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Paul Kern IMBLER, Petitioner, v. Richard PACHTMAN, District Attorney.
424 U.S. 409 (96 S.Ct. 984, 47 L.Ed.2d 128)
Paul Kern IMBLER, Petitioner, v. Richard PACHTMAN, District Attorney.
No. 74-5435.

Argued: Nov. 3, 1975. Decided: March 2, 1976.

opinion, POWELL [HTML]
concurrence, WHITE, BRENNAN, MARSHALL [HTML]

Syllabus
Petitioner, convicted of murder, unsuccessfully petitioned for state habeas corpus on the basis of respondent prosecuting attorney's revelation of newly discovered evidence, and charged that respondent had knowingly used false testimony and suppressed material evidence at petitioner's trial. Petitioner thereafter filed a federal habeas corpus petition based on the same allegations, and ultimately obtained his release. He then brought an action against respondent and others under 42 U.S.C. 1983, seeking damages for loss of liberty allegedly caused by unlawful prosecution, but the District Court held that respondent was immune from liability under § 1983, and the Court of Appeals affirmed. Held: A state prosecuting attorney who, as here, acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the State's case, is absolutely immune from a civil suit for damages under § 1983 for alleged deprivations of the accused's constitutional rights. 988-996.
(a) Section 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them. Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019. 988-990.
(b) The same considerations of public policy that underlie the common-law rule of absolute immunity of a prosecutor from a suit for malicious prosecution likewise dictate absolute immunity under § 1983. Although such immunity leaves the genuinely wronged criminal defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty, the alternative of qualifying a prosecutor's immunity would disserve the broader public interest in that it would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system and would often prejudice criminal defendants by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. 990-994.
9 Cir., 500 F.2d 1301, affirmed.

Roger S. Hanson, Woodlands Hills, Cal., for petitioner.
John P. Farrell, Los Angeles, Cal., for respondent.
Sol. Gen. Robert H. Bork, Washington, D. C., for United States, as amicus curiae, by special leave of Court.
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Mr. Justice POWELL delivered the opinion of the Court.
The question presented in this case is whether a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amendable to suit under 42 U.S.C. 1983 for

alleged deprivations of the defendant's constitutional rights. The Court of Appeals for the Ninth Circuit held that he is not. 500 F.2d 1301. We affirm.

* The events which culminated in this suit span many years and several judicial proceedings. They began in January 1961, when two men attempted to rob a Los Angeles market run by Morris Hasson. One shot and fatally wnded Hasson, and the two fled in different directions. Ten days later Leonard Lingo was killed while attempting a robbery in Pomona, Cal., but his two accomplices escaped. Paul Imbler, petitioner in this case, turned himself in the next day as one of those accomplices. Subsequent investigation led the Los Angeles District Attorney to believe that Imbler and Lingo had perpetrated the first crime as well, and that Imbler had killed Hasson. Imbler was charged with first-degree felony murder for Hasson's death.

The State's case consisted of eyewitness testimony from Hasson's wife and identification testimony from three men who had seen Hasson's assailants fleeing after the shooting. Mrs. Hasson was unable to identify the gunman because a hat had obscured his face, but from police photographs she identified the killer's companion as Leonard Lingo. The primary identification witness was Alfred Costello, a passerby on the night of the crime, who testified that he had a clear view both as the gunman emerged from the market and again a few moments later when the fleeing gunman after losing his hat turned to fire a shot at Costello 1 and to shed his coat 2 before continuing on. Costello positively identified Imbler as the gunman. The second identification witness, an attendant at a parking lot through which the gunman ultimately escaped, testified that he had a side and front view as the man passed. Finally, a customer who was leaving Hasson's market as the robbers entered testified that he had a good look then and as they exited moments later. All of these witnesses identified Imbler as the gunman, and the customer also identified the second man as Leonard Lingo. Rigorous cross-examination failed to shake any of these witnesses. 3

Imbler's defense was an alibi. He claimed to have spent the night of the Hasson killing bar-hopping with several persons, and to have met Lingo for the first time the morning before the attempted robbery in Pomona. This testimony was corroborated by Mayes, the other accomplice in the Pomona robbery, who also claimed to have accompanied Imbler on the earlier rounds of the bars. The jury found Imbler guilty and fixed punishment at death. 4 On appeal the Supreme Court of California affirmed unanimously over numerous contentions of error. People v. Imbler, 57 Cal.2d 711, 21 Cal.Rptr. 568, 371 P.2d 304 (1962).

Shortly thereafter Deputy District Attorney Richard Pachtman, who had been the prosecutor at Imbler's trial and who is the respondent before this Court, wrote to the Governor of California describing evidence turned up after trial by himself and an investigator for the state correctional authority. In substance, the evidence consisted of newly discovered corroborating witnesses for Imbler's alibi, as well as new revelations about prime witness Costello's background which indicated that he was less trustworthy than he had represented originally to Pachtman and in his testimony. Pachtman noted that leads to some of this information had been available to Imbler's counsel prior to trial but apparently had not been developed, that Costello had testified convincingly and withstood intense cross-examination, and that none of the new evidence was conclusive of Imbler's innocence. He explained that he wrote from a belief that "a prosecuting attorney had a duty to be fair and see that all true facts whether helpful to the case or not, should be presented." 5

Imbler filed a state habeas corpus petition shortly after Pachtman's letter. The Supreme Court of California appointed one of its retired justices as referee to hold a hearing, at which Costello was the main attraction. He recanted his trial identification of Imbler, and it also was established that on cross-examination and redirect he had painted a picture of his own background that was more flattering than true. Imbler's corroborating witnesses, uncovered by prosecutor Pachtman's investigations, also testified. In his brief to the Supreme Court of California on this habeas petition, Imbler's counsel described Pachtman's post-trial detective work as "(i)n the highest tradition of law enforcement and justice," and as

a premier example of "devotion to duty." 6 But he also charged that the prosecution had knowingly used false testimony and suppressed material evidence at Imbler's trial. 7 In a thorough opinion by then Justice Traynor, the Supreme Court of California unanimously rejected these contentions and denied the writ. In re Imbler, Cal.2d 554, 35 Cal.Rptr. 293, 387 P.2d 6 (1963). The California court noted that the hearing record fully supported the referee's finding that Costello's recantation of his identification lacked credibility compared to the original identification itself, id., at 562, 35 Cal.Rptr., at 297-299, 387 P.2d, at 10-11, and that the new corroborating witnesses who appeared on Imbler's behalf were unsure of their stories or were otherwise impeached, id., at 569-570, 35 Cal.Rptr., at 301, 387 P.2d, at 14.

In 1964, the year after denial of his state habeas petition, Imbler succeeded in having his death sentence overturned on grounds unrelated to this case. In re Imbler, 61 Cal.2d 556, 39 Cal.Rptr. 375, 393 P.2d 687 (1964). Rather than resentence him, the State stipulated to life imprisonment. There the matter lay for several years, until in late 1967 or early 1968 Imbler filed a habeas corpus petition in Federal District Court based on the same contentions previously urged upon and rejected by the Supreme Court of California.

The District Court held no hearing. Instead, it decided the petition upon the record, including Pachtman's letter to the Governor and the transcript of the referee's hearing ordered by the Supreme Court of California. Reading that record quite differently than had the seven justices of the State Supreme Court, the District Court found eight instances of state misconduct at Imbler's trial, the cumulative effect of which required issuance of the writ. Imbler v. Craven, 298 F.Supp. 795, 812 (C.D.Cal.1969). Six occurred during Costello's testimony and amounted in the court's view to the culpable use by the prosecution of misleading or false testimony. 8 The other two instances were suppressions of evidence favorable to Imbler by a police fingerprint expert who testified at trial and by the police who investigated Hasson's murder. 9 The District Court ordered that the writ of habeas corpus issue unless California retried Imbler within 60 days, and denied a petition for rehearing.

The State appealed to the Court of Appeals for the Ninth Circuit, claiming that the District Court had failed to give appropriate deference to the factual determinations of the Supreme Court of California as required by 28 U.S.C. 2254(d). The Court of Appeals affirmed, finding that the District Court had merely "reached different conclusions than the state court in applying federal constitutional standards to (the) facts," Imbler v. California, 424 F.2d 631, 632 and certiorari was denied, 400 U.S. 865, 91 S.Ct. 100, 27 L.Ed.2d 104 (1970). California chose not to retry Imbler, and he was released.

At this point, after a decade of litigation and with Imbler now free, the stage was set for the present suit. In April 1972, Imbler filed a civil rights action, under 42 U.S.C. 1983 and related statutes, against respondent Pachtman, the police fingerprint expert, and various other officers of the Los Angeles police force. He alleged that a conspiracy among them unlawfully to charge and convict him had caused him loss of liberty and other grievous injury. He demanded.$2.7 million in actual and exemplary damages from each defendant, plus $15,000 attorney's fees.

Imbler attempted to incorporate into his complaint the District Court's decision granting the writ of habeas corpus, and for the most part tracked that court's opinion in setting out the overt acts in furtherance of the alleged conspiracy. The gravamen of his complaint against Pachtman was that he had "with intent, and on other occasions with negligence" allowed Costello to give false testimony as found by the District Court, and that the fingerprint expert's suppression of evidence was "chargeable under federal law" to Pachtman. In addition Imbler claimed that Pachtman had prosecuted him with knowledge of a lie detector test that had "cleared" Imbler, and that Pachtman had used at trial a police artist's sketch of Hasson's killer made shortly after the crime and allegedly altered to resemble Imbler more closely after the investigation had focused upon him.

Pachtman moved under Fed.Rule Civ.Proc. 12(b)(6) to have the complaint dismissed as to him. The District Court, noting that public prosecutors repeatedly had been held immune from civil liability for

"acts done as part of their traditional official functions," found that Pachtman's alleged acts fell into that category and granted his motion. Following the entry of final judgment as to Pachtman under Fed.Rule Civ.Proc. 54(b), Imbler appealed to the Court of Appeals for the Ninth Circuit. That court, one judge dissenting, affirmed the District Court in an opinion finding Pachtman's alleged acts to have been committed "during prosecutorial activities which can only be characterized as an 'integral part of the judicial process,' " 500 F.2d, at 1302, quoting Marlowe v. Coakley, 404 F.2d 70 (C.A.9 1968). We granted certiorari to consider the important and recurring issue of prosecutorial liability under the Civil Rights Act of 1871. 420 U.S. 945, 95 S.Ct. 1324, 43 L.Ed.2d 423 (1975).

II

Title 42 U.S.C. 1983 provides that "(e)very person" who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages. 10 The statute thus creates a species of tort liability that on its face admits of no immunities, and some have argued that it should be applied as stringently as it reads. 11 But that view has not prevailed.

This Court first considered the implications of the statute's literal sweep in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). There it was claimed that members of a state legislative committee had called the plaintiff to appear before them, not for a proper legislative purpose, but to intimidate him into silence on certain matters of public concern, and thereby had deprived him of his constitutional rights. Because legislators in both England and this country had enjoyed absolute immunity for their official actions, Tenney squarely presented the issue of whether the Reconstruction Congress had intended to restrict the availability in § 1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials. The Court concluded that immunities "well grounded in history and reason" had not been abrogated "by covert inclusion in the general language" of § 1983. 341 U.S., at 376, 71 S.Ct. at 788. Regardless of any unworthy purpose animating their actions, legislators were held to enjoy under this statute their usual immunity when acting "in a field where legislators traditionally have power to act." Id., at 379, 71 S.Ct. at 789.

The decision in Tenney established that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them. Before today the Court has had occasion to consider the liability of several types of government officials in addition to legislators. The common-law absolute immunity of judges for "acts committed within their judicial jurisdiction," see Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872), was found to be preserved under § 1983 in Pierson v. Ray, 386 U.S. 547, 554-555, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967). 12 In the same case, local police officers sued for a deprivation of liberty resulting from unlawful arrest were held to enjoy under § 1983 a "good faith and probable cause" defense coextensive with their defense to false arrest actions at common law. 386 U.S., at 555-557, 87 S.Ct., at 1218. We found qualified immunities appropriate in two recent cases. 13 In Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), we concluded that the Governor and other executive officials of a State had a qualified immunity that varied with "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action. . . ." Id., at 247, 94 S.Ct., at 1692. 14 Last Term in Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), we held that school officials, in the context of imposing disciplinary penalties, were not liable so long as they could not reasonably have known that their action violated students' clearly established constitutional rights, and provided they did not act with malicious intention to cause constitutional or other injury. Id., at 322, 95 S.Ct., at 1001; cf. O'Connor v. Donaldson, 442 U.S. 563, 577, 95 S.Ct. 2486, 2495, 45 L.Ed.2d 396 (1975). In Scheuer and in Wood, as in the two earlier cases, the considerations underlying the nature of the immunity of the respective officials in suits at common law led to essentially the same immunity under § 1983. 15 See 420 U.S., at 318-321, 94 S.Ct., at 1000; 416 U.S., at 239-247, and n. 4, 94 S.Ct., at 1688.

This case marks our first opportunity to address the § 1983 liability of a state prosecuting officer. The Courts of Appeals, however, have confronted the issue many times and under varying circumstances. Although the precise contours of their holdings have been unclear at times, at bottom they are virtually unanimous that a prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties. 16 These courts sometimes have described the prosecutor's immunity as a form of "quasi-judicial" immunity and referred to it as derivative of the immunity of judges recognized in Pierson v. Ray, supra. 17 Petitioner focuses upon the "quasi-judicial" characterization, and contends that it illustrates a fundamental illogic in according absolute immunity to a prosecutor. He argues that the prosecutor, as a member of the executive branch, cannot claim the immunity reserved for the judiciary, but only a qualified immunity akin to that accorded other executive officials in this Court's previous cases.

Petitioner takes an overly simplistic approach to the issue of prosecutorial liability. As noted above, our earlier decisions on § 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983. Rather, each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it. The liability of a state prosecutor under § 1983 must be determined in the same manner.

The function of a prosecutor that most often invites a common-law tort action is his decision to initiate a prosecution, as this may lead to a suit for malicious prosecution if the State's case misfires. The first American case to address the question of a prosecutor's amendability to such an action was Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001 (1896). 18 The complaint charged that a local prosecutor without probable cause added the plaintiff's name to a grand jury true bill after the grand jurors had refused to indict him, with the result that the plaintiff was arrested and forced to appear in court repeatedly before the charge finally was nolle prossed. Despite allegations of malice, the Supreme Court of Indiana dismissed the action on the ground that the prosecutor was absolutely immune. Id., at 122, 44 N.E., at 1002.

The Griffith view on prosecutorial immunity became the clear majority rule on the issue. 19 The question eventually came to this Court on writ of certiorari to the Court of Appeals for the Second Circuit. In Yaselli v. Goff, 12 F.2d 396 (1926), the claim was that the defendant, a Special Assistant to the Attorney General of the United States, maliciously and without probable cause procured plaintiff's grand jury indictment by the willful introduction of false and misleading evidence. Plaintiff sought some $300,000 in damages for having been subjected to the rigors of a trial in which the court ultimately directed a verdict against the Government. The District Court dismissed the complaint, and the Court of Appeals affirmed. After reviewing the development of the doctrine of prosecutorial immunity, id., at 399-404, that court stated:

"In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy." Id., at 406.

After briefing and oral argument, this Court affirmed the Court of Appeals in a per curiam opinion. Yaselli v. Goff, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927).

The common-law immunity of a prosecutor is based upon the same considerations that underlie the commonlaw immunities of judges and grant jurors acting within the scope of their duties. 20 These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. One court expressed both considerations as follows:

"The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter a fairer law enforcement." Pearson v. Reed, 6 Cal.App.2d 277, 287, 44 P.2d 592, 597 (1935).

See also Yaselli v. Goff, 12 F.2d, at 404-406.

B

The common-law rule of immunity is thus well settled. 21 We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983. We think they do.

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. Cf. Bradley v. Fisher, 13 Wall., at 348, 20 L.Ed. 646; Pierson v. Ray, 386 U.S., at 554, 87 S.Ct., at 1217. 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.

Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and ultimately in every case the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. 22 The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials. Cf. Bradley v. Fisher, supra, 13 Wall., at 349, 20 L.Ed. 646.

The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system. Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. 23 The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify, as is illustrated by the history of this case. If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence. 24

The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to § 1983 liability. Various post-trial procedures are available to determine whether an accused has received

a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment. 25
We conclude that the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. 26 Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:
"As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." Gregoire v. Biddle, 177 F.2d 579, 581 (C.A.2 1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950).
See Yaselli v. Goff, 12 F.2d, at 404; cf. Wood v. Strickland, 420 U.S., at 320, 95 S.Ct., at 1000. 27
We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. 242, 28 the criminal analog of § 1983. O'Shea v. Littleton, 414 U.S. 488, 503, 94 S.Ct. 669, 679, 38 L.Ed.2d 674 (1974); cf. Gravel v. United States, 408 U.S. 606, 627, 92 S.Ct. 2614, 2628, 33 L.Ed.2d 583 (1972). The prosecutor would fare no better for his willful acts. 29 Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. 30 These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.
It remains to delineate the boundaries of our holding. As noted, Supra, at 416, the Court of Appeals emphasized that each of respondent's challenged activities was an "integral part of the judicial process." 500 F.2d, at 1302. The purpose of the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status was to distinguish and leave standing those cases, in its Circuit and in some others, which hold that a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's. 31 See Pierson v. Ray, 386 U. S., at 557, 87 S.Ct., at 1219. We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. 32 We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate. 33 We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983. 34 The judgment of the Court of Appeals for the Ninth Circuit accordingly is
Affirmed.

Mr. Justice STEVENS took no part in the consideration or decision of this case.
TOP

Mr. Justice WHITE, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, concurring in the judgment.

I concur in the judgment of the Court and in much of its reasoning. I agree with the Court that the gravamen of the complaint in this case is that the prosecutor knowingly used perjured testimony; and that a prosecutor is absolutely immune from suit for money damages under 42 U.S.C. 1983 for presentation of testimony later determined to have been false, where the presentation of such testimony is alleged to have been unconstitutional solely because the prosecutor did not believe it or should not have believed it to be true. I write, however, because I believe that the Court's opinion may be read as extending to a prosecutor an immunity broader than that to which he was entitled at common law; broader than is necessary to decide this case; and broader than is necessary to protect the judicial process. Most seriously, I disagree with any implication that absolute immunity for prosecutors extends to suits based on claims of unconstitutional suppression of evidence because I believe such a rule would threaten to injure the judicial process and to interfere with Congress' purpose in enacting 42 U.S.C. 1983, without any support in statutory language or history.

* Title 42 U.S.C. 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

As the language itself makes clear, the central purpose of § 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an Official's abuse of his position." Monroe v. Pape, 365 U.S. 167, 172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961) (emphasis added). The United States Constitution among other things, places substantial limitations upon state action, and the cause of action provided in 42 U.S.C. 1983 is fundamentally one for "(m)isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941). It is manifest then that all state officials as a class cannot be immune absolutely from damage suits under 42 U.S.C. 1983 and that extend absolute immunity to any group of state officials is to negate Pro tanto the very remedy which it appears Congress sought to create. Scheuer v. Rhodes, 416 U.S. 232, 243, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). Thus, as there is no language in § 1983 extending Any immunity to any state officials, the Court has not extended Absolute immunity to such officials in the absence of the most convincing showing that the immunity is necessary. Accordingly, we have declined to construe § 1983 to extend absolute immunity from damage suits to a variety of state officials, Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) (school board members); Scheuer v. Rhodes, supra (various executive officers, including the State's chief executive officer); Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) (policemen); and this notwithstanding the fact that, at least with respect to high executive officers, absolute immunity from suit for damages would have applied at common law. Spalding v. Vilas, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896); Alzua v. Johnson, 231 U.S. 106, 34 S.Ct. 27, 58 L.Ed. 142 (1913). Instead, we have construed the statute to extend only a qualified immunity to these officials, and they may be held liable for unconstitutional conduct absent "good faith." Wood v. Strickland, supra, 420 U.S. at 315, 95 S.Ct. at 1685. Any other result would "deny much of the promise of § 1983." Id., at 322, 95 S.Ct. at 1001. Nonetheless, there are certain absolute immunities so firmly rooted in the common law and supported by such strong policy reasons that the Court has been unwilling to infer

that Congress meant to abolish them in enacting 42 U.S.C. 1983. Thus, we have held state legislators to be absolutely immune from liability for damages under § 1983 for their legislative acts, Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), 1 and state judges to be absolutely immune from liability for their judicial acts, Pierson v. Ray, supra. 2

In justifying absolute immunity for certain officials, both at common law and under 42 U.S.C. 1983, courts have invariably rested their decisions on the proposition that such immunity is necessary to protect the decision-making process in which the official is engaged. Thus legislative immunity was justified on the ground that such immunity was essential to protect "freedom of speech and action in the legislature" from the dampening effects of threatened lawsuits. Tenney v. Brandhove, supra, 341 U.S. at 372, 71 S.Ct. at 786. Similarly, absolute immunity for judges was justified on the ground that no matter how high the standard of proof is set, the burden of defending damage suits brought by disappointed litigants would "contribute not to principled and fearless decision-making but to intimidation." Pierson v. Ray, supra, 386 U.S. at 554, 87 S.Ct. at 1218. In Bradley v. Fisher, 13 Wall. 335, 347, 20 L.Ed. 646 (1872), the Court stated:

"For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. . . ."

See also cases discussed in Yaselli v. Goff, 12 F.2d 396, 399-401 (C.A.2 1926), summarily aff'd, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927).

The majority articulates other adverse consequences which may result from permitting suits to be maintained against public officials. Such suits may expose the official to an unjust damage award, Ante, at 425; such suits will be expensive to defend even if the official prevails and will take the official's time away from his job, Ante, at 425; and the liability of a prosecutor for unconstitutional behavior might induce a federal court in a habeas corpus proceeding to deny a valid constitutional claim in order to protect the prosecutor, Ante, at 427. However, these adverse consequences are present with respect to suits against policemen, school teachers, and other executives, and have never before been thought sufficient to immunize an official absolutely no matter how outrageous his conduct. Indeed, these reasons are present with respect to suits against all state officials 3 and must necessarily have been rejected by Congress as a basis for absolute immunity under 42 U.S.C. 1983, for its enactment is a clear indication that at least some officials should be accountable in damages for their official acts. Thus, unless the threat of suit is also thought to injure the governmental decisionmaking process, the other unfortunate consequences flowing from damage suits against state officials are sufficient only to extend a qualified immunity to the official in question. Accordingly, the question whether a prosecutor enjoys an absolute immunity from damage suits under § 1983, or only a qualified immunity, depends upon whether the common law and reason support the proposition that extending absolute immunity is necessary to protect the Judicial process.

II

The public prosecutor's absolute immunity from suit at common law is not so firmly entrenched as a judge's, but it has considerable support. The general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution. 1 F. Harper & F. James, The Law of Torts § 4.3, p. 305 n. 7 (1956) (hereafter Harper & James), and cases there cited; Yaselli v. Goff, supra ; Gregoire v. Biddle, 177 F.2d 579 (C.A.2 1949); Kauffman v. Moss, 420 F.2d 1270 (C.A.3 1970); Bauers v. Heisel, 361 F.2d 581 (C.A.3 1965); Tyler v. Witkowski, 511 F.2d 449 (C.A.7 1975); Hampton v. City of Chicago, 484 F.2d 602 (C.A.7 1973); Barnes v. Dorsey, 480 F.2d 1057 (C.A.8 1973); Duba v. McIntyre, 501 F.2d 590

(C.A.8 1974); Robichaud v. Ronan, 351 F.2d 533 (C.A.9 1965). But see Leong Yau v. Carden, 23 Haw. 362 (1916). The rule, like the rule extending absolute immunity to judges, rests on the proposition that absolute immunity is necessary to protect the judicial process. Absent immunity, " 'it would be but human that they (prosecutors) might refrain from presenting to a grand jury or prosecuting a matter which in their judgment called for action; but which a jury might possibly determine otherwise.' " 1 Harper & James § 4.3, pp. 305-306, quoting Yaselli v. Goff, 8 F.2d 161, 162 (S.D.N.Y.1925). Indeed, in deciding whether or not to prosecute, the prosecutor performs a "quasi-judicial" function. 1 Harper & James 305; Yaselli v. Goff, 12 F.2d, at 404. Judicial immunity had always been extended to grand jurors with respect to their actions in returning an indictment, Id., at 403, and " 'the public prosecutor, in deciding whether a particular prosecution shall be instituted . . . performs much the same function as a grand jury.' " Id., at 404, quoting Smith v. Parman, 101 Kan. 115, 165 P. 663 (1917). The analogy to judicial immunity is a strong one. Moreover, the risk of injury to the judicial process from a rule permitting malicious prosecution suits against prosecutors is real. There is no one to sue the prosecutor for an erroneous decision Not to prosecute. If suits for malicious prosecution were permitted, 4 the prosecutor's incentive would always be not to bring charges. Moreover, the "fear of being harassed by a vexatious suit, for acting according to their consciences" would always be the greater "where powerful" men are involved, 1 W. Hawkins, Pleas of the Crown, 349 (6th ed. 1787). Accordingly, I agree with the majority that, with respect to suits based on claims that the prosecutor's decision to prosecute was malicious and without probable cause at least where there is no independent allegation that the prosecutor withheld exculpatory information from a grand jury or the court, see Part III, Infra the judicial process is better served by absolute immunity than by any other rule.

