violated the college’s “established . . . Training Committee protocol,” the department’s Patrol Division Lieutenant opened an internal affairs investigation.⁵⁶

Notwithstanding whether receiving free law enforcement training without permission is or should be a violation of policy, the investigating Lieutenant also believed that John McClane’s actions could have been a felony violation of section 2913.04(B) of the Ohio Revised Code.⁵⁷ He wrote that “[t]he facts and circumstances surrounding this investigation will be presented to the Cuyahoga County Prosecutor’s Office for review and probable cause determination.”⁵⁸

The statute provides, in relevant part:

No person . . . shall knowingly gain access to . . . any . . . computer system . . . without the consent of, or beyond the scope of the express or implied consent of, the owner of the . . . computer system, . . . or other person authorized to give consent.⁵⁹

51. See Resume of John McClane, *supra* note 33.

52. Telephone Interview with John McClane, *supra* note 43.

53. *Id.*

54. Memorandum of Internal Affairs Investigation #15-001, *supra* note 34, at 1.

55. *Id.* at 2–3.

56. *Id.* at 1.

57. *Id.* at 5.

58. *Id.* at 6.

59. OHIO REV. CODE ANN. § 2913.04(B) (2020).

A violation of this provision is classified as a fifth-degree felony,⁶⁰ punishable by six to twelve months in prison⁶¹ and a fine of up to \$2500.⁶² In addition, anyone convicted of a felony⁶³—or even indicted for a felony⁶⁴—cannot possess a firearm or ammunition,⁶⁵ and therefore cannot work as a police officer.

After completing the internal affairs investigation, the Patrol Division Lieutenant decided that McClane “was determined to be in violation of established department policy, and directives, as well as OHLEG protocols.”⁶⁶ Consequently, John McClane was “effectively terminated” by the campus police department on April 23, 2015.⁶⁷

Shortly before leaving the community college police department, John McClane began his career as a police officer, accepting a job at a small department in Northeast Ohio.⁶⁸ McClane completed a period of field training and ultimately worked patrolling his jurisdiction as his sole source of income.⁶⁹ He proposed to his then-girlfriend and began planning the couple’s wedding.⁷⁰ But his new career came to a screeching halt only six months later.

Firing John McClane was not enough for the community college and its Lieutenant. The Lieutenant followed through with his promise to present “the facts and circumstances surrounding this investigation . . . to the Cuyahoga County Prosecutor’s Office for review and probable cause determination.”⁷¹ While the discussions between the Lieutenant and the Prosecutor’s Office are unknown,⁷²

60. *Id.* § 2913.04(G)(2).

61. *Id.* § 2929.14(A)(5).

62. *Id.* § 2929.18(A)(3)(e).

63. 18 U.S.C. § 922(g)(1) (2018).

64. 18 U.S.C. § 922(n) provides that any person under felony indictment cannot “receive any firearm or ammunition.” This effectively prevents a person under felony indictment from operating as an armed police officer.

65. *Id.* §§ 922(g), 922(n).

66. Email from Patrol Div. Lieutenant to Ohio Bureau of Criminal Investigation OHLEG Quality Assurance Specialist (July 21, 2015) (on file with the author).

67. *Id.*

68. Telephone Interview with John McClane, *supra* note 43.

69. *Id.*

70. *Id.*

71. Memorandum of Internal Affairs Investigation #15-001, *supra* note 34, at 6.

72. John McClane believes that personal animosity between the Lieutenant and McClane also played a role in the prosecution. Telephone Interview with John McClane, *supra* note 43. While still employed at the Community College, McClane, who was one of the few non-African American employees in the police department,

it is apparent that an assistant prosecuting attorney was convinced that he had enough information to bring criminal charges.⁷³

In October 2015, John McClane was indicted by a grand jury on two felony counts of “unauthorized use of property” in violation of section 2913.04(B) of the Ohio Revised Code.⁷⁴ McClane was immediately suspended, without pay, by the police department for which he was working.⁷⁵ Unable to work in law enforcement, McClane took odd jobs and began driving for a ridesharing service.⁷⁶ John McClane had no choice but to hire a criminal defense attorney—eventually racking up over \$10,000 in legal fees.⁷⁷ His attorney immediately contacted the assistant prosecutor to discuss the case.⁷⁸

John McClane’s attorney questioned how criminal charges could be based solely on the allegation that McClane had used the eOPOTA system to watch training videos.⁷⁹ McClane’s attorney, other police officers, and other lawyers were dumbfounded that an authorized OHLEG user could be criminally prohibited from using its training feature.⁸⁰ In every reported Ohio case where a police officer was criminally charged with misuse of OHLEG or LEADS,⁸¹ the officer was accused of accessing law enforcement sensitive information, such as license plate or driver’s license records, for a non-official purpose.⁸² Examples include accessing vehicle

filed discrimination charges against the Community College with the Equal Employment Opportunity Commission. *Id.*

73. *State v. G.D.*, Nos. 104317, 104328, 2016 WL 7298513, at *1 (Ohio Ct. App. Dec. 15, 2016).

74. *Id.*; see OHIO REV. CODE ANN. § 2913.04(B) (2020).

75. Telephone Interview with John McClane, *supra* note 43.

76. *Id.*

77. *Id.*

78. Telephone Interview with John McClane, *supra* note 43.

79. *Id.*

80. *Id.*

81. The Ohio Law Enforcement Automated Data System (LEADS) is used by police officers and police dispatchers to access, among other law-enforcement sensitive information, vehicle registration records, driver’s license information, and arrest warrant information. See OHIO ADMIN. CODE 4501:2-10-01 to -14 (2019).

82. See, e.g., *State v. Hayes*, No. 17CA1056, 2019 WL 347181, at *1–7 (Ohio Ct. App. Jan. 17, 2019) (defendant ran numerous law enforcement database searches, including searches for driving information, criminal history, and social security information, on individuals with whom defendant had no law enforcement interaction); *State v. Moning*, No. C-010315, 2002 WL 31127751, at *1 (Ohio Ct. App. Sept. 27, 2002) (defendant used law enforcement database to look up criminal history of an acquaintance with whom he did not get along); *State v. Violi*, Nos. 94-T-5053, 94-T-5059, 1995 WL 815520, at *1 (Ohio Ct. App. Dec. 29, 1995) (defendant used law

registration records on behalf of corrupt public officials⁸³ and accessing driver's license records to find out where a driver found to be attractive by a police officer lives.⁸⁴ Surely, thought McClane's lawyer, McClane's alleged actions could not be considered a misuse of the OHLEG system by its administrators at the Ohio Attorney General's Office.⁸⁵

John McClane's attorney asked the prosecutor if the Ohio Peace Officer Training Commission (OPOTC), a division of the Ohio Attorney General's Office that maintains the eOPOTA training modules on OHLEG,⁸⁶ agreed that McClane's alleged conduct violated its policies or the criminal code.⁸⁷ The question was met not with an answer, but with a plea bargain offer that would require McClane to plead guilty to career-ending felonies.⁸⁸ When McClane refused to accept the plea offer, the prosecutor responded with a new twenty-four-count indictment, handed down on December 15, 2015.⁸⁹ Each count represented an instance when McClane allegedly watched an eOPOTA training video.⁹⁰

Frustrated with the prosecutor's office's lack of response to McClane's foundational question—whether the state agency that maintains and operates OHLEG and eOPOTA believed that McClane's alleged conduct was criminal or even violated policy—McClane's attorney issued a subpoena to OPOTC requesting “copies

enforcement database to run checks on individuals for his private investigator business); *State v. Haberek*, 546 N.E.2d 1361, 1363–64 (Ohio Ct. App. 1988) (defendant used law enforcement database to check traffic records of his private insurance clients).

83. See, e.g., Ryllie Danylko, *Moreland Hills Executive Lieutenant to Become Village's New Police Chief*, CLEVELAND.COM (Jan. 12, 2019), https://www.cleveland.com/chagrin-valley/2014/09/moreland_hills_executive_lieut.html; Peggy Gallek, *I-Team: Police Chief Indicted*, FOX 8 (Feb. 21, 2013, 5:25 PM), <https://fox8.com/2013/02/21/i-team-police-chief-indicted/>; Ray Jablonski, *Moreland Hills Extends Interim Police Chief Dale Canter's Contract While Police Chief Awaits Trial*, CLEVELAND.COM (Jan. 12, 2019), https://www.cleveland.com/chagrin-valley/2013/09/moreland_hills_extends_interim_1.html.

84. See *State v. Garn*, 91 N.E.3d 109, 117, 120–21 (Ohio Ct. App. 2017).

85. See Telephone Interview with John McClane, *supra* note 43.

86. See *Course Catalog*, OHIO ATTY GEN., <https://www.ohioattorneygeneral.gov/Law-Enforcement/Ohio-Peace-Officer-Training-Academy/Course-Catalog> (last visited Mar. 20, 2020).

87. Telephone Interview with John McClane, *supra* note 43.

88. *Id.*

89. See *State v. G.D.*, Nos. 104317, 104328, 2016 WL 7298513, at *1 (Ohio Ct. App. Dec. 15, 2016).

90. See *id.*

of any rules or restrictions on access to eOPOTA classes.”⁹¹ On February 1, 2016, four months after the original indictment and two months after the twenty-four-count indictment, OPOTC’s Director of Administration responded:

eOPOTA is a resource housed on the Ohio Law Enforcement Gateway (OHLEG) that is available to all criminal justice agency personnel that have valid OHLEG credentials. The Peace Officer Training Commission imposes no additional restrictions on eOPOTA use other than that the user must have a valid OHLEG account and follow the rules and regulations placed on all OHLEG users.⁹²

This letter confirmed what everyone consulted on the matter (other than the Cuyahoga County Prosecutor’s Office) believed was obvious—because John McClane, as a dispatcher for the Community College Police Department, had “valid OHLEG credentials,” all eOPOTA training classes were freely available to him.⁹³ Therefore, McClane could not have violated OHLEG rules or the law by watching training videos. In response to the OPOTC’s conclusion that McClane could not have violated the law by watching training videos, the prosecutor filed a motion to dismiss on February 1, 2016.⁹⁴ But this motion was far from a *mea culpa*.

Not only did the prosecutor move for dismissal *without* prejudice, he also acknowledged in his motion that he first spoke with a representative of the Ohio Attorney General’s office on January 29, 2016—many months after he presented the charges against John McClane to a grand jury.⁹⁵ The prosecutor wrote that in that phone call with Justin Hykes of the Attorney General’s Office, he “learned that Mr. Hykes communicated to [John McClane’s attorney] Mr. Emoff that all OHLEG users have unlimited and unrestricted access to the eOPOTA application.”⁹⁶ He continued that the “Grand Jury has brought an indictment against [John McClane] on the premise

91. Letter from Justin Hykes, Dir. of Admin. of Ohio Peace Officer Training Comm’n, to Jerome Emoff (Feb. 1, 2016) (on file with author).

92. *Id.*

93. *See id.*

94. State’s Motion to Dismiss, State v. [John McClane], No. CR-15-601926 (sealed) (on file with author).

95. *Id.*

96. *Id.*

that there is not unfettered access to the eOPOTA application. Clearly this position of the Ohio Peace Officer Training Commission, whether correct or incorrect, undermines the State's criminal case against [McClane]."⁹⁷ This so-called "premise"—the linchpin without which the State's case could not stand—was discovered by the prosecutor not before he presented charges against John McClane to a grand jury, but only in response to a subpoena issued by defense counsel.

Having no basis in fact or law to maintain the prosecution, the prosecutor still had to be figuratively dragged to dismiss the charges, concluding his motion: "[t]he State of Ohio believes [McClane] did commit violations of the Ohio Revised Code; however, in these matters, all law enforcement agencies involved should be united with the same interpretation of law."⁹⁸ The prosecutor did not explain his obviously erroneous belief. The trial court granted the State's motion to dismiss on February 3, 2016.⁹⁹

With the charges against him dismissed, McClane quickly filed an application to seal the record of the criminal charges.¹⁰⁰ In granting the petition and sealing the case, the trial court vacated its without prejudice dismissal and entered a new dismissal with prejudice.¹⁰¹ The same prosecutor's office that brought the frivolous charges appealed the sealing order.¹⁰²

The court of appeals left no doubt that it found the prosecution's conduct in bringing criminal charges against John McClane appalling:

Here, the Director of Admission for the Ohio Peace Officer Training Commission, on behalf of the Ohio Attorney General, prepared a letter stating that the conduct for which [John McClane] had been indicted was not criminal. That letter was obtained after defense counsel issued a subpoena to the Ohio Peace Officer Training Commission in connection with the preparation of [McClane's] defense. Had the state properly investigated this matter, it could have

97. *Id.*

98. *Id.*

99. *State v. G.D.*, Nos. 104317, 104328, 2016 WL 7298513, at *1 (Ohio Ct. App. Dec. 15, 2016).

100. *Id.*

101. *Id.* at *2.

102. *See id.*

obtained this information from the Ohio Peace Officer Training Commission or the Ohio Attorney General long before it originally indicted [John McClane] . . . [on October 8, 2014] or, at the very least, before it reindicted [McClane] two months later *There can be little doubt that criminal prosecution of an individual for conduct that is not illegal violates an individual's constitutional right to due process.*¹⁰³

Not only did the appellate court conclude that the prosecution of McClane for a non-crime was unconstitutional, it also found, “sua sponte, that the state’s appeal in this case [challenging the sealing of records] was frivolous.”¹⁰⁴ The court of appeals further held:

It is likewise admitted, based on the OPOTC letter, that the conduct at issue, i.e. [John McClane’s] use of his OHLEG access to take online educational courses, was not criminal. Nevertheless, the state appealed the order granting sealing of records, arguing that the trial court erred in dismissing [the second indictment] with prejudice and that the state’s right to reindict [McClane] for his admittedly non-criminal conduct should be preserved.¹⁰⁵

Moreover, “[t]he state’s appeal presents no reasonable question for review. It is not reasonably well-grounded in fact or warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law. As such, it is frivolous.”¹⁰⁶

But while John McClane’s legal ordeal ended with the appellate court’s decision confirming that the prosecution’s case was frivolous from its inception, McClane was left with no means by which to seek compensation for the prosecutor’s senseless actions. While the meritless case was pending, McClane lost his ability to earn a living in his chosen profession, lost significant income, endured significant case-related expenses, and suffered the humiliation of a felony indictment. But, as explained in Part II, *infra*, current law provides

103. *Id.* at *6 (emphasis added).

104. *Id.* at *7.

105. *Id.*

106. *Id.* at *8.

McClane with no cause of action against the prosecutor who caused McClane’s damages through his frivolous actions.

B. The Prosecution of Anthony Novak for Making Fun of the Police

Anthony Novak, twenty-seven at the time of the incident, did not have animosity toward his hometown police department in Parma, Ohio—he was just “bored.”¹⁰⁷ On March 2, 2016, while waiting at a bus stop to catch a bus from Cleveland to Parma, Novak used his mobile phone to create a parody Facebook page for the “Parma Police Department.”¹⁰⁸ He didn’t expect the “goofy” parody page to go beyond his Facebook “friends” group—but, to his surprise, it went “viral.”¹⁰⁹ Because he was using his mobile phone, Novak copied the background and profile pictures from the real Parma Police Department Facebook page, depicted in Figure 1.¹¹⁰

Figure 1
Real Facebook page header on left; Novak’s parody Facebook page header on right.¹¹¹



107. See Cleveland.com, *Live with Anthony Novak*, FACEBOOK (Aug. 14, 2016), <https://www.facebook.com/clevelandcom/videos/10155120066767501/>. See generally *Parma City, Ohio*, U.S. CENSUS BUREAU (July 1, 2018), <https://data.census.gov/cedsci/profile?q=Parma%20city,%20Ohio&g=1600000US3961000&tid=ACSDP1Y2018.DP05> (estimating that the Parma population is approximately 79,500); *Parma, Ohio Population 2020*, WORLD POPULATION REV., <http://worldpopulationreview.com/us-cities/parma-oh-population/> (last visited Mar. 20, 2020) (explaining that the City of Parma is the seventh largest city in Ohio with a 2020 estimated population of almost 79,000 residents).

108. See Complaint ¶ 3, *Novak v. City of Parma*, No. 1:17-cv-02148, 2018 WL 1791538 (N.D. Ohio Apr. 5, 2018) [hereinafter *District Court Complaint*]; see also *Live with Anthony Novak*, *supra* note 107 (explaining that Novak made the page at a bus stop).

109. *Live with Anthony Novak*, *supra* note 107.

110. See *id.*; see also Cory Shaffer, *First Amendment Covers Man Who Was Prosecuted for Parody Parma Police Facebook Page, Judge Says*, CLEVELAND.COM (Jan. 30, 2019), https://www.cleveland.com/court-justice/2018/04/first_amendment_covers_man_who_1.html (showing the Facebook header comparison).

111. Shaffer, *supra* note 110.

Anthony Novak's first post on the Facebook page satirized how Parma police dealt with homelessness,¹¹² writing that the Parma Police Department introduced a new law criminalizing giving food or shelter to the homeless:

PARMA, OHIO—Due to the slow increase of a homeless population in our city, The Parma Police Department is pleased to announce that it will be introducing a new temporary law that will forbid residence [sic] of Parma from giving ANY HOMELESS person food, money, or shelter in our city for 90 days. This is in an attempt to have the homeless population to leave our city due to starvation. Residents caught giving the homeless population food, shelter, or water will be sentenced to a minimum of 60 days in jail. You have been warned.¹¹³

His second post played off of Parma's long history of racial tensions.¹¹⁴ Novak wrote that the Police Department would soon be offering a civil service "written exam for basic Police Officer for the City of Parma" and "strongly encouraging minorities *not* to apply."¹¹⁵ Anthony Novak published only six posts during the twelve hours that the parody Facebook account remained online, attracting less than 100 followers.¹¹⁶ One of his more provocative and absurd posts involved abortion:

The Parma Police Department & Parma Auxiliary Police Food Drive to benefit teen abortions will take place on Saturday. We will be giving out free abortions to teens using an experimental technique

112. *Live with Anthony Novak*, *supra* note 107.