Public prosecutors were also absolutely immune at common law from suits for defamatory remarks made during and relevant to a judicial proceeding, 1 Harper & James, §§ 5.21, 5.22; Yaselli v. Goff, 12 F.2d, at 402-403; and this immunity was also based on the policy of protecting the judicial process. Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Col.L.Rev. 463 (1909). The immunity was not special to public prosecutors but extended to lawyers accused of making false and defamatory statements, or of eliciting false and defamatory testimony from witnesses; and it applied to suits against witnesses themselves for delivering false and defamatory testimony. 1 Harper & James, § 5.22, pp. 423-424, and cases there cited; King v. Skinner, Lofft 55, 98 Eng.Rep. 529, 530 (K.B.1772) (Per Lord Mansfield); Yaselli v. Goff, 12 F.2d, at 403. The reasons for this rule are also substantial. It is precisely the function of a judicial proceeding to determine where the truth lies. The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be "given every encouragement to make a full disclosure of all pertinent information within their knowledge." 1 Harper & James, § 5.22, p. 424. For a witness, this means he must be permitted to testify without fear of being sued if his testimony is disbelieved. For a lawyer, it means that he must be permitted to call witnesses without fear of being sued if the witness is disbelieved and it is alleged that the lawyer knew or should have known that the witness' testimony was false. Of course, witnesses should not be encouraged to testify falsely nor lawyers encouraged to call witnesses who testify falsely. However, if the risk of having to defend a civil damage suit is added to the deterrent against such conduct already provided by criminal laws against perjury and subornation of perjury, the risk of self-censorship becomes too great. This is particularly so because it is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present. A prosecutor faced with a decision whether or not to call a witness whom he believes, but whose credibility he knows will be in doubt and whose testimony may be disbelieved by the jury, should be given every incentive to submit that witness' testimony to the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.

"Absolute privilege has been conceded on obvious grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist. It is essential to the ends of justice that all persons participating in judicial proceedings (to take a typical class for illustration) should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences." Veeder, Supra, 9 Col.L.Rev., at 469.

For the above-stated reasons, I agree with the majority that history and policy support an absolute immunity for prosecutors from suits based solely on claims 5 that they knew or should have known that the testimony of a witness called by the prosecution was false; and I would not attribute to Congress an intention to remove such immunity in enacting 42 U.S.C. 1983.

Since the gravamen of the complaint in this case is that the prosecutor knew or should have known that certain testimony of a witness called by him was untrue and since for reasons set forth below the other allegations in the complaint fail to state a cause of action on any other theory, I concur in the judgment in this case. However, insofar as the majority's opinion implies an absolute immunity from suits for constitutional violations other than those based on the prosecutor's decision to initiate proceedings or his actions in bringing information or argument to the court, I disagree. Most particularly I disagree with any implication that the absolute immunity extends to suits charging unconstitutional suppression of evidence. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

III

There was no absolute immunity at common law for prosecutors other than absolute immunity from suits for malicious prosecution and defamation. There were simply no other causes of action at common law brought against prosecutors for conduct committed in their official capacity. 6 There is, for example, no reported case of a suit at common law against a prosecutor for suppression or nondisclosure of exculpatory evidence. Thus, even if this Court had accepted the proposition, which it has not, Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), that Congress incorporated in 42 U.S.C. 1983 all immunities existing at common law, it would not follow that prosecutors are absolutely immune from suit for all unconstitutional acts committed in the course of doing their jobs. Secondly, it is by no means true that such blanket absolute immunity is necessary or even helpful in protecting the judicial process. It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which § 1983 was enacted. Absent special circumstances, such as those discussed in Part II, Supra, with respect to actions attacking the decision to prosecute or the bringing of evidence or argument to the court, one would expect that the judicial process would be protected and indeed its integrity enhanced by denial of immunity to prosecutors who engage in unconstitutional conduct.

The absolute immunity extended to prosecutors in defamation cases is designed to encourage them to bring information to the court which will resolve the criminal case. That is its single justification. Lest they withhold valuable but questionable evidence or refrain from making valuable but questionable arguments, prosecutors are protected from liability for submitting before the court information later determined to have been false to their knowledge. 7 It would stand this immunity rule on its head, however, to apply it to a suit based on a claim that the prosecutor unconstitutionally withheld information from the court. Immunity from a suit based upon a claim that the prosecutor suppressed or withheld evidence would Discourage precisely the disclosure of evidence sought to be encouraged by the rule granting prosecutors immunity from defamation suits.Denial of immunity for unconstitutional withholding of evidence would encourage such disclosure. A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required. But, this will hardly injure the judicial process. 8 Indeed, it will help it. Accordingly, lower courts have held that unconstitutional suppression of exculpatory evidence is beyond the scope of "duties constituting an

integral part of the judicial process" and have refused to extend absolute immunity to suits based on such claims. Hilliard v. Williams, 465 F.2d 1212, 1218 (C.A.6) cert. denied, 409 U.S. 1029, 93 S.Ct. 461, 34 L.Ed.2d 322 (1972); Haaf v. Grams, 355 F.Supp. 542, 545 (Minn.1973); Peterson v. Stanczak, 48 F.R.D. 426 (N.D.Ill.1969). Contra, Barnes v. Dorsey, 480 F.2d 1057 (C.A.8 1973).

Equally important, unlike constitutional violations committed in the courtroom improper summations, introduction of hearsay evidence in violation of the Confrontation Clause, knowing presentation of false testimony which truly are an "integral part of the judicial process," Ante, at 416, the judicial process has no way to prevent or correct the constitutional violation of suppressing evidence. The judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface. It is all the more important, then, to deter such violations by permitting damage actions under 42 U.S.C. 1983 to be maintained in instances where violations do surface.

The stakes are high. In Hilliard v. Williams, supra, a woman was convicted of second-degree murder upon entirely circumstantial evidence. The most incriminating item of evidence was the fact that the jacket worn by the defendant at the time of arrest and some curtains appeared to have bloodstains on them. The defendant denied that the stains were bloodstains but was convicted and subsequently spent a year in jail. Fortunately, in that case, the defendant later found out that an FBI report of which the prosecutor had knowledge at the time of the trial and the existence of which he instructed a state investigator not to mention during his testimony concluded, after testing, that the stains were Not bloodstains. On retrial, the defendant was acquitted. She sued the prosecutor and the state investigator under 42 U.S.C. 1983 claiming that the FBI report was unconstitutionally withheld under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and obtained a damage award against both after trial. The prosecutor's petition for certiorari is now pending before this Court. Hilliard v. Williams, 516 F.2d 1344 (C.A.6 1975). The state investigator's petition, in which he claimed that he had only followed the prosecutor's orders, has been denied. Clark v. Hilliard, 423 U.S. 1066, 96 S.Ct. 805, 46 L.Ed.2d 656 (1976). It is apparent that the injury to a defendant which can be caused by an unconstitutional suppression of exculpatory evidence is substantial, particularly if the evidence is never uncovered. It is virtually impossible to identify Any injury to the judicial process resulting from a rule permitting suits for such unconstitutional conduct, and it is very easy to identify an injury to the process resulting from a rule which do not permit such suits. Where the reason for the rule extending absolute immunity to prosecutors disappears, it would truly be "monstrous to deny recovery." Gregoire v. Biddle, 177 F.2d, at 581.

IV

The complaint in this case, while fundamentally based on the claim that the prosecutor knew or should have known that his witness had testified falsely in certain respects, does contain some allegations that exculpatory evidence and evidence relating to the witness' credibility had been suppressed. Insofar as the complaint is based on allegations of suppression or failure to disclose, the prosecutor should not, for the reasons set forth above, be absolutely immune. However, as the majority notes, the suppression of fingerprint evidence and the alleged suppression of information relating to certain pretrial lineups is not alleged to have been known in fact to the prosecutor it is simply claimed that the suppression is legally chargeable to him. While this may be so as a matter of federal habeas corpus law, it is untrue in a civil damage action. The result of a lie-detector test claimed to have been suppressed was allegedly known to respondent, but it would have been inadmissible at Imbler's trial and is thus not constitutionally required to be disclosed. The alteration of the police artist's composite sketch after Imbler was designated as the defendant is not alleged to have been suppressed and in fact appears not to have been suppressed. The opinion of the California Supreme Court on direct review of Imbler's conviction states that "the picture was modified later, following suggestions of Costello and other witnesses," and that court presumably had before it only the trial record. The other items allegedly suppressed all relate to background information about only one of the three eyewitnesses to testify for the State, and were in large part concededly known

to the defense and thus may not be accurately described as suppressed. The single alleged fact not concededly known to the defense which might have been helpful to the defense was that the State's witness had written some bad checks for small amounts and that a criminal charge based on one check was outstanding against him. However, the witness had an extensive criminal record which was known to but not fully used by the defense. Thus, even taken as true, the failure to disclose the check charges is patently insufficient to support a claim of unconstitutional suppression of evidence. 9 The Court has in the past, having due regard for the fact that the obligation of the government to disclose exculpatory evidence is an exception to the normal operation of an adversary system of justice, imposed on state prosecutors a constitutional obligation to turn over such evidence only when the evidence is of far greater significance than that involved here. See Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972). Thus, the only constitutional violation adequately alleged against the prosecutor is that he knew in his mind that testimony presented by him was false; and from a suit based on such a violation, without more, the prosecutor is absolutely immune. For this reason, I concur in the judgment reached by the majority in this case.

1
This shot formed the basis of a second count against Imbler for assault, which was tried with the murder count.

2
This coat, identified by Mrs. Hasson as that worn by her husband's assailant, yielded a gun determined by ballistics evidence to be the murder weapon.

3
A fourth man who saw Hasson's killer leaving the scene identified Imbler in a pretrial lineup, but police were unable to find him at the time of trial.

4
Imbler also received a 10-year prison term on the assault charge. See n. 1, Supra.

5
Brief for Respondent, App.A., p. 6. The record does not indicate what specific action was taken in response to Pachtman's letter. We do note that the letter was dated August 17, 1962, and that Imbler's execution, scheduled for September 12, 1962, subsequently was stayed. The letter became a part of the permanent record in the case available to the courts in all subsequent litigation.

6
Brief for Respondent 5.

7
See generally Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

8
The District Court found that Costello had given certain ambiguous or misleading testimony, and had lied flatly about his criminal record, his education, and his current income. As to the misleading testimony, the court found that either Pachtman or a police officer present in the courtroom knew it was misleading. As to the false testimony, the District Court concluded that Pachtman had "cause to suspect" its falsity although, apparently, no actual knowledge thereof. See 298 F.Supp., at 799-807. The Supreme Court of California earlier had addressed and rejected allegations based on many of the same parts of Costello's testimony. It found either an absence of falsehood or an absence of prosecutorial knowledge in each instance. See In re Imbler, 60 Cal.2d 554, 562-565, and n. 3, 35 Cal.Rptr. 293, 297-300, and n. 3, 387 P.2d 6, 10-12, and n. 3 (1963).

9

See 298 F.Supp., at 809-811. The Supreme Court of California earlier had rejected similar allegations. See In re Imbler, supra, 60 Cal.2d, at 566-568, 35 Cal.Rptr., at 299-301, 387 P.2d, at 12-13.

10

42 U.S.C. 1983, originally passed as § 1 of the Civil Rights Act of 1871, 17 Stat. 13, reads in full:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

11

See, e. g., Pierson v. Ray, 386 U.S. 547, 559, 87 S.Ct. 1213, 1220, 18 L.Ed.2d 288 (1967) (Douglas, J., dissenting); Tenney v. Brandhove, 341 U.S. 367, 382-383, 71 S.Ct. 783, 791, 95 L.Ed. 1019 (1951) (Douglas, J., dissenting).

12

The Court described the immunity of judges as follows:
"Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' " 386 U.S., at 553-554, 87 S.Ct., at 1217 (citation omitted).

13

The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial. See Scheuer v. Rhodes, 416 U.S. 232, 238-239, 94 S.Ct. 1683, 1687, 40 L.Ed.2d 90 (1974); Wood v. Strickland, 420 U.S. 308, 320-322, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975).

14

The elements of this immunity were described in Scheuer as follows:
"It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct." 416 U.S., at 247-248, 94 S.Ct., at 1692.

15

In Tenney v. Brandhove, of course, the Court looked to the immunity accorded legislators by the Federal and State Constitutions, as well as that developed by the common law. 341 U.S., at 372-375, 71 S.Ct., at 786. See generally Doe v. McMillan, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973).

16

Fanale v. Sheehy, 385 F.2d 866, 868 (C.A.2 1967); Bauers v. Heisel, 361 F.2d 581 (C.A.3 1966), cert. denied, 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 (1967); Carmack v. Gibson, 363 F.2d 862, 864 (C.A.5 1966); Tyler v. Witkowski, 511 F.2d 449, 450-451 (C.A.7 1975); Barnes v. Dorsey, 480 F.2d 1057, 1060 (C.A.8 1973); Kostal v. Stoner, 292 F.2d 492, 493 (C.A.10 1961), cert. denied, 369 U.S. 868, 82 S.Ct. 1032, 8 L.Ed.2d 87 (1962); cf. Guerro v. Mulhearn, 498 F.2d 1249, 1255-1256 (C.A.1 1974); Weathers v. Ebert, 505 F.2d 514, 515-516 (C.A.4 1974). But compare Hurlburt v. Graham, 323 F.2d 723 (C.A.6 1963), with Hilliard v. Williams, 465 F.2d 1212 (C.A.6), cert. denied, 409 U.S. 1029, 93 S.Ct. 461, 34 L.Ed.2d 322 (1972). See Part IV, infra.

17
E.g., Tyler v. Witkowski, supra, at 450; Kostal v. Stoner, supra, at 493; Hampton v. City of Chicago, 484 F.2d 602, 608 (C.A.7 1973), cert. denied, 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974). See n. 20, infra.
18
The Supreme Court of Indiana in Griffith cited an earlier Massachusetts decision, apparently as authority for its own holding. But that case, Parker v. Huntington, 68 Mass. 124 (1854), involved the elements of a malicious prosecution cause of action rather than the immunity of a prosecutor. See also Note, 73 U.Pa.L.Rev. 300, 304 (1925).
19
Smith v. Parman, 101 Kan. 115, 165 P. 663 (1917); Semmes v. Collins, 120 Miss. 265, 82 So. 145 (1919); Kittler v. Kelsch, 56 N.D. 227, 216 N.W. 898 (1927); Watts v. Gerking, 111 Or. 654, 228 P. 135 (1924) (on rehearing). Contra, Leong Yau v. Carden, 23 Haw. 362 (1916).
20
The immunity of a judge for acts within his jurisdiction has roots extending to the earliest days of the common law. See Floyd v. Barker, 12 Coke 23, 77 Eng.Rep. 1305 (1608). Chancellor Kent traced some of its history in Yates v. Lansing, 5 Johns. 282 (N.Y.1810), and this Court accepted the rule of judicial immunity in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872). See n. 12, supra. The immunity of grand jurors, an almost equally venerable common-law tenet, see Floyd v. Barker, supra, also has been adopted in this country. See, e. g., Turpen v. Booth, 56 Cal. 65 (1880); Hunter v. Mathis, 40 Ind. 356 (1872). Courts that have extended the same immunity to the prosecutor have sometimes remarked on the fact that all three officials judge, grand juror, and prosecutor exercise a discretionary judgment on the basis of evidence presented to them. Smith v. Parman, supra ; Watts v. Gerking, supra. It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as "quasi-judicial" officers, and their immunities being termed "quasi-judicial" as well. See, e. g., Turpen v. Booth, supra, 56 Cal. at 69; Watts v. Gerking, supra, 111 Or., at 661, 228 P., at 138.
21
See e. g., Gregoire v. Biddle, 177 F.2d 579 (C.A.2 1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950); Cooper v. O'Connor, 69 App.D.C. 100, 99 F.2d 135, 140-141 (1938); Anderson v. Rohrer, 3 F.Supp. 367 (S.D.Fla.1933); Pearson v. Reed, 6 Cal.App.2d 277, 44 P.2d 592 (1935); Anderson v. Manley, 181 Wash. 327, 43 P.2d 39 (1935). See generally Restatement of Torts § 656 and comment b (1938); 1 F. Harper & F. James, The Law of Torts § 4.3, pp. 305-306 (1956).
22
This is illustrated by the history of the disagreement as to the culpability of the prosecutor's conduct in this case. We express no opinion as to which of the courts was correct. See nn. 8 and 9, supra.
23
In the law of defamation, a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding. In the case of lawyers the privilege extends to their briefs and pleadings as well. See generally 1 T. Cooley Law of Torts § 153 (4th ed. 1932); 1 F. Harper & F. James, supra, § 5.22. In the leading case of Hoar v. Wood, 44 Mass. 193 (1841), Chief Justice Shaw expressed the policy decision as follows:
"Subject to this restriction (of relevancy), it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions." Id., at 197-198.
24

A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages. Cf. American Bar Association Project on Standards for Criminal Justice, Prosecution and Defense Function § 3.9(c) (Approved Draft 1971).

25

The possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation. At trial this duty is enforced by the requirements of due process, but after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction. Cf. ABA Code of Professional Responsibility § EC 7-13 (1969); ABA Standards, supra, § 3.11. Indeed, the record in this case suggests that respondent's recognition of this duty led to the post-conviction hearing which in turn resulted ultimately in the District Court's granting of the writ of habeas corpus.

26

In addressing the consequences of subjecting judges to suits for damages under § 1983, the Court has commented:

"Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." Pierson v. Ray, 386 U.S., at 554, 87 S.Ct., at 1218.

27

Petitioner contends that his suit should be allowed, even if others would not be, because the District Court's issuance of the writ of habeas corpus shows that his suit has substance. We decline to carve out such an exception to prosecutorial immunity. Petitioner's success on habeas, where the question was the alleged misconduct by several state agents, does not necessarily establish the merit of his civil rights action where only the respondent's alleged wrongdoing is at issue. Certainly nothing determined on habeas would bind respondent, who was not a party. Moreover, using the habeas proceeding as a "door-opener" for a subsequent civil rights action would create the risk of injecting extraneous concerns into that proceeding. As we noted in the text, consideration of the habeas petition could well be colored by an awareness of potential prosecutorial liability.

28

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

29

California also appears to provide for criminal punishment of a prosecutor who commits some of the acts ascribed to respondent by petitioner. Cal.Penal Code § 127 (1970); cf. In re Branch, 70 Cal.2d 200, 210-211, 74 Cal.Rptr. 238, 245, 449 P.2d 174, 181 (1969).

30

See ABA Code of Professional Responsibility § EC 7-13. See generally ABA, Standards, supra, n. 24, §§ 1.1(c), (e), and Commentary, pp. 44-45.

31

Guerro v. Mulhearn, 498 F.2d, at 1256; Hampton v. City of Chicago, 484 F.2d, at 608-609; Robichaud v. Ronan, 351 F.2d 533, 537 (C.A.9 1965); cf. Madison v. Purdy, 410 F.2d 99 (C.A.5 1969); Lewis v. Brautigam, 227 F.2d 124 (C.A.5 1955). But cf. Cambist Films, Inc. v. Duggan, 475 F.2d 887, 889 (C.A.3 1973).

32

Both in his complaint in District Court and in his argument to us, petitioner characterizes some of respondent's actions as "police-related" or investigative. Specifically, he points to a request by respondent of the police during a courtroom recess that they hold off questioning Costello about a pending bad-check charge until after Costello had completed his testimony. Petitioner asserts that this request was an investigative activity because it was a direction to police officers engaged in the investigation of crime. Seen in its proper light, however, respondent's request of the officers was an effort to control the presentation of his witness' testimony, a task fairly within his function as an advocate.

33

We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

34

Mr. Justice WHITE, concurring in the judgment, would distinguish between willful use by a prosecutor of perjured testimony and willful suppression by a prosecutor of exculpatory information. In the former case, Mr. Justice WHITE agrees that absolute immunity is appropriate. He thinks, however, that only a qualified immunity is appropriate where information relevant to the defense is "unconstitutionally Withheld . . . from the court." Post, at 443.

We do not accept the distinction urged by Mr. Justice WHITE for several reasons. As a matter of principle, we perceive no less an infringement of a defendant's rights by the knowing use of perjured testimony than by the deliberate withholding of exculpatory information. The conduct in either case is reprehensible, warranting criminal prosecution as well as disbarment. See Supra, at 429, nn. 29 and 30. Moreover, the distinction is not susceptible of practical application. A claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested. That the two types of claims can thus be viewed is clear from our cases discussing the constitutional prohibitions against both practices. Mooney v. Holohan, 294 U.S. 103, 110, 55 S.Ct. 340, 341, 79 L.Ed. 791 (1935); Alcorta v. Texas, 355 U.S. 28, 31-32, 78 S.Ct. 103, 105, 2 L.Ed.2d 9 (1957); Brady v. Maryland, 373 U.S. 83, 86, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963); Miller v. Pate, 386 U.S. 1, 4-6, 87 S.Ct. 785, 786, 17 L.Ed.2d 690 (1967); Giglio v. United States, 405 U.S. 150, 151-155, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). It is also illustrated by the history of this case: at least one of the charges of prosecutorial misconduct discussed by the Federal District Court in terms of suppression of evidence had been discussed by the Supreme Court of California in terms of use of perjured testimony. Compare Imbler v. Craven, 298 F.Supp., at 809-811, with In re Imbler, 60 Cal.2d, at 566-567, 35 Cal.Rptr., at 299-301, 387 P.2d, at 12-13. Denying absolute immunity from suppression claims could thus eviscerate, in many situations, the absolute immunity from claims of using perjured testimony.

We further think Mr. Justice WHITE's suggestion, Post, at 440 n. 5, that absolute immunity should be accorded only when the prosecutor makes a "full disclosure" of all facts casting doubt upon the State's testimony, would place upon the prosecutor a duty exceeding the disclosure requirements of Brady and its progeny, see 373 U.S., at 87, 83 S.Ct. at 1196; Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972); cf. Donnelly v. DeChristoforo, 416 U.S. 637, 647-648, 94 S.Ct. 1868, 1874, 40 L.Ed.2d 431 (1974). It also would weaken the adversary system at the same time it interfered seriously with the legitimate exercise of prosecutorial discretion.

1

The Court emphasized that the immunity had a lengthy history at common law, and was written into the United States Constitution in the "Speech or Debate Clause" and into many state constitutions as well. 341 U.S., at 372-373, 71 S.Ct., at 786.

2

The Court concluded that "(f)ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872)." 386 U.S., at 553-554, 87 S.Ct., at 1217.

3

Even the risk that decisions in habeas corpus proceedings will be skewed is applicable in the case of policemen; and if it supplies a sufficient reason to extend absolute immunity to prosecutors, it should have been a sufficient reason to extend such immunity to policemen. Indeed, it is fair to say that far more habeas corpus petitions turn on the constitutionality of action taken by policemen than turn on the constitutionality of action taken by prosecutors. We simply rely on the ability of federal judges correctly to apply the law to the facts with the knowledge that the overturning of a conviction on constitutional grounds hardly dooms the official in question to payment of a damage award in light of the qualified immunity which he possesses, and the inapplicability of the res judicata doctrine, Ante, at 428 n. 27.

4

I agree with the majority that it is not sufficient merely to set the standard of proof in a malicious prosecution case very high. If this were done, it might be possible to eliminate the danger of an unjust damage award against a prosecutor. However, the risk of having to Defend a suit even if certain of ultimate vindication would remain a substantial deterrent to fearless prosecution.

5

For the reasons set forth in Part III, Infra, absolute immunity would not apply to independent claims that the prosecutor has withheld facts tending to demonstrate the falsity of his witness' testimony where the alleged facts are sufficiently important to justify a finding of unconstitutional conduct on the part of the prosecutor.

6

Immunity of public officials for false arrest was, unlike immunity of public officials for malicious prosecution, not absolute, 1 Harper & James, §§ 3.17 and 3.18; and when prosecutors were sued for that tort, they were not held absolutely immune. Schneider v. Shepherd, 192 Mich. 82, 158 N.W. 182 (1916). A similar result has obtained in the lower courts in suits under 42 U.S.C. 1983 against prosecutors for initiating unconstitutional arrests. Robichaud v. Ronan, 351 F.2d 533 (C.A.9 1965); Hampton v. Chicago, 484 F.2d 602 (C.A.7 1973); Wilhelm v. Turner, 431 F.2d 177, 180-183 (C.A.8 1970) (dictum); Balistrieri v. Warren, 314 F.Supp. 824 (W.D.Wis.1970). See also Ames v. Vavreck, 356 F.Supp. 931 (Minn.1973).

7

The reasons for making a prosecutor absolutely immune from suits for defamation would apply with equal force to other suits based solely upon the prosecutor's conduct in the courtroom designed either to bring facts or arguments to the attention of the court. Thus, a prosecutor would be immune from a suit

based on a claim that his summation was unconstitutional or that he deliberately elicited hearsay evidence in violation of the Confrontation Clause.

8

There may be circumstances in which ongoing investigations or even the life of an informant might be jeopardized by public disclosure of information thought possibly to be exculpatory. However, these situations may adequately be dealt with by In camera disclosure to the trial judge. These considerations do not militate against disclosure, but merely affect the manner of disclosure.

9

The majority points out that the knowing use of perjured testimony is as reprehensible as the deliberate suppression of exculpatory evidence. This is beside the point. The reason for permitting suits against prosecutors for suppressing evidence is not that suppression is especially reprehensible but that the only effect on the process of permitting such suits will be a beneficial one more information will be disclosed to the court; whereas one of the effects of permitting suits for knowing use of perjured testimony will be detrimental to the process prosecutors may withhold questionable but valuable testimony from the court. The majority argues that any "claim of using perjured testimony simply may be reframed and asserted as a claim of suppression." Our treatment of the allegations in this case conclusively refutes the argument. It is relatively easy to allege that a government witness testified falsely and that the prosecutor did not believe the witness; and, if the prosecutor's subjective belief is a sufficient basis for liability, the case would almost certainly have to go to trial. If such suits were permitted, This case would have to go to trial. It is another matter entirely to allege specific objective facts known to the prosecutor of sufficient importance to justify a conclusion that he violated a constitutional duty to disclose. It is no coincidence that petitioner failed to make any such allegations in this case. More to the point and quite apart from the relative difficulty of pleading a violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) a rule permitting suits based on withholding of specific facts unlike suits based on the prosecutor's disbelief of a witness' testimony will have no detrimental effect on the process. Risk of being sued for suppression will impel the prosecutor to err if at all on the side of overdisclosure. Risk of being sued for disbelieving a witness will impel the prosecutor to err on the side of withholding questionable evidence. The majority does not appear to respond to this point. Any suggestion that the distinction between suits based on suppression of facts helpful to the defense and suits based on other kinds of constitutional violations cannot be understood by district judges who would have to apply the rule is mystifying. The distinction is a simple one.

Finally, the majority states that the rule suggested in this concurring opinion "would place upon the prosecutor a duty exceeding the disclosure requirements of Brady and its progeny." The rule suggested in this opinion does no such thing. The constitutional obligation of the prosecutor remains utterly unchanged. We would simply not grant him Absolute immunity from suits for committing violations of pre-existing constitutional disclosure requirements, if he committed those violations in bad faith.

500 F.2d 1301: Paul Kern Imbler, Plaintiff-appellant, v. Richard Pachtman et al., Defendants-appellees

United States Court of Appeals, Ninth Circuit. - 500 F.2d 1301

July 12, 1974

Roger S. Hanson (argued) of Hanson & Milman, Beverly Hills, Cal., for plaintiff-appellant.

Richard G. Brungard, Deputy County Counsel (argued), Los Angeles, Cal., for defendants-appellees.

Before KOELSCH, HUFSTEDLER and KILKENNY, Circuit Judges.

KOELSCH, Circuit Judge:

1

This matter has a long history. In 1961 plaintiff-appellant Imbler was convicted on a murder charge in Los Angeles Superior Court and sentenced to death. The California Supreme Court affirmed. People v. Imbler, 57 Cal.2d 711, 21 Cal.Rptr. 568, 371 P.2d 304 (1962). Thereafter, Imbler's state habeas corpus petition was denied following an evidentiary hearing. In re Imbler, 60 Cal.2d 554, 35 Cal.Rptr. 293, 387 P.2d 6 (1963). A subsequent writ set aside the death penalty, In re Imbler, 61 Cal.2d 556, 39 Cal.Rptr. 375, 393 P.2d 687 (1964); and when the state declined to prosecute another 'penalty trial,' Imbler was given a life sentence.

2

In 1969 the United States District Court, concluding that Imbler's conviction was secured in part by testimony the prosecution knew, or had strong reason to know, was perjured, granted him a writ of habeas corpus. Imbler v. Craven, 298 F.Supp. 795, 809 (1969). We affirmed, Imbler v. Craven, 424 F.2d 631 (9th Cir. 1970), cert. denied, 400 U.S. 865, 91 S.Ct. 100, 27 L.Ed.2d 104.

3

Imbler then brought this suit for damages. So far as need be noticed, his allegations in substance are that the defendant Pachtman, the district attorney who prosecuted the criminal charges on behalf of the State of California, had knowingly, maliciously, etc., used perjured testimony to secure a conviction and hence

was liable in damages for violation of his, Imbler's, civil rights. The district judge dismissed Imbler's complaint as to Pachtman without leave to amend; he ruled that Pachtman, as a prosecuting attorney, enjoyed an immunity from suit for acts committed 'in the performance of duties constituting an integral part of the judicial process . . .', Marlowe v. Coakley, 404 F.2d 70 (9th Cir. 1968); see Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965); and that as a matter of law the acts complained of came within a quasi-judicial prosecutorial function to which immunity attached. Imbler appeals.[1] We affirm.

4

The district court's dismissal of appellant's claim was consistent with our prior decisions. Ney v. State of California, 439 F.2d 1285 (9th Cir. 1971); Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970); Marlowe v. Coakley, supra; Clark v. Washington, 366 F.2d 678 (9th Cir. 1966); Robichaud v. Ronan, supra; Agnew v. Moody, 330 F.2d 868 (9th Cir. 1964); Harmon v. Superior Court, 329 F.2d 154 (9th Cir. 1964); Sires v. Cole,320 F.2d 877 (9th Cir. 1963). The acts of the defendant which allegedly harmed appellant occurred during prosecutorial activities which can only be characterized as an 'integral part of the judicial process.'[2] All involved the questioning of a witness during the 1961 criminal prosecution.[3]

5

Appellant, in effect, urges us to reject the doctrine of prosecutorial immunity and overrule a long line of this court's decisions. We decline to do so. The protection given a prosecutor acting in his quasi-judicial role protects not simply the prosecutor, but, more importantly, the effective operation of the judicial process, and hence the 'common good.' Because both the honest and dishonest are insulated, on occasion an injury without redress inevitably results; but, as well expressed by Judge Learned Hand:

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'It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The jurisdiction for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books.' Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).

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As indicated earlier, the issue is not 'res nova' in this circuit.[4] The 'balance between the evils inevitable in either alternative' has consistently been struck in favor of protecting honest criminal prosecution, at the expense of those injured by scoundrels,[5] by granting immunity from suit to all prosecutors.[6]

8

The judgment is affirmed.

9

KILKENNY, Circuit Judge (dissenting):

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Although appellant's 22 page amended complaint, with 23 pages of exhibits, is admittedly repetitious and in places ambiguous, there is no question but that it charges appellee, Pachtman, with knowingly, wilfully and maliciously using eight different items of false material testimony in securing appellant's initial conviction. If this is true, I believe that appellee violated appellant's procedural due process rights, and that he should be stripped of his official or representative character and subjected in his person to the consequences of his individual conduct.

11

The Supreme Court decision in Scheuer, Adm'x. v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), the most recent expression of the Court on the overall subject, convinces me that, on these charges, the appellee does not have quasi-judicial, or any other immunity. True enough, Scheuer involved state executive, rather than judicial immunity. However, the Court in Scheuer, analyzed the long history behind executive, as well as judicial immunity, and noted that there was a '. . . similarity in the controlling policy considerations in the case of high echelon executive officers and judges . . .' (94 S.Ct. at 1691, n. 8); the policy considerations revolving, in large measure, around the continued assurance that public officials will continue to vigorously perform their public functions without threat of harassment by civil suit. All this being said, the Supreme Court went on to hold that high executive officers do not have an unqualified immunity from civil suit. The Court emphasized:

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'Under the criteria developed by precedents of this Court, 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer has 'the qualify of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government.' Sterling v. Constantin, 287 U.S. 378, 397 (53 S.Ct. 190, 77 L.Ed. 375) (1932).' 94 S.Ct. at 1692.

13

If, as held in Scheuer, the highest executive officer of a great state is not clothed with absolute immunity and, assuming that the policy considerations behind executive immunity are similar to those behind judicial immunity, then it must necessarily follow that a prosecuting attorney, shielded only by a form of

judicial immunity (Robichaud v. Ronan, 351 F.2d 533 (CA9 1965)), should not be elevated to a status which would place him above the chief executive officer of his state. Otherwise, the office of the district attorney, rather than the Constitution of the United States, becomes the Supreme Law of the Land. Of course, under our system of government, such a conclusion is clearly untenable. State officials in these circumstances should not escape the paramount authority of the Federal Constitution. I quote from Sterling v. Constantin, 287 U.S. 378, 398, 53 S.Ct. 190, 195, 77 L.Ed. 375 (1932):

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'When there is a substantial showing that the exertion of state power has overridden private rights secured by (the) Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression.'

15

Aside from my view that Scheuer is controlling, the cases cited by the majority, in my opinion, are clearly distinguishable. For example, in Ney v. State of California, 439 F.2d 1285 (CA9 1971), the appellant charged the district attorney, or his deputy, with knowingly using altered tapes. The facts revealed, however, that the district attorney's deputy actually used the tapes and, therefore, if the district attorney could be sued at all, he would be liable only on a theory of respondent superior. In Ney, this court stressed that the allegation of fact supporting the purported misconduct was based on '. . . much conclusionary language . . ..' 439 F.2d at 1287. In the instant case, the factual allegations charge the district attorney with engaging in specific instances of misconduct wholly reprehensible to the integrity of the judicial process.

16

Donovan v. Reinbold, 433 F.2d 738 (CA9 1970), is no more enlightening. There, the action was against two city police officers and two city attorneys. This court held that the doctrine of immunity from civil suit under 1983 would not bar an action against them. Nothing in Donovan even remotely indicates that a civil rights action should not lie on our facts. For that matter, the opinion recognizes that:

17

'the purpose of according judicial immunity is to protect the integrity of the judicial process. It is not to shield lawyers or judges from liability for the invasion of another's federally secured constitutional rights, when the alleged invasion did not occur during the performance of acts that are an integral part of the judicial process.' 433 F.2d at 743.

18

To now hold, on our facts, that the knowing, wilful and malicious use of perjured testimony to gain a conviction, even though accomplished during the course of a trial, constitutes an integral part of the judicial process, flies in the very face of the integrity sought to be protected by judicial and quasi-judicial immunity.

19

The allegations in Marlowe v. Coakley, 404 F.2d 70 (CA9 1968) charged the prosecuting attorney with '. . . knowingly and wilfully, or with gross negligence, present(ing) perjured testimony to the grand jury . . ..' Needless to say, there is a monumental distinction between charging an officer with gross negligence in connection with the presentation of perjured testimony and charging him with knowingly, wilfully and maliciously using perjured testimony to obtain a conviction. Consequently, the decision of the Marlowe court could well rest on the failure of the complainant to clearly charge wilful misconduct in presenting the perjured testimony. Cf. Ney v. State of California, supra, 439 F.2d at 1287. The alternative does not equate with wilful action. I decline to hold that the shield of immunity should rest on the brow of a district attorney who knowingly, wilfully and maliciously utilizes perjured testimony to obtain a conviction. This conduct should not be condoned as an integral part of the judicial process.

20

Clark v. State of Washington, 366 F.2d 678 (CA9 1966), recognizes the rule that a prosecuting attorney enjoys immunity under the Civil Rights Act only insofar as his prosecuting functions are concerned. At the risk of being repetitive, I again stress that appellee's acts, as charged in the amended complaint, had nothing to do with his legitimate prosecutory functions.

21

In Agnew v. Moody, 330 F.2d 868 (CA9 1964), cert. denied 379 U.S. 867, 85 S.Ct. 137, 13 L.Ed.2d 70, the court there sidestepped the contention that the doctrine of official immunity did not apply where the wrongful act was of an extraordinary character, as that phrase was used in Tenney v. Brandhove, 341 U.S. 367, 378-379, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), by saying, 'if such an indefinite exception to the immunity rule exists, we are satisfied that appellant's case does not fall within it.' 330 F.2d at 869. Scheuer, supra, makes it clear that the doctrine of official immunity does not apply in cases where the wrongful act is of an extraordinary character.

22

Hilliard v. Williams, 465 F.2d 1212 (CA6 1972), cert. denied 409 U.S. 1029, 93 S.Ct. 461, 34 L.Ed.2d 322, is closely in point. There, the court, in a civil rights action, recognized the general rule that a prosecuting attorney, when acting in his official capacity, is immune from a suit for damages. The court then goes on to hold that the doctrine of quasi-judicial immunity, normally shielding a prosecuting attorney, should not be extended to the situation where a complaint charges that the officer deliberately suppressed material evidence which resulted in the conviction of the appellant. The court emphasized that such wilful conduct was '. . . outside (the officer's) quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process." 465 F.2d at 1218.

23

On the charges before us, I would hold that appellee acted entirely outside the scope of his jurisdiction and should not be permitted to shelter himself from liability by a plea that he was acting under the immunity of his office. Not to be forgotten is the high responsibility accepted by a prosecuting officer when he enters upon the duties of his office. For example: (1) he is required to recognize that in our system of justice, the accused is to be given the benefit of all reasonable doubt; (2) his decisions during the course of the prosecution must be fair to all, including the defendant; (3) he has a duty of timely

disclosure to the defense of all available evidence known to him that tends to help the defendant, and (4) it is his duty to seek justice, not pervert it by placing a conviction above the constitutional rights of the accused. It is time to recognize that prosecutors are not entirely above the law which holds other individuals financially accountable for their intentional misdeeds.

24

Needless to say, I express no opinion as to the merits of appellant's claims. I only say that on the basis of the allegations in the amended complaint, he is entitled to have a full-fledged judicial inquiry.

25

I would reverse.

1

As appears from the caption, there are several defendants. In ruling against Imbler the court directed entry of judgment immediately, R. 54(b), F.R.Civ.P. The appeal from the ensuing limited judgment is thus valid

2

The dissent argues that deliberate suppression of evidence or subornation of perjured testimony is unprotected by quasi-judicial immunity because such acts, being improper exercises of prosecutorial power, are not an integral part of the judicial process; the dissent therefore concludes that our prior cases do not confer immunity when the complaint charges knowing and malicious abuse of prosecutorial power. The purported distinction undermines the purpose of the absolute immunity previously recognized, because the addition of an easy to make but difficult to prove charge of knowing and malicious prosecutorial misconduct to any complaint would suffice to require a full trial on the merits of the prosecutor's conduct while acting as a judicial officer

More importantly, the distinction is clearly inconsistent with our prior cases. In Robichaud v. Ronan, supra, the court indicated that a prosecutor's immunity is absolute when engaged in quasi-judicial activities, noting that no suit for malicious prosecution could be brought regardless of the existence of malice or even willfulness on the part of the prosecuting attorney. See 351 F.2d at 536. Equally in point is Marlowe v. Coakley, supra; the dissent's 'monumental distinction' of Marlowe is spurious. The complaint there alleged that the prosecuting attorney knowingly and willfully, or with gross negligence, presented perjured testimony to the grand jury investigating plaintiff's activities and that he suppressed from the grand jury exculpating evidence within his knowledge, again willfully and deliberately. In ruling on the district court's dismissal under Rule 12(b)(6), the court necessarily had to evluate the claim assuming that the charges of willful perjury and suppression were true. Notwithstanding these allegations, the court held that the district attorney, in presenting evidence to the grand jury, was acting within the scope of his duty to advise and present information to the grand jury, and that this function is an integral part of the judicial process. In short, the dissent's approach to prosecutorial immunity has been rejected in this circuit.

3

Appellant contends the defendant engaged in non-immune police activity when he asked two police officers, seeking, during a recess in the trial, to discuss a criminal charge with the prosecution's chief witness, to wait until the end of the witness's testimony. We reject the contention. A prosecutor's request for an opportunity to complete an examination during a trial is a quasi-judicial act within the purposes of the immunity. More critically, the request to the police did not in itself deprive appellant of any civil right. Even if the defendant had then been acting in a police role, only the subsequent inducement of the testimony that the witness was trying to 'straighten out,' when the prosecutor had good reason to know the witness was in trouble, made the request to the officers legally relevant to appellant's civil rights; the questioning of a witness at trial is within a traditional prosecutorial function

4

The dissent's reliance on the Supreme Court's latest pronouncement on the subject of immunity, Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), holding that state executive officials are not absolutely immune from suit, is misplaced. If anything, Scheuer tends to support our conclusion. The Court there recognized (Scheuer at 239 n. 4, 94 S.Ct. 1683; see Pierson v. Ray, 386 U.S. 547, 553-555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967)) that the immunity of executive officers has historically 'been of a more limited nature' than that of judicial officers-- undoubtedly because the threat of private liability as a sanction for abuse of power is less necessary in the judicial system, which provides institutionalized systems of review to correct errors. Prosecutorial immunity is not a form of executive immunity, but rather a form of judicial immunity, Robichaud v. Ronan, supra, 351 F.2d at 536, designed to protect the judicial process; it attaches only to prosecutorial acts 'constituting an integral part of the judicial process.'

5

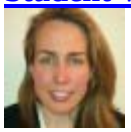
The reference is general and not intended as personal

6

Appellant contends, in substance, that the district court's determination in the habeas proceeding established defendant's violation and therefore assures that an 'innocent' prosecutor is not being made to face a trial and potential liability. Wholly aside from the fact that the California Supreme Court, on precisely the same facts available to the district court (the district court did not hold an evidentiary hearing and relied on the factual findings of the referee in the California Supreme Court's habeas proceeding), found there was no evidence that the prosecutor knowingly used perjured testimony, In re Imbler, supra, 60 Cal.2d at 565, 35 Cal.Rptr. 293, 387 P.2d 6, those determinations are not res judicata as to the defendant: he was not a party to the habeas proceeding. Here, as in any other 1983 suit against a prosecutor, a determination of the claim would require a full trial. The burden and risk of that trial is precisely what the immunity is designed to prevent. If one prosecutor must face the risk of liability because of an ill-grounded exception to absolute immunity, then all potentially may, and the public purpose of the immunity is lost

Today on Verdict

The U.S. Court of Appeals for the Third Circuit Rules in Favor of a Public Elementary School Student Who Sought to Pass Out Invitations to Her Church's Party to Her Classmates



Justia columnist and attorney Julie Hilden comments on a recent school speech decision from the U.S. Court of Appeals for the Third Circuit.

By Julie Hilden

Plain Error

THE OFFICIAL BLOG OF THE INNOCENCE PROJECT OF FLORIDA

Posts Tagged 'Paul Kern Imbler'

Above the Law: Prosecutorial Misconduct

WSainvil — July 26, 2012 @ 1:58 PM — Comments (6)

As the lead prosecutor of the case, it was his decision to do the right thing or continue winning cases. He had two options: disclose information that could possibly clear the defendant or cover it up and continue adding to his list of convictions. On the outside looking in it's a simple decision, do the right thing. Seeking true justice is more important than winning…right? However, the small voice of reason in his head lost the battle. He decided not only to hide exculpatory evidence, but to also make deals that promised inmates early release in exchange for false testimonies. This poor and reckless decision cost an innocent man three years of his life.

No, that was not the plot of a Law and Order episode or an excerpt from a John Grisham novel, it is the real life story of Nino Lyons, and a small look at how a prosecutor can behave unjustly.

The recent release of Duke Law's Wrongful Convictions Clinic exoneree LaMonte Armstrong has put the spotlight back on prosecutorial misconduct, and there are many questions still awaiting responses. With the number of exonerees growing each year, it's quite apparent that our legal system has many flaws. While many attorneys are aware of these issues, the general public is sometimes left in the dark about what causes a prosecutor to hide evidence and arrange deals with criminals.

A majority of the blame can be focused on the way the prosecutor's office is operated and how promotions are given. The prosecutor's office keeps track of each attorney's conviction rate. Though few will admit it, prosecutors are promoted based

Tags

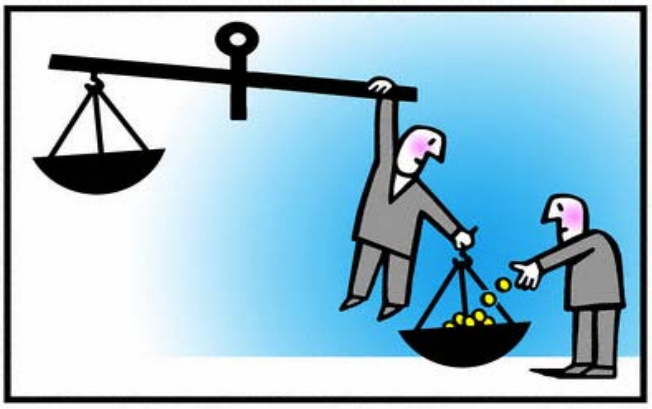
Alan Crotzer Anthony Caravella Brevard County Chad Heins compensation crime labs death penalty Derrick Williams DNA DNA testing exoneration exoneree eyewitness misidentification false confession Florida Florida Innocence Commission forensics forensic science Innocence Commission Innocence Project of Florida innocent interrogations jailhouse snitches James Bain John Preston junk science justice law enforcement legislation National Academy of Sciences Obama perjury police post-conviction prison prosecutorial misconduct Supreme Court of the United States Texas The Innocence Project Troy Anthony Davis unreliable witness testimony William Dillon Wilton Dedge wrongful conviction wrongful incarceration

Categories

- Constitution (13)
- exoneration (113)
- Innocence Project of Florida (152)

on the number of cases they have won, and the importance of winning cases is critical to their success. Some are elected officials and all are expected to win. When a position opens up, it's more likely that the prosecutor with the highest conviction rate will be a top prospect for the spot.

In no way does this justify the behavior of those who choose to ignore the laws they swore to uphold. However, it is apparent how this system can cause a prosecutor to disregard all moral, ethical, and even, legal rules.



History has shown that American society, as a whole, is driven by money and power, and it's apparent that some prosecutors are willing to sacrifice lives of innocent people to obtain the two. Truth and integrity seem to be a thing of the past.

People question how often this behavior occurs, and there is no set number. In 2010, a USA Today investigation compiled a list of 201 criminal cases where federal judges found prosecutors who broke the law or ethical rules. These violations led to the convictions of innocent people, which also means that guilty criminals were living freely.

A person can argue that 201 cases out of the thousands that go through the system are not significant, but they would be wrong. These cases are just the ones in which federal judges deemed behavior to be unethical. This number does not include cases where there wasn't "enough" evidence to determine if a prosecutor misbehaved.

Prosecutors Protection

In America, a citizen can sue for just about anything, but you can't sue a prosecutor. Many believe this is a major factor in what causes prosecutors to misbehave.

In 1961, Paul Kern Imbler was convicted and sentenced to death for the murder of Morris Hasson. It was later revealed that the district attorney, Richard Pachtman, had suppressed exculpatory evidence and evoked falsified testimonies from key witnesses. After his exoneration Imbler sued Pacthman for prosecutorial misconduct, but the Supreme Court dismissed the case because Pactman was protected by prosecutorial immunity. Even if a prosecutor has been found to be acting in bad faith or ill will by deliberately hiding evidence or misrepresenting the facts, they are free from civil lawsuits.

When an average citizen violates the law there are repercussions for his or her actions. Sadly, the same rules don't apply to prosecutors. *Brady v. Maryland* determined that "significant" evidence that is favorable to the defense must be

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disclosed or it's a violation of the due process clause of the 14th amendment. The lead prosecutor in the Lyons case, Bruce Hinshelwood and many others, did just that. However, his "punishment" is one many would consider as a joke. Documents obtained by USA Today show he was ordered to serve a one-day ethics course for his behavior. A one-day course for deliberately putting an innocent man in prison for three years. The system basically gives a pass to its own, and takes years of life from the ones they are meant to protect. Many wonder, where is the justice in that?

It is infuriating that some prosecutors are advancing their careers by putting innocent people in prison without any accountability. This makes them above the law, because they are clearly not adhering to or being punished for breaking it. They have nothing to fear, because most of their actions are met with a slap on the wrist.

"If you want to change the culture, you will have to start by changing the organization. "
-Mary Douglas

Changing the way these offices operate is the only way this behavior will cease. Sadly, the chances of these changes is slim.

> "Life is like a boomerang…Sooner or later, our thoughts, beliefs and actions return to us with amazing accuracy."

Although it is apparent the legal system rarely and truly punishes prosecutors guilty of purposefully convicting the innocent, we must remember Newtons Third Law – for every action, there is an equal and opposite reaction. For all their wrongdoing, there are innocence projects all over this country fighting for the true justice people of America deserve.

Your Thoughts

What do you think would be a fair punishment prosecutorial misconduct? We would love to hear your thoughts.

judicial,justice, district attorney Richard Pachtman, lamonte armstrong, Nino Lyons, Paul Kern Imbler, prosecutorial misconduct

Wrongly Convicted Database Record

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Paul Kern Imbler

Years Imprisoned:	**10**
Charge:	**First Degree Murder**
Sentence:	**Death**
Year Convicted:	**1961**
Year Cleared:	**1971**
Location of Trial:	**California**
Result:	**Judicially Exonerated Released**
Summary of Case:	**Death Row Inmate. Convicted of murder largely based a prosecution fingerprint expert's false testimony that Imbler's fingerprint matched a latent crime scene print. Paul Imbler was sentenced to death. He was granted stay 7 days before his scheduled excution. His conviction was overturned based on prosecutorial misconduct of concealing exculpatory evidence, police manufacturing of evidence, and the fingerprint examiner's false testimony that deprived him of his constitutional right to a fair trial. After his exoneration he sued the prosecutor, Los Angeles Deputy District Attorney Richard Pachtman for damages, but the US Supreme Court dismissed the suit on the grounds of prosecutorial immunity. (See, Imbler v. Pachtman, 424 U.S. 409 (1976))**
Conviction Caused By:	**Prosecutorial misconduct of concealing exculpatory evidence and police manufacturing of evidence. A prosecution fingerprint expert falsely testified that Imbler's fingerprint matched latent crime scene prints.**
Innocence Proved By:	**Conviction overturned based on prosecutorial misconduct of concealing exculpatory evidence, police manufacturing of evidence, and the fingerprint examiner's false testimony that affected the jury's verdict.**
Defendant Aided By:	
Compensation Awarded:	
Was Perpetrator Found?	

Age When Imprisoned:	
Age When Released:	
Information Source 1:	**“Miscarriages of Justice in Potentially Capital Cases,” Hugo Adam Bedau & Michael L. Radelet, Stanford Law Review, November, 1987, Vol. 40, p. 128.**
Information Location 1:	
Information Source 2:	**Imbler v. Pachtman, 424 U.S. 409 (1976)**
Information Location 2:	
Information Source 3:	
Information Location 3:	
Information Source 4:	
Information Location 4:	
Information Source 5:	
Information Location 5:	
Ethnicity/Skin:	
Book About Case:	
Book Information:	
Book About Case (2):	
Book Information (2):	
Movie About Case:	
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Buckley, Imbler and stare decisis: the present predicament of prosecutorial immunity and an end to its absolute means.