113. Chris Seaton, *Police in Parma, OH Can't Take a Joke*, MIMESIS L. (Mar. 31, 2016), <http://mimesislaw.com/fault-lines/police-in-parma-oh-cant-take-a-joke-anthony-novak/8272>; see District Court Complaint, *supra* note 108, ¶ 45(6).

114. See, e.g., Isabel Wilkerson, *Integration Proves Elusive in an Ohio Suburb*, N.Y. TIMES, Oct. 30, 1988, at 1, <https://www.nytimes.com/1988/10/30/us/integration-proves-elusive-in-an-ohio-suburb.html> (providing an example of racial tensions in the area); see also *Live with Anthony Novak*, *supra* note 107 (discussing the second post).

115. District Court Complaint, *supra* note 108, ¶ 45(5) (emphasis added); see also *Live with Anthony Novak*, *supra* note 107 (explaining that the post was intended to "be a joke on cops being racists").

116. District Court Complaint, *supra* note 108, ¶¶ 45, 55.

discovered by the Parma Police Department. All teens must bring a note from their parent to be part of the experiment. The abortions will be held Saturday 4/19/2016 from noon to 4 PM in a police van in the parking lot at Giant Eagle [grocery store] (7400 Broadview Rd).¹¹⁷

Anthony Novak intended his page and posts to be funny and obvious parody.¹¹⁸ He included “obviously parodic errors, like the satiric ‘We no [sic] crime’” and designated the Facebook profile as “community” instead of the official Parma Police Department’s profile designation of “Police Station[]” or “Government Organization[].”¹¹⁹ Novak likewise did not seek to have his fake profile verified.¹²⁰ He shared his parody page with his Facebook “friends,” who were mainly other Parma residents “familiar with the Facebook idiom and Mr. Novak’s anti-authoritarian, parodic idiosyncrasies.”¹²¹ His friends were amused, posting comments like “the funniest thing ever” and “Oh my god I’m dying,” and sharing the page with their Facebook “friends.”¹²²

While Novak’s friends were amused by the absurd posts, the real Parma Police Department was outraged. On the same day Novak posted the fake Facebook profile, the Parma Police Department discovered the anonymous page.¹²³ While it is evident that no

117. Seaton, *supra* note 113; see District Court Complaint, *supra* note 108, ¶ 45(3); see also District Court Complaint, *supra* note 108, ¶ 45(1), (2), (4) (explaining that Novak’s other posts included: “An ‘official stay inside and catch up with the family day’ enforced by police curfew: ‘Anyone’s [sic] seen outside their home from the hours of 12pm to 9pm will be arrested’”; “A ‘Pedophile Reform event’ with ‘multiple learning stations including a ‘No means no’ station filled with puzzles and quizzes,’ encouraging attendees to ‘Have fun out there!’ and promising pedophiles recognition as ‘honorary police officer[s]’ upon completion”; and “An apology for neglecting to inform the public about an armed white male who robbed a Subway sandwich shop, requesting assistance identifying the ‘African American woman’ loitering in front of the shop while it was robbed ‘so that she may be brought to justice.’”).

118. See District Court Complaint, *supra* note 108, ¶ 46.

119. *Id.*

120. *Id.* ¶ 47; see also *What Is a Verified Page or Profile?*, FACEBOOK, https://www.facebook.com/help/100168986860974?helpref=faq_contenthttps://www.facebook.com/help/100168986860974?helpref=faq_content (last visited Mar. 20, 2020) (explaining how Facebook validates the authenticity of select pages and profiles).

121. District Court Complaint, *supra* note 108, ¶ 56.

122. *Id.* ¶¶ 58–59.

123. *Id.* ¶¶ 45, 63 (stating that the posts were posted on March 2, 2016 and the police discovered the posts that same day).

reasonable observer could have thought that Novak’s parody—describing the police department performing free abortions on teens in a van behind a grocery store—was sanctioned by the Parma Police, Parma officers began an immediate investigation.¹²⁴ An officer testified in Novak’s trial that “we all stopped what we were doing to take a look at it, and a couple of us tried to figure out who did it and where it started.”¹²⁵ A police lieutenant opened a criminal investigation and assigned an officer who had experience investigating online child pornography, believing this experience could be leveraged to shut down the Facebook page.¹²⁶

The investigator spent the day and the next day “monitoring” Novak’s parody page, and in the afternoon the police department posted an announcement on its real Facebook page to “warn the public” about the parody account:

The Parma Police Department would like to warn the public that a fake Parma Police Facebook page has been created. This matter is currently being investigated by the Parma Police Department and Facebook. This is the Parma Police Department’s official Facebook page. The public should disregard any and all information posted on the fake Facebook account. The individual(s) who created this fake account are not employed by the police department in any capacity and were never authorized to post any information on behalf of the department.¹²⁷

Dozens of Parma residents responded to this “warning” by posting “comments mocking the Department for its inability to take a joke and urging the officers to focus on real police work.”¹²⁸ The department deleted about fifty such comments from its official page.¹²⁹ The police investigator then sent a letter to Facebook demanding that Novak’s parody account be removed and contacted a member of the Ohio Internet Crimes Against Children Taskforce requesting non-public contact information for a Facebook official who works with law enforcement to immediately remove pages

124. *See id.* ¶ 64 (discussing the immediate investigation).

125. *Id.*

126. *Id.* ¶¶ 69, 70.

127. *Id.* ¶¶ 73, 76.

128. *Id.* ¶ 77.

129. *Id.* ¶ 78.

engaged in illegal activity, like posting child pornography.¹³⁰ Since Novak's identity was still unknown to the Parma Police, the investigator subpoenaed Facebook asking for the parody account holder's name and IP address.¹³¹

Later that day, the Parma Police Department issued a press release announcing that they opened a criminal investigation and posted an announcement of the investigation on its real Facebook page.¹³² In a classic example of the "Streisand effect,"¹³³ the media attention drew many more visitors to Novak's parody page and numerous comments showed that no reasonable person thought the page was real.¹³⁴ But when Novak learned of the extensive publicity his page had drawn, and fearing—justifiably so—retribution by the Parma Police, Novak removed the parody page less than twelve hours after he had created it.¹³⁵

The removal of the page did not placate Parma Police investigators. Until this point, all internal reports and communications to Facebook showed that the Department's only concern was the "falsity" of Novak's parody page.¹³⁶ Now, in keeping with the press release warning that Parma Police was opening a criminal investigation, the investigator looked for a criminal offense that might fit.¹³⁷ As scholars have noted, many police officers do not receive adequate training to be able to view criminal statutes through a constitutional lens.¹³⁸ But surely trained lawyers should know that parody is protected under the First Amendment.¹³⁹ Yet,

130. *Id.* ¶¶ 81, 85.

131. *Id.* ¶ 90.

132. *Id.* ¶¶ 92–93.

133. See *What Is the Streisand Effect?*, *ECONOMIST* (Apr. 16, 2013), <https://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect> ("Named after the American singer and actress Barbra Streisand, the Streisand Effect describes how efforts to suppress a juicy piece of online information can backfire and end up making things worse for the would-be censor.").

134. See District Court Complaint, *supra* note 108, ¶¶ 95, 96; John Harper, *The Felony Parma Facebook Page and Barbra Streisand Have Something in Common*, *CLEVELAND.COM* (Jan. 11, 2019), https://www.cleveland.com/court-justice/2016/05/the_felony_parma_facebook_page.html.

135. District Court Complaint, *supra* note 108, ¶ 97.

136. *Id.* ¶ 92.

137. See *id.* ¶¶ 93, 97–98.

138. See, e.g., *infra* Section I.C.

139. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988); *accord Parks v. LaFace Records*, 329 F.3d 437, 456 (6th Cir. 2003) ("[P]arody is an artistic form of expression protected by the First Amendment.").

when the police investigator took this case to the Parma Law Director and Chief Prosecutor, both agreed that Novak’s actions could be prosecuted as a felony disruption of public services,¹⁴⁰ which provides that “No person shall knowingly use any computer, computer system, computer network, telecommunications device, or other electronic device or system or the internet so as to disrupt, interrupt, or impair the functions of any police, fire, educational, commercial, or governmental operations.”¹⁴¹

On March 18, more than two weeks after Novak posted—and removed—the parody Facebook page, Parma Police, with the approval of the Parma prosecutor, filed a criminal complaint.¹⁴² The complaint charged Novak with a single felony count: “ANTHONY C. NOVAK CREATED A FAKE FACEBOOK ACCOUNT, PURPORTING IT TO BE A LEGITIMATE PARMA POLICE FACEBOOK PAGE, IMPAIRING THE FUNCTIONS OF THE PARMA POLICE DEPARTMENT IN THEIR GOVERNMENTAL OPERATIONS.”¹⁴³ Parma Police obtained an arrest warrant for Novak that same day and arrested him as he was leaving a store a week later.¹⁴⁴

Novak “spent the next four days in jail, three in the general population of the Cuyahoga County’s jail alongside persons facing charges for murder, rape, and other violent crimes.”¹⁴⁵ When media accounts of Novak’s arrest for creating a parody Parma Police Facebook page reached residents, their responses posted to Parma Police’s official Facebook page were swift and brutal—Parma residents instantly recognized the First Amendment implications that eluded Parma Police and prosecutors. Responses included:

This whole thing reeks of a few cops getting all butt-hurt because somebody called them names. Charges will not stick. This speech is satire and it doesn’t even come close to yelling fire in a crowded theater.

NAZI Thought Police ever hear of the Constitution?

140. District Court Complaint, *supra* note 108, ¶ 104.

141. OHIO REV. CODE ANN. § 2909.04(B) (2020).

142. District Court Complaint, *supra* note 108, ¶ 105.

143. *Id.* ¶ 106.

144. *Id.* ¶¶ 107–08.

145. *Id.* ¶ 109.

I guess it's true that there's an intelligence cap on police officers in Parma, because only a bunch of stupid bullies would do this to an OBVIOUS SATIRIST and claim themselves to be victims. Good luck with that police state!

I hope this man sues the f*** out of you! Your [sic] a joke go fight real crime and not mess with people's First Amendment right[s]. This is fascism at its best

By arresting the author of the fake Fa[c]ebook page on inapplicable grounds, you have demonstrated that you are a collection of mean-spirited chickenshits. You are also violating his First Amendment rights to free speech, which have, on a number of occasions, been held to include the right to parody and satire.

I haven't served this country 12 years in the military to have fascist like those in your department press fraudulent charges against man for exercising free speech. Satire is free speech, as established by the oldest of legal precedents in this country.¹⁴⁶

Other residents posted citations to Supreme Court precedents holding that satirical speech is protected under the First Amendment and noting that local governments can be sued for civil rights violations.¹⁴⁷ The Parma Police were undeterred. On the day

146. *Id.* ¶ 110 (internal citations omitted). Other, more restrained comments included: "What he did was very stupid but a felony? Are you kidding right now? I'm very interested to see the laws they try to use to make this stick. I respect the police and am grateful for what they do but this is just silly"; "Satire and free speech are apparently not on the menu at the police academy. Get sued"; "Satire is free speech. Have fun living on the wrong side of history folks"; "The Parma officials should be jailed for infringing on free speech"; "You get Facebook to take down the page, sure. Arresting the man who put it up is tyrannical, full stop. Arresting someone who mocked you in public is the very essence of a free speech violation. I sincerely hope and pray that the legal blowback from your unconstitutional action ruins both your department and your careers." *Id.* ¶ 111 (internal citations omitted).

147. *Id.* ¶ 112 (internal citations omitted). These comments included, "Parma police would do well to read the *Hustler Magazine v. Jerry Falwell* supreme court decision."; "If you don't know what *Monell v. Department of Social Services of the City of New York* is, you might want to look it up when Mr. Novak sues you in federal court under 42 USC 1983 for violating his civil rights." *Id.* (referencing

Novak was arrested, the Parma Police investigator submitted an application for a warrant to search Novak’s apartment.¹⁴⁸ Despite testifying that “once you start reading [Novak’s Facebook parody page] posts, the absurd nature of the actual content of the posts come through,” the investigator sought—and obtained—a search warrant based on an allegation that Novak “knowingly post[ed] false information.”¹⁴⁹ Parma Police executed the sweeping search warrant with the help of its SWAT¹⁵⁰ team searching for “electronic devices, including ‘any and all information pertaining to social media,’ and all records, documents, and other materials ‘relating to social media,’ which, according to template language in the warrant, were ‘unlawfully kept, concealed and possessed’ at Mr. Novak’s apartment in supposed violation of Ohio law.”¹⁵¹ Officers seized all of Novak’s electronics, including two laptops, several computer hard drives, video game consoles, cell phones, and a tablet.¹⁵² After the application of forensic techniques usually reserved for child pornography investigations, no incriminating evidence was found.¹⁵³

Because Novak was charged with a felony, the case moved to the Cuyahoga County Prosecutor’s Office, which sought to hold Novak criminally liable for “creating a fake Facebook page.”¹⁵⁴ At this point, the County prosecutors knew—or after conducting rudimentary legal research, should have known—that Novak’s alleged conduct was constitutionally protected.¹⁵⁵ Yet they took the case to a grand jury and, not surprisingly (as discussed in Section II.D, *infra*), the grand jury indicted Novak.¹⁵⁶ Even after the indictment, the prosecutor had an opportunity to end the meritless prosecution when Novak’s

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), and *Monell v. Department Social Services*, 436 U.S. 658 (1978)).

148. *Id.* ¶ 116.

149. *Id.* ¶¶ 116–17.

150. A SWAT (special weapons and tactics) team is defined as “a special section of some law enforcement agencies trained and equipped to deal with especially dangerous or violent situations, as when hostages are being held (often used attributively).” *SWAT*, DICTIONARY.COM, <https://www.dictionary.com/browse/s-w-a-t> (last visited Mar. 20, 2020).

151. District Court Complaint, *supra* note 108, ¶¶ 121–22.

152. *Id.* ¶ 123.

153. *Id.* ¶¶ 127–33.

154. *Id.* ¶ 138.

155. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 729–30 (2012) (holding false statements are not exempted from protection under the First Amendment); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (holding parody is protected by the First Amendment).

156. District Court Complaint, *supra* note 108, ¶ 132.

lawyer filed a motion to dismiss, but the prosecutor declined to do so.¹⁵⁷

When the case against Novak proceeded to jury trial, the prosecution's case focused on the "the supposedly 'false' 'nature or content' of the Parody Account."¹⁵⁸ The only evidence of a disruption of police services presented at trial was a total of twelve minutes of phone calls received by the police department about Novak's Facebook page, "mostly to complain about the perceived affront to its officers, [to] notify the Department that [the parody page] existed, or enquire whether it was authorized."¹⁵⁹ These allegedly disruptive calls were documented on April 5—more than a week *after* Novak's arrest and searches.¹⁶⁰ Unsurprisingly, the jury quickly acquitted Novak.¹⁶¹ Novak filed suit against the City of Parma and the several officers of the Parma Police Department.¹⁶² On appeal, the City's

157. *Id.* ¶ 135.

158. *Id.* ¶ 150.

159. *Id.* ¶¶ 147–48.

160. *Id.* ¶ 148.

161. *See id.* ¶ 151.

162. *Novak v. City of Parma*, No. 1:17-CV-2148, 2018 WL 1791538, at *4 (N.D. Ohio Apr. 5, 2018). In denying the City's motion to dismiss, the district court did not hesitate in concluding that Novak's actions were constitutionally protected speech:

Plaintiff pleaded sufficient facts to establish that he was engaged in a constitutionally protected activity. He alleges that his Facebook Page was a parody. Parody is a form of speech that is protected by the First Amendment. Parodies involve speech that cannot "reasonably be understood as describing actual facts about [the subject of the parody]." No reasonable person—whether police officer or Parma citizen—would believe that Plaintiff's posts were describing actual facts about the Department (for example, that the Department was performing teen abortions using experimental techniques in a Wal-Mart parking lot). Despite the Defendants' attempts to argue otherwise, it cannot be seriously contended that the Facebook Page was anything but a parody. Thus, Plaintiff was engaged in constitutionally protected speech.

Id. (internal citations omitted) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988)).

The district court continued:

The Defendants offer only one justification for their actions: Plaintiff disrupted police operations in violation of state law. But since the only evidence of "disruption" ever produced was a total of twelve minutes of calls made to the Department on March 2, 2016 (documented by the Department over a month later on April 5, 2016), the officers' motivation can certainly be called into question.

Plaintiff alleges facts, which if proven, show that the Officer Defendants abused their police power to punish Plaintiff for

lawyer argued before the Sixth Circuit Court of Appeals that the officers should not be held liable because “multiple people agreed that there was probable cause,” including the Parma city prosecutor and county prosecutors who took the case to the trial.¹⁶³ Under current law, Novak has no remedy against the prosecutors who initiated and maintained this illegal prosecution.

C. *The Body Camera Tells a Different Story*

At the time of the incident, Cole Sear¹⁶⁴ was a first-year student at The University of Alabama living in a dormitory suite with three roommates.¹⁶⁵ Each roommate had his own bedroom, but all four shared a common living room and two bathrooms.¹⁶⁶ On November 30, 2016, just before midnight, two University of Alabama resident assistants noticed what they believed to be the smell of burnt marijuana coming from the suite Cole shared with his roommates.¹⁶⁷ The resident assistants entered the suite to conduct a “health and safety check.”¹⁶⁸ Once inside, they found what they believed to be a homemade gravity bong¹⁶⁹ and called a University police officer to

exercising his First Amendment rights. Plaintiff had a constitutional right to his Facebook Page on March 2, 2016 and he still does today. Absent a significant disruption in police operations, Plaintiff cannot be harassed *or prosecuted* for his speech.