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of Action

B. Malicious Prosecution as a Section 1983 Cause

of Action CONCLUSION

INTRODUCTION

A right without a remedy is as if it were not. For every

beneficial purpose it may be said not to exist.(1)

We presently possess rights that defy this pronouncement. Enforcement of our civil rights, permitted through suit via Title 42 United States Code section 1983, may be blocked by immunity defenses. Immunity can be absolute or qualified. If an immunity is qualified, it may be overcome by a showing of malicious or unreasonable conduct. Whether an immunity is available depends upon the violator's role or function at the time of the alleged misconduct. Historically, absolute immunity was only available to judges, witnesses, legislators, and the chief executive. However, in Imbler v. Pachtman,(2) the Supreme Court extended absolute immunity to criminal prosecutors in section 1983 cases.

This Article scrutinizes Imbler and its progeny, which shield from suit prosecutors who knowingly deny persons a fair trial. These cases created an intricate standard for immunity that disservices the criminal justice system and confounds the civil one. Although, in its current form, absolute prosecutorial immunity discourages prosecutors from engaging in pre-trial investigation, it encourages them to indict early and often. It also insulates prosecutors who deliberately suppress exculpatory evidence. These shortcomings are compounded by the absence of oversight and discipline by bar associations and other criminal prosecutors. Finally, the reasons for extending prosecutors absolute immunity no longer exist. Changes in the law, especially the greater availability of qualified immunity, make absolute immunity unnecessary.

Part I of this Article examines the origins of section 1983 immunity and the types of immunity available in those actions.(3) Part II analyzes Imbler and the Supreme Court's recent prosecutorial immunity decisions.(4) Part III addresses stare decisis and the Court's methodology for overruling precedent.(5) Part IV specifically focuses on Imbler's stare decisis implications and finds it ripe for reconsideration.(6) Finally, this Article examines unresolved issues concerning section 1983 claims against prosecutors.(7)

This Article does not advocate abandonment of the functional approach used for deciding section 1983 immunity defenses. Instead, it suggests abandoning Imbler, which misapplied the approach. Moreover, this Article does not seek to undermine prosecutors who perform the difficult and vital work necessary for a safe society. Although prosecutors need some protection from suit, absolute immunity is too much. Developments over the last twenty years make qualified immunity adequate protection. Discarding absolute prosecutorial immunity will only leave incompetent or malevolent prosecutors subject to civil liability for their misdeeds.

I. SECTION 1983 AND ITS HIDDEN IMMUNITY

Section 1983, which was passed on the heels of the Fourteenth Amendment, provides a neutral forum for adjudicating deprivations of federal rights by state and local officials.(8) Under section 1983, a plaintiff must allege that a state or local official, while acting "under color of state authority",(9) violated rights secured to the plaintiff either by the United States Constitution or a federal statute.(10) In relevant part, section 1983 states:

Every person who, under color of [law] . . . causes to be subjected,

any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding

for redress.(11)

Although this broad statutory language does not refer to exceptions or immunities, the Supreme Court, in Tenney v. Brandhove,(12) interpreted this silence to mean that Congress accepted the immunities contemporary to section 1983's passage in 1871.(13) Tenney involved the immunity available to state legislators, which was explicitly conferred to federal legislators in the Constitution,(14) and granted by English and American common law to prevent nuisance suits from deterring legislative decision-making.(15) The Tenney Court concluded that if the forty-second Congress wished to abrogate immunities "well grounded in history and reason" it would have specifically so provided.(16)

Two levels of official immunity exist--absolute and qualified. Absolute immunity precludes suit even if the offending official knew that his or her conduct was unlawful, malicious, or otherwise without justification. Absolute immunity rests on a notion that the conduct of certain officials is so important that it is better to shield them entirely from tort actions rather than allow a few appropriate recoveries.(17) Because absolutely immune officials have no obligation to justify their actions, suits against them are ordinarily dismissed on pretrial motions.(18) The defendant has the burden of establishing any higher level of immunity beyond the qualified level.(19)

Qualified immunity insulates officials who unknowingly cause a constitutional injury. Qualified immunity may preclude suit or be asserted as an affirmative defense at trial.(20) The defendant must show that he or she did not violate clearly established laws that a reasonable official would have known under the circumstances.(21) If, based on undisputed facts, the trial judge finds that reasonable minds could differ as to whether an official broke the law, the defendant is immune and entitled to summary judgment.(22) If the facts are disputed, the trial judge may limit discovery to the issue of whether the defendant official committed the unreasonable act.(23)

II. IMBLER AND ABSOLUTE PROSECUTORIAL IMMUNITY

A. Imbler v. Pachtman

In Imbler v. Pachtman,(24) the Supreme Court first addressed the immunity of prosecutors in section 1983 claims. This case, which came early in the Court's formulation of its approach to section 1983 immunities, set forth a broad rule of absolute prosecutorial immunity.

1. Facts

In 1961, the owner of a Los Angeles market was killed during a robbery.(25) Shortly thereafter, a robbery occurred at a different market, during which one of the thieves was killed.(26) Paul Imbler turned himself into the police and confessed to his involvement in the second robbery.(27) Based on the confession and the fact that a passerby identified Imbler as having fled the scene of the first robbery, the police concluded that Imbler was also involved in the first robbery-murder.(28) Imbler claimed that he was at a bar during the first robbery.(29) Despite the alibi, a jury convicted Imbler of murder and sentenced him to death.(30)

While Imbler waited on death-row, the prosecuting attorney, Richard Pachtman, discovered new evidence suggesting that Imbler was innocent.(31) Accordingly, Pachtman informed the Governor of the new

findings.(32) After his sentence was commuted, Imbler filed a habeas corpus action in state court.(33) At the state hearing, the eyewitness recanted his identification.(34) In addition, evidence emerged which suggested that Pachtman may have known about the eyewitness' criminal record and other inaccuracies before Imbler's initial trial.(35) Despite the additional evidence, the California courts uniformly rejected any relief.(36)

Imbler fared somewhat better in federal court. The District Court found several instances of misconduct and prejudice, and vacated the conviction.(37) Once released, Imbler sued Pachtman and several police officers alleging a conspiracy to violate his civil rights.(38) Nonetheless, the suit was dismissed under the Ninth Circuit's prosecutorial immunity case law.(39)

2. Holding

On appeal, the Supreme Court held that immunity should be granted to a prosecutor who initiates and prosecutes a case. However, the Court did not give prosecutors absolute immunity for all actions taken. The Court explained Tenney's(40) functional law approach and promised officials the same protections of "the general principles of tort immunities and defenses."(41) The Court recognized the onerous requirements on an official seeking qualified immunity in stating:

The procedural difference between the absolute and the

qualified immunities is important. An absolute immunity

defeats a suit at the outset, so long as the official's actions

were within the scope of the immunity. The fate of an official

with qualified immunity depends upon the circumstances and

motivations of his actions, as established by the evidence at

trial.(42)

Observing that prosecutorial immunity under section 1983 was an issue of first impression, the Court pledged a "considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."(43) The Court recognized that Griffith v. Slinkard,(44) which became the majority view among the states in the early twentieth century,(45) was the first published case recognizing absolute prosecutorial immunity.(46) Turning to policy, the Court articulated several justifications for absolute rather than qualified prosecutorial immunity. First, if prosecutors could be sued, they would have to divert important time away from their public duties to defend against the often frivolous suits of disgruntled defendants.(47) Second, suits which survived the pleadings would pose a distinct evidentiary challenge to prosecutors since they would have to prove that they acted in good faith often years after the criminal trial.(48) Third, fear of liability would stifle prosecutors during trials and discourage them from calling witnesses with dubious pasts.(49) The Court also feared that reviewing judges might refrain from reversing convictions for constitutional abuses if prosecutors might face liability as a result.(50)

Balancing between providing a remedy against bad prosecutors or no remedy at all, the Court adopted Judge Hand's conclusion that the needs of prosecutors outweigh those they occasionally injure.(51) The Court defended this harsh outcome by noting that alternative checks existed to deter mischievous prosecutors.(52) Bar associations and other prosecutors would supposedly substitute for civil liability and insure that prosecutors would consider the constitutional rights of accused persons.(53)

After endorsing absolute prosecutorial immunity, the Court returned to the functional approach to

determine what prosecutorial acts were covered. The Court held that absolute immunity applied when a prosecutor acted as an advocate for the state by initiating or presenting the state's case or by otherwise performing acts "intimately associated with the judicial phase of the criminal process."(54) Although the Court did not indicate what immunity applied to prosecutors engaged in administrative or investigative work, the Court observed that some pretrial work was an implicit part of advocacy.(55) However, the Court admitted that "drawing a proper line between these functions may present difficult questions" in the future.(56)

3. Justice White's Concurrence

Justice White agreed that absolute immunity was proper for decisions to initiate proceedings or unknowingly present perjured testimony.(57) However, unlike judicial or legislative immunity, Justice White determined that prosecutorial immunity "was not so firmly entrenched."(58) He also doubted the majority's policy argument that a reviewing judge would be reluctant to reverse convictions absent absolute immunity.(59) Police officers also face suit if a court finds that a constitutional deprivation on their part denied a plaintiff a fair trial.(60) However, the Court did not hold that this justified granting them absolute immunity.(61) Moreover, White presumed that common law defamation immunity already protected prosecutors who elicited false statements from witnesses.(62)

Justice White was particularly disturbed by extending absolute immunity to Brady violations.(63) He found neither common law decisions nor good policy reasons to immunize the suppression of exculpatory evidence. A prosecutor fearing subsequent suit for failing to disclose information would only be induced to disclose more, which is hardly ruinous of the judicial process.(64) Immunity for deliberate suppression of evidence "discourage[s] precisely the disclosure of evidence sought to be encouraged by the rule granting prosecutors immunity from defamation suits."(65) Moreover, a judge cannot rectify what he or she does not know, which prevents the judicial process from realistically replacing civil liability as a check on prosecutorial misconduct.(66)

B. Post-Imbler Developments

After Imbler, the Sixth Circuit reversed its decision denying a prosecutor absolute immunity in Hilliard v. Williams.(67) In Hilliard, the prosecutor in a murder case withheld a Federal Bureau of Investigation report revealing that the red blotches on the defendant's jacket, which the prosecution argued were blood, were really paint.(68) Moreover, the prosecutor coached an investigator to testify without revealing this information.(69) Justice White had mentioned the facts of this case in his plea for a more narrow absolute immunity rule.(70)

Between 1976 and 1991, appellate courts applied Imbler to a broad range of prosecutorial conduct. Such conduct included decisions about whether to prosecute,(71) acts done during plea bargaining,(72) the preparation of testimony,(73) subpoenaing witnesses,(74) freezing a suspect's assets,(75) and, again, the suppression of exculpatory evidence.(76) Meanwhile, these courts considered prosecutors to be investigators and, therefore, only qualifiedly immune, when they organized police raids(77) or ordered arrests.(78) Often the dividing line between whether conduct received absolute or qualified immunity was the courtroom door.(79) As splits emerged among the circuit-courts, the Supreme Court again addressed absolute prosecutorial immunity in 1991.

C. Burns v. Reed

1. Facts

On September 2, 1982, Cathy Burns' two sons were shot while sleeping at home.(80) Indiana police suspected that Burns committed the crime while in a schizophrenic state.(81) Although she told police that

she neither shot her children nor suffered from schizophrenia, the police asked prosecutor Richard Reed whether they could question her under hypnosis.(82) Although this would not produce admissible evidence, Reed instructed them to proceed.(83) When she was hypnotized, Burns referred to herself and the assailant as "Katie."(84)

Based on these "admissions," Reed told the officers that they likely had probable cause to arrest Burns.(85) The police then arrested Burns and she was confined to a psychiatric ward.(86) At a probable cause hearing, Reed characterized Burns' statements as a confession without telling the court about the hypnosis or her prior assertions of innocence.(87) The court issued a search warrant and Burns was charged with attempted murder.(88)

Later, after Burns successfully moved the court to suppress these statements,(89) the prosecution dismissed the charges.(90) Burns then sued Reed for various constitutional violations stemming from her arrest and incarceration.(91) After Burns presented her case, the district court granted Reed a directed verdict and the Seventh Circuit affirmed, reasoning that Reed's actions were protected by absolute immunity.(92)

2. Holding

The Supreme Court noted a circuit-split on the question of prosecutorial immunity for giving the police legal advice.(93) After reciting Imbler's justifications for immunity, the Court listed subsequent immunity decisions that followed the "functional approach."(94) These cases created the presumption that qualified immunity was sufficient to protect executive officials discharging their duties and that absolute immunity should only be granted sparingly.(95)

The Court restricted Burns' first cause of action to the probable cause hearing and found Reed's testimony absolutely immunized from suit.(96) The Court analogized Reed's testimony to that of a witness at trial, who possessed common law immunity before the passage of section 1983.(97) The Court stated that "pretrial court appearances by the prosecutor [associated with a] criminal action against a suspect present[ed] a substantial likelihood of vexatious litigation" and deserved absolute protection.(98)

However, the Court reached a different conclusion concerning Reed's advice to arrest Burns. The Court held that the common law did not absolutely immunize this activity.(99) Noting the policy reasons set forth by the Seventh Circuit and the United States as amicus curiae to protect such advisement, the Court nevertheless rested its conclusion on the lack of historical support.(100) The Court downplayed concerns over the adequacy of qualified immunity by recognizing that "the qualified immunity standard is today more protective of officials than it was that the time that Imbler was decided."(101)

3. Scalia's Concurrence

Along with Justices Marshall and Blackmun, Justice Scalia agreed that a "prosecutor has absolute immunity for eliciting false statements in a judicial hearing,"(102) based upon the common law history of absolute defamation immunity prior to section 1983. However, Scalia determined that Burns had a separate cause of action for malicious prosecution based on the search warrant proceeding.(103) Scalia noted that the presence of common law immunity analogous to present prosecutorial activity was merely a necessary, but not a sufficient, factor.(104) The policy justifications of immunity preceding section 1983 could still wilt under the history and intent of the civil rights laws.(105)

Investigating common law immunities in 1870, Scalia discovered three categories. First, statements made during "a court proceeding were absolutely privileged against ... defamation."(106) Judicial immunity, which was also absolute, existed when a judge resolved disputes between parties or adjudicated private rights.(107) A variant of this was "quasi-judicial immunity" which protected government servants performing

discretionary "quasi-judicial acts."(108) However, aquasi-judicial immunity" was not absolute and could be overcome by proving malice.(109) Scalia concluded that prosecutors fell in this category.(110) Under these limited immunity rules, Scalia reasoned that Burns had a cause of action against Reed for knowingly securing a warrant without probable cause.(111)

D. Buckley v. Fitzsimmons

1. Facts

The Court's most recent prosecutorial immunity decision is Buckley u. Fitzsimmons.(112) In Buckley, Stephen Buckley sued Fitzsimmons, the district attorney, for fabricating evidence that led to his three-year incarceration for the alleged rape and murder of a young girl.(113) Buckley alleged that after Fitzsimmons suspected him, he took a bootprint found at the murder scene to three experts until one expert, who had questionable credentials,(114) agreed to falsely testify that the print came from Buckley's boot.(115) The expert s testimony was secured after a year long investigation and a special grand jury was convened just for the case.(116)

This testimony led to an indictment and a trial, which subsequently ended in a hung jury.(117) Buckley remained in prison for two additional years awaiting retrial.(118) However, in that time, the expert died and a third party confessed to the crime.(119) After the charges were dropped, Buckley sued the prosecutors and police for wrongful imprisonment and for defamatory comments Fitzsimmons made to the media.(120)

The district court granted absolute immunity to Fitzsimmons for all claims, except those concerning press conferences.(121) On appeal, the Seventh Circuit extended absolute immunity to the public statements as well.(122) The circuit court reasoned that whatever harm the statements caused was only related to the progression of the case and that the conduct associated with such activity (i.e., indictment and trial) was covered by absolute immunity.(123)

2. Holding

The Supreme Court rejected the Seventh Circuit's "location of injury" theory for immunity rulings.(124) Instead, the Court reiterated that it is the judiciary's duty to effectuate Congress' intent with respect to section 1983, rather than make a "`freewheeling policy choice.'"(125)

Under the Tenney functional approach, neither the harm nor the lawfulness of conduct at issue affects immunity determinations.(126) The Court reiterated that prosecutors receive absolute immunity for acts done in preparing for a judicial proceeding, which includes the evaluation of evidence and "appropriate preparation for its presentation at trial or before a grand jury."(127) However, the Court distinguished such functions from that of an officer looking for clues or corroboration to support probable cause.(128) When undertaking this investigatory conduct, a prosecutor would only receive qualified immunity.(129)

Under the above paradigm, five members of the Court found Fitzsimmons to be an investigator and not an advocate when he secured the dubious expert testimony.(130) The majority concluded that a prosecutor could not assume the function of an advocate before possessing probable cause to arrest.(131) Before securing the expert testimony, Fitzsimmons publicly stated he was unable to make an arrest and only after his "bootprint shopping" did he feel able to arrest Buckley.(132) The majority noted that the "determination of probable cause" does not thereafter render all of a prosecutor's subsequent conduct absolutely immune.(133) The majority foresaw instances when a prosecutor might do further investigative work during a trial, which would also merit only qualified immunity.(134)

The Court unanimously held that the absence of a common law analogue weighed against extending absolute immunity to Fitzsimmons' out-of-court statements about Buckley's guilt.(135) Again, the Court

brushed aside policy arguments in the absence of historical support contemporaneous to the passage of section 1983.(136) The Court reasoned that "[e]ven if policy considerations allowed us to carve out new absolute immunities," no such reasons existed to create such immunity for a prosecutor's public statements, "which have no functional tie to the judicial process."(137) The Court noted that it would be odd, after Burns, to find qualified immunity sufficient to protect prosecutors when they advised the police, but not when they informed the press.(138)

3. Scalia's Concurrence

Justice Scalia re-emphasized that 1871 common law controlled the level of permissible immunity.(139) While he did not urge reconsideration of Imbler, his date restriction would produce a similar effect, since his Burns concurrence noted that absolute immunity did not exist for any prosecutorial conduct in 1871.(140) Prosecutors could not achieve immunity for acts beyond what Imbler had already allowed.

A second intriguing aspect of Scalia's concurrence was his conclusion that claimants like Buckley probably lack a federal cause of action in the first place.(141) He believed a "due process" claim against Fitzsimmons for using fabricated evidence at trial would be barred by "traditional defamation immunity."(142) Furthermore, "the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, [would not alone] violate[] the Constitution."(143)

4. The Dissent

The dissent concluded that Fitzsimmons' search for a sympathetic bootprint expert constituted trial preparation.(144) The dissent launched three notable arguments against the probable cause line drawn by the majority to discern functions of prosecutorial immunity. First, it made probable cause an element of any future suit against a prosecutor, and thereby threatened the continued protection of absolute immunity from malicious prosecution actions bestowed in Imbler.(145) Second, the probable cause line could perversely encourage prosecutors to present perjured or fabricated evidence to a neutral third party in order to secure immunity for subsequent acts.(146) Finally, prosecutors would now be encouraged to avoid pre-trial investigations.(147) The dissent asserted that the majority's probable cause standard stemmed from the fundamental misconception that before probable cause a prosecutor functions solely as a police officer, and therefore deserves no greater immunity.(148)

The Court's decision in Buckley was perceived by some as gutting Imbler, a result that Scalia intimated and the dissent discouraged.(149) Despite this conflict, Imbler still extends absolute immunity to prosecutors who deliberately withhold exculpatory evidence.(150) Undoubtedly, confusion over Buckley's meaning or mechanics flows from Imbler's greater flaws. As a result, the Court should go back to the drawing board and start with a clean slate. The manner in which the Court should clean the slate will become clearer after a brief discussion of stare decisis.

III. STARE DECISIS AND OVERRULING PRECEDENT

A. Stare Decisis

A staple of Anglo-American jurisprudence, stare decisis serves several valuable purposes. First, adherence to precedent ensures that the law is applied evenhandedly.(151) In addition, stare decisis promotes certainty and efficiency by persuading parties to not relitigate matters already decided without a good reason for doing so. Most important, the doctrine reinforces the legitimacy of the judicial system by ensuring unbiased decision-making in lasting concepts of justice, rather than outcomes tied to beliefs peculiar or personal to a judge.(152)

B. Grounds for Dispensing with Stare Decisis

Though valuable, the Supreme Court does not treat stare decisis as an "inexorable command."(153) When reviewing a statutory interpretation, the Court has repeatedly averred a greater unwillingness to dispense with stare decisis. Some assert that Congress can readily correct the Court's mistaken interpretation of a statute, while overruling a constitutional interpretation requires the citizenry to employ the arcane machinery of constitutional amendment.(154) In Monroe v. Pape,(155) Justice Harlan suggested that only a finding that the Court misinterpreted congressional intent "beyond doubt" should upset a previous statutory decision.(156) However, in practice the Court has found it unwise to view congressional silence on a decision as congressional acceptance of an interpretation.(157) The difficulty of passing legislation in a bicameral legislature, beset by hierarchical committees and other deliberative bodies, makes it "`impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation."(158) Hence, the Court does not expect the Congress to correct the Court's errors.(159)

Fidelity to stare decisis means that a prior decision must be more than simply "wrong" to justify discarding it.(160) The Court has examined a multitude of factors in evaluating the viability of a statutory precedent. When parties reasonably rely upon a previous decision, regardless of whether or not the decision was correct, it may be unfair to abruptly overrule it. Thus, in Monell, the Court found that municipalities could not claim that reliance on Monroe excepted them as potentially liable parties in a section 1983 suit, since such entities were already mandated to uphold the Constitution.(161)

Occasionally, a statutory interpretation falls out of step with later decisions. When this "frustrates" a federal policy, the Court will not wait for Congress to reconcile case law.(162) Inconsistency invites bad results, like the type of forum-shopping that resulted from lower federal courts crafting a "general federal common law"(163) or rulings that encouraged defense attorneys to "sandbag" constitutional claims in order to preserve them for federal habeas corpus review.(164)

Subsequent developments in law and society may erode the factual basis of a decision. For instance, new economic theory has changed the Court's view of vertical non-price restraints under the Sherman Act.(165) Similarly, the increasingly cluttered federal docket, along with the increased expertise and procedures of review for arbitration, has altered the Court's response to arbitration clauses.(166)

Sometimes, as seen in Hubbard v. United States,(167) a subsequent legal development becomes a rival doctrine, which the Court cannot reconcile with the old interpretation. In Hubbard, the Court overruled United States v. Bramblett,(168) which held that courts and legislative committees were a "department or agency" under the false statement statute.(169) Dissatisfied with this interpretation, lower courts created a "judicial or adjudicative function exception," which contradicted Bramblett by ruling that misstatements to courts were outside the statute.(170) In Hubbard, the Court rejected Bramblett not only for its questionable reasoning,(171) but also to promote legal stability by removing the need for exceptions.(172)

Experience demonstrates that a court's interpretation may be impossible to apply. For example, in Swift & Co. v. Wickham,(173) the Court reconsidered its holding in Kesler u. Department of Public Safety.(174) Kesler required federal judges to initially determine whether a plaintiff had a straight preemption claim, which was ripe for hearing by a panel, or a claim requiring full statutory interpretation, which was beyond the panel's jurisdiction.(175) Finding this standard to be too subjective and a waste of resources, the Court rejected it.(176)

C. The "Prudential and Pragmatic Considerations"

The Court recently reiterated the grounds for overruling precedents in Patterson v. McLean Credit Union(177) and Planned Parenthood v. Casey.(178) In Patterson, the respondent urged the Court to

overrule Runyon v. McCrary,(179) which held that Title 42 United States Code section 1981, prohibited racial discrimination in private contracts.(180) The Court did not overrule Runyon for three reasons. First, there was no "intervening development of the law" that "removed or weakened the conceptual underpinnings" of Runyon.(181) Second, Runyon did not upset the "coherence and consistency" in section 1981 law(182) and, similarly, Runyon did not interfere with Title VII's proscription on employment discrimination.(183) Third, Runyon was not "outdated" or "inconsistent with the sense of justice or with the social welfare."(184)

In Planned Parenthood v. Casey,(185) the Court reconsidered the highly divisive rule set down in Roe v. Wade.(186) The Court explained that a "wrongly decided" decision should not be reversed without some special justification.(187) The Court then set forth the following considerations to determine if reversal is justified: (1) the workability of the standard;(188) (2) whether changes in the law, as developed, make the old rule an aberration;(189) (3) whether premises of fact "have so [far] changed" that the precedent can no longer handle the issues involved;(190) and (4) the reliance interests and the consequences of overruling.(191)

In light of these considerations, the Court did not overrule Roe.(192) First, although Roe's holding was controversial, it was not an unworkable rule.(193) Second, the twenty years after Roe sired considerable reliance interests among women who "ordered their thinking around their ability to control their reproductive lives."(194) Third, Roe remained consistent with subsequent abortion cases,(195) as well as cases which further extended individual freedom in intimate relationships(196) and the right of privacy.(197) Finally, while medical advances altered some of Roe's "factual assumptions," they only affected the time limits on "viability" and not the central holding.(198) Therefore, on balance, the "precedential inquiry" favored reaffirming Roe rather than overruling it.(199)

IV. OVERRULING IMBLER

The cases collected in Casey provide a blueprint for reevaluating precedent. Under this regimen, Imbler should be reversed for the following reasons: (1) the standard for applying absolute immunity, as set forth in Imbler and its progeny, is unworkable and produces undesirable incentives; (2) intervening developments in section 1983 immunity doctrine leave Imbler inconsistent with the Court's current approach; (3) other legal advances have undermined the "premises of fact" given in Imbler for absolute prosecutorial immunity; and (4) no legitimate reliance interests exist to excuse prosecutors from their civil rights violations.