Id. (emphasis added).

163. Oral Argument at 9:54–10:25, *Novak v. City of Parma*, 932 F.3d 421 (6th Cir. 2019) (No. 18-3373), https://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=recent/06-20-2019%20-%20Thursday/18-3373%20Anthony%20Novak%20v%20City%20of%20Parma.mp3&name=18-3373%20Anthony%20Novak%20v%20City%20of%20Parma.

164. “Cole Sear” is a pseudonym for the individual described in this Section and is based on the name of the psychic child in *The Sixth Sense*. See *THE SIXTH SENSE* (Hollywood Pictures 1999). Because Cole was considered a Youthful Offender under Alabama law when the described events occurred, all records pertaining to the case are sealed.

165. See Deposition of Investigating Officer, *Alabama v. [Sear]*, No. DC-2016-002857 (Dist. Ct. Tuscaloosa Cty. 2017) [hereinafter Deposition of Officer] (sealed) (on file with author).

166. See Videotape: Body-Worn Camera Footage University of Alabama Police Officer Givens [hereinafter Body Cam Footage] (on file with author).

167. Deposition of Officer, *supra* note 165.

168. *Id.*

169. *Gravity Bong*, DICTIONARY.COM, <https://www.dictionary.com/e/slang/gravity-bong/> (last visited Mar. 20, 2020) (A “gravity bong” is a “device for smoking marijuana. It is made by submerging a modified plastic bottle into a larger container

the room.¹⁷⁰ Officer Raylan Givens¹⁷¹ arrived at the suite and entered to find four students in the shared living room.¹⁷² Cole was not one of them, but emerged from his room a few seconds later.¹⁷³ Givens spent the next fifteen minutes searching for a marijuana pipe and speaking to some of the suite's residents about marijuana use.¹⁷⁴

Givens then went to Cole's individual bedroom and called for Cole to go inside.¹⁷⁵ Once inside Cole's room, Givens closed the door and told Cole—who Givens believed was “high as a kite”—that the two “need to talk.”¹⁷⁶ After reading Cole the *Miranda*¹⁷⁷ warning, Givens said, “when I walked in [to the suite] you were hiding, you were throwing something up on the shelf over there,” while pointing to a small shelf on the wall above a desk in Cole's bedroom.¹⁷⁸ Givens then accused Cole of “gutting [a] cigar to stuff it with marijuana,” and asked if there was “marijuana in this room.”¹⁷⁹ Cole responded, “no, sir.”¹⁸⁰ Givens then asked, “can I search [the room],” to which Cole clearly replied, “no, sir.”¹⁸¹

Undeterred, Officer Givens asked Cole to exit his bedroom and said, “I'm going to search this right here, this area right here [indicating the small shelf and desk], because that's enough probable cause [that] I can do that.”¹⁸² Givens proceeded to search the top of the desk and opened a drawer, finding no incriminating evidence.¹⁸³ He then opened the desk's lower cabinet door.¹⁸⁴ Inside, Givens

of water. It is said to harness gravity in order to pull smoke down into the bottle's chamber as the bottle is lifted from the water.”).

170. See Body Cam Footage, *supra* note 166; see also Deposition of Officer, *supra* note 165.

171. “Raylan Givens” is a pseudonym for the officer described in this section, based on the name of a character on the FX television series *Justified*. See *Justified* (FX Productions 2010–2015). Officer Givens asked that his real name not be used because he is embarrassed by the numerous Fourth Amendment violations documented on his body-worn camera during the incident.

172. See Body Cam Footage, *supra* note 166, at 00:37.

173. *Id.* at 00:50.

174. *Id.* at 00:50–16:00.

175. *Id.* at 15:58.

176. *Id.* at 16:05–16:20.

177. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966) (discussing the *Miranda* warning requirement).

178. See Body Cam Footage, *supra* note 166, at 16:56–17:02.

179. *Id.* at 17:07–17:11.

180. *Id.* at 17:10.

181. *Id.* at 17:13.

182. *Id.* at 17:23–17:30.

183. *Id.* at 17:30–18:12.

184. *Id.* at 18:15.

found a grinder and prescription cough syrup.¹⁸⁵ When he opened the grinder, Givens found what appeared to be trace amounts of marijuana.¹⁸⁶ Continuing his unlawful search, Givens later commented, “hey, [Cole], I thought for sure I’d find more than this in here; kinda disappointing.”¹⁸⁷

As a result of the search, Officer Givens charged Cole Sear with Possession of Drug Paraphernalia in violation of section 13A-12-260 of the Alabama Code.¹⁸⁸ Cole was later booked into jail and allowed to post bond. Cole’s father hired an attorney and the case was set for arraignment.¹⁸⁹ At the arraignment, the Tuscaloosa County prosecutor offered Cole a plea deal; Cole refused, explaining to his lawyer that he did not consent to the search of his bedroom.¹⁹⁰ Cole entered a plea of not guilty, and his case was set for trial.¹⁹¹ When Cole’s attorney received the subpoenaed body-worn camera footage, the illegality of the search that led to the criminal charges became obvious.¹⁹²

After filing a motion to suppress, Cole’s attorney repeatedly asked the prosecutor, in person and by email, to watch the body camera footage.¹⁹³ Weeks went by; the trial date approached. Eventually, succumbing to requests to “just watch the video,” the prosecutor did.¹⁹⁴ Almost six months after Cole’s arrest, the prosecutor moved to dismiss the case.¹⁹⁵ Had the prosecutor taken the time to watch the body cam footage when the charges were originally filed, this case would not have hung over Cole Sear for months. But there is no existing rule requiring the prosecutor to review his or her “evidence” early on in a case.

185. *Id.* at 18:20.

186. *Id.* at 19:05–19:10.

187. *Id.* at 22:14–22:20.

188. Deposition of Officer, *supra* note 165.

189. Docket, Alabama v. [Sear], No. 63-DC-2016-002857 (Dist. Ct. Tuscaloosa Cty.) (sealed).

190. The author attended Cole Sear’s arraignment in Tuscaloosa County District Court.

191. The author attended Cole Sear’s arraignment in Tuscaloosa County District Court.

192. *See* Body Cam Footage, *supra* note 166.

193. *See* Telephone Interviews with Jason Neff, Attorney (Mar., Apr. 2017).

194. *See id.*

195. *See* Order Dismissing and Sealing Case, Alabama v. [Sear], No. 63-DC-2016-002857 (Dist. Ct. Tuscaloosa Cty. May 15, 2017) (sealed) (on file with author).

*D. The Neighbor's Dog Wasn't on a Leash—But It
Didn't Have to Be*

While the previous examples involve cases initiated by law enforcement officials, in some states private citizens can initiate criminal cases.¹⁹⁶ In Alabama, for example, any person can go to his or her local courthouse and file a misdemeanor criminal complaint.¹⁹⁷ As long as the citizen's statement sets forth the elements of a criminal offense, a judge or non-attorney magistrate¹⁹⁸ will issue an arrest warrant or summons.¹⁹⁹ A sheriff's deputy will then serve the summons or arrest the defendant.²⁰⁰ This is what happened to Sherrie Worrell in late 2018 when a neighbor in rural Tuscaloosa County, with whom Worrell had a long-standing dispute, filed a criminal charge of "dogs running at large" against Worrell.²⁰¹ The neighbor alleged that one of the Worrell family's dogs was unleashed and ran into the neighbor's yard.²⁰² But the law does not require dogs to be leashed outside of city limits in Tuscaloosa County.²⁰³ Instead, state law, which applies in unincorporated areas

196. See Nicole Dungca & Jenn Abelson, *Private Citizens Sometimes Seek Charges Against Their Accusers in Secret Courts*, BOS. GLOBE (Dec. 16, 2018, 8:26 PM), <https://www.bostonglobe.com/metro/2018/12/16/private-citizens-sometimes-retaliation-file-criminal-charges-massachusetts-secret-courts/EZRYv4ucfAE7B0jIBovE2N/story.html>; Jeff Welty, *Private Citizens Initiating Criminal Charges*, N.C. CRIM. L. BLOG (Apr. 9, 2015, 10:20 AM), <https://nccriminallaw.sog.unc.edu/private-citizens-initiating-criminal-charges/> (listing states where criminal prosecutions can be started by citizens).

197. ALA. CODE § 15-7-2 (2019).

198. See ALA. R. JUD. ADMIN. 18(I)(A)(2)(a) (2018) (non-attorney magistrates in district courts may issue attest warrants, but only magistrates who are licensed attorneys may issue search warrants); *Id.* at 18(I)(B)(2)(a) (non-attorney magistrates in municipal courts may issue arrest warrants).

199. ALA. CODE § 15-7-3 (2019).

200. ALA. CODE §§ 15-7-4, 20, 21 (2019).

201. Deposition of Brittany Dyer, *Alabama v. Worrell*, No. DC-2018-2565 (Dist. Ct. Tuscaloosa Cty. Dec. 13, 2018) (on file with author).

202. *Id.*

203. ALA. CODE § 3-1-5 (2019). Some Alabama municipalities have enacted laws requiring dogs to be leashed within the city's limits. See, e.g., TUSCALOOSA CITY ORDINANCE 4-40(a) ("It shall be unlawful for the owner of any dog to allow or permit such dog to be at large, unconfined or able to travel on public property or the property of another in the city unless such dog is *restrained by a leash, rope or chain* of not more than ten (10) feet in length and of sufficient strength to control the actions of such dog." (emphasis added)).

of Alabama counties, only requires that dogs going off of the owner's property be accompanied by a person:

Every person owning or having in charge any dog or dogs shall at all times confine such dog or dogs to the limits of his own premises or the premises on which such dog or dogs is or are regularly kept. *Nothing in this section shall prevent the owner of any dog or dogs or other person or persons having such dog or dogs in his or their charge from allowing such dog or dogs to accompany such owner or other person or persons elsewhere than on the premises on which such dog or dogs is or are regularly kept.*²⁰⁴

Unlike a complaint written by a law enforcement officer or prosecutor, the neighbor's sworn statement was more of a rambling story:

The issues first started on October 25, 2017. The neighbors kept charging at me and my family. November 6, 2017 the dog charged after my husband, while [Sherrie Worrell] stood in her doorway and watched. I believe November 6th is when we called animal control. We both received warnings, so I took my dogs to my mother's house until we got a pen for our dogs. November 15th, 2017 the one dog that was charging was still off the chain. [Worrell] kept telling me that I needed to stay calm, and I just needed to come pet her dogs so they could get to know me. November 26th, 2017 I contacted animal control again. A lieutenant called me back and spoke with me about it . . . I got called from my maw maw saying my dogs had escaped. When I got home it was actually hers [sic] dogs. This is the first time I have talked to Martha at animal control, and she actually came out and spoke with [the Worrells]. I didn't have

204. See ALA. CODE § 3-1-5(a) (emphasis added). While Tuscaloosa County Commissioners considered enacting stronger regulations in 2003, a more restrictive law was not passed. Johnny Kampis, *County Considers Leash Law for Dogs*, TUSCALOOSA NEWS (Mar. 27, 2003, 12:01 AM), <https://www.tuscaloosa.com/news/20030327/county-considers-leash-law-for-dogs>.

proof of this particular incident. December 2nd, 2018 I walked outside around 8am or so, and her dogs were in my yard again. They were told if they come off the running chains they need to be on a leash.²⁰⁵

The only relevant allegation is the penultimate sentence: that Sherrie Worrell's dogs were in the complainant's yard on the morning of December 2. But the final sentence of the account demonstrates the complainant's ignorance of the law—dogs in Tuscaloosa County need not be on a leash, only accompanied by a person.²⁰⁶ And there is no way to know if the magistrate who approved the complaint and summons understood what the law did and did not require. Nevertheless, Worrell had to post bond and her case was set for arraignment.²⁰⁷

Sherrie Worrell's defense attorneys asked the assistant district attorney assigned to the case to review the statute and discontinue the prosecution.²⁰⁸ She refused. Instead, she provided defense counsel with a short video clip shot by the neighbor on the morning of the alleged crime showing Worrell's son—a high school long-distance running athlete—running on an unpaved road near the Worrell's house accompanied by the family's dogs.²⁰⁹ The frivolity of criminally prosecuting what is essentially a neighbor dispute in which law enforcement refused to intervene is obvious—yet there is no mechanism by which the prosecutor's office can be held accountable for continuing Sherrie Worrell's meritless prosecution.²¹⁰

II. CURRENT CHECKS ON PROSECUTORIAL CONDUCT

In many ways, a prosecutor is just like any other attorney, subject to the rules and numerous checks that apply to lawyers and their work in and out of court. At the root of the legal profession is

205. Deposition of Brittany Dyer, *supra* note 201.

206. ALA. CODE § 3-1-5(a).

207. See Summons, State of Alabama v. Worrell, No. DC-2018-2565 (Dist. Ct. Tuscaloosa Cty. Dec. 13, 2018) (on file with author).

208. The University of Alabama School of Law Clinical Programs represented Sherrie Worrell and the author spoke with them regarding this case.

209. See Video Taken by Brittany Dyer (Dec. 2, 2018) (on file with author).

210. After the case was appealed to the Tuscaloosa County Circuit Court, the District Attorney finally dismissed the charge. See State of Alabama v. Worrell, No. CC-2019-000658 (Cir. Ct. Tuscaloosa Cty. Nov. 13, 2019) (on file with author).

the accountability lawyers face before the courts, state bar associations, and other lawyers. As the most powerful players in the criminal justice system,²¹¹ prosecutors should be held to at least the same standard as all other lawyers, and arguably to a higher standard. After all, nothing happens in the criminal justice process without the say-so of a prosecutor, from investigation to sentencing and everything in between.²¹² Courts have recognized “that the breadth of discretion that our country’s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.”²¹³

Prosecutors serve in a unique position: they are part of the executive branch, but function in the judiciary branches of federal, state, or local governments. This allows prosecutors to avoid many of the processes in place to hold other lawyers accountable for mistakes and misdeeds. As this Part will show, in spite of the supposed limitations in place, the power of prosecutors remains virtually unchecked. As it stands right now, “courts and bar associations do little to punish the prosecutors responsible [for wrongful convictions], refusing criminal defendants the right to compensation and declining to sanction the prosecutors who erred.”²¹⁴

A. Ethical Rules

The American Bar Association (ABA) lays out ethical rules for all lawyers and regulates the practice of law through the regulation of lawyers’ behavior. The Model Rules of Professional Conduct, promulgated by the ABA,²¹⁵ include specific regulations for prosecutors²¹⁶ in addition to the rules that apply to all lawyers.²¹⁷

211. See Angela J. Davis, *Prosecutors as the Most Powerful Actor in the Criminal Justice System*, RACE, RACISM & L., <https://racism.org/index.php/articles/law-and-justice/criminal-justice-and-racism/136-uncategorized-articles/1742-prosecutors-as-the-most-powerful-actor> (last visited Mar. 20, 2020).

212. See *id.*

213. *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

214. Daniel Woislaw, *Absolute Immunity: Applying New Standards for Prosecutorial Accountability*, 26 GEO. MASON U. C.R. L.J. 349, 350 (2016).

215. See generally *Text of the Model Rules of Professional Conduct*, AM. BAR ASS’N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ (last visited Mar. 20, 2020).

216. MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR ASS’N 2019).

217. All states have adopted some form of ethical rules to govern the behavior of lawyers, most modeled on the ABA’s Model Rules of Professional Conduct. See *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS’N,

Even within these rules, the restrictions on prosecutors are minimal. The only limitation placed on their charging power, the most powerful aspect of the prosecutorial decision-making process, is that the charge be based on probable cause before it is brought forward for prosecution.²¹⁸

Despite the Model Rules' ethical requirements for prosecutors, in the history of the ABA, prosecutors are "rarely disciplined for misconduct, and if so, not very seriously."²¹⁹ Studies have shown that the ABA and other such organizations are "less likely to bring charges or successfully inflict sanctions against prosecutors" overall, even on the rare occasion that misconduct is brought to their attention.²²⁰ Out of the forty-four cases of prosecutorial misconduct brought to the ABA's attention between 1970 and 2003, only two resulted in disbarment.²²¹ And the cases of prosecutorial misconduct studied by most scholars involve serious breaches of trust that often lead to wrongful convictions²²²—not the type of mistakes and misjudgments discussed in Part I, *supra*. Because the run-of-the-mill miscarriages of justice discussed in Part I rarely result in long prison sentences, regulatory bodies and the media pay them far less attention. But the unremedied injuries to defendants can still be significant.²²³

State attorney governing bodies—in some cases state bar associations,²²⁴ in other cases state supreme courts²²⁵—have adopted

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last visited Mar. 20, 2020).

218. MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (AM. BAR ASS'N 1983) ("The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; . . .").

219. Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 65 (2016).

220. Weiss, *supra* note 16, at 223.

221. *Id.* at 224.

222. See, e.g., Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 307 (2019) (stating that "[t]he scars from *Brady* misconduct represent wrongful convictions of innocent defendants, including innocent defendants sent to death row because of prosecutorial misconduct").

223. See Robbins, *supra* note 18.

224. For example, Alabama's State Bar Association handles attorney licensing. See *Attorney Licensing*, ALA. ST. B., <https://www.alabar.org/members/attorney-licensing/> (last visited Mar. 20, 2020).

225. For example, Ohio's Supreme Court handles attorney licensing. See *Office of Bar Admissions*, SUP. CT. OHIO & OHIO JUD. SYS., <https://www.supremecourt.ohio.gov/AttySvc/admissions/default.aspx> (last visited Mar. 20, 2020).

their own versions of ethics rules for lawyers licensed in their states.²²⁶ Every state has adopted a version of ABA Model Rule 3.8, “Special Responsibilities of a Prosecutor.”²²⁷ In adopting it, almost

226. Whether federal prosecutors are bound by state ethics rules has been a matter of debate over the last three decades. In 1989, the Thornburgh Memo—a Department of Justice (DOJ) memorandum issued by Attorney General Richard Thornburgh—discharged federal prosecutors of the obligation to comply with state ethics rules, declaring that federal prosecutors were not bound by state ethical rules. Memorandum from Richard Thornburgh, Attorney Gen., on Communication with Persons Represented by Counsel, to All Justice Dep’t Litigators (June 8, 1989), *in In re Doe*, 801 F. Supp. 478, 489–93 (D.N.M. 1992) [hereinafter Thornburgh Memo]. Moreover, the memo declared that any compliance with state ethics rules during the performance of investigations and other government duties was wholly voluntary on the part of federal prosecutors. Thornburgh Memo, *supra*. Most notably, the memo weighed a prosecutor’s duty to enforce the law against an attorney’s ethical duty under Model Rule 4.2, which generally prohibits contact between an attorney and his or her opponent’s client without the approval of opposing counsel; in the criminal justice system, that contact is often in the context of a prosecutor’s decision to interview a defendant. Thornburgh Memo, *supra*. The Thornburgh Memo asserted that a state ethics rule (analogous to Model Rule 4.2) would not be effective where it would “cripple Federal investigative techniques” and that a state’s authority over its ethical standards for attorneys permitted “regulation of federal attorneys only if the regulation does not conflict with the federal law or with the attorneys’ federal responsibility.” Thornburgh Memo, *supra*, at 490, 493. While not legally binding, the memo continued to represent the DOJ’s interpretation of its ethical obligations as lawyers until Janet Reno’s appointment to Attorney General in 1993. In response to the fervor generated by the Thornburgh Memo, the Reno administration established new ethical rules for federal prosecutors, promulgated in the Code of Federal Regulations and known colloquially as the “Reno Rules,” but these rules lacked statutory authority and as such were effectively unenforceable. *See United States ex rel. O’Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998). The Reno Rules were ultimately replaced by 28 U.S.C. § 530B, which provides: “An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.” 28 U.S.C. § 530B(a) (2018).

227. Variations from the language of ABA Model Rule 3.8(a), “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause,” are noted after the state that has modified this Model Rule. *See* MODEL RULES OF PROF’L CONDUCT r. 3.8(a) (AM. BAR ASS’N 2019). Alabama: ALA. RULES OF PROF’L CONDUCT r. 3.8 (2020); Alaska: ALASKA RULES OF PROF’L CONDUCT r. 3.8 (2014); Arizona: ARIZ. RULES OF PROF’L CONDUCT r. 3.8 (2014); Arkansas: ARK. RULES OF PROF’L CONDUCT r. 3.8 (2020); California: CAL. RULES OF PROF’L CONDUCT r. 3.8 (2018) (“*not institute or continue to prosecute* a charge that the prosecutor knows* is not supported by probable cause” (emphasis added)); Colorado: COLO. RULES OF PROF’L CONDUCT r. 3.8 (2011); Connecticut: CONN. RULES OF PROF’L CONDUCT 3.8 (2015); Delaware: DEL. LAWYERS’ RULES OF PROF’L CONDUCT r. 3.8 (2013); Florida: RULES REGULATING THE FLA. BAR 4-3.8 (2019); Georgia: GA. RULES OF PROF’L CONDUCT r. 3.8 (2020); Hawaii: HAW. RULES OF PROF’L CONDUCT r. 3.8 (2014) (“(a)

every state directly copied the language of the ABA Model Rule,²²⁸ only requiring that a prosecutor “refrain from prosecuting a charge”

not institute or cause to be instituted criminal charges when the prosecutor or government lawyer *knows or it is obvious that* the charges are not supported by probable cause” (emphasis added)); Idaho: IDAHO RULES OF PROF'L CONDUCT r. 3.8 (2014); Illinois: ILL. RULES OF PROF'L CONDUCT r. 3.8 (2016); Indiana: IND. RULES OF PROF'L CONDUCT r. 3.8 (2019); Iowa: IOWA RULES OF PROF'L CONDUCT r. 32:3.8 (2005) (“(a) refrain from prosecuting a charge that the prosecutor *knows or reasonably should know* is not supported by probable cause” (emphasis added)); Kansas: KAN. RULES OF PROF'L CONDUCT r. 3.8 (2007); Kentucky: KY. RULES OF PROF'L CONDUCT r. 3.8 (2009); Louisiana: LA. RULES OF PROF'L CONDUCT r. 3.8 (2006); Maine: ME. RULES OF PROF'L CONDUCT r. 3.8 (2009) (“refrain from prosecuting a *criminal or juvenile charge* that the prosecutor knows is not supported by probable cause” (emphasis added)); Maryland: MD. ATTORNEYS' RULES OF PROF'L CONDUCT r. 19-303.8 (2016); Massachusetts: MASS. RULES OF PROF'L CONDUCT r. 3.8 (2016) (“refrain from prosecuting where the prosecutor *lacks a good faith belief* that probable cause to support the charge exists, and refrain from *threatening to prosecute a charge where the prosecutor lacks a good faith belief* that probable cause to support the charge exists or can be developed through subsequent investigation” (emphasis added)); Michigan: MICH. RULES OF PROF'L CONDUCT r. 3.8; Minnesota: MINN. RULES OF PROF'L CONDUCT r. 3.8 (2005); Mississippi: MISS. RULES OF PROF'L CONDUCT r. 3.8 (2020); Missouri: MO. RULES OF PROF'L CONDUCT r. 4-3.8 (2007); Montana: MONT. RULES OF PROF'L CONDUCT r. 3.8 (2020); Nebraska: NEB. RULES OF PROF'L CONDUCT § 3-503.8 (2008); Nevada: NEV. RULES OF PROF'L CONDUCT r. 3.8 (2006); New Hampshire: N.H. RULES OF PROF'L CONDUCT r. 3.8 (2008); New Jersey: N.J. RULES OF PROF'L CONDUCT r. 3.8 (2004); New Mexico: N.M. RULES OF PROF'L CONDUCT r. 16-308 (2015); New York: N.Y. RULES OF PROF'L CONDUCT r. 3.8 (2019) (“A prosecutor or other government lawyer shall not *institute, cause to be instituted or maintain* a criminal charge when the prosecutor or other government lawyer *knows or it is obvious that* the charge is not supported by probable cause.” (emphasis added)); North Carolina: N.C. RULES OF PROF'L CONDUCT r. 3.8 (2017); North Dakota: N.D. RULES OF PROF'L CONDUCT r. 3.8 (2013); Ohio: OHIO RULES OF PROF'L CONDUCT r. 3.8 (2019) (“*pursue or prosecute* a charge that the prosecutor *knows* is not supported by probable cause” (emphasis added)); Oklahoma: OKLA. RULES OF PROF'L CONDUCT r. 3.8 (2017); Oregon: OR. RULES OF PROF'L CONDUCT r. 3.8 (2005); Pennsylvania: PA. RULES OF PROF'L CONDUCT r. 3.8 (2005); Rhode Island: R.I. RULES OF PROF'L CONDUCT r. 3.8 (2020); South Carolina: S.C. RULES OF PROF'L CONDUCT r. 3.8 (2005); South Dakota: S.D. RULES OF PROF'L CONDUCT r. 3.8 (2018); Tennessee: TENN. RULES OF PROF'L CONDUCT r. 3.8 (2011); Texas: TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 3.09 (2019) (“refrain from *prosecuting or threatening to prosecute* a charge that the prosecutor knows is not supported by probable cause” (emphasis added)); Utah: UTAH RULES OF PROF'L CONDUCT r. 3.8 (2005); Vermont: VT. RULES OF PROF'L CONDUCT r. 3.8 (2009); Virginia: VA. RULES OF PROF'L CONDUCT r. 3.8 (2000) (“not *file or maintain* a charge that the prosecutor knows is not supported by probable cause” (emphasis added)); Washington: WASH. RULES OF PROF'L CONDUCT r. 3.8 (2011); West Virginia: W. VA. RULES OF PROF'L CONDUCT r. 3.8 (2015); Wisconsin: WIS. RULES OF PROF'L CONDUCT SCR 20:3.8 (2009); Wyoming: WYO. RULES OF PROF'L CONDUCT r. 3.8 (2014).

228. See sources cited *supra* note 227.

that he or she “*knows* is not supported by probable cause.”²²⁹ Nine states made slight modifications to the model rule, with Massachusetts making the most significant change,²³⁰ requiring the prosecutor to have a “good faith belief” that probable cause exists before bringing, or even threatening to bring, criminal charges.²³¹

B. ABA Standards for Criminal Justice

In 2015, the ABA House of Delegates approved a set of “Criminal Justice Standards for the Prosecution Function.”²³² While these standards are significantly more extensive than the ABA’s Model Rules of Professional Conduct²³³ and are “intended to be entirely consistent” with the Model Rules, they carry no legal authority.²³⁴ Instead, the standards are:

[A]spirational or describe best practices,” and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve

229. MODEL RULES OF PROF’L CONDUCT r. 3.8(a) (AM. BAR ASS’N 2019) (emphasis added).

230. See sources cited *supra* note 227.

231. MASS. RULES OF PROF’L CONDUCT r. 3.8 (2016) (“refrain from prosecuting where the prosecutor *lacks a good faith belief* that probable cause to support the charge exists, and refrain from *threatening to prosecute a charge where the prosecutor lacks a good faith belief* that probable cause to support the charge exists or can be developed through subsequent investigation” (emphasis added)).

232. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS’N 2015), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

233. For example, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2(b) provides:

The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

Id. § 3-1.2(b).

234. *Id.* § 3-1.1(b).

as a predicate for a motion to suppress evidence or dismiss a charge.²³⁵

C. Absolute Immunity from Civil Suits

Thanks to the absolute immunity their position affords them, prosecutors virtually never have to answer to lawsuits or other legal ramifications for their misconduct. Since 1976, prosecutors “acting within the scope of their ‘advocative’ function on behalf of the government” have been protected by absolute immunity.²³⁶ To this day, that doctrine shields most prosecutorial conduct from lawsuits brought by wronged criminal defendants. On its face, this protection is grounded in sound reasoning. After all, being exposed to the potential of civil liability could alter prosecutors’ decision-making processes, causing them to weigh the fear of retaliatory civil suit with their duty to do justice.²³⁷ The wave of lawsuits and the work to respond to them could distract prosecutors from their core function—prosecuting crimes.²³⁸ Immunity means that “much prosecutorial discretion is unreviewed or unreviewable by the courts.”²³⁹

The only currently recognized avenues for attacking a prosecutor’s decisions are based on equal protection or due process claims. Prosecutors cannot base their charging or other decisions on “race, religion, the exercise of rights, or other arbitrary classifications.”²⁴⁰ But the bar for proving a case under these claims is extremely high. “Everybody knows: selective prosecution is a long-shot defense, a very long shot” because defendants have to prove that similarly situated individuals were not prosecuted in the same way.²⁴¹ This combination makes the decisions of prosecutors “virtually immune from legal attack.”²⁴² In addition, a judge hearing a civil lawsuit against a prosecutor faces a separation of powers

235. *Id.*

236. Woislaw, *supra* note 214, at 357 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976)).

237. *See id.* at 358.

238. *See id.*

239. Griffin, *supra* note 10, at 275.

240. *Id.* at 276.

241. *Id.* at 277 (quoting H. RICHARD UVILLER, *THE TILTED PLAYING FIELD: IS THE CRIMINAL JUSTICE SYSTEM UNFAIR?* 52 (1999)).

242. *Id.* at 278 (quoting Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 *FORDHAM URB. L.J.* 513, 513 (1993)).

problem—the court would be asked to “exercise judicial power over a ‘special province’ of the Executive.”²⁴³

Legal impediments to holding prosecutors’ offices liable for civil rights violations committed by its prosecutors are equally insurmountable. Holding a prosecutor’s office, like any other local governmental entity, liable under § 1983 requires a showing that the wrongful act was done pursuant to official governmental policy.²⁴⁴ Absent explicit unconstitutional policies, liability can attach only when a prosecutor’s lack of training “amount[s] to ‘deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.’”²⁴⁵ And a showing of deliberate indifference ordinarily requires a “pattern of similar constitutional violations by untrained employees.”²⁴⁶ In the cases discussed in Part I, *supra*, the frivolous prosecutions in cases with different charges and facts would never rise to the level required to impose liability on the prosecutor’s office under § 1983.

D. Grand Jury Indictment

The Fifth Amendment of the U.S. Constitution provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.”²⁴⁷ Thus, in a federal felony prosecution, unless the right is waived,²⁴⁸ charges must be presented to a grand jury for a determination of probable cause.²⁴⁹ A federal grand jury is comprised

243. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

244. *See Connick v. Thompson*, 563 U.S. 51, 60 (2011); *see also* 42 U.S.C. § 1983 (2018) (providing for a civil action for a violation of rights).

245. *Connick*, 563 U.S. at 61 (quoting *Canton v. Harris*, 489 U.S. 378, 388 (1989)).

246. *Id.* at 62.

247. U.S. CONST. amend. V.

248. *See* FED. R. CRIM. P. 7(b); *see also* *United States v. Ferguson*, 758 F.2d 843, 850 (2d Cir. 1985) (stating that “a defendant may waive the similar personal right of indictment by a grand jury”).

249. *See* U.S. CONST. amend. V; *Green v. United States*, 356 U.S. 165, 183 (1958); *Mackin v. United States*, 117 U.S. 348, 350–52 (1886); *Ex parte Wilson*, 114 U.S. 417, 426 (1885); *United States v. Wellington*, 754 F.2d 1457, 1462 (9th Cir. 1985); *United States v. Gonzalez*, 661 F.2d 488, 492 (5th Cir. 1981); *United States v. Russell*, 585 F.2d 368, 370 (8th Cir. 1978); *Catlette v. United States*, 132 F.2d 902, 907 (4th Cir. 1943). Because federal misdemeanor offenses are not considered “infamous” crimes and cannot be punished by imprisonment in a penitentiary,

of sixteen to twenty-three individuals²⁵⁰ who determine whether there is sufficient evidence to believe that a crime has been committed by the charged individual.²⁵¹ When twelve jurors agree that the evidence presented to them is sufficient to warrant prosecution of the accused, they hand down an indictment,²⁵² also known as a “true bill.”²⁵³ If twelve jurors are not convinced that there is enough evidence to proceed with the prosecution, they hand down a “no true bill.”²⁵⁴

The Fifth Amendment’s grand jury clause is one of the few provisions of the Bill of Rights that have not been held applicable to the states.²⁵⁵ While most states have a statutory or rule-based grand jury provision, the provision’s function varies widely.²⁵⁶ Though

misdemeanor charges need not be presented to a grand jury. *See* 18 U.S.C. § 4083 (2018) (discussing penitentiary imprisonment).

250. FED. R. CRIM. P. 6(a)(1).

251. *See* John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341, 353 (2005).

252. FED. R. CRIM. P. 6(f).

253. *See* MARK MOTIVANS, U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2014 – STATISTICAL TABLES 53 (2017), <https://www.bjs.gov/content/pub/pdf/fjs14st.pdf>.

254. *See* Decker, *supra* note 251, at 353.

255. *See* *Hurtado v. California*, 110 U.S. 516, 534–35 (1884).