A. The Unworkable Standard

1. Divining Prosecutorial Function

From the start, the Court understood that the Imbler rule was not user-friendly.(200) In Buckley v. Fitzsimmons, the Court attempted to simplify this problem by placing pre-probable cause actions outside absolute immunity.(201) However, probable cause is only a necessary, and not a sufficient, condition for absolute immunity. After a determination of probable cause, apparently by the prosecutor,(202) subsequent conduct could still fall within the administrative or investigative categories.

Therefore, a court still faces the awkward task of labelling a prosecutor's function. Imbler requires a trial court to determine when a prosecutor is acting as a prosecutor. This type of open-ended standard is reminiscent of the one rejected in Swift, under which a court has to determine the appropriate level of statutory interpretation before deciding if so much construction was required to give it, and not a three judge panel, jurisdiction.(203) Although it is fairly easy to identify the clearly administrative actions,(204) and even though some courts have found certain conduct so egregious that it falls outside the prosecutorial function,(205) there are many areas that defy easy classification. For example, it is unclear

how a court should classify the following situations: a general policy to indict in sex offense cases merely on the basis of a complainant's allegations;(206) using a press-conference to draw in witnesses;(207) deliberately violating a state victim-impact law to prevent the victim's family from disputing a plea bargain;(208) or, distinguishing coercing witnesses from suborning perjury.(209) There is no simple answer to these situations. Still, the broad language of Imbler promises support for whatever label a judge wishes to slap on a prosecutor's "function."

Undoubtedly, reasonable minds disagree about what label to put on a prosecutor's functions. The polarized dispute in Buckley as to the classification of Fitzsimmons' conduct in retaining a pro-prosecution expert undercuts Justice Kennedy's optimistic prediction that federal courts can accurately distinguish between investigative conduct and conduct "preparatory" to prosecution.(210) Unable to precisely establish the outer bounds of absolute prosecutorial immunity and given the choice of possibly permanently immunizing numerous or no prosecutorial acts, "the restrictive view . . . is more consistent with a discriminating reading of the statute itself than is the first more embracing interpretation."(211)

2. The Bad Incentives of Absolute Prosecutorial Immunity

The Court has postulated that the absolute immunity granted by Imbler encourages undesirable behavior by litigants. In Buckley, the majority opined that immunizing the fabrication of evidence, which was later used at trial, would encourage prosecutors to try a case simply to maintain absolute immunity.(212) Meanwhile, the dissent in Buckley lamented that the majority's probable cause line invited prosecutors to get a probable cause determination as quickly as possible, even if it meant fabricating evidence and perjuring themselves before a magistrate, so as to start their immunity running.(213) At the other end, prosecutors might forego investigations they are ethically required to do.(214) Additionally, the dissent in Buckley claimed that the majority's view invited plaintiffs to circumvent Imbler by artful pleading.(215)

The upshot of the Supreme Court's predictions say little about its faith in the prosecutorial bar. Apparently, the Court believes that prosecutorial decision-making will be affected by the possibility for immunity in the same way that it was once believed that the potential for liability would affect choices. In Erie Railroad v. Tompkins,(216) the Court rejected nearly 100 years of case law upholding general federal common law because it encouraged litigants to manufacture diversity to indirectly obtain what they could not get directly.(217) Given the stakes involved in the criminal justice system, the incentives deriving from Imbler and Buckley prove even less tolerable.

3. The Bad Results of Absolute Prosecutorial Immunity

As Justice White asserted, absolute prosecutorial immunity should not cover all acts done as an advocate.(218) Most notably, no historical or policy argument supports immunizing the withholding of exculpatory evidence. Clearly, prosecutors are constitutionally and ethically required to turn over such evidence.(219) Moreover, police officers face liability for withholding exculpatory evidence from prosecutors.(220) Immunizing the deliberate suppression of exculpatory evidence contradicts why prosecutors may invoke defamation immunity when a witness turns out to be a liar or if the witness' past is suspect. A prosecutor does not aid a post-acquittal civil suit by providing the material showing bias or a lack of credibility as Brady requires.(221) In addition, unlike bringing an action lacking probable cause, suppressing evidence evades judicial correction.(222) Consequently, after Buckley, the strange situation exists where a prosecutor may lack absolute immunity for initiating a prosecution (quasi-judicial acts), but possess it while presenting a case and doing merely "lawyerly" acts.

A recently added wrinkle concerns post-conviction suppression. In Houston v. Partee,(223) the plaintiff claimed that the lead-prosecutor lied to his attorney about the existence of a third-party confession to the crime for which he had been convicted and imprisoned.(224) Despite the second confession and new eye-witnesses, the state maintained Houston's guilt throughout his post-conviction proceedings.(225) The court

of appeals found that once the lead-prosecutor left the case, he could not have been acting as an advocate when he withheld the information from others in his office or Houston's counsel.(226) The court also took the extraordinary step of directing the clerk of the court to send a copy of its opinion to the Illinois Attorney Registration and Disciplinary Commission for further investigation.(227)

In Carter v. Burch,(228) an officer told investigator Beamer and prosecutor Burch about information that undermined the credibility of their complaining witness in an attempted murder case.(229) The alleged victim had told the officer, while brandishing a revolver, that she would be willing to shoot herself to frame her ex-husband.(230) Carter, her ax-husband, was tried and convicted for the superficial wounding of the complainant with the same type of gun.(231) Burch did not tell the defense about the victim's threat, either before or after Carter's trial. Three years later, the officer informed Burch's counsel of the complainant's statements, and in a new trial he was acquitted.(232) Carter sued, but the district court dismissed the suit against Burch.(233)

Applying the Imbler standard, the court of appeals found it immaterial when Burch learned of the complainant's statements since he was "clearly protected by absolute immunity."(234) The court figured that Burch's determination of the exculpatory nature of the evidence fell under his duties as advocate.(235) The court distinguished this case from Houston by noting that Burch was personally handling Carter's post-conviction proceedings.(236)

It is alarming, but the different results in Houston and Burch may be only a product of staff size and not staff conduct.(237) The separation of appellate from trial work now may affect a prosecutor personally. To stay absolutely immune, a prosecutor should divert attention from his or her courtroom activities while remaining, at least, nominally involved in subsequent post-conviction proceedings. Again, maintaining absolute immunity may "interfere with [a prosecutor's] exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability."(238)

4. Determining When a Prosecutor Determines Probable Cause

The Court's latest attempt to create a simpler standard for determining a prosecutor's function in Buckley actually complicated immunity determinations.(239) In Hill v. City of New York,(240) the Second Circuit faced an especially chilling case of prosecutorial misconduct. In Hill, the plaintiff, Ms. Hill, called the police after suspecting her son had been physically abused by his foster family.(241) The five-year old boy told his mother, his doctor, and the police that "Big Jesse" and "Little Jesse" inserted a piece of wood into his rectum.(242) However, despite the child's testimony, the assistant district attorney believed that Hill was the culprit.(243) In fact, he filed a report which alleged that Hill had used a stick to sexually assault the boy and his younger brother.(244) Subsequently, the assistant district attorney removed the younger boy from Hill's custody.(245)

The district attorney next videotaped an interview with the child in the presence of a social worker.(246) When questioned, the child reiterated that his foster-brother was the one who had hurt him.(247) Hearing this, Mr. Adago, the prosecutor, immediately stopped the interview.(248) Two days later, and after subsequent interviewing, Adago again taped an interview with the child.(249) This time the boy implicated his mother.(250)

Adago used the second tape to secure a warrant and an indictment against Hill.(251) The grand jury did not see the first tape and Adago filed two court documents stating that no exculpatory material existed.(252) Unable to post bail, Hill remained in jail for nine months. Hill only learned about the first tape after Adago "accidentally" sent it to her attorney.(253) A dismissal of the charges later followed on speedy trial grounds.(254)

Hill initiated a section 1983 suit against Adago and others for violations of her Fourth and Fourteenth Amendment rights.(255) Adago moved to dismiss on grounds of absolute immunity.(256) Concluding that it could not tell from the pleadings alone whether Adago was entitled to absolute immunity, the district court denied his motion.(257)

On appeal, the Second Circuit summarized Hill's causes of action against Adago as follows: "(1) unjustifiably directing that her children be removed from her home; (2) directing the police to arrest her without probable cause; (3) maliciously prosecuting her; (4) conspiring to present falsified evidence to, and to withhold exculpatory evidence from, a grand jury; (5) deliberately suppressing Brady material; and (6) fabricating evidence."(258) The court found that removal of a child from parental custody during a child abuse investigation was an act not entitled to absolute immunity.(259) Second, the court held that there was no absolute immunity for the false arrest claim.(260) Under Imbler, the court then dismissed Hill's claims regarding the initiation of the prosecution, the prosecutor's grand jury conduct, and his failure to turn over the first tape.(261)

The court then struggled with the fabrication of evidence claim.(262) The court held that "if before obtaining [the] second videotaped statement [the prosecutor] lacked probable cause to arrest Hill, and the results of that interview contributed to his finding probable cause, the interview would then be held to be an investigatory function."(263) Finding the pleadings insufficient to resolve this question, the court dismissed the appeal as it related to the district court's denial of Adago's dismissal motion.(264) Since it was beyond its jurisdiction, the court declined to address whether Hill had stated a cognizable claim.(265)

The Hill case demonstrates how Buckley added another layer of inquiry onto absolute immunity determinations. A court now has to resolve whether the alleged misconduct preceded and/or contributed to the prosecutor's determination of probable cause. This requires a court to examine the prosecutor's thoughts and intentions when he or she acted. This is the same factual investigation of a defendant-prosecutor's subjective judgments which Imbler found too burdensome to leave qualified immunity as a prosecutor's only defense.(266) This extra analytical step diverts the court's and a prosecutor's resources.(267) Meanwhile, the unresolved question in Buckley (i.e. whether fabrication of evidence itself creates a cause of action and not its presentation in some proceeding where immunity purportedly adheres) is sidestepped and may not be resolved until after a lengthy trial.

Imbler gave absolute immunity to a prosecutor when he or she acts as an advocate, but not an administrator or investigator.(268) Buckley sought to clarify Imbler by indicating that a prosecutor is an advocate only after probable cause is established.(269) However, both opinions muddied the standard by conceding that pretrial preparation is part of good advocacy.(270) Justice Kennedy's criticism of the Buckley majority for failing to recognize that a prosecutor may be an advocate, even before probable cause arises,(271) illustrates how foolish it is to try to separate the investigative element of proper lawyering from formal advocacy. While the existing rule affords some flexibility, it sacrifices the certainty and even-handedness that a legal standard ought to possess.(272)

In addition to its amorphousness, the Imbler rule creates bad incentives.(273) Moreover, as demonstrated by Carter v. Burch(274) and Houston v. Partee,(275) the standard leads to irrational results where the level of immunity depends on an office's division of appellate and trial work. Finally, as Hill displayed, decisions as to a prosecutor's function now involve a new inquiry about if, when, and how, the prosecutor determined probable cause. Determining if a prosecutor acted as a prosecutor/investigator or prosecutor/lawyer does not resemble a "simple limitation" every court can apply,(276) but a versatile description that differs with every court.

B. The Historical-Functional Approach and Imbler as "Abandoned Remnant"

1. Legal Developments and the "True Anomaly"

In Imbler, the Court equated a section 1983 action against a prosecutor with a malicious prosecution action.(277) To establish malicious prosecution, a plaintiff must ordinarily show the following elements: (1) a criminal proceeding against her attributable to the defendant; (2) termination of the action in the plaintiff's favor; (3) lack of probable cause for the action; (4) the defendant maliciously brought the action; and (5) the action caused the plaintiff harm.(278)

Buckley changed immunity in malicious prosecution actions by maintaining that prosecutors lack absolute immunity before probable cause exists.(279) Therefore, as a by-product of proving malicious prosecution, a plaintiff will establish lack of probable cause, which defeats absolute immunity. Thus, the latest attempt at implementing Imbler created a "true anomaly" that leaves Imbler's preclusion of malicious prosecution claims outside the new brightline.(280)

2. The New Approach to Immunities: No More "Freewheeling Policy Choices"

Imbler is not only at odds with its progeny, but also with the entire approach the Court uses for section 1983 immunity determinations. The Court in Imbler interpreted Tenney(281) as holding that "`immunities well grounded in history and reason'" were silently retained in the general language of section 1983.(282) However, the first case cited by the Court granting a prosecutor absolute immunity from malicious prosecution actions came eighteen years after Congress passed section 1983.(283) Moreover, this did not become the majority position until the early 1920s.(284) The well-established nature of legislative immunity prior to section 1983 was the linchpin of the Tenney Court's decision to find such immunity despite the statute's text:

> Did Congress by the general language of its 1871 statute
>
> mean to overturn the tradition of legislative freedom achieved
>
> in England by Civil War and carefully preserved in the
>
> formation of State and National Governments here? Did it
>
> mean to subject legislators to civil liability for acts done
>
> within the sphere of legislative activity? Let us assume,
>
> merely for the moment, that Congress has constitutional
>
> power to limit the freedom of State legislators acting within
>
> their traditional sphere. That would be a big assumption.
>
> But we would have to make an even rasher assumption to
>
> find that Congress thought it had exercised that power. . . .
>
> We cannot believe that Congress -- itself a staunch advocate
>
> of legislative freedom -- would impinge on a tradition so well
>
> grounded in history and reason by covert inclusion in the
>
> general language before us.(285)

Considering the insignificant number of nineteenth century cases recognizing absolute prosecutorial immunity, the Imbler Court's interpretation is ridiculous.(286)

Not only is Imbler inconsistent with Tenney, it also contradicts the modern method of making immunity determinations, which can be called the historical-functional approach. According to this approach, a court must do the following: (1) identify the function the official engaged in while performing the alleged injurious act;(287) (2) identify the level of immunity, if any, an official performing such a function received at common law, prior to section 1983;(288) and (3) balance the policy interests of common law immunity and the purposes of section 1983, and if necessary, preclude or diminish the defense.(289)

The historical-functional approach developed in the late 1970s and early 1980s. In Butz v. Economou,(290) the Court articulated that the function, and not the status, of an official is dispositive for immunity purposes. In Butz, the Court held that administrative law judges performing "quasijudicial acts" deserved the same absolute protection from suit that traditional judges enjoyed at common law.(291) In Stump v. Sparkman,(292) the Court gave absolute immunity to a judge who ordered the forced sterilization of a young girl. The Court found that the order came within the defendant's role as judge.(293) The Cour reasoned that a long history of absolute judicial immunity antedated section 1983, and(294) that the nature of judicial decision-making -- choosing between competing parties -- required insulation from the inevitably dissatisfied losers.(295)

By 1982, the Court's approach still resembled a loose combination of historical reference and policy assessment. In Nixon v. Fitzgerald,(296) the President was given absolute immunity from suit for actions taken while in office. Although the Court drew upon the long history of "sovereign immunity" for the chief executive, the Court rested its decision on the "special functions" of the office, including the President's Constitutional responsibilities and the likelihood his decisions would invite suit.(297) In a companion case, the Court found that sound policy did not support absolute immunity for the President's close aides.(298)

In 1984, the Court reestablished the preeminence of history in immunity determinations. In Tower v. Glover,(299) a dissatisfied client sued the public defender claiming that the public defender had conspired with the prosecutor to convict the client.(300) The defense argued that the Court should extend public defenders the same absolute immunity afforded prosecutors for the same policy reasons.(301) The Court began by describing its two-tiered approach to immunity cases. The first tier required a "considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."(302) If some immunity existed, the Court would move to the second tier and consider if the history or purposes of section 1983 countermanded its modern recognition.(303) Applying this framework, the Court examined the immunity accorded defense attorneys at 1871 common law and determined that those lawyers could face suit for intentional misconduct.(304) This ended the Court's inquiry. It declined to investigate how the policy concerns offered in Imbler applied to public defenders:

Petitioners' concerns may be well founded, but the remedy

petitioners urge [absolute immunity] is not for us to adopt. We do

not have a license to establish immunities from [sections] 1983 actions

in the interests of what we judge to be sound public policy. It is

for Congress to determine whether [sections] 1983 litigation has become

too burdensome to state or federal institutions and, if so, what

remedial action is appropriate.(305)

The primacy of historical support over policy judgments continued through the late 1980s. In Malley v. Briggs,(306) the Court found that police officers, who lied to secure an arrest warrant, were similar to complaining witnesses, who had no absolute immunity under common law in 1871.(307) The Court reiterated what was implicit in the Tenney decision, that absent evidence proving that an immunity was well-settled in 1871, separation of powers and rudimentary rules of statutory interpretation prevented the carving new unmentioned and unforeseen immunities out of section 1983 today.(308) The Court has clearly indicated that the judiciary cannot make a "freewheeling policy choice" concerning the level of immunity.(309) This mantra of history before policy can be found throughout the Court's recent immunity decisions.(310) As one long-time follower of the Court in this area explains:

Recently, the Court seems to be using every available opportunity to

reiterate that it confers immunities primarily on the basis of the

common law of 1871, and not because of its own views of policy....

Buckley's signal to those claiming absolute immunity is this: be sure

that the common law of 1871 is on your side. Policy alone will not

suffice.(311)

The Court has also taken a narrower view of absolutely immune "quasi-judicial" conduct. At common law some acts were considered so judge-like that they were qualifiedly immune from suit.(312) In modern parlance, the Court has treated "quasi-judicial" acts as deserving of the absolute immunity judges received at common law.(313) In Cleavinger v. Saxner,(314) the Court listed the following factors warranting absolute quasi-judicial immunity:

(a) the need to assure that the individual can perform his functions

without harassment or intimidation; (b) the presence of safeguards

that reduce the need for private damages actions [to deter abuses];

(c) insulation from political influence; (d) the importance of

preceden[ce] [in the official's decisions]; (e) the adversarial nature of

the process [the official is involved in]; and (f) the correctability of

error on appeal.(315)

In Cleavinger, the Court found that a prison disciplinary committee was not insulated and independent because it consisted of subordinate prison officials deciding disputes between their co-workers and prisoners. The committee argued the Butz factors should not control since prosecutors secured absolute immunity in Imbler despite exercising "broad and generally unreviewable" discretion.(316) The Court never addressed this contention and instead distinguished the committee from a classic adjudicatory body.(317)

Today, prosecutors would rarely meet the requirements for absolute immunity as "quasi-judicial" officials, especially when evaluating evidence for Brady purposes. As extensively detailed below, no "safeguards" currently serve as an adequate substitute for civil liability to deter abuses.(318) Moreover, prosecutors are not "politically insulated" as the Court obscured in Buckley.(319) In addition, prosecutors often have great leeway in their handling of cases, and are not bound by office precedence. Obviously criminal prosecutors

function in an adversary setting, where the stakes often increase the combativeness. Finally, what a prosecutor does outside the court's eyes may escape judicial scrutiny.(320)

The post-Imbler decisions, making 1871 immunity the upper bound to the immunity an official may receive, comprise an "intervening development of the law."(321) The Court's vigilant application of the historical-functional approach in a "virtually unbroken line of cases"(322) from Tower through Buckley means that doctrine "can lay a legitimate claim to respect as a settled body of law."(323) However, this doctrine is at odds with the policy-driven decision in Imbler. Justice Scalia recognized in Burns the flaws of Imbler, but considered stare decisis a barrier to reversal.(324) However, as detailed above, Buckley deeply eroded any stability and certainty Imbler possibly provided in 1991.

C. Changes Eroding Imbler's Policy Judgments

If Buckley signals the demise of absolute prosecutorial immunity, prosecutors should not be too concerned. The coalescence of disparate changes in the law makes the immunity afforded prosecutors at 1871 common law, which is akin to qualified immunity, sufficient insulation for their good-faith discretionary acts. In short, Imbler's "premises of fact" have lost their validity,(325) undermining that Court's conclusion of the necessity of absolute immunity.

The Imbler Court recited the following policy reasons to support its decision: (1) prosecutors protected only by qualified immunity would be paralyzed and distracted by the prospect (or reality) of angry defendants routinely retaliating with civil suits; (2) suits surviving pleadings would require a retrial of the criminal case, thus placing a greater burden upon prosecutors who have to defend these cases years afterwards; (3) prosecutors fearing suit would be less likely to present the seemingly honest but nefarious witness, and thereby decrease trial accuracy; (4) post-trial reviewers would slant their decisions against defendants to avoid suits against prosecutors; and (5) other avenues of deterrence exist to punish the bad prosecutor, including disbarment and criminal prosecution.(326)

1. Beating and Barring Vexatious Suits

a. Changes With Respect to Qualified Immunity

When the Imbler Court asserted that prosecutors would have a harder time attaining qualified immunity than other executive officials, they had a now antiquated rule in mind. In 1976, a defendant wishing to assert qualified immunity had to prove a reasonable good-faith belief that he acted lawfully.(327) The subjective element often became an issue for the jury to decide along with its determination liability.(328) Six years later, in Harlow v. Fitzgerald,(329) the Court removed the subjective element of the qualified immunity defense because deciphering "subjective intent" often forced expensive trials.(330) The Court held that "government officials performing discretionary functions [would receive civil immunity] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."(331) Under this new rule, the official would plead her immunity defense on a summary judgment motion. No further discovery would begin "[u]ntil this threshold immunity question [was] resolved."(332)

Another change in qualified immunity decisions came in 1985. Prior to 1986, only the denial of absolute immunity by a trial judge was immediately reviewable. In Mitchell v. Forsyth,(333) the Court held that because qualified immunity is not a defense, but rather a right not to stand trial (effectively lost if a case proceeds to trial), it was a "collateral order" amenable to interlocutory appeal.(334) In reaching this conclusion the Court relied heavily on Harlow.(335) In addition, appellate review is de novo, as qualified immunity is now a question of law and not fact.(336)

In Anderson v. Creighton,(337) the Court fine-tuned Harlow by permitting limited discovery of issues

necessary for establishing the defense, thus increasing the likelihood of a summary judgment disposition.(338) While the movant must show that no genuine issue of material fact exists,(339) the plaintiff must have some sufficient factual support for his or her claim.(340) For those who laud Buckley as permitting flexibility, the "insufficiency/sufficiency" standard for summary judgment offers even more room for trial courts to sort the worthwhile from the worthless claims, while capping the amount of protection the wrong-doing prosecutor may obtain. In any event, district courts still have the right to control discovery and thereby to deny plaintiffs indiscriminate requests for all files held by an official.(341)

"Heightened pleading" rules also increase a defendant's chances of successfully asserting qualified immunity. After an official asserts the defense, "the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal."(342) The Supreme Court has recently rejected "heightened pleading requirements" for section 1983 suits against municipalities as inconsistent with notice pleading under Federal Rule of Civil Procedure 8.(343) However, heightened pleading rules for immunity cases have persisted.(344)

The revolution in qualified immunity/summary judgment determinations has frequently been acknowledged by the Court as effectively protecting officials from "vexatious or retaliatory" suits.(345) In Burns, the Court stated:

Harlow . . . "completely reformulated qualified immunity" . .

[it] was "specifically designed to avoid excessive disruption of

government and permit the resolution of many insubstantial

claims on summary judgment," and we believe it sufficiently

serves [that] goal. . . . Accordingly, it satisfie[d] . . . principal

concerns underlying our recognition of absolute immunity.(346)

Thus it is preaching to the converted to point out the demise of the first policy concern of Imbler, namely that asserting qualified immunity would entail distractive litigation. Meanwhile, Buckley's factual inquiry as to probable cause has made the assertion of absolute immunity more difficult, as exemplified in Hill.(347) This added step is not only inefficient but unnecessary now that qualified immunity amply protects "all but the plainly incompetent or those who knowingly violate the law."(348)

b. Shrinking and Scaring the Plaintiff Pool

The Imbler Court worried that defendants would turn their resentments against prosecutors in civil courts if allowed to do so.(349) However, vengeful ax-defendants face greater obstacles today than in 1976. First, the Supreme Court has limited the availability of a section 1983 action for ax-defendants. In Heck v. Humphrey,(350) the Court held that to recover damages, a section 1983 plaintiff must first show that his or her "conviction or sentence has been reversed on direct appeal, expunged . . . declared invalid by [the appropriate state] tribunal . . . or called into question by a federal court's . . . writ of habeas corpus."(351) The Court again equated a convict's section 1983 action addressing his or her trial with that for malicious prosecution, which requires a plaintiff to show that he or she prevailed at the prior criminal proceeding. Absent this showing, a convict would not yet have a cause of action.(352)

Tougher habeas corpus rules have also added to the burdens which the pertinent class of section 1983 plaintiffs must overcome. Shortly after Imbler, the Court ruled Fourth Amendment issues heard below could not be the subject of a federal habeas corpus petition.(353) Next, the Court modified the holding of Fay v. Noia,(354) by preventing the "deliberate bypass" of state courts to get to federal court, and thus reducing

the ability of prisoners to get a reversal.(355) Also, in 1977, a Congressional amendment allowed district courts to apply a quasi res judicata rule to reject successive redundant petitions.(356) These and other changes in the habeas corpus laws have contributed to the very small success rate.(357) So long as ax-defendants remain in prison, prosecutors need not worry about any vindictive civil actions they may wish to take.