256. Each state grand jury provisions or rules are noted after the state name. Alabama: ALA. R. CRIM. P. 12.2(a); Alaska: ALASKA R. CRIM. P. 6(d); Arizona: ARIZ. REV. CODE § 21-404 (West 2019); Arkansas: ARK. CODE ANN. § 16-32-201(c) (West 2019); California: CAL. PENAL CODE §§ 888, 888.2 (West 2019); Colorado: COLO. REV. STAT. ANN. § 13-72-102 (West 2019); Connecticut: CONN. GEN. STAT. § 54-45 (West 2019); Delaware: 10 DEL. C. § 4505 (West 2019); Florida: FLA. STAT. § 905.01(1) (West 2019); Georgia: GA. CODE ANN. §§ 15-12-61(a), 15-12-100(b) (West 2019); Hawaii: HAW. R. CRIM. P. 6(a); Idaho: IDAHO CODE ANN. §§ 2-103, 2-502 (West 2019); Illinois: 705 ILL. COMP. STAT. 305/9 (West 2019); Indiana: IND. CODE § 35-34-2-2(a) (West 2019); Iowa: IOWA R. CRIM. P. 2.3(1); Kansas: KAN. STAT. ANN. § 22-3001(d) (West 2019); Kentucky: KY. REV. STAT. ANN. § 29A.200 (West 2019); Louisiana: LA. CODE CRIM. P. art. 413A; Maine: ME. R. CRIM. P. 6(a); Maryland: Attorney Grievance Comm’n v. Bailey, 403 A.2d 1261, 1263–64 (Md. Ct. App. 1979); Massachusetts: MASS. GEN. LAWS ch. 277 § 1 (West 2019); Michigan: MICH. COMP. LAWS ANN. § 767.11 (West 2019); Minnesota: MINN. STAT. ANN. § 628.41(1) (West 2019); Mississippi: MISS. CODE ANN. § 13-5-41 (West 2019); Missouri: MO. CONST. art. 1, § 16; Montana: MONT. CODE ANN. § 3-15-103 (West 2019); Nebraska: NEB. REV. STAT. § 25-1633 (West 2019); Nevada: NEV. REV. STAT. ANN. §§ 6.110, 6.120 (West 2019); New Hampshire: *State v. Fleury*, 321 A.2d 108, 113 (N.H. 1974); New Jersey: N.J. STAT. ANN. 2B:21-2 (West 2019); New Mexico: N.M. STAT. ANN. § 31-6-1 (West 2019); New York: N.Y. CRIM. P. LAW § 190.05; North Carolina: N.C. GEN. STAT. § 15A-621 (West 2019); North Dakota: N.D. CODE §§ 29-10.1-01, 29-10.2-03 (West 2019); Ohio: OHIO R. CRIM. P. 6(A); Oklahoma: OKLA. STAT. § 22-311 (West 2019); Oregon: OR. REV. STAT. ANN. § 132.010 (West 2019); Pennsylvania: PA. R. CRIM. P. 556.3; Rhode

about half of states have rules relating to grand juries, the rules do not require that a grand jury be used to initiate a criminal proceeding.²⁵⁷ And for those states that do require a grand jury, not only do the prerequisites for what kind of criminal cases require a grand jury indictment differ, but also both the number of grand jurors and how many must agree to issue an indictment are varied.²⁵⁸

The concept of a grand jury should be comforting, ostensibly fulfilling the goal of Federal Rule of Civil Procedure 11 in the criminal system: making sure that prosecutors stop and think before they attempt to prosecute someone. Looking at the federal system alone, the requirement of convincing twelve people of a case's merits seems an effective means of achieving that goal. And yet one could question the efficacy of such a system when looking at the numbers: examining Federal Justice Statistics from October 1, 2013 to September 30, 2014, the last year for which statistical tables are published, there were 170,161 cases handled by federal prosecutors.²⁵⁹ Of those cases, only 28,285 (16.6%) were declined and did not proceed.²⁶⁰ And of those cases that did not move forward, only fourteen cases were declined because they did not receiving a "true bill" from the grand jury.²⁶¹ Statistically speaking, a would-be criminal defendant has a better chance of not being prosecuted due to the prosecution's lack of resources or fugitive status than due to a grand jury returning a "no bill."²⁶²

But this is not truly surprising, considering the nature of a grand jury. In a grand jury proceeding, "the prosecutor holds all the

Island: R.I. GEN. LAWS §§ 12-11-1, 12-11.1-1 (West 2019); South Carolina: S.C. CODE ANN. §§ 14-7-1510, 14-7-1620 (West 2019); South Dakota: S.D. CODIFIED LAWS § 23A-5-1 (West 2019); Tennessee: TENN. CODE ANN. § 40-12-206(a) (West 2019); Texas: TEX. CONST. art. V, § 13; Utah: UTAH CODE ANN. § 77-10a-4(1) (West 2019); Vermont: VT. R. CRIM. P. 6(a); Virginia: VA. CODE ANN. § 19.2-195 (2019); Washington: WASH. REV. CODE § 10.27.020(6) (West 2019); West Virginia: W. VA. R. CRIM. P. 6(a); Wisconsin: WIS. STAT. ANN. § 968.40 (West 2019); Wyoming: WYO. STAT. ANN. § 7-5-103(a) (West 2019); *see also* Susan Brenner & Lori Shaw, *State Grand Juries*, FED. GRAND JURY, <https://web.archive.org/web/20100718003858/http://campus.udayton.edu/~grandjur/stategj/stateg.htm> (discussing various state grand jury methods).

257. Decker, *supra* note 251, at 354.

258. *Id.*

259. MOTIVANS, *supra* note 253, at 11 tbl. 2.2.

260. *Id.* at 12 tbl. 2.3.

261. *Id.*

262. *Id.*

cards”;²⁶³ since neither the accused nor their counsel may be present at grand jury proceedings, the only party involved is the prosecutor.²⁶⁴ Thus the prosecutor is the only party who provides any form of evidence to the grand jury for consideration, producing a rather one-sided story.²⁶⁵ This is especially dangerous where the only burden the prosecutor must meet is one of providing probable cause—the “kind of ‘fair probability’ on which ‘reasonable and prudent [people,] not legal technicians, act.’”²⁶⁶ And since the prosecutor may build his or her entire grand jury presentation on hearsay evidence—evidence inadmissible at trial—the facility with which a prosecutor may obtain a grand jury indictment is obvious.²⁶⁷ Coupled with the Supreme Court’s holding that prosecutors are not obligated to present exculpatory evidence to the grand jury during their presentation of the facts,²⁶⁸ one arrives at an inescapable fact—prosecutors, especially federal prosecutors, generally only fail to gain an indictment when they don’t want one. In the words of several judges and attorneys—a grand jury would indict a “ham sandwich” if the case was presented to them.²⁶⁹

While the courts have stated that prosecutorial discretion in what prosecutors may say and do is indeed “not boundless,” an indictment may not be dismissed unless in “flagrant cases.”²⁷⁰ In this context, flagrant means significantly infringing on the grand jury’s ability to exercise independent judgement; the inquiry focusing not on the culpability of the prosecutor but instead on the impact on the grand jury’s ability to remain impartial.²⁷¹ Simply put, dismissal of an indictment is only “warranted on constitutional grounds if prosecutorial misconduct has undermined the grand jury’s ability to make an informed and objective evaluation of the evidence presented

263. Note, *Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency*, 130 HARV. L. REV. 1205, 1208 (2017) (quoting *Commonwealth v. Walczak*, 979 N.E.2d 732, 752 (Mass. 2012) (Lenk, J., concurring)).

264. FED. R. CRIM. P. 6(d)(1).

265. See FED. R. CRIM. P. 6(d)(1); *Restoring Legitimacy: The Grand Jury as the Prosecutor’s Administrative Agency*, *supra* note 263, at 1208.

266. *Kaley v. United States*, 571 U.S. 320, 338 (2014) (quoting *Florida v. Harris*, 568 U.S. 237, 244 (2013)).

267. *Decker*, *supra* note 251, at 356–57.

268. See *United States v. Williams*, 504 U.S. 36, 52 (1992).

269. See, e.g., *In re Grand Jury Subpoena of Stewart*, 545 N.Y.S.2d 974, 977 n.1. (N.Y. Sup. Ct. 1989).

270. *United States v. De Rosa*, 783 F.2d 1401, 1405 (9th Cir. 1986) (quoting *United States v. Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir. 1983)).

271. *Id.*

to it.”²⁷² Thus a prosecutor may cross a line by asserting personal opinions and making inflammatory statements, but absent a showing that the behavior caused prejudice in the actions of the grand jury the indictment will stand.²⁷³ Put best by former Chicago federal district judge Williams J. Campbell, “today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury.”²⁷⁴

E. Current State of Judicial Oversight of Prosecutors’ Actions

It is commonly argued that a prosecutor’s discretion is not absolute because the judge overseeing the proceedings or trial can rein in bad behavior before that conduct has a chance to ruin or otherwise improperly affect any outcome.²⁷⁵ The public expects judges to “take the lead in holding prosecutors accountable for misconduct” since judges are the ones most likely to see it happen and are best positioned to react and order sanctions at the time the bad behavior occurs.²⁷⁶

However, judges have been “unable or unwilling to serve this regulatory function” when it comes to prosecutors.²⁷⁷ In *United States v. Navarro*, the judge was quoted as saying to the jury that the prosecutors in his court “will be candid, they’ll be honest, that they’ll act in good faith in all matters presented to you.”²⁷⁸ Overall, judges remain “indifferent to the moral culpability of the prosecutor” in front of them, as long as the basic trial process is not flagrantly

272. *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1391 (9th Cir. 1983); see also *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1986) (dismissal of the indictment is appropriate only “if it is established that the violation substantially influenced the grand jury’s decision to indict,” or if there is ‘grave doubt’ that the decision to indict was free from the substantial influence of such violations.” (quoting *United States v. Mechnik*, 475 U.S. 66, 78 (1986) (O’Connor, J., Concurring)).

273. *Sears, Roebuck & Co.*, 719 F.2d at 1391.

274. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, FEDERAL GRAND JURY REFORM REPORT & ‘BILL OF RIGHTS’ 2 (2000), <https://www.nacdl.org/getattachment/0aebc59b-b21b-49ea-b7f9-7d3b1ea60255/federal-grand-jury-reform-report-and-bill-of-rights.pdf>.

275. See, e.g., David Fisher, *Fifth Amendment—Prosecutorial Discretion Is Not Absolute: Constitutional Limits on Decision Not to File Substantial Assistance Motions*, 83 J. CRIM. L. & CRIMINOLOGY 744, 744 (1993).

276. Green & Yaroshesky, *supra* note 219, at 62.

277. *Id.* at 62–63.

278. *United States v. Navarro*, 608 F.3d 529, 536 (9th Cir. 2010).

unfair.²⁷⁹ This sort of deference to the prosecution and trust in their abilities and ethics is exceedingly common; judges often give prosecutors “the benefit of the doubt.”²⁸⁰ Judges see the prosecutors who practice in their court more frequently than many other lawyers and as a result develop an almost friendship-like professional relationship. Some judges have “elevated this belief [in prosecutors] to the level of a legal presumption.”²⁸¹ When they do notice misconduct, most judges are reluctant to hold the individual prosecutor responsible. They delegate the issues to “internal office regulation or perhaps . . . attorney disciplinary agencies” and do not want to interfere with either of those functions.²⁸² And appellate courts often review a trial court’s determination of a claim of prosecutorial misconduct under a deferential abuse of discretion standard or require proof that the alleged misconduct was prejudicial.²⁸³

Even when defense counsel notices misconduct on the part of the prosecutor, it is rare for them to bring it to the attention of the presiding judge, during or after trial. There is generally “a perception that no judicial remedy” would come from complaining and that they would just subject their clients to “the prosecution’s wrath.”²⁸⁴ Based on that same unfettered discretion that led to the misconduct, the prosecutor could conceivably retaliate against the defendant out of spite for his or her defense lawyer, and that too

279. Griffin, *supra* note 10, at 261.

280. Green & Yaroshefsky, *supra* note 219, at 54; *see also* United States v. Turner, 104 F.3d 1180, 1185–86 (9th Cir. 1997) (offering an example of prosecutorial deference).

281. Green & Yaroshefsky, *supra* note 219, at 54; *see also* United States v. Bernal-Obeso, 989 F.2d 331, 335 (9th Cir. 1993) (stating that the court relies on the “integrity of government agents and prosecutors not to introduce untrustworthy evidence into the system”).

282. Green & Yaroshefsky, *supra* note 219, at 63.

283. *See, e.g.*, State v. Allen, 941 N.E.2d 824, 829 (Ohio Ct. App. 2010) (citing State v. Treesh, 739 N.E.2d 749, 771 (Ohio 2001)) (“The standard of review for prosecutorial misconduct is whether the comments and questions by the prosecution were improper and, if so, whether they prejudiced appellant’s substantial rights.”); Commonwealth v. Solomon, 25 A.3d 380, 383 (Pa. Super. Ct. 2011), *appeal denied*, 615 Pa. 766 (2012) (“Our standard of review for a claim of prosecutorial misconduct is limited to whether the trial court abused its discretion.”); State v. Hayes, 855 N.W.2d 668, 674–75 (S.D. 2014) (“The standard of review for prosecutorial misconduct claims is abuse of discretion.”).

284. Green & Yaroshefsky, *supra* note 219, at 63.

would remain unchecked. It simply is not good advocacy for a defense lawyer to call out a prosecutor for bad behavior.²⁸⁵

III. HOLDING CIVIL LITIGATORS ACCOUNTABLE FOR FRIVOLOUS CONDUCT: CIVIL RULE 11, WHAT IT IS AND HOW IT WORKS

Unlike the dearth of legal remedies available to criminal defendants who suffer damages as a result of prosecutor's frivolous conduct, there is a wide range of remedies for civil litigants, who may invoke both statutory protections and rules of civil procedure to address civil litigators' misconduct. Some states have statutes that address frivolous filings and arguments made by counsel in civil cases.²⁸⁶ And the Federal Rules of Civil Procedure and most states'

285. This is seen in the prosecutor's reaction to defense counsel questioning the legitimacy of charges against John McClane described in Section 1.A, *supra*.

286. See, e.g., ALA. CODE § 12-19-272(a) (West 2019) (“[I]n any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorneys' fees and costs against any attorney or party, or both, who has brought a civil action, or asserted a claim therein, or interposed a defense, that a court determines to be without substantial justification, either in whole or part.”); CONN. GEN. STAT. § 52-568 (West 2019) (“Any person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages.”); FLA. STAT. § 57.105(1) (West 2019) (“(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts.”); MISS. CODE ANN. § 11-55-5(1) (West 2019) (“[I]n any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure.”); NEB. REV. STAT. § 25-824(1) (West 2019) (“The signature of a party or of an attorney on a pleading constitutes a certificate by him or her that he or she has read the

civil rules have a rule that deals with attorneys' improper conduct in bringing or maintaining frivolous claims or presenting frivolous arguments to a court in motions or other filings.²⁸⁷ To understand how a proposed *criminal* Rule 11²⁸⁸ would function in empowering

pleading; that to the best of his or her knowledge, information, and belief there is good ground for the filing of the pleading; and that it is not interposed for delay.”); NEB. REV. STAT. § 25-824(2) (“[I]n any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney’s fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.”); N.J. REV. STAT. § 2A:15-59.1(a)(1) (West 2019) (“A party who prevails in a civil action, either as plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the non-prevailing person was frivolous.”); OHIO REV. CODE ANN. § 2323.51(B)(1) (West 2019) (“[A]ny party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney’s fees, and other reasonable expenses incurred in connection with the civil action or appeal. The court may assess and make an award to any party to the civil action or appeal who was adversely affected by frivolous conduct, . . .”).

287. See FED. R. CIV. P. 11. The relevant state statutes are as follows: Alabama: ALA. R. CIV. P. 11; Alaska: ALASKA R. CIV. P. 11; Arizona: ARIZ. R. CIV. P. 11; Arkansas: ARK. R. CIV. P. 11; California: CAL. CIV. PROC. CODE § 128.7 (West 2019); Colorado: COLO. R. CIV. P. 11; Connecticut: N/A; Delaware: DEL. SUP. CT. R. CIV. P. 11; Florida: N/A; Georgia: N/A; Hawaii: HAW. R. CIV. P. 11; Idaho: IDAHO R. CIV. P. 11; Illinois: ILL. SUP. CT. R. 137; Indiana: IND. R. TRIAL P. 11; Iowa: IOWA R. CIV. P. 1.413; Kansas: KAN. STAT. ANN. § 60-211 (West 2019); Kentucky: KY. R. CIV. P. 11; Louisiana: LA. CODE CIV. P. ANN. art. 863 (West 2019); Maine: ME. R. CIV. P. 11; Maryland: MD. RULE 1-311; Massachusetts: MASS. R. CIV. P. 11; Michigan: MICH. CT. R. 1.109; Minnesota: MINN. R. CIV. P. 11.02; Mississippi: MISS. R. CIV. P. 11; Missouri: MO. SUP. CT. R. 55.03; Montana: MONT. R. CIV. P. 11; Nebraska: N/A; Nevada: NEV. R. CIV. P. 11; New Hampshire: N.H. SUP. CT. R. 11(d) (relating to motions, ability to recover attorney’s fees for frivolous conduct established by *Harkeem v. Adams*, 377 A.2d 617 (1977)); New Jersey: N.J. CT. R. 1:4-8; New Mexico: N.M. R. CIV. P. 1-011; New York: N.Y. CT. R. § 130-1.1; North Carolina: N.C. R. CIV. P. 11; North Dakota: N.D. R. CIV. P. 11; Ohio: OHIO R. CIV. P. 11; Oklahoma: OKLA. STAT. § 12-2011 (West 2019); Oregon: OR. R. CIV. P. 17; Pennsylvania: PA. R. CIV. P. 1023.1; Rhode Island: R.I. DIST. CT. R. CIV. P. 11; South Carolina: S.C. R. CIV. P. 11; South Dakota: S.D. CODIFIED LAWS ANN. § 15-6-11(b); Tennessee: TENN. R. CIV. P. 11.02; Texas: TEX. R. CIV. P. 13; Utah: UTAH R. CIV. P. 11; Vermont: VT. R. CIV. P. 11; Virginia: VA. CODE ANN. § 8.01-271.1 (West 2019); Washington: WASH. SUP. CT. CIV. R. 11; West Virginia: W. VA. R. CIV. P. 11; Wisconsin: WIS. STAT. ANN. § 802.5 (West 2019); Wyoming: WYO. R. CIV. P. 11.

288. The Federal Rules of Criminal Procedure does have a Rule 11 that governs, among other things, plea agreements and the entering and accepting of a plea by a criminal defendant. See FED. R. CRIM. P. 11. The new rule proposed by this Article, to create a mechanism by which courts can hold prosecutors accountable for frivolous conduct, would have to have another number. Perhaps the proposed rule could be

courts to hold prosecutors accountable for misconduct, it is helpful to begin with a careful look at *civil* Rule 11—what it is and how it functions.

Federal Rule of Civil Procedure 11 is well-known to every civil litigator who practices in federal court.²⁸⁹ In addition to requiring all

added as Rule 1.1. *See infra* Part IV. As previously discussed, because state rules of criminal procedure have varied numbering schemes, the new rule proposed by the Article may have a different number in each state that enacts it.

289. State versions of Rule 11 use very similar language. For example: Tennessee Rule 11.02, provides:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denial of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

TENN. R. CIV. P. 11.02.

West Virginia's Rule 11, provides:

(b) Representations to court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, and attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

court filings submitted by lawyers to be signed by the counsel of record, the rule allows trial judges to impose sanctions on lawyers²⁹⁰ for engaging in frivolous conduct.²⁹¹ Rule 11(b) requires that an attorney, when:

[P]resenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it . . . certifies that to the best of the [attorney]’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.²⁹²

Rule 11 then provides for the court authority to impose sanctions on lawyers and their firms who run afoul of the Rule’s requirements:

If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

W. VA. R. CIV. P. 11.

290. While the Rule also applies to *pro se* litigants, because all prosecutors are licensed attorneys, this Article considers only sanctions available against lawyers.

291. FED. R. CIV. P. 11.

292. *Id.* at 11(b).

been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.²⁹³

A court can consider the imposition of sanctions *sua sponte*²⁹⁴ or on motion filed by a party after the party has met the “safe harbor” requirement.²⁹⁵

A. *Intent and Limitations*

Adopted in 1937, with substantive amendments in 1983 and 1993,²⁹⁶ the core purpose of Federal Rule of Civil Procedure 11 has remained resolute: to act as a deterrent to frivolous arguments, both claims and defenses, being brought before courts and thus “speeding up and reducing the costs of litigation.”²⁹⁷ The Rule’s language setting forth this intent—“representations to the court”²⁹⁸—is purposefully particular, limiting the application of the rule to “conduct associated with papers signed and filed with the court.”²⁹⁹ This means the scope of the Rule is limited in two aspects: what the rule governs over and the timeframe to which it applies.

The Rule governs written “representations to the court” in a “pleading, written motion, or other paper” and arguments made to the court based on such a submission.³⁰⁰ The term pleading is meant to apply to both a plaintiff’s complaint and a defendant’s response—a fact made clear with the mention of both claims and defenses in the Rule.³⁰¹ The Rule applies to frivolousness in every pleading:

293. *Id.* at 11(c)(1).

294. *Id.* at 11(c)(3).

295. *Id.* at 11(c)(2). Under the Rule’s “safe harbor” provision, before a party can file the motion requesting sanctions, he or she must give the opposing party twenty-one-days’ notice to withdraw the “challenged paper, claim, defense, contention, or denial.” *Id.*

296. FED. R. CIV. P. 11 advisory committee’s notes.

297. *Binghamton Masonic Temple, Inc. v. Bares*, 168 F.R.D. 121, 126 (N.D.N.Y. 1996).

298. FED. R. CIV. P. 11(b).

299. *Jones v. Intn’l Riding Helmets, Ltd.*, 145 F.R.D. 120, 122 (N.D. Ga. 1992).

300. FED. R. CIV. P. 11(b).

301. *Id.* at 11(b)(2).

complaints, answers third-party complaints, etc.,³⁰² as well as motions presented to the court.³⁰³

The term “other paper” appears to be a catchall, applicable to any document presented to a court with the exception of written discovery requests and responses and discovery motions.³⁰⁴ Thus, the reach of “other paper” is wide, going so far as to cover affidavits,³⁰⁵ notices of appearances,³⁰⁶ and even documents that, while not officially filed, were submitted to the court or judge directly.³⁰⁷

Despite this expansive reach, the Rule is still limited to written submissions. A civil litigator cannot be sanctioned under Rule 11 for only making a frivolous or misleading oral statement during an oral argument, oral presentation, or oral representation at a hearing.³⁰⁸ Instead, for an oral statement to fall under the scope of Rule 11, the statement must be one that reaffirms frivolous or baseless positions argued in a written document presented to the court.³⁰⁹

Rule 11’s second limitation relates to the time a violation occurs—that is, whether the pleading, motion, or paper was frivolous at the time it was filed or submitted to the court. A court must decide whether the attorney’s conduct was reasonable at the moment

302. Permissible pleadings are set forth in FED. R. CIV. P. 7(a).

303. FED. R. CIV. P. 11(b).

304. *Id.* at 11(d). This carve out exists because Rule 37 provides a separate mechanism for seeking sanctions for discovery abuses. *See* FED. R. CIV. P. 37.

305. *Eisenberg v. Univ. of N.M.*, 936 F.2d 1131, 1133–34 (10th Cir. 1991) (“Although . . . [the] affidavit was not formally ‘filed’ in the court file, it was nonetheless submitted with the intention that the court, as factfinder, rely upon the truth and accuracy of the statements contained therein. . . . Thus, we conclude that . . . [the] affidavit was a signed, certified document, submitted to the court, and within the scope of ‘other papers’ appropriate for consideration under Rule 11.”).

306. *See, e.g., Turner v. Sungard Bus. Sys., Inc.*, 91 F.3d 1418, 1421 (11th Cir. 1996).

307. *See, e.g., Legault v. Zambarano*, 105 F.3d 24, 27–28 (1st Cir. 1997) (Letter sent by attorney to opposing counsel, with a copy of sent to the judge, was considered “other papers” as it influenced the judge and his decision.).

308. *See Oliner v. Kontrabecki (In re Cent. European Indus. Dev. Co.)*, 2009 Bankr. LEXIS 639, at *30–31. (N.D. Cal. Jan. 14, 2009).

309. *O’Brien v. Alexander*, 101 F.3d 1479, 1490 (2d Cir. 1996) (“Thus, to be sanctionable an oral representation must meet two requirements: (1) it must violate the certification requirement of Rule 11(b), *e.g.*, by advocating baseless allegations, and (2) it must relate directly to a matter addressed in the underlying paper and be in furtherance of that matter to constitute advocating within the meaning of subsection (b).”); *accord* FED. R. CIV. P. 11 advisory committee notes on 1993 amendments.

the written document was submitted.³¹⁰ Facts that are discovered after the document is submitted are irrelevant to the determination of sanctionable conduct unless the litigator continues to argue positions contained in the written submission that are no longer sustainable. This means that if an attorney were to submit a pleading with five claims that were reasonable at the time of submission, but two of them were later found to be factually unsupported, Rule 11 sanctions could not be imposed for the original pleading.³¹¹ Nor is failure of a claimant to dismiss claims for which no factual support could be found sanctionable.³¹² But should the litigator continue to present an argument to the court despite knowing its frivolous nature, the attorney opens himself or herself to the sanctions under the Rule.³¹³

B. Requirement for Reasonable Inquiry into Facts and Law

Federal Rule of Civil Procedure 11 has had a singular purpose throughout its existence—to encourage attorneys to make a reasonable, proper inquiry into the relevant law and facts before signing and submitting any pleading, motion, or paper.³¹⁴ Put best by Judge Brotman of the U.S. District Court for the District of New Jersey:

Rule 11 provides that by submitting a “pleading, written motion, or other paper” to the court, a person is certifying, among other things, that to the best [of] their knowledge the legal arguments contained therein are supported by a[n] existing law, or a non-frivolous argument for extension, modification or reversal and that the facts contained therein are supported by existing evidence or are likely to be

310. FED. R. CIV. P. 11 advisory committee notes on 1983 amendments.

311. *See, e.g.*, *Cunningham v. County of Los Angeles*, 879 F.2d 481, 490 (9th Cir. 1988) (“Plaintiff’s claims were not frivolous at the time they were filed. The fact that some of the claims were later found lacking in evidentiary foundation is irrelevant to the Rule 11 inquiry.”).

312. *Samuels v. Wilder*, 906 F.2d 272, 275 (7th Cir. 1990) (“[T]he district judge imposed sanctions in this case because plaintiffs *failed* to file a document dismissing the complaint at the time the court thought they should have dismissed their cherry picking claim. Rule 11 does not support sanctions for inactivity or belated activity.”).

313. FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

314. *See Fla. Monument Builders v. All Faiths Mem’l Gardens*, 605 F. Supp. 1324, 1325 (S.D. Fla. 1984).

supported after reasonable inquiry. . . . Put simply, Rule 11 requires a person contemplating filing a paper with the court to “stop, think, and investigate” before doing so.³¹⁵

Before submitting any document to a court, every civil litigator must ask themselves two questions. First, is my argument reasonable? And second, based on the circumstances, what makes this argument reasonable? The Rule itself explains that the determination of what is reasonable is not a one-size-fits-all determination but is instead based on the circumstances of the case.³¹⁶ As an objective standard, it requires litigators to act as any reasonable, similarly situated attorney would act under similar circumstances.³¹⁷ Factors that can be considered include: how much time the litigator had to investigate; whether he or she depended on a client, forwarding counsel, or both; whether the legal arguments are based on a plausible view of the law; what information was available before filing; and whether discovery could be expected to provide more information.³¹⁸ All of these considerations revolve around the essential question of whether the lawyer’s inquiry was reasonable.

For the attorney’s inquiry to be reasonable under the circumstances, the lawyer’s legal contentions need not be perfect, and the factual allegations need not be certain. But the legal contentions must be supported by a reasonable interpretation of existing law or a reasonable argument for a change in the law.³¹⁹ And the factual contentions must have evidentiary support.³²⁰ It is not unreasonable for a lawyer to make legal arguments that go

315. *Wartsila NSD N. Am., Inc. v. Hill Int’l, Inc.*, 315 F. Supp. 2d 623, 627 (D.N.J. 2004); *accord, e.g.*, FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

316. FED. R. CIV. P. 11(b); *accord* *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (3d Cir. 1985) (“The standard for testing conduct under amended Rule 11 is reasonableness under the circumstances”); *Lockheed Martin Energy Sys., Inc. v. Slavin*, 190 F.R.D. 449, 457 (E.D. Tenn. 1999) (“In determining whether Rule 11 has been violated, the Court must assess ‘whether the individual’s conduct was reasonable under the circumstances.’” (quoting *Lemaster v. United States*, 891 F.2d 115, 118 (6th Cir. 1989))).

317. *Lockheed Martin Energy Sys., Inc.*, 190 F.R.D. at 457.

318. *See* FED. R. CIV. P. 11 advisory committee’s note to 1983 amendment; *accord In re Meier*, 223 F.R.D. 514, 518 (W.D. Wis. 2004).

319. FED. R. CIV. P. 11(b)(2).

320. *Id.* at 11(b)(3).

against current jurisprudence; arguing for a modification, reversal, or extension of existing law is reasonable as long as there is some support for the legal theories, such as dissenting opinions, case law from other jurisdictions, law review articles, or even other attorneys' opinions.³²¹ Nor is there a requirement that the lawyer anticipate and consider every possible defense that would defeat their legal claims—only that the lawyer “consider ‘whether any *obvious* affirmative defenses bar the case.’”³²²

There is also no requirement for absolute certainty of the facts that support a claim, but the litigator must have enough factual support for his or her claim to be reasonable in believing the facts are as alleged.³²³ The Rule requires the lawyer to know enough facts, after an inquiry, that make it reasonable to initiate the litigation and conduct discovery.³²⁴ Accordingly, as a general rule, a litigator cannot rely solely on information given to him or her by the client.³²⁵ “In general, [w]hen the attorney can get the information necessary to certify the validity of the claim in public fashion and need not rely on the client, he must do so.”³²⁶ But relying solely on information from a client may be sufficient if the client would presumptively be the best source of the needed information³²⁷ and time constraints

321. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

322. *F.D.I.C. v. Calhoun*, 34 F.3d 1291, 1299 (5th Cir. 1994) (quoting *White v. Gen. Motors Corp.*, 908 F.2d 675, 682 (10th Cir. 1990)).

323. *See Forbes v. Eagleson*, 228 F.3d 471, 488 (3d Cir. 2000).

324. *Cook v. Rockwell Int'l Corp.*, 147 F.R.D. 237, 247 (D. Colo. 1993) (“Rule 11 requires not that counsel *plead* facts but that counsel *know* facts after conducting a reasonable investigation—and then only enough to make it reasonable to press litigation to the point of seeking discovery.” (quoting *Frantz v. U.S. Powerlifting Federation*, 836 F.2d 1063, 1068 (7th Cir. 1987))).

325. *See, e.g., Mars v. Anderman*, 136 F.R.D. 351, 354 (E.D.N.Y. 1989) (stating that a subjective good faith reliance on information provided by a client is not enough to defeat application for Rule 11 sanctions).

326. *Wigton v. Rosenthal*, 137 F.R.D. 4, 5–6 (S.D.N.Y. 1991) (quoting *Nassau-Suffolk Ice Cream, Inc. v. Integrated Res., Inc.*, 114 F.R.D. 684, 689 (S.D.N.Y. 1987)); *see also Coburn Optical Indus., Inc. v. Cilco, Inc.*, 610 F. Supp. 656, 659 (M.D.N.C. 1985) (“Despite an attorney's belief in the statements of his client, he needs facts on which to ground knowledge, information or belief. If all the attorney has is his client's assurance that facts exist or do not exist, when a reasonable inquiry would reveal otherwise, he has not satisfied his obligation.”).

327. *Hamer v. Career Coll. Ass'n*, 979 F.2d 758, 759 (9th Cir. 1992) (“The need to evaluate the lawyer's investigation in light of the totality of the circumstances, and suggested that good faith reliance upon statements of a client ought to be sufficient in the early stages of litigation.”).

limit the lawyer's ability to look for other sources of information.³²⁸ And while there is no requirement that an attorney always doubt his or her client and require corroborating information,³²⁹ there is a requirement that in the face of evidence that brings the client's information into question, the lawyer must perform his or her own inquiry into the facts that support the legal argument. But lawyers will not be sanctioned under Rule 11 for relying on incorrect information when other inquiries give viable credence to that information.³³⁰ The same Rule 11 rules apply when a litigator relies solely on information from another attorney who forwarded the case to them.³³¹

Because the standard is objective reasonableness, the attorney's subjective belief is irrelevant and does not factor into the question of the lawyer's reasonableness.³³² And while imposition of sanctions against opposing counsel under Rule 11 "does not require a finding of bad faith,"³³³ a showing of bad faith can provide significant support for imposition of sanctions.³³⁴ "While bad faith remains sanctionable, it is now not a *sine qua non* to a Rule 11 impost. Put bluntly, a pure heart no longer excuses an empty head."³³⁵ Nor can a lucky gamble that the attorney's meritless argument will later find evidentiary support protect a litigator from being sanctioned for making the argument in the first place.³³⁶

328. *Homer v. Halbritter*, 158 F.R.D. 236, 238 (N.D.N.Y. 1994) (finding the plaintiffs directed their counsel to file a complaint within five days); *see also Hamer v. Career Coll. Ass'n*, 979 F.2d 758, 759 (9th Cir. 1992) (indicating that some cases, including cases seeking a temporary restraining order, require immediate filing).

329. *Hamer*, 979 F.2d at 759.

330. *See Mars*, 136 F.R.D. at 354.

331. *See Val-Land Farms, Inc. v. Third Nat'l Bank*, 937 F.2d 1110, 1118 (6th Cir. 1991) ("The text of the rule does not provide a safe harbor for lawyers who rely on the representations of outside counsel."); *see also Unioil, Inc. v. E.F. Hutton & Co.*, 809 F.2d 548, 558 (9th Cir. 1986) ("[R]eliance on forwarding co-counsel may in certain circumstances satisfy an attorney's duty of reasonable inquiry. . . . [H]owever, counsel must 'acquire[] knowledge of facts sufficient to enable him to certify that the paper is well-grounded in fact.'" (quoting William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 187 (1985))).

332. *See, e.g., Coburn Optical Indus., Inc. v. Cilco, Inc.*, 610 F. Supp. 656, 661 (M.D.N.C. 1985) ("An attorney's reasonable belief that a paper is 'warranted by law' requires an objective analysis turning on the facts and circumstances of the case, not on the attorney's state of mind.").

333. *Barth v. Kaye*, 178 F.R.D. 371, 380 (N.D.N.Y. 1998).

334. *EEOC v. Sears, Roebuck & Co.*, 111 F.R.D. 385, 388 (N.D. Ill. 1986).

335. *Lancellotti v. Fay*, 909 F.2d 15, 19 (1st Cir. 1990).

336. *See, e.g., Slater v. Skyhawk Transp., Inc.*, 187 F.R.D. 211, 217 (D.N.J. 1999) ("Thus, even if an attorney signs and files a motion without conducting research

C. Sanctions

If the court finds that a litigator's actions were unreasonable and violated the provisions of Rule 11(b), it may "impose an appropriate sanction on [the offending] attorney, [and his or her] law firm."³³⁷ The court has considerable latitude in determining the appropriate sanction or sanctions—monetary and nonmonetary—ranging from striking the offending filing or paper, to reprimands, to fines payable to the court, and the award of attorney's fees and expenses to the offended party.³³⁸ In more egregious cases that call into question the lawyer's ethical behavior, the court can refer the conduct to the appropriate attorney disciplinary authority, such as the state licensing authority, bar, or a government agency.³³⁹ To maintain a uniform approach to sanctions—at least in complex civil cases—federal judges can refer to the Manual of Complex Litigation that sets forth the types of sanctions available and considerations for when certain sanctions are justified.³⁴⁰ The guiding principle is that sanctions are meant to act as a deterrent and must therefore be appropriate to deter repeat frivolous behavior.³⁴¹ This ambiguity has led to differing interpretations by federal courts, with some holding that they can only impose the *least* severe appropriate sanction³⁴² and others deciding that the sanction must only be appropriate.³⁴³

Just as the determination of what constitutes a reasonable inquiry must be done on a case-by-case basis, so too must the determination of what is an appropriate sanction. The Rule's comments note that it makes no attempt to "enumerate the factors a

that, with luck, is supported by law discovered after filing that motion, the attorney has violated the obligation imposed by Rule 11 to conduct a reasonable inquiry *before* filing the motion.").

337. FED. R. CIV. P. 11(c)(1). Imposition of sanctions against the law firm for misconduct committed by its lawyer is mandatory "[a]bsent exceptional circumstances." *Id.*

338. FED. R. CIV. P. 11(c)(4); FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

339. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

340. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.15 (Stanley Marcus et al. eds., 2004).

341. FED. R. CIV. P. 11(c)(4).

342. *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988) ("We specifically adopt the principle that the sanction imposed should be the least severe sanction adequate to the purpose of Rule 11.").