Vengeful ax-defendants advancing meritless claims risk greater civil penalties today than in 1976. The 1983 amendments to the Federal Rules of Civil Procedure increased the likelihood that vexatious and frivolous litigation would result in sanctions against a plaintiff instead of an extorted settlement award. Lawyers are required to investigate such claims and assure "good ground to support" the pleadings.(358) This rule change was so significant that it led to an avalanche of motions for its imposition, and then to Congressional reform to decrease the incentives to file for sanction by directing penalty monies to the trial court.(359)

2. Suing the Municipality in Place of the Prosecutor

The Imbler Court found that without absolute immunity, a case surviving the pleadings would often force a retrial of a claim years after the disputed conduct occurred.(360) The Court believed this would disadvantage the prosecutor/defendant.(361) However, the plaintiff, as always, must prove a constitutional deprivation.(362) In addition, Harlow lessened the burden on defendants claiming qualified immunity; they need not face a retrial if they establish the objective reasonableness of their conduct.(363) Changes in the law may permit these "retrials" anyway--against the prosecutor's supervisor.

Two years after Imbler, the Court overturned a portion of Monroe v. Pape,(364) by recognizing local governmental entities as potentially liable "persons" in section 1983 suits.(365) Municipalities do not enjoy any immunity, having possessed none at common law.(366) While the Monell Court ruled respondeat superior an improper basis for suit against a municipality, the Court paved a route to sue grossly negligent supervisors in City of Canton v. Harris.(367) Today, a district attorney who is "deliberately indifferent" to the constitutional abuses of her assistants may be forced to defend their past conduct.(368) In states like New York where the district attorney ranks as a "final policymaker" for the county or city, those entities also may end up as defendants.(369)

Walker v. City of New York(370) illustrates how plaintiffs may use municipal liability to circumvent the blameworthy prosecutor's absolute immunity. Walker won reversal of his murder and armed robbery convictions after decades of wrongful incarceration.(371) The Assistant District Attorney, J. Paul Zsuffa, suppressed parts of an alleged eye-witness statement claiming Walker committed the robbery with a second person, one whom Zsuffa learned was imprisoned at that time.(372) Zsuffa had the witness testify before a grand jury and leave out the inconsistency.(373) In addition, Zsuffa did not inform the defense that the victim failed to identify Walker in a lineup.(374) Walker sued New York City alleging it failed to train its police and assistant district attorneys not to suborn perjury or suppress exculpatory evidence.(375) The Second Circuit found Walker had a triable claim.(376)

The evolution of municipal liability serves to undermine Imbler in two ways. First and more generally, its emergence indicates Imbler no longer reflects societal notions of what is just.(377) Society now places greater emphasis on accountability, and especially on compensating those deprived of their civil rights.(378) Second, the immunity extended in Imbler no longer rescues a prosecutor's office from spending time and resources defending against civil rights actions long after the injurious acts occurred. Instead, absolute prosecutorial immunity may only deprive courts and litigants of the truly guilty party.

3. The Recognition of Absolute Witness Immunity

The Imbler Court worried that prosecutors sheltered only by qualified immunity would refrain from putting a

shady, yet sincere, witnesses on the stand.(379) In 1976, the presentation of a disreputable witness could have resulted in a civil jury trial to determine: (a) the witness' veracity; and (b) whether and when the prosecutor knew of any falsehoods.(380) By 1983, however, the Court extended the defamation immunity present at common law to testifying witnesses.(381) So important was the need for unrestrained witness testimony that the common law barred defamation actions based on any statements made during a court proceeding. An ordinary witness could not be sued at all, while a complaining witness could be sued only for malicious prosecution.(382) This immunity against defamation suits also extended to attorneys who elicited false testimony.(383) Thus, Briscoe protects prosecutors who present uncoached, untruthful witnesses, and thereby satisfies the Imbler Court's fourth policy concern without the overkill of absolute immunity.(384)

4. Post-Conviction Review and Changes in Res Judicata

The fourth justification offered in Imbler for absolute immunity was that appellate review would be tainted by the looming prospect of prosecutorial liability if constitutional defects were uncovered.(385) This fear may also have been rooted in the then unproductive rules for qualified immunity.(386) In any event, subsequent changes in res judicata rules allowed states to reduce this risk if it ever existed. In 1976, the Court found Imbler could not rest the merits of his claim on the habeas court's findings of error because Pachtman was not a party to that action.(387) Subsequently, the Court held that state law governs the preclusive effect of a state court decision upon a subsequent section 1983 action.(388) Thus, states can create rules preventing issue or claim preclusion from accompanying appellate or habeas corpus decisions.(389) Reversal of a conviction need not equate to a civil judgment against a prosecutor. Indeed, an appellate or habeas corpus reversal may not even be admissible evidence in the subsequent civil suit.(390)

It is true that Heck's requirement that a conviction be set aside before an action arises seemingly increases the pressure on reviewers sympathetic to prosecutors not to find constitutional flaws.(391) However, this concern may deserve nothing more than a sincere "so what?" The Court tolerates whatever impact the looming civil liability of police officers has on reviewing judges.(392) There is no valid reason to skew determinations in favor of wayward lawyers who are better acquainted with civil rights than police officers. Some judges may be unduly protective of prosecutors, as the next section sadly describes. But to temper suit against all bad prosecutors on the expectation that some bad judges will be so moved out of concern for a prosecutor's pocketbook that they will deny a prisoner her freedom, wrongly panders to an unacceptable, if not imaginary, bias.(393)

5. The Unfulfilled Promise of Alternative Deterrence

The Imbler Court assured that whatever wrongs absolute civil immunity shielded, professional or other prosecutorial bodies would uncover and discipline.(394) Twenty years after Imbler, the results of letting these foxes guard the hen house is unquestionably far below the standard that the Court, or even an ardent cynic, must have anticipated. Researchers have repeatedly found that prosecutorial misconduct gets published in case reporters, but not punished by bar associations.(395)

In his exhaustive piece on prosecutorial discipline, Professor Richard A. Rosen searched all public filings and contacted every state bar association for disciplinary cases involving the suppression of exculpatory evidence.(396) While finding numerous opinions where courts condemned prosecutorial misconduct, Professor Rosen found few instances where a bar association followed up with sanctions.(397) Rosen found only nine cases where a Brady violation precipitated disciplinary action.(398) Of these, three resulted in no action, four resulted in minor sanctions such as a reprimand, caution or censure, and only two cases ended in a recommendation for disbarment.(399)

In the first case, Price v. State Bar of California,(400) Deputy District Attorney Price had altered evidence at

a murder trial to secure a conviction.(401) Fearing his acts would be discovered, he offered the defendant a favorable sentence recommendation in exchange for him forgoing an appeal.(402) The state bar found him guilty of acts of moral turpitude, violating his attorney's oath, suppressing evidence, and misleading the judge, jury and/or other party.(403) While the state bar recommended disbarment, the state supreme court took pity on Price, and reduced the penalty to a suspension.(404)

The second case where disbarment was recommended for acts commensurate with a civil rights violation was Virginia State Bar ex rel Sixth District Committee v. Read.(405) The Read case began when, amid an arson and murder trial, prosecutor Read's chief eyewitness recanted having seen defendant Mesner at the crime scene. Read asked the witness, Sils, if he could testify that the man he saw looked like Mesner.(406) However, Sils not only had come to doubt his identification, but after seeing Mesner in court, became convinced they were prosecuting the wrong man.(407) Read decided not to call Sils and to not tell the defense about Sils' change of heart.(408) A few days later, a concerned Sils contacted Mesner's attorney.(409) After Read rested, the defense called Sils to testify.(410) Only then did Read attempt to inform defense counsel of Sils' retraction.(411) The charges were dismissed by the state.(412)

The Virginia State Bar Disciplinary Board moved to disbar Read.(413) It noted the trial court had issued a discovery order for any exculpatory information, including information as to identification witnesses.(414) The Board found that Read intentionally violated a disciplinary rule by failing to disclose to a defendant all information required by law, and that he "`would have knowingly permitted Mesner to be convicted of arson and murder' without letting a jury consider Sils'" negative identification.(415)

On appeal, the Virginia Supreme Court reversed.(416) The court found that because Mesner's counsel knew of Sils' testimony in sufficient time to make use of it at trial, no Brady violation occurred.(417) The court cited four cases in support; however, all dealt with post-conviction claims centering on the lack of prejudice and not whether the prosecutor properly disclosed material.(418) These cases were completely beside the point.(419) It is beyond doubt that Brady requires prosecutors to turn over statements affirmatively declaring the defendant was not the person likely to have committed the crime.(420) Once it is clear that Sils' testimony was Brady material, Read was obliged by the judge's order, and by ethical cannons, to turn over the information.(421) That Sils was diligent enough to come forward for Mesner's sake should not have spared Read from punishment. The remarkable interpretation of the Virginia Supreme Court hardly encourages reluctant bar associations to investigate prosecutorial misconduct.(422)

Criminal action against prosecutors who violate civil rights is also more myth than truth. Only one such case has been located, United States v. Brophy.(423) Brophy "willfully deprived an individual of his constitutional rights [by] `suborn[ing] perjury; fabricat[ing] evidence and materials and introduc[ing] at state proceedings knowingly false, misleading and perjured testimony and suppress[ing] favorable and exculpatory evidence, materials and testimony.'"(424) All this got him a $500 fine.(425) Brophy was automatically suspended because of the conviction, but the New York Supreme Court, Appellate Division, reduced the sanction to censure, finding that Brophy already "`had suffered the stigma of a criminal conviction.'"(426)

Whatever the lapses (or motives) of the judiciary, bar associations, or criminal prosecutors, they have failed to provide the deterrence that excused absolute prosecutorial immunity. One judge has stated that "in the justice delivery system, these alternatives are seldom if ever actually applied. It is an unacceptable fraud on the public since prosecutors seldom prosecute prosecutors and bar associations infrequently take punitive action to correct prosecutorial suborned perjury."(427)

As a postscript, no adverse action befell the cast of prosecutors discussed in this Article. Larry Wharrie, whose deliberate suppression of a third-party confession moved the Seventh Circuit to order its opinion be sent to the state bar committee, moved to Grundy County, Illinois, and hung out a shingle.(428) Fifty-percent of his practice includes criminal defense.(429) The Illinois Attorney Registration and Disciplinary

Commission reported no public action resulted from any possible investigation.(430)

William T. Burch, who never turned over statements by an alleged victim that suggested a hoax,(431) never left the Loudon County District Attorney's Office.(432) In reviewing Burch's case, the Virginia Courts again rebuffed the only state bar to show any real interest in disciplining prosecutorial abuse.(433) Beverly Read, benefactor of the Virginia Supreme Court's curious interpretation of Brady and ethical rules,(434) did eventually leave practice, voluntarily surrendering his license because of a "disability."(435) Richard Adago, who allegedly coaxed a four-year old child to blame his mother for abuse and then suppressed a videotape where the boy said otherwise,(436) left the Manhattan District Attorney's Office for a private law firm.(437) His specialty is family law.(438)

D. The Absence of Valid Reliance Interests

In Monell, the Court found municipalities could not have reasonably relied on the earlier rejection of respondeat superior liability as a green light to disobey civil rights laws.(439) Correspondingly, with the multitude of rules and laws aspirationally cited by the Imbler Court, no tears ought to be shed for the prosecutor who cries he would not have violated a person's civil rights if he knew he would actually be held responsible for his misconduct. The reliance interests of prosecutors are even less than that of the municipality in Monell. There, it could at least be argued that city managers relied on Monroe when obtaining indemnification insurance.(440) Neither prosecutors nor their indemnifiers can claim such reliance, as Imbler never provided prosecutors total immunity and Buckley further eroded any assumption that prosecutors are untouchable.

E. How Imbler Would Be Decided Today: An Illustration

It is 1996, not 1976, and District Attorney Robert Pachtman has just written the governor about newly discovered evidence in the Imbler murder case. Pachtman asks the governor to stay the scheduled execution. How does Imbler express his gratitude? He sues Pachtman for all that he is worth alleging that Pachtman knew of this evidence before probable cause existed.

Recall that Imbler sued claiming the following: (1) Pachtman knew or should have known Costello was lying;(441) (2) Pachtman suppressed exculpatory evidence denying him a fair trial;(442) and (3) based upon these and other acts, Pachtman maliciously prosecuted a man he knew to be innocent.(443)

Today, Imbler could only make his claim after securing reversal of his conviction,(444) and that ruling would have no preclusive effect on his civil complaint.(445) Under the rule of Briscoe, defamation immunity would preclude the first cause of action.(446) Under Buckley, the second and most alarming claim -- that Pachtman buried exculpatory evidence -- would be thwarted.(447) Most telling is how the third claim would fare. The malicious prosecution claim would continue identically under either qualified or absolute immunity. In either case, if Pachtman knew that his witness was lying -- and thus knew that he lacked probable cause to charge Imbler -- the claim could progress.(448) Because of Buckley, the issue of probable cause would be examined regardless of whether Pachtman claimed qualified or absolute immunity. Under a qualified immunity standard, the issue of malice would require little additional investigation as it appears intertwined with the absolute immunity issue of whether one could reasonably find that Costello's testimony lent probable cause to the action.

Assuming Robert Pachtman's post-conviction investigations were, in the words of Imbler's attorney, "`[i]n the highest tradition of law enforcement and justice,'"(449) it would seem just that armed only with qualified immunity, the Pachtmans of the world need not fear suit. But the larger point is that after Burns and Buckley, the Pachtmans of the world may face suit anyway. Since absolute immunity cannot prevent the "good" prosecutors from facing some occasional litigation, why continue the rule when it may shield the "bad" ones who wait until the trial to misbehave? Moreover, under a qualified-only immunity standard,

there is no time wasted with the nebulous issue of the prosecutor's role; the focus is immediately on the wrongdoing. It is foreseeable that with culpability at the forefront, the "bad" prosecutors would settle their cases quickly to avoid the unwanted precedent.

Furthermore, prosecutors may also reap a benefit from a qualified only immunity standard. Plaintiff's pleadings must be accepted as true under an absolute immunity inquiry.(450) Therefore, many good prosecutors (who ultimately prevail on a dismissal motion) have still had their name besmirched through published decisions repeating the plaintiff's accounts of prosecutorial misconduct. These prosecutors appear merely to win by a technicality, not because the plaintiff's charges lack evidence, but because the prosecutor acted in an immunized role. If the same prosecutor prevailed by way of a qualified immunity summary judgment, it would be because the plaintiff failed to show a genuine issue of fact indicating misconduct. Therefore, under present qualified immunity rules, the honest prosecutor may face suit but, in all likelihood, will not face a trial or long discovery process. Thus, she can expect her indemnifiers to fully defend her honor, without unnecessarily diverting her energies.

The justifications for stare decisis include certainty, reliance, equality, consistency, efficiency, and the appearance of justice.(451) The Imbler approach instituted three functional "roles" of the prosecutor, with only the advocacy function insulated from federal suit.(452) No statutory language exists to concede this immunity, nor to confine it. Furthermore, it was inconsistently applied throughout the 1980s. The "probable cause" standard of the 1990s suggests that all post-arrest activity may be protected, regardless of its illegality, while pre-arrest actions are heretofore considered with respect to their reasonableness. Municipalities may pay in suits in place of the immune prosecutor, something they usually do anyway under modern indemnification plans,(453) but in more complex and inefficient actions. Meanwhile, the newer rules for qualified immunity provide trial judges a broad and flexible standard that lets them weed out frivolous suits without closing out meaningful claims. Finally, absolute prosecutorial immunity is unfair. Prosecutors enjoy absolute immunity in their role as an advocate, while subsequent interpretations of section 1983 have denied such broad protection to public defenders, prison boards, and a host of other officials representing one side in an adversarial process. In sum, the justifications for stare decisis are nowhere present or furthered by Imbler, and the decision should be overruled.

V. REMAINING ISSUES

A. Fabrication of Evidence as a Section 1983 Cause of Action

Presenting altered or fabricated evidence to a grand jury or a court is illegal. When false evidence impedes a fair trial, the defendant's constitutionally protected civil rights are violated.(454) However, Justice Scalia and the Seventh Circuit suggested that defamation immunity could immunize prosecutors presenting fabricated evidence before a judicial proceeding.(455) No cause of action would exist because the "harm" occurred at an immunized setting.(456) This interpretation would mean that prosecutors could begin illegal or unethical conduct outside a courtroom, and then cloak their actions with immunity upon entering its doors. The unlawful presentation of fabricated evidence before a judicial proceeding would become an "intervening act" breaking the causal chain of a fabricated evidence claim.

It is presently unclear whether immunity may reach back to cover misconduct engaged in before formal presentation of a case. In Malley v. Briggs, the Court held that a judicial officer's issuance of an arrest warrant based on the officer's patently false affidavit did not break the chain of causation.(457) Similarly, the funnelling of fabricated evidence through a witness with absolute defamation immunity should not filter out liability for causing the continued incarceration of an innocent person. The Buckley majority implicitly affirmed this when they forbade the subsequent calling of a grand jury to "retroactively transform" the district attorney's investigative misconduct into absolutely immune trial conduct.(458) However, the dissent asserted that prosecutors can now lie to grand juries or magistrates to obtain probable cause and start their immunity running.(459) Thus the Court harbors conflicting understandings of how the common law

immunities ought to function today.

At common law, immunities were cropped to prevent their misuse. A complaining witness who testified falsely to advance her illegitimate suit could not rely on defamation immunity to escape a malicious prosecution action.(460) Recognizing this, the Second Circuit, prior to Buckley, permitted suits against an immunized witness who conspired with a prosecutor to suborn perjury and, thereby deprive an individual of her constitutional rights.(461)

B. Malicious Prosecution as a Section 1983 Cause of Action

A considerable question remains as to whether malicious prosecution even constitutes a section 1983 cause of action. The Second, Fourth, Fifth, and Ninth Circuits accept malicious prosecution as a permissible section 1983 claim.(462) The First and the Tenth Circuits do not.(463) In 1994, a plurality of the Supreme Court suggested an arrest and prosecution deliberately done without probable cause may permit a section 1983 action grounded in the Fourth Amendment, while other members of the Court found suit may lie as a matter of substantive due process.(464) Of the five different opinions in that case, none commanded a majority.(465) Deciding immunity before resolving the question of a cause of action defies Court precedent as well as common sense.(466) Nevertheless, while the status of malicious prosecution and fabricated evidence remain unclear, jurists quibble over what hat the prosecutor wore when committing misconduct.(467)

CONCLUSION

A case will come before the Supreme Court where a plaintiff has suffered because of a prosecutor's deliberate suppression of exculpatory evidence. The neglect of bar associations to discipline unethical prosecutors invites it. Though no common law immunity insulated such acts, a lower court will dismiss it solely because of Imbler. In anticipation of this case, the above arguments are marshalled to demonstrate something the Court probably already knows; that Imbler was a misstep along the way of the historical-functional approach, and remains out-of-step with its current practice. Rather than removing Imbler piecemeal, as in Buckley, the Court should now rectify its mistake. If the policy arguments for absolute immunity propounded in 1976 are still salient, Congress can carry the onus of rewriting the law -- and explaining to constituents why prosecutors can violate their civil rights with near impunity.

For now, some ameliorative steps may be taken. First, legislatures may enact laws providing an alternative forum for compensating the wrongly convicted. Several states already offer some minimal compensation to those wrongly incarcerated.(468) Second, state bar associations can and must pledge greater time and effort into the investigation and rectification of prosecutorial misconduct. Courts may help by installing contempt and reporting mechanisms. For instance, the Second Circuit stated that when faced with prosecutorial misconduct it may: (1) reprimand the offending prosecutor by name in a publicized opinion; (2) direct the trial court to initiate appropriate disciplinary action; or (3) impose sanctions such as suspension from all courts in the circuit.(469) Finally, Congress could create a new remedial civil rights law that had no immunity defenses.(470)

All of these actions could take place without any stare decisis implications. Indeed, compensation and deterrence may be best achieved via this route rather than through our lottery-esque civil legal system. The aforementioned changes could supplement or supplant civil liability. Nevertheless, they have not come over the last twenty years of absolute immunity. Perhaps if the burden of inertia for legal change rested upon the prosecutorial bar and not with dispersed and aggrieved citizens, such beneficial proposals would stream out of bar associations, courthouses, and legislatures.

The Imbler Court adopted Judge Hand's conclusion that it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of

retaliation."(471) However, now that the legal system has aggressively acted to allay the "dread," it is irresponsible and intolerable to overlook foreseeable and redressable wrongs. The Court should act before another deprivation of rights at the hands of a prosecutor goes without a remedy. (1) Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 554 (1866).

(2) 424 U.S. 409 (1976).

(3) See infra notes 8-23 accompanying text.

(4) See infra notes 24-150 accompanying text.

(5) See infra notes 151-99 and accompanying text.

(6) See infra notes 200-453 and accompanying text.

(7) See infra notes 454-67 and accompanying text.

(8) 42 U.S.C. [sections] 1983 (1994); See Sheldon H. Nahmod, Civil Rights & Civil Liberties Litigation [sections] 1.03 (2d ed. 1986) (indicating that section 1983 was modeled after section two of the Civil Rights Act of 1866 and that a civil remedy was afforded after the Civil Rights Act of 1871).

(9) Monroe v. Pape, 365 U.S. 167, 172 (1961).

(10) 42 U.S.C [sections] 1983 (1994).

(11) 42 U.S.C. [sections] 1983 (1994).

(12) 341 U.S. 367 (1951).

(13) Id. at 376.

(14) Id. at 372. Federal legislators were immunized criminally for acts taken in accordance with the Speech or Debate Clause. Kilbourn v. Thompson, 103 U.S. 168, 201-05 (1880). In addition, the Court observed that 41 of 48 state constitutions contained similar protections for legislators. Tenney, 341 U.S. at 375-76 n.5.

(15) Tenney, 341 U.S. at 377.

(16) Id. at 376.

(17) Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.) (upholding immunity of two attorney generals and mid-level Justice Department officials in wrongful imprisonment action), cert. denied, 339 U.S. 949 (1950).

(18) Paul M. Bator Et Al., Hart & Wechsler's The Federal Courts And The Federal System 1294-95 (3d ed. 1988); see Fed. R. Civ. P. 12(b)(6).

(19) Burns v. Reed, 500 U.S. 478, 486 (1991). The scant number of actors absolutely immunized at common law has created a presumption for qualified immunity. Id. at 486. As a result of this presumption, the Court has been "quite sparing" in granting absolute immunity. Id. at 487 (citing Forrester v. White, 484 U.S. 219, 224 (1988)).

(20) Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

(21) Anderson v. Creighton, 483 U.S. 635, 646 (1987).

(22) See, e.g., Hunter v. Bryant, 502 U.S. 224, 228 (1991) (per curiam) (holding that secret service agents were entitled to qualified immunity despite a mistake, since they had a reasonable belief that plaintiff had sent threatening letters); Mitchell, 472 U.S. at 535 n.12 (noting that qualified immunity applied when there was a "legitimate question" as to whether the conduct was unlawful).

(23) Anderson, 483 U.S. at 646-47 n.6. Currently, many circuit courts have different rules for treating the qualified immunity defense. Some circuit courts are less plaintiff-friendly than others. See generally Kathryn R. Urbonia, Qualified Immunity from Damages, in 2 Section 1983 Civil Rights Litigation & Attorneys' Fees 1994 7 (PLI Litig and Admin. Practice Course Handbook Series No. H-512, 1994) (overviewing qualified immunity defense).

(24) 424 U.S. 409 (1976).

(26) Id. at 411.

(27) Id.

(28) Id.

(29) Id. at 412. An accomplice in the second crime corroborated Imbler's alibi. Id.

(30) Id. (31) Id. Pachtman discovered other witnesses who also corroborated Imbler's alibi. Id. Moreover, the passerby's credibility was undermined when Pachtman found that he had lied about his criminal record and certain observations. Id.

(32) Id. The Court repeated the comments of Imbler's counsel that described Pachtman's post-trial detective work as "`[i]n the highest tradition of law enforcement and justice,'" and as "a premier example of devotion to duty." Id. at 413 (quotations omitted).

(33) Id. at 413.

(34) Id.

(35) Id. at 416.

(36) Id.

(37) Without holding a new hearing, and only upon the state court records, the district court found eight instances of prejudicial misconduct, including the prosecution's use of false or misleading testimony from the passerby and the suppression of fingerprint evidence. Imbler v. Pachtman, 500 F.2d 1301, 1302 (9th Cir. 1974). The California courts had rejected these grounds. Id.; Imbler v. Pachtman, 424 U.S. 409, 416 (1976).

(38) Imbler, 424 U.S. at 415. Imbler's civil complaint tracked the district court's findings of error in the habeas corpus proceeding.

(39) Imbler, 500 F.2d at 1302. See, e.g., Marlowe v. Coakley, 404 F.2d 70 (9th Cir. 1968) (holding that prosecutors are "immune from civil suit for acts committed in the performance (of duties constituting an integral part of the judicial process"), cert. denied, 395 U.S. 947 (1969).

(40) Tenney v. Brandhove, 341 U.S. 367 (1951).

(41) Imbler, 424 U.S. at 418.

(42) Id. at 419 n.13 (emphasis added).

(43) Id. at 421.

(44) 44 N.E. 1001 (Inc. 1896).

(45) Imbler, 424 U.S. at 422.

(46) Id. at 421.

(47) Id. at 424.

(48) Id. at 425. The Court asserted:

The prosecutors possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and ultimately in every case -- the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, . . . [t]he presentation of such issues . . . often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials.

Id.

(49) Id. at 426.

(50) Id. at 427.

(51) Id. at 428 (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). In Gregoire, Judge Hand indicated:

There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this

instance it has been thought in the end better to leave unredressed the

wrongs done by dishonest officers than to subject those who try to do their

duty to the constant dread of retaliation.

Gregoire, 177 F.2d at 581.

(52) Imbler, 424 U.S. at 429 n.30 (citing Model Code of Professional Responsibility EC 7-13 (1980)). As a result of these disciplinary considerations, prosecutors purportedly stood "unique, among officials whose acts could deprive persons of constitutional rights, in [their] amenability to professional discipline by an association of [their] peers." Id. (citation omitted).