343. *Kirk Capital Corp. v. Bailey*, 16 F.3d 1485, 1490 (8th Cir. 1994) ("It simply requires that the sanction be 'appropriate' as required by old Rule 11 thereby according broad discretion to the trial court.").

court should consider in deciding . . . what sanctions would be appropriate in the circumstances.”³⁴⁴ Instead, the comments give a long list of possible considerations as a starting point:

- [1] whether the improper conduct was willful, or negligent;
- [2] whether it was part of a pattern of activity, or an isolated event;
- [3] whether it infected the entire pleading, or only one particular count or defense;
- [4] whether the person has engaged in similar conduct in other litigation;
- [5] whether it was intended to injure;
- [6] what effect it had on the litigation process in time or expense;
- [7] whether the responsible person is trained in the law;
- [8] what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case;
- [9] what amount is needed to deter similar activity by other litigants³⁴⁵

Rule 11 sanctions can be divided into two main categories—nonmonetary and monetary. The first, less complicated category is nonmonetary sanctions. These are listed in the Manual of Complex Litigation as both lenient sanctions, such as reprimands and remedial actions, and more severe sanctions, such as removal of counsel, dismissal, suspension/disbarment, and even referral for possible criminal prosecution.³⁴⁶ The determination of what sanction to impose falls within the court’s “significant discretion” and is based on the severity of the violation.³⁴⁷

Where a Rule 11 violation was minor and could be easily deterred in the future by bringing it to the attention of the violating party, less severe nonmonetary sanctions are appropriate.³⁴⁸ When it is the violating party’s first minor violation, an oral public

344. FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

345. *Id.*

346. MANUAL FOR COMPLEX LITIGATION, *supra* note 340, § 10.154.

347. FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

348. *See id.*

reprimand may be sufficient to achieve the Rule's goal.³⁴⁹ More severe nonmonetary sanctions may include a written public reprimand, an order barring the offending attorney from coming before the court for a period of time, or even an order requiring the attorney to circulate the court's critical opinion to other lawyers at his or her law firm.³⁵⁰ Courts may also require that offending lawyers complete "compulsory legal education" to ensure that the mistake does not happen again.³⁵¹ This level of sanction is appropriate where the lawyer who ran afoul of Rule 11 did so without malice and caused relatively minor damage to the litigation and the opposing party. In such cases, bringing the mistake to the attention of the violating party is generally enough to deter future similar behavior. The next level of sanctions can include requiring the offending counsel to take remedial actions to fix his or her mistakes and granting or denying additional time for discovery and other matters.³⁵²

In situations where the Rule 11 violation is more egregious, more severe nonmonetary sanctions are appropriate.³⁵³ One such sanction may be a restriction on further lawsuits based upon the same facts, a sanction normally imposed when the violator has repeatedly filed frivolous lawsuits.³⁵⁴ Another sanction is striking a pleading, which can occur where "the attorney who signed the pleading met the standards delineated in" Rule 11 by not having "good ground to support" the pleading when he or she signed it.³⁵⁵ "If an attorney's signature to a pleading is to be more than a hollow gesture he must do more than obtain a person willing to lend his name as a plaintiff . . ." ³⁵⁶ A pleading can be stricken as a Rule 11 sanction if it is clearly

349. See MANUAL FOR COMPLEX LITIGATION, *supra* note 340, § 10.154.

350. See *Total Television Entm't Corp. v. Chestnut Hill Vill. Assocs.*, 145 F.R.D. 375, 385 (E.D. Pa. 1992); see also MANUAL FOR COMPLEX LITIGATION, *supra* note 340, § 10.154 (stating more serious nonmonetary sanctions that may be issued).

351. *Total Television Entm't Corp.*, 145 F.R.D. at 385; see also *U.S. Bank Nat'l Ass'n, N.D. v. Sullivan-Moore*, 406 F.3d 465, 471 (7th Cir. 2005) (Courts may "impose non-monetary sanctions when appropriate to deter repetition of the offending conduct.").

352. MANUAL FOR COMPLEX LITIGATION, *supra* note 340, § 10.154.

353. See *id.*

354. See *Dean v. ARA Env'tl. Servs., Inc.*, 124 F.R.D. 224, 227 (N.D. Ga. 1988) (granting motion for sanctions based on repetitive frivolous lawsuits against the same defendants); see also *Ortman v. Thomas*, 99 F.3d 807, 811 (6th Cir. 1996) (stating that the violator was enjoined from bringing suit on the same facts unless complaint is first certified as non-frivolous by a Magistrate Judge).

355. *Freeman v. Kirby*, 27 F.R.D. 395, 396 (S.D.N.Y. 1961).

356. *Id.* at 399.

a sham, false, and in clear violation of the intent and purpose of the Rule,³⁵⁷ especially where a cursory investigation would have shown the flaws and errors with the pleading.³⁵⁸

The striking of a pleading can lead to a complete dismissal of the case. The Manual of Complex Litigation suggests that such a severe nonmonetary sanction should be imposed only after a litigant's failure to fix the violation and where lesser sanctions would be ineffective.³⁵⁹ Courts have agreed that before dismissing a case as a Rule 11 sanction, there must be clear and convincing evidence of a violation and a reasonable justification for why lesser sanctions would not work.³⁶⁰ Thus, while the court must weigh factors such as deterrence, previous violations, failure to correct the violation, and any prejudice to the opposing party due to the violation, the court need not exhaust every possible sanction before arriving at dismissal.³⁶¹

The second category of sanctions is monetary sanctions. As with nonmonetary sanctions, the purpose of monetary sanctions is not to punish but to deter and correct violations of the Rule.³⁶² However, what makes a monetary sanction such an effective deterrent is its punitive nature. Fines are the primary form of monetary sanctions levied upon violators of Rule 11.³⁶³ The commentary to the rule speaks to this, stating that since the purpose of the rule is to deter rather than compensate, ordinarily any monetary sanctions should be paid to the court itself.³⁶⁴ The comment goes further, suggesting in its list of possible factors for a court to consider both the financial resources available to the violating party and the amount expected to deter others from making the same violation when determining the appropriate monetary sanction.³⁶⁵ The Manual of Complex

357. See *S. L. Kaye Co. v. Dulces Anahuac, S. A.*, 524 F. Supp. 17, 19 (S.D.N.Y. 1981).

358. *Brand v. Tisch*, 253 F. Supp. 122, 125 (S.D.N.Y. 1966).

359. MANUAL FOR COMPLEX LITIGATION, *supra* note 340, § 10.154.

360. *Mikkilineni v. Penn Nat'l Mut. Cas. Ins. Co.*, 271 F. Supp. 2d 151, 154 (D.D.C. 2003).

361. *Id.* at 154–55.

362. FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment.

363. See, e.g., Jeffrey A. Parness, *Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for the "Stop-and-Think-Again" Rule*, 1993 BYU L. REV. 879, 895–96 ("[T]he last few years . . . have prompted a slowly growing number of federal court fines.").

364. See FED. R. CIV. P. 11 (c)(4); FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

365. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

Litigation states that “[t]he amount should be the minimum necessary to achieve the deterrent or punitive goal, considering the resources of the person or entity fined.”³⁶⁶ Courts have also adopted this policy, holding that great discretion is normally given to the judge in deciding an appropriate fine as long it is appropriate to deter based on the entirety of the circumstances.³⁶⁷

The other form of monetary sanctions is cost-shifting sanctions, better known as attorney’s fees. Attorney’s fees cannot be imposed by a court *sua sponte*, such a sanction must be requested by a motion asking for such fees and may be awarded to deter repeat behavior.³⁶⁸ The committee notes make clear that the purpose of awarding attorney’s fees is not to compensate the aggrieved party.³⁶⁹ But the notes also recognize that sometimes a sanction is not effective unless the lawyer who violated the Rule is made to pay those injured by the violation.³⁷⁰ An award of attorney’s fees and costs can only compensate for those “expenses and attorneys’ fees for the services directly and unavoidably caused by the violation of the certification requirement.”³⁷¹

IV. A CRIMINAL RULE 11 FOR PROSECUTORS

As discussed in the previous section, Federal Rule of Civil Procedure 11 and its state counterparts are the minimum standard to which we hold civil litigators in ensuring that the cases and arguments they bring before a court are well-supported by fact and law. But among the sixty-one rules in the Federal Rules of Criminal Procedure, there is no corollary rule.³⁷² While Part II, *supra*, discusses some of the checks on prosecutors’ conduct, several of which can be used to hold them accountable for improper conduct, none are effective or sufficient to deal with the harm caused to defendants who are wrongfully prosecuted. The argument that prosecutors should not be under constant fear that their charging decisions will engender civil lawsuits has merit.³⁷³ But prosecutors,

366. MANUAL FOR COMPLEX LITIGATION, *supra* note 340, § 10.154.

367. Pope v. Fed. Express Corp., 49 F.3d 1327, 1328 (8th Cir. 1995).

368. See FED. R. CIV. P. 11(c)(4).

369. FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

370. *Id.*

371. *Id.*

372. See generally FED. R. CRIM. P. 1–61.

373. See *supra* Section II.C. In *Imbler v. Pachtman*, the Supreme Court explained:

just like civil litigators, must be expected to stop, think, and ask themselves, “what exactly am I presenting to the court and what supports my decision to do so?”³⁷⁴ Because a criminal prosecution often has graver potential consequences than a civil lawsuit—especially for an innocent defendant—a prosecutor arguably has a heightened duty to ensure that the cases he or she brings are not frivolous. Charges must have support in the facts that are known, or should be known, and the facts must fit existing statutes.³⁷⁵

In the American criminal justice system, all criminal offenses must be based in statute.³⁷⁶ Additionally, under the rule of lenity,

If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such 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. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

424 U.S. 409, 424–25 (1976) (internal citations omitted).

374. This section, and this Article, argues for the adoption of a rule of criminal procedure similar to Rule 11 in the Federal Rules of Civil Procedure that would apply to the actions of prosecutors and not criminal defense attorneys. It has long been recognized that the respective roles of prosecutor and defense attorney in our criminal justice system are quite different. Prosecutors, as representatives of the government, have a duty to ensure justice for society and crime victims as well as for the defendants they prosecute. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION r. 3-1.2 (AM. BAR ASS'N 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/. As demonstrated in Part I, *supra*, wrongful prosecution can lead to significant collateral personal and financial consequences even if the defendant is acquitted at trial. In contrast, a defense lawyer's obligation is only to his or her client. See CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION r. 4-1.2 (AM. BAR ASS'N 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/. As long as a defense lawyer acts ethically and within the bounds of the Rules of Professional Conduct, his or her actions cannot be considered frivolous. See *generally id.* (discussing the role of defense counsel). Moreover, a defense lawyer's zealous advocacy for his or her defendant-client cannot injure the government in the way that a wrongful prosecution can injure the defendant.

375. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 374, at r. 3-4.3.

376. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33–34 (1812).

criminal statutes must be narrowly construed in the defendant's favor to ensure that people have reasonable notice of what conduct is prohibited.³⁷⁷ Thus, prosecutors' ability to argue for an extension of the law is severely restricted. Likewise, most cases are brought to prosecutors by law enforcement officers and investigators whose job is to determine the facts.³⁷⁸ And while the impact of body-worn cameras on policing is still being studied, the rapid increase in video evidence generated by surveillance and body-worn cameras is undisputed.³⁷⁹ This additional access to relevant evidence makes it even less excusable for prosecutors to bring or maintain frivolous criminal cases.

A. *The Proposed Rule*

To help address the problems with prosecutorial accountability in frivolous cases, this Article proposes the addition of a Rule 1.1³⁸⁰ to the Federal Rules of Criminal Procedure and to corollary rules of criminal procedure in the states.³⁸¹

377. See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886 (2004).

378. See Natapoff, *supra* note 28 (stating that “[a]rrests determine who will end up in the misdemeanor pipeline”); see also CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 374, at r. 3-4.2(a) (recognizing that “[w]hile the decision to arrest is often the responsibility of law enforcement personnel, the decision to institute formal criminal proceedings is the responsibility of the prosecutor”).

379. See Cynthia Lum et al., *Research on Body-Worn Cameras: What We Know, What We Need to Know*, 18 CRIMINOLOGY & PUB. POL’Y 93, 94 (2019); see also Margaret Steen, *Ubiquitous Cameras Lead to Ubiquitous Video: What’s the Storage Solution?*, GOV’T TECH.: EMERGENCY MGMT. (Jan. 28, 2016) <https://www.govtech.com/em/safety/-Ubiquitous-Cameras-Lead-to-Ubiquitous-Video-Whats-the-Storage-Solution.html> (discussing the difficulties police departments face with storing the enormous amount of video data collected by body cameras).

380. Referred to hereinafter as the Proposed Rule or Rule 1.1. Because the Proposed Rule would apply to all aspects of a criminal prosecution, it would be a natural fit between Federal Rule of Criminal Procedure 1 (Scope; Definitions) and 2 (Interpretation). See FED. R. CRIM. P. 1, 2. That the new Proposed Rule’s number would be only a period away from Federal Rule of Civil Procedure 11 is not lost on the author.

381. The Proposed Rule, especially section (a), borrows language from ABA Model Rule 3.8 and state corollaries. See *supra* Section II.A. It is also based on the form and language of its civil corollary, FED. R. CIV. P. 11.

Rule 1.1. Government Attorney's³⁸² Duty to the Court; Sanctions.

(a) REPRESENTATIONS TO THE COURT. By threatening to prosecute a charge, initiating or causing the initiation of a prosecution, or continuing to prosecute a charge, a government attorney certifies that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances into the facts and law:

- (1) it is supported by probable cause;
- (2) it is not being presented for any improper purpose, such as to harass, intimidate, or gain an advantage in another case;
- (3) the charges and other legal contentions are warranted by existing law;
- (4) the factual underpinnings have evidentiary support based upon an investigation reasonable under the circumstances; and
- (5) there are no legal defenses that would defeat the government's case.

(b) SANCTIONS.

(1) IN GENERAL. If, after notice and a reasonable opportunity to respond, the court determines that Rule 1.1(a) has been violated, the court may impose an appropriate sanction on any government attorney or the attorney's office that violated the rule or is responsible for the violation. Absent exceptional circumstances, the government attorney's office must

382. The Federal Rules of Criminal Procedure refer to prosecuting attorneys (usually an Assistant United States Attorney) as "attorneys for the government." *See, e.g.*, FED. R. CRIM. P. 6(d)(1). State versions of the Proposed Rule would refer to the prosecutor by the name appropriate to that jurisdiction (e.g., prosecuting attorney, state's attorney, district attorney).

be held jointly responsible for a violation committed by its attorney.

(2) MOTION FOR SANCTIONS. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 1.1(a).

(3) ON THE COURT'S INITIATIVE. On its own, the court may order a government attorney or the attorney's office to show cause why conduct specifically described in the order has not violated Rule 1.1(a).

(4) NATURE OF A SANCTION. A sanction imposed under this rule must be limited to what:

(A) suffices to deter repetition of the conduct or comparable conduct by others similarly situated; and

(B) suffices to compensate the defendant for monetary losses, attorney's fees, and other expenses directly resulting from the violation.

The sanction may also include nonmonetary directives.

(5) REQUIREMENTS FOR AN ORDER. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

B. Criminal Rule 1.1's Application

Rule 1.1's implementation would require that by threatening, filing, or maintaining a prosecution, the government's attorney represents five things to the court: 1) the charges are supported by probable cause; 2) the case is being threatened or brought for a proper purpose; 3) the alleged conduct is prohibited by current law; 4) the allegations of fact are supported by a reasonable investigation; and 5) the prosecutor is unaware of a legal defense that would defeat the charges. Underpinning all of these requirements is the implicit condition that the prosecutor must not only act in good faith, but

also that he or she must investigate both the factual allegations against the defendant and the legal foundation of the charge. In other words, the prosecutor must make an “inquiry reasonable under the circumstances”³⁸³ into the evidence and law before threatening or proceeding with criminal charges.³⁸⁴ The Proposed Rule would apply at all stages of a criminal proceeding, from arraignment³⁸⁵ to preliminary hearing, presentment to a grand jury,³⁸⁶ or prosecution of a misdemeanor case in an inferior court. And the Proposed Rule’s obligations would continue throughout the prosecution.³⁸⁷

1. Probable Cause

The basic constitutional requirement for all arrests is that they are based on probable cause.³⁸⁸ Probable cause requires “[a] reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person’s belief that certain alleged facts are probably true.”³⁸⁹ Just like police officers making an arrest, prosecutors must have a reasonable belief that the evidence supports the proposed charges against the

383. See Proposed Rule 1.1(a). Just as conduct under Federal Rules of Civil Procedure Rule 11 is judged under an objective reasonableness standard, objective reasonableness would apply to the Proposed Rule. See FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment. Among the considerations a court could take into account in determining whether a violation of the Proposed Rule occurred are: the size of the prosecutor’s office, its staffing and caseload, the nature of the alleged crime, the evidence available to the prosecutor, and the effort put forth by the prosecutor.

384. While some may argue that ethical rules already require such an inquiry, as described above in Part II, current law provides no real consequences for a prosecutor who fails to do so.

385. FED. R. CRIM. P. 10(a).

386. As discussed in Section II.D, *supra*, the grand jury process fails to provide adequate protection against frivolous prosecutions.

387. A recent case from Tuscaloosa County, Alabama provides an example of a prosecutor’s office’s proper conduct. When defense counsel found new evidence showing that the defendant, facing a capital murder charge, could not have been the perpetrator, the district attorney quickly dismissed the charge. Stephanie Taylor, *Murder Suspect Freed After Cellphone Photos Surface*, TUSCALOOSANEWS.COM (Aug. 2, 2019, 4:34 PM), <https://www.tuscaloosaneews.com/news/20190801/murder-suspect-freed-after-cellphone-photos-surface>.

388. U.S. CONST. amend. IV.

389. JACK G. HANDLER, *BALLENTINE’S LAW DICTIONARY* 431 (Legal Assistant ed., 1994).

suspect.³⁹⁰ The Supreme Court has held that “the central teaching of our decisions bearing on the probable cause standard is that it is a ‘practical, nontechnical conception.’”³⁹¹ “In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”³⁹² This requirement that prosecutors form a reasonable belief that probable cause exists is intertwined with the other requirements of the Proposed Rule.

2. Proper Purpose

The second representation made by the prosecutor under Proposed Rule 1.1 is that the case “is not being presented for any improper purpose, such as to harass, intimidate, or gain an advantage in another case.”³⁹³ This prong is designed to ensure two things: first, that threats of prosecution are not made unless the government has an actual intent to bring charges and not simply to coerce a potential defendant into cooperating with investigators or prosecutors on another case; and second, that prosecutions are not commenced for retaliatory motives.

Police officers and investigators often use the threat of criminal charges to obtain cooperation from suspects in building more serious criminal cases.³⁹⁴ This technique is common in drug investigations where a low-level drug user or dealer is offered a deal, often involving not filing criminal charges, to become an informant.³⁹⁵ Police officers can also lie to suspects in an interrogation as long as their conduct is not coercive.³⁹⁶ But lies and threats of criminal

390. See *id.* (stating the requirement for police officers); see also CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 374, at r. 3-4.3 (providing that charges must be supported by probable cause).

391. *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

392. *Id.* (quoting *Brinegar*, 338 U.S. at 175).

393. See *supra* Section IV.A (Proposed Rule 1.1(a)).

394. See, e.g., *Hoffa v. United States*, 385 U.S. 293, 296 (1966).

395. See, e.g., *60 Minutes: Confidential Informants* (CBS television broadcast Dec. 6, 2015) <https://www.cbsnews.com/news/confidential-informants-60-minutes-lesley-stahl/>.

396. See Amelia Courtney Hritz, Note, “Voluntariness with a Vengeance”: *The Coerciveness of Police Lies in Interrogations*, 102 CORNELL L. REV. 487, 492 (2017); see also *Frazier v. Cupp*, 394 U.S. 731, 739 (finding that an otherwise voluntary confession was admissible even with police misrepresentations).

charges made by prosecutors must be treated differently from lies and threats made by investigators.

The threat of prosecution made by the government lawyer, who has the power to bring an indictment, is more serious than a similar threat brought by a police officer, who cannot bring a case to court on his or her own. Prosecutors are officers of the court who have “an obligation to promote justice and effective operation of the judicial system” and “have an absolute ethical duty to tell judges the truth, including avoiding dishonesty or evasion.”³⁹⁷ Though prosecutors represent the government’s interest in protecting society from wrongdoers, their role is to serve as a check on law enforcement conduct—not to become an extension of law enforcement. Consequently, the Proposed Rule forbids prosecutors from threatening to bring or maintain charges for a purely coercive motive.

The second reason for this provision is to prevent prosecutors from bringing or maintaining retaliatory prosecutions. A retaliatory prosecution is one in which the real motive of bringing the case is to punish the defendant for conduct other than that which forms the legal basis of the case.³⁹⁸ The Supreme Court recently held that claims of retaliatory prosecution against law enforcement officers cannot be maintained if the officers had probable cause to arrest,³⁹⁹ and absolute immunity prevents such claims suits against prosecutors.⁴⁰⁰ But the Proposed Rule 1.1 would allow trial judges to sanction prosecutors whose conduct is purely retaliatory. As explained above, prosecutors’ heightened duty to justice requires that they not participate in retaliatory prosecutions.

397. *Officer of the Court*, LAW.COM, <https://dictionary.law.com/Default.aspx?selected=1385>. See generally Isaac M. Meekins, *The Lawyer as an Officer of the Court—His Duty to the Court in the Administration of Justice*, 4 N.C. L. REV. 95 (1926) (discussing the duties of a prosecutor).

398. Criminal defense lawyers have defined the term as follows: “Retaliatory prosecution is when a person is arrested or charged with a crime or with a summary offense because the person exercised his or her rights. Usually this means that a person was charged with a crime for exercising a constitutional right.” *False or Wrongful Arrest or Malicious Prosecution*, DYLLER L. FIRM, <https://www.dyllerlawfirm.com/false-or-wrongful-arrest-or-malicious-prosecution/> (last visited Mar. 20, 2020).

399. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1728 (2019).

400. See, e.g., *Hartman v. Moore*, 547 U.S. 250, 261–62 (2006).

3. Charges and Legal Contentions Are Justified by Existing Law

Federal Rule of Civil Procedure 11 requires that in civil cases “the claims, defenses, and other legal contentions [of counsel] are warranted by existing law *or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.*”⁴⁰¹ But criminal law is different—citizens must be on notice of the legality or illegality of their conduct.⁴⁰² This means that prosecutors cannot be “creative” with their charging decisions by trying to shoehorn a set of facts into an inapplicable statute in order to gain a better chance at ultimately obtaining a conviction.⁴⁰³ Incentives for a prosecutor to do so, however, may come from public pressure or demands of law enforcement. John McClane’s prosecution, discussed in Section I.A, *supra*, was motivated by a vindictive police lieutenant,⁴⁰⁴ but it was not supported by existing law because McClane’s alleged conduct was not legally prohibited.⁴⁰⁵ And in the case described in Section I.D, *supra*, the basis for charging Ms. Worrell was a mistaken belief by the citizen filing the complaint that the law required dogs to be leashed.⁴⁰⁶ This part of the Proposed Rule would allow a trial court to sanction McClane’s prosecutor for not finding out if McClane’s conduct was illegal before bringing charges and Worrell’s prosecutor for not immediately dismissing charges initiated by a citizen based on a mistaken understanding of the law.

The charges brought against Anthony Novak for creating a parody Facebook page that the Parma, Ohio police department found insulting⁴⁰⁷ is a quintessential example of criminal charges that are unsupported by law and where the First Amendment provides a complete defense, as discussed in the next subsection.⁴⁰⁸ First, as

401. FED. R. CIV. P. 11(b)(2) (emphasis added).

402. See Price, *supra* note 377, at 886.

403. See, e.g., Alexander M. Parker, Note, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 820–21 (1996); Mike Masnick, *Courts Stretching Computer Hacking Law in Dangerous Ways*, TECHDIRT (Mar. 18, 2010, 8:06 PM), <https://www.techdirt.com/articles/20100305/0404088432>.

404. See *supra* Section I.A.

405. See *supra* Section I.A.

406. See *supra* Section I.D.

407. See *supra* Section I.B.

408. U.S. CONST. amend. I; *Novak v. City of Parma*, 932 F.3d 421, 427 (6th Cir. 2019) (observing that parody is a protected form of speech under the First Amendment).

examined more comprehensively in Section I.B, *supra*, the dozen short phone calls received by the police department's dispatcher could not reasonably support a charge of interrupting public services. Second, the First Amendment protections afforded to parodic speech are well established.⁴⁰⁹ Accordingly, it is reasonable to assume that the real motive for the prosecution was to retaliate against Novak's constitutionally protected criticism.⁴¹⁰

4. Sufficient Evidence to Support the Charge and Lack of Legal Defense

The last two representations that must be made in good faith under Proposed Rule 1.1—that “the factual underpinnings have evidentiary support based upon an investigation reasonable under the circumstances” and that “there are no legal defenses that would defeat the government's case”—go hand in hand.⁴¹¹ Prosecutors must form a reasonable belief based on a reasonable investigation that the evidence supports the charge *and* that the evidence was obtained lawfully. Prosecutors cannot simply accept the allegations presented to them by police officers or investigators, but instead must make their own inquiry into the evidence.

The language of the Proposed Rule states that the depth and breadth of that inquiry will depend on the circumstances of the case.⁴¹² But the argument that prosecutors are too busy to do more than simply rely on investigators' accusations is unpersuasive. Law enforcement officers are not lawyers and as such cannot be expected to have the same perspective of the evidence and its potential admissibility in court as do prosecutors. The best example is the additional evidence now available through the prevalence of dashboard and body-worn cameras in use by law enforcement.⁴¹³ While prosecutors and defense lawyers may not agree on many

409. See *Novak*, 932 F.3d at 427; *supra* Section I.B.

410. See *Novak*, 932 F.3d at 424 (upholding the denial of qualified immunity for some claims against the police officers, even in light of the Supreme Court's decision in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019)). Proposed Rule 1.1 also covers retaliatory prosecutions. See *supra* Section IV.B.2.

411. See *supra* Section IV.A.

412. See *supra* Section IV.A.

413. See, e.g., Brett Chapman, *Body-Worn Cameras: What the Evidence Tells Us*, NAT'L INST. JUST. (Nov. 14, 2018), <https://www.nij.gov/journals/280/Pages/body-worn-cameras-what-evidence-tells-us.aspx>.

things, they do agree that the evidence produced by these cameras is invaluable in criminal cases.⁴¹⁴

Consequently, in cases where video footage of the incident is readily available, prosecutors should review the video before bringing charges filed by law enforcement officers or maintaining a prosecution based on such charges. While reviewing body-worn and dashboard camera footage or other evidence gathered by investigators may increase the amount of time a prosecutor must spend preparing a case, that time may be offset by the time saved by not prosecuting frivolous cases. The efficient operation of a prosecutor's office cannot supersede the rights of suspects to not be subjected to meritless prosecutions. If the prosecutor had reviewed the body-worn camera footage of the search of Cole Sear's dormitory room before proceeding with the charge, it would have been immediately obvious that the drug paraphernalia was seized as a result of an illegal search.⁴¹⁵ But because the prosecutor did not review the available evidence, the defendant was forced to make numerous unnecessary court appearances and pay legal fees.⁴¹⁶

C. Sanctions

A rule of conduct is not worth the paper it is written on if there are no consequences for its violation. The previous subsection discussed the types of prosecutorial misconduct that would be prohibited by Proposed Rule 1.1. We now turn to the sanctions a judge could impose for the Rule's violation. While the primary goal of Federal Rule of Civil Procedure 11 is deterrence and monetary sanctions are a sanction of last resort,⁴¹⁷ under Proposed Rule 1.1,

414. See Milton J. Valencia, *As Body Camera Footage Gets Used in Court, Both Sides Agree on Its Usefulness*, BOS. GLOBE (Mar. 26, 2018, 6:56 PM), <https://www.bostonglobe.com/metro/2018/03/26/body-camera-footage-gets-used-court-both-sides-agree-its-usefulness/JIDH0T4TdASK9Bt74QWqHP/story.html>.

415. See *supra* Section I.C.

416. See *supra* Section I.C.

417. The advisory committee to the Federal Rules of Civil Procedure noted that: Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for [subdivision] (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation.

FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment.

both deterrence and compensation are equally essential elements of the available sanctions.⁴¹⁸

1. Deterrence

Under Federal Rule of Civil Procedure 11, judges in civil cases have a wide variety of possible nonmonetary sanctions that may be imposed to deter future misconduct by the sanctioned lawyer.⁴¹⁹ Some of these possible sanctions can apply equally to a violation of the Proposed Rule, but many would be inapplicable because of the differences between civil litigation and criminal prosecution. Examples of minor sanctions that could apply to a violation of Proposed Rule 1.1, taken directly from the Federal Judicial Center's Manual of Complex Litigation,⁴²⁰ include: reprimand,⁴²¹ remedial action,⁴²² or grant/denial of time.⁴²³ More serious sanctions include: requiring the offending attorney to attend a legal seminar or educational program,⁴²⁴ removal of the attorney prosecuting the case,⁴²⁵ preclusion/waiver/striking,⁴²⁶ or suspension/disbarment.⁴²⁷

418. The sanctions imposed by the Proposed Rule should be sufficient to "deter repetition of the conduct or comparable conduct by others similarly situated" and "compensate the defendant for monetary losses, attorney's fees, and other expenses directly resulting from the violation." *See supra* Section IV.A (Proposed Rule 1.1(b)(4)).

419. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 340, § 10.154.

420. Because the sanctions suggested in the Manual are familiar to all litigators, the Manual is a good source of possible sanctions for a violation of the Proposed Rule. *Id.*

421. "An oral reprimand will suffice for most minor violations, particularly a first infraction. A written reprimand may be appropriate in more serious cases." *Id.*

422. "Counsel and parties may be required to remedy a negligent or wrongful act at their own expense, as by reconstructing materials improperly destroyed or erased." *Id.*

423. "Improper delay may justify awarding opposing parties additional time for [criminal] discovery or other matters, or denying otherwise proper requests for extension of time." *Id.*

424. FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment.

425. "[A prosecutor] may be removed from a position as lead . . . counsel, or (in an extreme case) from further participation in the case entirely." MANUAL FOR COMPLEX LITIGATION, *supra* note 340, § 10.154.

426. "Failure to timely make required disclosures or production . . . may constitute sufficient grounds for the court to preclude the introduction of related evidence, deem certain facts admitted and objections waived . . ." *Id.*

427. "The court has inherent power to suspend or disbar attorneys, but should follow applicable local rules." *Id.* While this is the case in federal courts, state court judges may not have this authority, which may impact the Proposed Rule as applied to state rules of criminal procedure.

Unlike the monetary sanctions discussed below, the nonmonetary sanctions designed to deter future misbehavior would be applied to individual prosecutors who run afoul of the Proposed Rule.

2. Monetary Sanctions

As discussed earlier, while the purpose of Federal Rule of Civil Procedure 11 “sanctions is to deter rather than to compensate,”⁴²⁸ the Proposed Rule places monetary sanctions on the same plane as sanctions designed to act solely as a deterrent. These monetary sanctions can take two forms: compensation for monetary losses and expenses and attorney’s fees. But unlike the nonmonetary sanctions discussed above, compensatory sanctions would be paid not by the individual prosecutor, but by his or her office.⁴²⁹ And since prosecutors’ offices are publicly funded, the money would be paid from the governmental entities that fund the offices. The concept of the federal government and state governments paying individuals injured by their employees has a long history. Federal government liability for civil rights violations was established in 1971 in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.⁴³⁰ State government liability under 42 U.S.C. § 1983 is 100 years older, dating back to the Civil Rights Act of 1871.⁴³¹

i. Compensation for Monetary Losses

In each of the cases discussed in Part I, the defendants suffered financial damages because of frivolous prosecutions. But under current law, due to prosecutors’ absolute immunity, such defendants have no avenue by which to seek compensation for the prosecutors’ actions. In the case of John McClane, the wrongful filing of felony charges forced him out of his police job, resulting in a substantial loss of income.⁴³² In addition to lost income, wrongfully prosecuted

428. FED. R. CIV. P. 11 advisory committee’s notes to 1993 amendment.

429. While I propose that monetary damages be paid by prosecutors’ offices, and not individual attorneys, holding individuals who act on behalf of the state, like police officers, personally accountable is common under 42 U.S.C. § 1983. *See, e.g., Khanari v. City of Houston*, 14 F. Supp. 3d 842, 852 (S.D. Tex. 2014) (stating that § 1983 provides a right of action against public officials and individual officers).

430. 403 U.S. 388 (1971).

431. *See* 42 U.S.C. § 1983 (2018) (originally enacted as Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871)).

432. *See supra* Section I.A.

defendants incur consequential expenses like transportation and childcare costs. Judges at all levels are well-versed in determining reasonable compensatory damages and should have little trouble doing so in cases of violations of the Proposed Rule.

ii. Attorney's Fees

In addition to suffering out-of-pocket financial damages, many defendants are forced to hire defense attorneys to fight the frivolous charges. Just as the Rules of Civil Procedure allow judges to award attorney's fees as a sanction for frivolous conduct,⁴³³ the Proposed Rule also permits judges to reimburse wrongfully prosecuted defendants for their attorney's fees.⁴³⁴ But unlike parties in most civil litigation, many criminal defendants cannot afford to hire private lawyers and must rely on appointed counsel or public defenders.⁴³⁵

Public defenders and appointed attorneys are often funded by the same taxpayer dollars that fund prosecutors' offices. In 2013, the last year for which statistics are published, nearly 104 million people were served by indigent defense counsel.⁴³⁶ Of the criminal cases handled by appointed counsel that were resolved that year, 67% were handled by public defenders, 20% by appointed counsel, and 13% by contract attorneys.⁴³⁷ If the fee-shifting provision of the Proposed Rule were to be applied to cases where the defendant was represented by a public defender or appointed counsel, the sheer scale of money that would have to be paid from prosecutors' offices to defenders could be untenably high. And since wrongfully accused indigent defendants would not be the ones paying legal fees, the need for fee shifting is greatly diminished and should be ordered only in extraordinary circumstances. Indigent defendants would still be entitled to compensation for their financial damages, meeting one of main goals of the criminal sanctions provision.

433. See FED. R. CIV. P. 11(c)(4), 37(d)(3).

434. See *supra* Section IV.A.

435. In federal court, indigent defendants who face the possibility of jail time are entitled to legal representation at government expense. U.S. CONST. amend. VI; see *Gideon v. Wainwright*, 372 U.S. 335, 348 (1963) (Clark, J., concurring) (citing *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)).

436. SUZANNE M. STRONG, U.S. DEP'T OF JUSTICE, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013, at 3 (2016), <https://www.bjs.gov/content/pub/pdf/saids13.pdf> (last updated May 3, 2017).

437. *Id.*

CONCLUSION

Scholars have suggested many potential solutions to the issue of prosecutorial misconduct, from stronger ethics regulations to the end of absolute prosecutorial immunity. While each of these proposals have merit, they target instances of severe misconduct, such as failure to disclose exculpatory evidence, that often lead to wrongful conviction and long prison sentences. Left largely unaddressed before this Article is the problem of lower-level frivolous prosecutions that usually end in acquittals. Defendants who fall victim to these meritless prosecutions have no remedy under current law to receive compensation for pecuniary damages and attorney's fees. By enacting a rule of criminal procedure patterned on Federal Rule of Civil Procedure 11, judges would be able to address prosecutor's frivolous conduct by imposing sanctions that can both deter future bad behavior and compensate defendants for their financial injuries. The Proposed Rule comes without some of the downsides of other proposed solutions as it does not impinge on prosecutors' discretion to bring necessary prosecutions any more than Federal Rule of Civil Procedure 11 chills civil litigators from bringing legitimate cases to court.