(53) Id.

(54) Id. at 430.

(55) Id. at 430-31.

(56) Id. at 431 n.33.

(57) Id. at 438, 440 (White, J., concurring, joined by Brennan, J., & Marshall, J.).

(58) Id. at 437 (citing cases dating back to only the early twentieth century).

(59) Id.

(60) Id.

(61) Id. at 436.

(62) Id. at 439.

(63) Id. at 441. In Brady v. Maryland, the Supreme Court held the prosecutor's withholding of exculpatory evidence violated the defendant's right to a fair trial. 373 U.S. 83, 86 (1963).

(64) Imbler, 424 U.S. at 444-45. Justice White indicated:

More to the point and quite apart from the relative difficulty of

pleading a violation of Brady v. Maryland . . . a rule permitting suits

based on withholding of specific facts unlike suits based on the

prosecutor's disbelief of a witness' testimony will have no detrimental

effect on the process. Risk of being sued for suppression will impel the

prosecutor to err if at all on the side of overdisclosure . . . [while the]

[r]isk of being sued for disbelieving a witness will impel the prosecutor to

err on the side of withholding questionable evidence. The majority does not

appear to respond to this point. Any suggestion that the distinction between

suits based on suppression of facts helpful to the defense and suits based on

other kinds of constitutional violations cannot be understood by district

judges who would have to apply the rule is mystifying. The distinction is

a simple one.

Id. at 446-47 n.9.

(65) Id. at 443 (emphasis in original).

(66) Id.

(67) 540 F.2d 220 (6th Cir. 1976).

(68) Hilliard v. Williams, 616 F.2d 1344, 1345-46 (6th Cir. 1975), vacated, 424 U.S. 961 (1976).

(69) Id.

(70) Imbler, 424 U.S. at 444-45 (White, J., concurring) (contending that "[w]here the reason for the rule extending absolute immunity to prosecutors disappears, it would truly be `monstrous to deny recovery'" (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949))).

(71) Newcomb v. Ingle, 944 F.2d 1534 (10th Cir. 1991), cert. denied, 502 U.S. 1044 (1992); Fields v. Soloff, 920 F.2d 1114 (2d Cir. 1990); see Powers v. Coe, 728 F.2d 97, 103-04 (2d Cir. 1984) (holding prosecutor absolutely immune for presentment of case in breach of an agreement not to prosecute); Gray v. Bell, 712 F.2d 490, 502 (D.C. Cir. 1983) (holding prosecutors absolutely immune in presenting evidence to a grand jury), cert. derived, 465 U.S. 1100 (1984).

(72) Taylor v. Kavanagh, 640 F.2d 450 (2d Cir. 1981); see McGruder v. Necaise, 733 F.2d 1146, 1148 (5th Cir. 1984) (holding prosecutor absolutely immune when offering to drop charges in return for defendant's dropping of civil suit).

(73) Buckley v. Fitzsimmons, 919 F.2d 1230, 1243-45 (7th Cir. 1990) (holding that a prosecutor, who took bootprint evidence to various experts before he could find a favorable opinion, was absolutely immune from suit), rev'd, 113 S. Ct. 2606 (1993).

(74) Betts v. Richard, 726 F.2d 79, 81 (2d Cir. 1984) (concluding that a prosecutor was immune from section 1983 liability for procuring a writ to secure plaintiff as state's main witness in a criminal trial).

(75) Ehrlich v. Giuliani, 910 F.2d 1220, 1223-24 (4th Cir. 1990) (holding that the prosecutor's "preserv[ation of] the defendant's asset for forfeiture proceedings" surpassed his investigative function and entered the realm of judicial advocacy).

(76) Jones v. Shankland, 800 F.2d 77, 80 (6th Cir. 1986) (holding prosecutor absolutely immune for failing to disclose exculpatory witness statement specifically requested by plaintiff during his murder trial), cert. denied, 481 U.S. 1048 (1987); accord Fullman v. Graddick, 739 F.2d 553 (11th Cir. 1984).

(77) Hampton v. Hanrahan, 600 F.2d 600, 632 (7th Cir. 1979) (analogizing the prosecutors' "`planning and execution of a raid'" to the "`activities of police officers allegedly acting under [their] direction'" end thus affording them only qualifies immunity (quoting Hampton v. City of Chicago, 484 F.2d 602, 609 (7th Cir. 1973) (alteration in original))).

(78) Day v. Morgenthau, 909 F.2d 75, 77-78 (2d Cir. 1990) (holding that "[a]rests and searches . . . `are normally police functions, and they do not become prosecutorial functions merely because a prosecutor has chosen to participate'" (quoting Robinson v. Via, 821 F.2d 913, 918 (2d Cir. 1987))).

(79) See, e.g, Buckley v. Fitzsimmons, 919 F.2d 1230 (7th Cir. 1990) (declining to find absolute immunity for prosecutor conducting a coercive interrogation), rev'd on other grounds, 113 S. Ct. 2606 (1993); Coleman v. Turpen, 697 F.2d 1341 (10th Cir. 1982) (finding that a prosecutor was only qualifiedly immune for alleged mismanagement of seized property); Price v. Moody, 677 F.2d 676 (8th Cir. 1982) (declining to find absolute immunity for order to mistreat prisoner); Kaylor v. Fields, 661 F.2d 1177 (8th Cir. 1981) (finding qualified immunity for prosecutor's press release); Henderson v. Fisher, 631 F.2d 1115 (3rd Cir. 1980) (holding that a prosecutor is not entitled to absolute immunity when he destroys evidence).

(80) Burns v. Reed, 500 U.S. 478, 481 (1991).

(81) Id. at 481-82.

(82) Id. at 482.

(83) Id. (84) Id.

(85) Id.

(86) Id. at 482 & n.1. Burns' children were taken by the state. After a four month period, the hospital concluded that Burns did not suffer from multiple personalities. Id. at 482 n.1.

(87) Id. at 482-83.

(88) Id. at 483.

(89) Id.

(90) Id.

(91) Id.

(92) Id.

(93) Id. at 483 & n.2 (citing Wolfenbarger v. Williams, 826 F.2d 930, 937 (10th Cir. 1987) (finding no absolute immunity for "legal advice given to police officers")), Marx v. Gumbinner 855 F.2d 783, 790 (11th Cir. 1988) (holding a prosecutor absolutely immune for the "rendering [of] legal advice to police officers"); Myers v. Morris, 810 F.2d 1437, 1449-51 (8th Cir.) (finding a prosecutor absolutely immune in "her role in the interviewing of children"), cert. denied, 484 U.S. 828 (1987)).

(94) Burns 500 U.S. at 485-86.

(95) Id. at 486-87 (citing Forrester v. White, 484 U.S. 219, 224 (1988)).

(96) Id. at 489-92.

(97) Id. at 489-90. This immunity was recognized as absolute for section 1983 suits in Briscoe u. LaHue. 460 U.S. 325 (1983); see infra notes 381-82 and accompanying text.

(98) Burns, 500 U.S. at 492. The Court also observed that subsequent judicial review of a prosecutor's

conduct at a hearing or proceeding decreased the likelihood of abuse. Id.

(99) Id. at 493.

(100) Id. The Court reasoned:

We do not believe, however, that advising the police in the investigative

phase of a criminal case is so "`intimately associated with the judicial

phase of the criminal process,'" that it qualifies for absolute immunity.

Absent a tradition of immunity comparable to the common-law immunity from

malicious prosecution, which formed the basis for the decision in Imbler,

we have not been inclined to extend absolute immunity from liability under

[sections] 1983.

Id. (citations omitted) (emphasis added).

(101) Id. at 494 (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

(102) Id. at 496-97 (Scalia, J., concurring in part and dissenting in part).

(103) Id. at 497.

(104) Id. at 497-98 (citing Malley v. Briggs, 475 U.S. 335, 339-40 (1986)).

(105) Id. at 498.

(106) Id. at 501. The Court's recognition of "defamation immunity" supported the finding of absolute witness immunity in Briscoe v. LaHue. 460 U.S 325, 330-34 (1983).

(107) Burns, 500 U.S. at 500 (citing Wall v. Trumbull, 16 Mich. 228, 235-37 (1867), Barhyte v. Shepherd, 35 N.Y. 238, 241-42 (1866), Steele v. Dunham, 26 Wis. 393, 396-97 (1870)).

(108) Id. at 500.

(109) Id. (citing Billings v. Lafferty, 31 Ill. 318, 322 (1863); Reed v. Conway, 20 Mo. 22, 44-52 (1854)).

(110) Id. at 500 (citing Wight v. Rindskopf, 43 Wis. 344, 354 (1877)).

(111) Id. at 504.

(112) 113 S. Ct. 2606 (1993)

(113) Id. at 2608.

(114) Id. at 2610. The expert was "well known for her willingness to fabricate unreliable expert testimony." Id.

(115) Id.

(116) Id. All of this occurred just before an election for the district attorney's office. Id.

(117) Id. at 2610-11.

(118) Id. at 2611.

(119) Id.

(120) Id.

(121) Id.

(122) Buckley v. Fitzsimmons, 919 F.2d 1230, 1245 (7th Cir. 1990).

(123) Id. at 1240-42. The dissent determined that while judicial procedures may reduce the impact of some prosecutorial impropriety (e.g., voir dire might prevent a prosecutor from tainting a jury by bad publicity), these procedures only mitigate damages, and do not afford a basis for immunity. Id at 1246 (Fairchild, J., dissenting).

(124) Buckley, 113 S. Ct. at 2615.

(125) Id. at 2613 (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)).

(126) Id. at 2615.

(127) Id. The Court also let the lower court's ruling that Fitzsimmons' conduct before the grand jury was absolutely immune stand. Buckley did not include this issue in his petition for certiorari. Id. at 2612 n.3.

(128) Id. at 2616.

(129) Id.

(130) Id.

(131) Id; accord Day v. Morgenthau, 909 F.2d 75, 77-78 (2d Cir. 1990).

(132) Buckley, 113 S. Ct. at 2610-11 ("It was well after the alleged fabrication of false evidence concerning the bootprint that a special grand jury was impaneled. And when it finally was convened, its immediate purpose was to conduct a more thorough investigation of the crime--not to return an indictment against [Buckley].").

(133) Id. at 2616 n.5.

(134) Id.

(135) Id. at 2618.

(136) Id. (citing Tower v. Glover, 467 U.S. 914, 922-23 (1984)).

(137) Id.

(138) Id.

(139) Id. at 2619 (Scalia, J., concurring).

(140) Burns v. Reed, 500 U.S. 478, 500-01 (Scalia, J., concurring in part and dissenting in part); see supra notes 102-10 and accompanying text. The Petitioner in Buckley seemed to make a similar argument, and then, apparently apprehensive about asking that Imbler be overruled, only asked that it be limited "to the thrust of the conduct challenged there--the presentation of evidence in court." Petitioner's Brief at 45, Buckley v. Fitzeimmons, 113 S. Ct. 2606 (1993) (No. 91-7849).

(141) Buckley, 113 S. Ct. at 2620 (Scalia, J., concurring).

(142) Id.

(143) Id. Scalia did not explain why Buckley's arrest and detention secured by fabricated evidence and resulting in three years of incarceration would not suffice as conduct that "otherwise harms" someone. Id.
(144) Id. at 2621 (Kennedy, J., concurring in part and dissenting in part).

(145) Id. at 2623. Kennedy contended:

If the Court means to withhold absolute immunity whenever it is alleged

that the injurious actions of a prosecutor occurred before he had probable

cause . . . then no longer is a claim for malicious prosecution subject to

ready dismissal on absolute immunity grounds, at least where the claimant is

clever enough to include some actions taken by the prosecutor prior to the

initiation of prosecution. I find it rather strange that the classic case for

the invocation of absolute immunity falls on the unprotected side of the

Court's new dividing line.

(146) Id.

(147) Id.

(148) Id. at 2624. Kennedy declared:

Two actors can take part in similar conduct and similar inquiries while

doing so for different reasons and to advance different functions. It may

be that a prosecutor and a police officer are examining the same evidence

at the same time, but the prosecutor is examining the evidence to determine

whether it will be persuasive at trial and of assistance to the trier of

fact, while the police officer examines the evidence to decide whether it

provides a basis for arresting a suspect. The conduct is the same but the

functions distinct.

Id.

(149) See, e.g, Brian P. Barrow, Buckley v. Fitzsimmons: Tradition Pays a Price for the Reduction of Prosecutorial Misconduct, 16 Whittier L. Rev. 301 (1995); James P. Kenner, Prosecutorial Immunity: Removal of the Shield Destroys the Effectiveness of the Sword, 33 Washburn L.J. 402, 426-27 (1994); Deborah S. Platz, Buckley v. Fitzsimmons: The Beginning of the End for Absolute Prosecutorial Immunity, 18 Nova L. Rev. 1919, 1937 (1994).

(150) Reid v. New Hampshire, 56 F.3d 332, 337 (1st Cir. 1995). "Imbler thus implicitly acknowledged that prosecutors retain discretion to determine what evidence is to be disclosed under Brady and that absolute immunity attaches to their exercise of discretion. . . . Nor was absolute immunity forfeited because the prosecutors continued to withhold the exculpatory evidence." Id. at 337-38 (emphasis in original).

(151) William O. Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949).

(152) Cf. Monell v. Department of Social Servs., 436 U.S. 658, 709 n.6 (1978) ("The doctrine of stare decisis advances two important values of a rational system of law: (i) the certainty of legal principles and (ii) the wisdom of the conservative vision that existing rules should be presumed rational and not subject to modification `at any time a new thought seems appealing.'" (quotation omitted)).

(153) Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting); see Helvering v. Hallock, 309 U.S. 106, 119 (1940) (stating that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience").

(154) Hubbard v. United States, 115 S. Ct. 1754, 1763 (1995); Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

(155) 365 U.S. 167 (1961), overruled by Monell v. Department of Social Servs., 436 U.S. 658 (1978).

(156) Id. at 192 (Harlan, J., concurring); accord Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 257-58 (1970) (Black, J. dissenting).

(157) Boys Markets, 398 U.S. at 241 (citation omitted); see Hubbard, 115 S. Ct. at 1768 (Rehnquist, C.J., dissenting) ("We have often noted the danger in relying on congressional inaction in construing a statute" (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988))).

(158) Patterson, 491 U.S. at 175 n.1 (quoting Johnson v. Transportation Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting)).

(159) Monell, 436 U.S. at 695 (citing Girouard v. United States, 328 U.S. 61, 70 (1946)).

(160) Hubbard v. United States, 115 S. Ct. 1754, 1765 (1995) (Scalia, J., concurring) ("Who ignores [stare decisis] must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all)." (parenthetical in original)).

(161) Monell, 436 U.S. at 700.

(162) See, e.g., Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 151-54 (1976), overruling United Auto Workers v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949) (holding that the earlier UAW decision that states may regulate partial strike activities frustrated the federal labor regulatory scheme).

(163) Black & White Taxicab v. Brown & Yellow Taxicab, 276 U.S. 518, 530 (1928) (permitting taxicab company to reincorporate out of state and to use a federal court with its own "general federal common law" to exact a decision it would not have obtained had its case been decided in the state court system); see Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 247-48 (1970) (observing that the rule providing that anti-strike agreements are not enforceable in federal court discouraged collective-bargaining by encouraging unions to remove cases to federal court to escape state-court injunctions).

(164) Wainwright v. Sykes, 433 U.S. 72, 77 (1977) (overruling, for all intents and purposes, Fay v. Noia, which established the bad rule. 372 U.S. 391 (1963)).

(165) Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58 (1977), overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

(166) Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989), overruling Wilko v. Swan, 346 U.S. 427 (1953).

(167) 115 S. Ct. 1754 (1995)

(168) 348 U.S. 503 (1955).

(169) Id. at 502. In Bramblett, the Court interpreted Title 18 of the United States Code section 1001, which established penalties for making or using false or fraudulent statements within the jurisdiction of any department or agency of the United States. Id.; 18 U.S.C. [sections] 1001 (1994). The Court held the statute "clearly covers the presentation of false claims against any component of the Government to any officer of the Government." Bramblett, 348 U.S. at 505. However, the wording of the statute indicated that words like "department" and "agency" were to be given their natural meaning. Id. at 508.

(170) See, e.g., United States v. Masterpol, 940 F.2d 760, 766 (2d Cir. 1991) (stating that "[n]o court . . . has ever sustained a [Title 18 United States Code] section 1001 conviction for false statements made . . . to a court acting in its judicial capacity"); United States v. Mayer, 775 F.2d 1387, 1390 (9th Cir. 1985) (holding that section 1001 should only be applied in a judicial proceeding relating to administrative or housekeeping functions as opposed to adjudicative functions); Morgan v. United States, 309 F.2d 234, 237 (D.C. Cir. 1962) (summarizing the problems with Bramblett and stating: "Does a defendant `cover up . . . a material fact' when he pleads not guilty? Does an attorney `cover up' when he moves to exclude hearsay testimony he knows to be true, or when he makes a summation on behalf of a client he knows to be guilty? "), cert. denied, 373 U.S. 917 (1963).

(171) Hubbard, 115 S. Ct. at 1761. The Court indicated: Putting Bramblett's historical misapprehension to one side, however, we believe the Bramblett Court committed a far more basic error in its underlying approach to statutory construction. Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress. Id.

(172) Id. at 1764. Given that other statutes punish misrepresentations to courts, the Court also cited an absence of significant reliance interests in rejecting Bramblett. Id.

(173) 382 U.S. 111 (1965).

(174) 369 U.S. 153 (1962).

(175) Swift, 382 U.S. at 115-16.

(176) Id. at 124-25. The Court noticed that under Kesler, in order to ascertain the correct forum for a claim, a trial judge would have to determine the claim's merits to decide if such adjudication caused her to

"engage[ ] in so much more construction" that he or she, and not a panel, had jurisdiction. Id. at 125 (citing Swift & Co. v. Wickham, 230 F. Supp. 398, 410 (S.D.N.Y. 1964)).

(177) 491 U.S. 164 (1989).

(178) 505 U.S. 833 (1992).

(179) 427 U.S. 160 (1976).

(180) Patterson, 491 U.S. at 171.

(181) Id. at 173 (citing Rodriguez de Quijas v. Shearson/Am. Express, 490 U.S. 477 (1989)).

(182) Id. (citing Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977)).

(183) Id. (citing Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970)).

(184) Id. at 174 (quotation omitted). In fact, Runyon exemplified the country's commitment against discrimination reflected in contemporary Congressional acts and court decisions. Id.

(185) 505 U.S. 833, 853 (1992)

(186) 410 U.S. 113 (1973)

(187) Casey, 505 U.S. at 854.

(188) Id. (citing Swift & Co. v. Wickham, 382 U.S. 111 (1965)).

(189) Id. at 855 (citing Patterson v. McLean Credit Union, 491 U.S. 164 (1989)).

(190) Id. (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1992)).

(191) Id. at 854 (citing United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924) (holding reliance interests in land distributed under the Court's interpretation of Mexican cession treaty would make a reversal unfair and costly)).

(192) Id. at 869

(193) Id. at 855. Because Roe simply prohibits states from banning all abortions, it is not too difficult to determine laws that run afoul of such a rule.

(194) Id. at 856. (195) Id. The Court observed through the 20 years of subsequent abortion cases, the main holding of Roe was always expressly affirmed. Id.

(196) Id. at 857 (citing Moore v. East Cleveland, 431 U.S. 494 (1977) (striking down ordinance restricting occupancy in a zoned area to nuclear family members only)).

(197) Id. (citing Cruzan v. Department of Health, 497 U.S. 261 (1990) (recognizing in broad terms a right to bodily integrity and a right to die)).

(198) Id. at 860.

(199) Id.

(200) Imbler v. Pachtman, 424 U.S. 409, 431 n.33 (1976) ("Drawing a proper line between these functions [prosecutive, administrative, or investigative! may present difficult questions but this case does not require us to anticipate them.").

(201) Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2615 (1993).

(202) Cf. id. at 2615-17; see Hill v. City of New York, 45 F.3d 653, 662 (2d Cir. 1995).

(203) Swift & Co. v. Wickham, 382 U.S. 111, 124-25 (1965); see supra notes 173-76 and accompanying text.

(204) See, e.g., Lemmons v. Morris & Morris, 39 F.3d 264, 266 (10th Cir. 1994) (finding that when a prosecutor blocked inmate testimony he acted in an administrative function and was not entitled to absolute immunity); Giuffre v. Bissell, 31 F.3d 1241, 1254 (3d Cir. 1994) (holding that a prosecutor acts in an administrative role while advising officers who benefitted from property forfeiture when no charges are pending and no judicial oversight is available).

(205) See, e.g., Rodrigues v. City of New York, 602 N.Y.S.2d 337, 341 (App. Div. 1993) (holding that attempts at extortion by entrapment, the issuance of numerous grand jury subpoenas when one was not convened, and press-leaks to media of false information to compel plaintiff to cooperate fell outside prosecutor's authority and is not protected by absolute immunity).

(206) See, e.g., Eisenberg v. District Attorney, 847 F. Supp. 1029, 1037 (E.D.N.Y. 1994) (finding such a policy is prosecutorial and not administrative).

(207) See, e.g., Field v. Kitron, 856 F. Supp. 88, 95 (D. Conn. 1994) (holding that attorney general's communications about consumer fraud case was an attempt to reach potential witnesses and therefore an act preparatory to a judicial proceeding and protected by absolute immunity).

(208) See, e.g., Pusey v. City of Youngstown, 11 F.3d 652, 657 (6th Cir. 1993) (holding prosecutor's decision not to tell murder-victim's family he was reducing suspect's charges was within his function as advocate), cert. dewed, 114 S. Ct. 2742 (1994).

(209) Moore v. Valder, 65 F.3d 189, 194 (6th Cir. 1995) (holding that coercing or intimidating witness into changing testimony was not advocacy and, therefore, not absolutely immunized conduct).

(210) Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2624 (1993) (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy indicated:

the primary question, one which I have confidence the federal courts are

able to answer with some accuracy, is whether a prosecutor was acting as

an advocate, an investigator, or an administrator when he took the actions

called into question in a subsequent [sections] 1983 action. As long as

federal courts center their attention on this question, a concern that

prosecutors can disguise their investigative and administrative actions

as early forms of advocacy seems to be unfounded.

Id. Compare id. at 2625 ("In recognizing a distinction between advocacy and investigation, the functional

approach requires the drawing of difficult and subtle distinctions, and I understand the necessity for a workable standard in this area.").

(211) Swift & Co. v. Wickham, 382 U.S. 111, 126 (1965) (discussing whether the court should correct the Kesler problem by permitting all suits to enjoin enforcement of a state statute to go before a three-judge panel, or precluding the "supremacy clause" as a sole basis for invoking panel review).

(212) Buckley, 113 S. Ct. at 2617.

(213) Id. at 2623 (Kennedy, J., concurring in part and dissenting in part).

(214) See Model Code of Professional Responsibility EC 7-13 (1980). The rules of Professional Responsibility urge prosecutors to be both investigator and advocate at all times. Id. The Model Code indicates that "a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused." Id.

(215) Buckley, 113 S. Ct. at 2623 (Kennedy, J., concurring in part and dissenting in part).

(216) 304 U.S. 64 (1938), overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

(217) Id.

(218) Imbler v. Pachtman, 424 U.S. 409, 432-33 (1976) (White, J., concurring).

(219) See, e.g., Model Rules of Professional Conduct Rule 3.8 (1983).

(220) Sanders v. English, 950 F.2d 1152, 1162 (5th Cir. 1992) (holding a police lieutenant liable for arrestee's detention for knowingly and willfully withholding from a prosecutor overwhelming exculpatory evidence that would have led to dismissal of the charges); Walker v. Tyler County Comm'n, 886 F.Supp. 540 (N.D. W. Va. 1995) (holding that medical examiner, who withheld exculpatory materials from defense despite state laws requiring disclosure of such evidence, could not claim either absolute or qualified immunity)

(221) See Imbler, 424 U.S. at 446 n.9 (White, J., concurring) (citing Brady v. Maryland, 373 U.S. 83 (1963)).

(222) Id. at 443.

(223) 978 F.2d 362 (7th Cir. 1992), cert. denied, 507 U.S. 1005 (1993).

(224) Id. at 363.

(225) Id. at 364.

(226) Id. at 367.

(227) Id. at 369.

(228) 34 F.3d 257 (4th Cir. 1994), cert. denied, 115 S. Ct. 1101 (1995).

(229) Id. at 260.

(230) Id.

(231) Id. at 259. There was a dispute as to when Burch learned of complainant's previous statements. Id. at 260. He claimed he only learned of the evidence after the conviction. Id.

(232) Id. at 259-60.

(223) Id. at 260.

(234) Id. at 262.

(235) Id.

(236) Id. at 263. Carter's luck did not improve in his suit against Beamer. Though the jury found the investigator liable, it awarded Carter only $1.00 in damages. Id. at 259. The court of appeals surmised that the award was consistent with a finding that Burch was ultimately responsible for withholding evidence, and the jury may have therefore been reluctant to punish Beamer. Id. at 264.

(237) The Houston case took place in Cook County, Illinois, where Chicago is located. The State Attorney's Office has 850 attorneys, and distinct trial and appellate divisions. Telephone Interview with [name withheld], (June 15, 1995). Carter was tried by the States' Attorneys Office in Loudon County, Virginia, where six attorneys handle all phases of a criminal proceeding. Telephone Interview with [name withheld] (June 15, 1995).

(238) Malley v. Briggs, 475 U.S. 335, 343 (1986).

(289) See supra notes 200-11 and accompanying text.

(240) 45 F.3d 653 (2d Cir. 1995). The plaintiff's version of the facts were treated as true because of the procedural posture of the case. Id at 657.

(241) Id. at 657. After hearing her son scream in pain from the bathroom, Ms. Hill found wood particles in her son's feces. Id. (242) Id.

(243) Id.

(244) Id. Ms. Hill's second son was living with her at the time. Id. The younger child showed no signs of abuse and was never examined by the assistant district attorney. Id.

(245) Id.

(246) Id. at 65; 7-58.

(247) Id. at 658.

(248) Id. The prosecutor's recorded statement explained that he had stopped the interview because the boy had grown "somewhat unruly and somewhat uncooperative" due to his age and the lateness of the day. Id. at 658 n.1.

(249) Id. at 658.

(250) Id.

(251) Id.

(252) Id.

(253) Id.

(254) Id.

(255) Id.

(256) Id. at 659.

(257) Id. Ms. Hill's suits against others involved in the taping were ultimately dismissed. Id. at 659, 664.

(258) Id. at 661. The Court did not discuss Ms. Hill's claims against New York City for failing to adequately train the prosecutor. Id.

(259) Id. (citing Robison v. Via, 821 F.2d 913, 918-20 (2d Cir. 1987)).

(260) Id. (citing Burns v. Reed, 500 U.S. 478, 493 (1991)).

(261) Id. (citing Imbler v. Pachtman, 424 U.S. 409, 431 (1976)).

(262) Id. at 662.

(263) Id. at 663.

(264) Id. The Second Circuit stated:

It is impossible, as the district court observed, to determine from the

pleadings alone what function Adago was engaged in when he and the other

defendants videotaped the interview of Joseph Hill. Quite plainly, when it

may not be gleaned from the complaint whether the conduct objected to was

performed by the prosecutor in an advocacy or an investigatory role, the

availability of absolute immunity from claims based on such conduct cannot

be decided as a matter of law on a motion to dismiss.

Id. (citation omitted).

(265) Id. at 664. A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim for which relief can be granted is generally not considered an appealable final order. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

(266) Imbler v. Pachtman, 424 U.S. 409, 425 (1976).

(267) Cf. id. at 425.

(268) Id. at 430-31.

(269) Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2616 (1993).

(270) Id. at 2615; Imbler, 424 U.S. at 431 n.33.

(271) Buckley, 113 S. Ct. at 2624 (Kennedy, J., concurring in part and dissenting in part); see supra note 148 and accompanying text.

(272) Jeffery J. McKenna, Prosecutorial Immunity: Imbler, Burns and Now Buckley v. Fitzsimmons -- The Supreme Court's Attempt to Provide Guidance in a Difficult Area, 1994 B.Y.U. L. Rev. 663, 684-90, 695 (finding the Buckley standard "rational and functional" and concluding that it provides a greater balancing of the needs of both injured citizens and prosecutors).

(273) Buckley, 113 S. Ct. at 2621 (Kennedy, J., concurring in part and dissenting in part); see supra notes 212-17 and accompanying text.

(274) 34 F.3d 257 (4th Cir. 1994); see supra notes 228-36 and accompanying text.

(275) 978 F.2d 362 (7th Cir. 1992); see supra notes 223-27 and accompanying text.

(276) Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992) ("Although Roe has engendered opposition, it has in no sense proven `unworkable,' .. . representing as it does a simple limitation beyond which a state law is unenforceable." (citation omitted)).

(277) Imbler v. Pachtman, 424 U.S. 409, 424 (1976).

(278) See W. Page Keeton et al., Prosser & Keeton on the Law of Torts [sections] 119, at 871 (5th ed. 1984); see also Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2623 (1993) (Kennedy, J., concurring in part and dissenting in part) (observing that "the central component of a malicious prosecution claim is that the prosecutor in question acted maliciously and without probable cause" (citing Wyatt v. Cole, 504 U.S. 158, 172 (1992)).

(279) Buckley, 113 S. Ct. at 2616.

(280) Buckley, 113 S. Ct. at 2623 (Kennedy, J., concurring in part and dissenting in part); Cf. Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992) (observing that Roe's central holding had been expressly affirmed in numerous subsequent abortion cases).

(281) Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

(282) Imbler, 424 U.S. at 418 (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)).

(283) See Griffith v. Slinkard, 44 N.E. 1001 (Inc. 1896).

(284) Imbler, 424 U.S. at 424; see Gregoire v. Biddle, 177 F.2d 579, 580 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950); Cooper v. O'Connor, 99 F.2d 135, 140-41 (D.C. Cir.), cert. denied, 305 U.S. 643 (1938); Anderson v. Rohrer, 3 F. Supp. 367, 367-68 (S.D. Fla. 1933); Pearson v. Reed, 44 P.2d 592, 594-96 (Cal. Dist. Ct. App. 1935); Anderson v. Manley, 43 P.2d 39, 39-40 (Wash. 1935); Restatement of Torts [sections] 656 (1938). Absolute immunity did not become the unanimous rule. See, e.g., Leong Yau v. Carden, 23 Haw. 362, 369 (1916) (immunity for malicious prosecution not available if prosecutors acted with malice and without probable cause); Watts v. Gerking, 228 P. 135, 140-41 (Or. 1924) (holding prosecutor immune for malicious prosecution, but not for subornation of perjury).

(285) Tenney, 341 U.S. at 376.

(286) Cf. Burns v. Reed, 500 U.S. 478, 505 (1991) (Scalia, J., concurring in part and dissenting in part) (recognizing that the absolute immunity extended to prosecutors in Imbler "was not even a logical extrapolation from then-established immunities"). The respondents in Buckley tried to take Justice Scalia to

task on this point by unearthing contemporary treatise discussions of the type of immunity that ought to be available for quasijudicial acts. Respondents' Brief at 41-44, Buckley v. Fitzsimmons, 113 S. Ct. 2606 (1993) (No. 91-7849). However, the best face respondent could put on these dialogues was that "[c]learly, there existed divergent views before 1871 on whether quasijudicial officers had absolute or qualified immunity from personal liability in civil actions stemming from their official duties." Id. at 44. But when one considers the rationale of Tenney, this concession (by biased parties who scoured nineteenth-century case law) irrefutably proves Justice Scalia's argument: absolute immunity for quasijudicial actors was not the norm in 1871, instead it was actually controversial. Thus, it is illogical to presume that despite this evolving debate Congress assumed or even imagined absolute immunity would be the rule for prosecutors when it passed section 1983.

(287) Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2613 (1993) (stating that "we have applied a `functional approach' which looks to `the nature of the function performed, not the identity of the actor who performed it'" (quotation omitted)).

(288) See Tower v. Glover, 467 U.S. 914, 920 (1984); see also infra notes 298-304 and accompanying text.

(289) See, e.g., Forrester v. White, 484 U.S. 219, 229-30 (1988) (holding that in employment matters, the historic justification for absolute judicial immunity was not present, and immunizing this misconduct ran afoul of the purposes of section 1983).

(290) 438 U.S. 478, 508 (1978). (291) Id. at 511-13.

(292) 435 U.S. 349 (1978).

(293) Id. at 362.

(294) Id. at 355-56.

(295) Id. at 363.

(296) 457 U.S. 731 (1982).

(297) Id. at 744-50.

(298) Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982). The Court noted that those unelected officials wielded greater power with little formal restraints or checks, which increased the need for the section 1983 remedy. Id. (citing Butz v. Economou, 438 U.S. 478, 506 (1978)).

(299) 467 U.S. 914 (1984).

(300) Id. at 916.

(301) Id. at 922.

(302) Id. at 920 (citing Pulliam v. Allen, 466 U.S. 522, 529 (1984); Imbler v. Pachtman, 424 U.S. 409, 421 (1976)).

(303) Id.

(304) Id. at 921-22 (citing Baker v. Humphrey, 101 U.S. 494 (1879); Hoopes v. Burnett, 26 Miss. 428 (1853)). On the paucity of opinions, the Court noted that "few state appellate courts have addressed the

question of public defender immunity." Id. at 922. This undermined any claim that absolute immunity for public defenders was "well-settled" at common law.

(305) Id. at 922-23 (emphasis added).

(306) 475 U.S. 335 (1986).

(307) Id. at 340-41. 308 Id. at 342. Ironically, the Court invoked Imbler as exemplary of its approach:

We reemphasize that our role is to interpret the intent of Congress in

enacting [sections] 1983, not to make a freewheeling policy choice, and that

we are guided in interpreting Congress' intent by the common-law tradition.

In Imbler,... we concluded that at common law `[t]he general rule was, and

is, that a prosecutor is absolutely immune from suit for malicious

prosecution.' ... We do not find a comparable tradition of absolute immunity

for one whose complaint causes a warrant to issue.... While this observation

may seem unresponsive to petitioner's policy argument, it is, we believe, an

important guide to interpreting [sections] 1983. Since the statute on its

face does not provide for any immunities, we would be going far to read

into it an absolute immunity for conduct which was only accorded qualified

immunity in 1871.

Id. (citations omitted) (emphasis in original). (309) Id.

(310) See, e.g., Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2618 (1993) ("Fitzsimmons argues... that policy considerations support extending absolute immunity to press statements ... When as here, the prosecutorial function is not within the advocate's role and there is no historical tradition of immunity on which we can draw, our inquiry is at an end."); Antoine v. Byers & Anderson, Inc., 113 S. Ct. 2167, 2170 (1993) ("Faced with the absence of a common-law tradition involving court reporters themselves, respondents urge us to treat as their historical counterparts common-law judges who made handwritten notes during trials. We find the analogy unpersuasive."); Burns v. Reed, 500 U.S. 478, 498 (1991) (Scalia, J., concurring in part and dissenting in part) ("Where we have found that a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under [sections] 1983.... [B]ecause the presumed legislative intent not to eliminate traditional immunities is our only justification for limiting the categorical language of the statute." (emphasis added)).

(311) Sheldon H. Nahmod, 2 Civil Rights and Civil Liberties Litigation: the Law of Section 1983 [sections] 7.12, at 30 (3d ed. Supp. 1995) (emphasis in original).

(312) Burns, 500 U.S. at 500.

(313) Mitchell v. Forsyth, 472 U.S. 511, 521 (1985). The Court considers quasi-judicial acts those that are both necessary to society but usually leave "a winner [and] at least one loser." Id. This increases the

likelihood of a "sour-grapes" lawsuit. The Court in Mitchell found that an attorney general's decision to authorize illegal wiretaps was not a "quasi-judicial act," but dismissed the suit on basis of qualified immunity. Id. at 520, 524.

(314) 474 U.S. 193 (1985)

(315) Id. at 202 (citing Butz v. Economou, 438 U.S. 478, 512 (1978)).

(316) Id.

(317) Id. at 203.

(318) See infra notes 394-438 and accompanying text.

(319) Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2610-11 (1993) ("Although no additional evidence was obtained in the interim, the indictment was returned in March, when Fitzsimmons held the defamatory press conference so shortly before the primary election.").

(320) Cf. Burns v. Reed, 500 U.S. 478, 496 (1991) (noting the availability of appellate review, deemed in Imbler as a significant check on constitutional abuses, will not restrain out-of-court prosecutorial activities where a suspect is never prosecuted).

(321) Hubbard v. United States, 115 S. Ct. 1754, 1764 (1995) (citations omitted), overruling United States v. Bramblett, 348 U.S. 503 (1955).

(322) Id.

(323) Id. (holding the widespread adoption of the "judicial function exception" to the False Statement Act constituted an "intervening development of law" worthy of displacing the Court's own decision to include misrepresentations to judicial and legislative bodies under the act).

(324) Burns, 500 U.S. at 505 (Scalia, J., concurring in part and dissenting in part) ("While I would not, for the reasons stated above, employ that methodology here [post-1871 common law], the holding of Imbler remains on the books, and for reasons of stare decisis I would not abandon it.").

(325) Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992).

(326) Imbler v. Pachtman, 424 U.S. 409, 424-28 & nn. 23-25 (1976).

(327) Id. at 419 n.14 (quoting Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974)).

(328) Id. at 419 n.13 (citing Scheuer, 416 U.S. at 238-39. In Scheuer, the Court found that a governor and high-state officials were only afforded qualified immunity for putting down a campus disturbance). Scheuer, 416 U.S. 232, 250 (1974).

(329) 457 U.S. 800 (1982).

(330) Id. at 815-18.

(331) Id. at 818 (citations omitted).

(332) Id.

(333) 472 U.S. 511 (1985).

(334) Id. at 527; see 28 U.S.C. [sections] 1291 (1994). The Court has recently explained that only decisions related to whether a rule was clearly established are immediately appealable, and not denials of qualified immunity premised upon a court's finding of a genuine issue of material fact. Johnson v. Jones, 115 S. Ct. 2151, 2156-58 (1995).

(335) Mitchell, 472 U.S. at 526 ("[The Harlow Court refashioned the qualified immunity doctrine in such a way as to `permit the resolution of many insubstantial claims on summary judgment' and to avoid `subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery.'" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982))).

(336) Elder v. Holloway, 114 S. Ct. 1019, 1023 (1994).

(337) 483 U.S. 635 (1987). (338) Id. at 544-45; cf. id. at 647-48 (Stevens, J., dissenting); see Nahmod, supra note 311, [sections] 8.06, at 123.

(339) See Fed. R. Civ. P. 56(c).

(340) See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (reinstating summary judgment against plaintiff who failed to make a sufficient showing of an essential element of her case for which she bore the burden of proof, namely that her husband had come into contact with defendant's asbestos products).

(341) Cf. Jordan v. Jackson, 15 F.3d 333, 340 (4th Cir. 1994).

(342) Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring).

(343) Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163 (1993).

(344) See, e.g., Kimberlin v. Quinlan, 6 F.3d 789, 794 n.8 (D.C. Cir. 1993) (noting that "`heightened pleading' is a misnomer because [it only] requires a greater evidentiary showing rather than enhanced pleading"), vacated on other grounds sub nom., Johnson v. Jones, 115 S. Ct. 2151 (1995); see also Schultea v. Wood, 47 F.3d 1427, 1434 (5th Cir. 1995) (holding pleadings must be "tailored to an answer pleading the defense of qualified immunity").

(345) See, e.g, Cleavinger v. Saxner, 474 U.S. 193, 207-08 (1985).

We likewise are not impressed with the argument that anything less than

absolute immunity will result in a flood of litigation and in substantial

procedural burdens and expense for [prisoner disciplinary hearing]

committee members. This argument, too, has been made before. But this

Court's pronouncements in Narlow v. Fitzgerald place the argument in

appropriate perspective, for many cases may be disposed of without the

necessity of pretrial discovery proceedings . . . [a]nd any expense of

litigation largely is alleviated by the fact that a Government official

who finds himself as a defendant in litigation of this kind is often

represented, as in this case, by Government counsel.

Id. (citations omitted).

(346) Burns v. Reed, 500 U.S. 478, 494 n.8 (1991) (emphasis added) (citing Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976)).

(347) Hill v. City of New York, 45 F.3d 653 (2d Cir. 1995).

(348) Malley v. Briggs, 475 U.S. 335, 341 (1986).

(349) Imbler v. Pachtman, 424 U.S. 409, 424-25 (1976).

(350) 114 S. Ct. 2364 (1994).

(351) Id. at 2372 (citation omitted).

(352) The Court gave the following as an example:

A state defendant is convicted of and sentenced for the crime of

resisting arrest, defined as intentionally preventing a peace officer from

effecting a lawful arrest . . . He then brings a [sections] 1983 action

against the arresting officer, seeking damages for violation of his Fourth

Amendment right to be free from unreasonable seizures. In order to prevail

in this [sections] 1983 action, he would have to negate an element of the

offense of which he has been convicted. Regardless of the state law

concerning res judicata . . . the [sections] 1983 action will not lie.

Id. at 2372 n.6.

(353) Stone v. Powell, 428 U.S. 465 (1976).

(354) 372 U.S. 391 (1963)

(355) Wainwright v. Sykes, 433 U.S. 72, 77 (1977).

(356) Bator et al., supra note 18, at 1476. The Court has also acted to reduce successive petitions of new claims. McCleskey v. Zant, 499 U.S. 467 (1991) (holding failure to raise claim in earlier habeas corpus petition would be excused only upon showing cause and prejudice or to prevent a "fundamental miscarriage of justice").

(357) Richard Faust et al., The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate, 18 N.Y.U. Rev. L. & Soc. Change 637, 680 (1990-91) (finding only about a three to four percent success rate).

(358) See FED. R. Civ. P. 11 advisory committee's note (stating that "[t]he new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule.

The standard is one of reasonableness under the circumstances. . . . [It] is more stringent that the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation").

(359) Id. at [sections] 11(c)(2)(B). Subdivision (c)(2)(B) requires imposition of sanctions occur before a voluntary dismissal. These changes do not disable Rule 11 sanctions from deterring frivolous suits, but instead should prevent frivolous and vexatious litigation of sanctions and counter-sanctions.

(360) Imbler v. Pachtman, 424 U.S. 409, 425 (1976).

(361) Id. at 425-26.

(362) See Alexander v. Alexander, 706 F.2d 751 (6th Cir. 1983).

(363) Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

(364) 365 U.S. 167 (1961).

(365) Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978).

(366) Owen v. City of Independence, 445 U.S. 622, 638 (1980).

(367) 489 U.S. 378 (1989).

(368) Id. at 390.

(369) See Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991) (holding that a county district attorney's long practice of ignoring evidence of police misconduct and sanctioning and covering up wrongdoing could make the county liable); Claude H. v. County of Oneida, 626 N.Y.S.2d 933 (App. Div. 1995) (holding that district attorney's command that plaintiff be unlawfully arrested could support action against county for false imprisonment).

(370) 974 F.2d 293 (2d Cir. 1992), cert. denied, 507 U.S. 961 (1993).

(371) Id. at 294 ("Plaintiff James Walker spent nineteen years in prison for a crime that it now appears he did not commit.").

(372) Id. at 295.

(373) Id.

(374) Id. Not only did Zsuffa not disclose this identification evidence, but at a preliminary hearing he denied under oath that a lineup ever took place. Id.

(375) Id. at 294.

(376) Id. at 299-300. The court found (1) the district attorney knew ADA's would acquire Brady material; (2) training would have helped ADA's in dealing with such evidence; and (3) failing to turn over Brady material will normally lead to a constitutional violation. Id .; accord City of Savannah v. Wilson, 447 S.E.2d 124, 126 (Ga. Ct. App. 1994) (upholding trial court's finding that inadequate district attorney's guidelines as to Brady amounted to "follow the law," and were therefore inadequate).

(377) Cf. Patterson v. McLean Credit Union, 491 U.S. 164, 174 (1989) (finding that Runyon was "entirely consistent" with societal notions of the elimination of racial discrimination).

(378) See 42 U.S.C. [sections] 1988 (1994).

(379) Imbler v. Pachtman, 424 U.S. 409, 426 (1976).

(380) Id. at 415-16.

(381) Briscoe v. LaHue, 460 U.S. 325, 345-46 (1983).

(382) John Townshend, Seander and Libel 357-67 (2d ed. 1872).

(383) Id. at 357-58.

(384) The fact that witness immunity covered the most likely source of suits against prosecutors -- claims they suborned perjury -- was suggested by Justice White in Imbler, and noted by Justice Scalia in Burns. Imbler, 424 U.S. at 441 (White, J., concurring); Burns v. Reed, 500 U.S. 478, 501 (1991) (Scalia, J., concurring in part and dissenting in part); see supra notes 55-64 and accompanying text.

(385) Imbler, 424 U.S. at 427.

(386) Id. (stating that the focus of reviewing judges "should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment" (emphasis added)). Neither error nor mistakes in judgment resemble the conduct now remaining outside qualified immunity's reach, specifically the "plainly incompetent" or the knowing violation. Malley v. Briggs, 475 U.S. 335, 341 (1986). (387) Imbler, 424 U.S. at 428 n.27.

(388) Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 84-85 (1984).

(389) See, e.g., Hubbert v. City of Moore, 923 F.2d 769, 772-73 (10th Cir. 1991) (holding that a probable cause determination at preliminary hearing is binding for subsequent civil suit under Oklahoma law).

(390) See, e.g., Carter v. Burch, 34 F.3d 257, 265 (4th Cir. 1994) (finding that a judge's letter opinion ordering plaintiff's release on a writ of habeas corpus was hearsay and not within the business records exception), cert. denied, 115 S. Ct. 1101 (1995). Also, as noted in Carter, a judge's balancing of probative value and prejudice by a judge under section 403 of the Federal Rules of Evidence will likely keep these opinions out, which by their very nature are a prejudgment of a case by a higher ranking court. See Nipper v. Snipes, 7 F.3d 415, 418 (4th Cir. 1993)

(391) Heck v. Humphrey, 114 S. Ct. 2364 (1994).

(392) Imbler v. Pachtman, 424 U.S. 409, 436-37 (1976) (White, J., concurring). Justice White stated:

Even the risk that decisions in habeas corpus proceedings will be skewed is

applicable in the case of policemen; and if it supplies a sufficient reason

to extend absolute immunity to prosecutors, it should have been a sufficient

reason to extend such immunity to policemen. Indeed, it is fair to say that

far more habeas corpus petitions turn on the constitutionality of action

taken by policemen than turn on the constitutionality of action taken by

prosecutors.

Id. at 436 n.3.

(393) See id. at 436 n.3 (White, J., concurring). Justice White noted: We simply rely on the ability of federal judges correctly to apply the law to the facts with the knowledge that the overturning of a conviction on constitutional grounds hardly dooms the official in question to payment of a damage award in light of the qualified immunity which he possesses, and the inapplicability of the res judicata doctrine.

Id.

(394) Id.

(395) See, e.g., James Cleary, When the Prisoner Is Innocent, Hum. Rts., Spring 1987, at 42; Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393 (1992); Walter W. Steele, Jr., Unethical Prosecutors and Inadequate Discipline, 38 Sw. L.J. 965 (1984); see also Bennett L. Gershman, Prosecutorial Misconduct [sections] 13.6 (1990).

(396) Richard A. Rosen, Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C. L. Rev. 693, 697 (1987). A similar methodology was used by this author in a search for any new cases, and to follow up those Professor Rosen cited.

(397) Id. In addition to the lack of enforcement, Professor Rosen observed that the move towards "harmless error" analysis for Brady violations has further decreased the chances of reversing a conviction, and thus the deterrent effect of Brady. Id. at 705-08.

(398) Id. at 720.

(399) Id. at 720-31.

(400) 638 P.2d 1311 (Cal. 1982)

(401) Id. at 1314. During a murder trial, Price was asked by defense counsel for a copy of a cabdriver's "trip ticket," after the cabby testified he had picked up the defendant near the crime scene. Id. Price originally told defense counsel he had no such ticket. Id. When Price realized the ticket he had did not coincide with the cab-driver's testimony, he altered the ticket's time and place, photocopied it, destroyed the original, and presented the photocopy to the defense. Id.

(402) Id.

(403) Id. at 1316.

(404) Id. at 1317-18. The California Supreme Court deemed a five year suspension appropriate given Price's record, cooperation, and demonstration of remorse. Id. at 1318. The court noted he had "been under mental and emotional stress for several years because of a heavy caseload and regular work weeks of 57 to 60 hours." Id. at 1315. As countered by the dissent, "[m]ost lawyers live honorably under conditions of stress and contention. It is the very air they breathe." Id. at 1319 (Richardson, J., dissenting).

(405) Virginia State Bar ex ref. Sixth Dist. Comm. v. Read, No. 86-17, at 8 (Cir. Ct. Rockbridge County, Sept. 11, 1989) (unpublished order on file with the Albany Law Review); See Rosen, supra note 396, at 729.

(406) Virginia State Bar, supra note 405, at 3; Rosen, supra note 396, at 729. Sils said that he could testify

that Mesner looked like the man he saw, "but he would also have to say that he was certain the defendant was not the man." Id. (citation omitted).

(407) Virginia State Bar, supra note 405, at 3.

(408) Id. at 3-4.

(409) Id.

(410) Id. at 4.

(411) Id.

(412) Id.

(413) Id. at 8.

(414) Id. at 6.

(415) Id. at 7-8.

(418) Read v. Virginia State Bar, 357 S.E.2d 544, 546 (Va. 1987).

(417) Id.

(418) Id. at 547 (citing United States v. Darwin, 757 F.2d 1193 (11th Cir. 1985), United States v. Behrens, 689 F.2d 154 (10th Cir.), cert. denied, 459 U.S. 1088 (1982); United States v. Stone, 471 F.2d 170 (7th Cir. 1972), cert. denied, 411 U.S. 931 (1973); United States v. Elmore, 423 F.2d 775 (4th Cir.), cert. denied, 400 U.S. 825 (1970)).

(419) Indeed, Read had tried the same gambit on the Bar Disciplinary Committee which unanimously rebuffed the argument:

Counsel's argument is misplaced. It may be appropriate in response to

a defense motion to dismiss for prosecutorial misconduct under the line of

cases out of Brady v. Maryland. . . . But, the trial court's disclosure

order remains in effect as does the continuing obligation of the prosecutor

to comply with it. Moreover, it is equally misplaced in this proceeding

under DR 8-102(A)(4) requiring a prosecutor to disclose all information

required by law.

Virginia State Bar, supra note 405, at 6-7.

(420) The Supreme Court expressly advised that if only one of two eyewitnesses told the prosecutor that the defendant was not the perpetrator, failure of the prosecutor to disclose this statement would require reversal of the conviction. United States v. Agurs, 427 U.S. 97, 112 n.21 (1976) (citation omitted).

(421) See Model Rules of Professional Conduct Rule 3.8(d) (requiring prosecutors to make "timely

disclosure" of Brady information). ABA Standard 3-3.11(a) declares it unprofessional conduct for a prosecutor to "intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity," of Brady material. ABA Standards for Criminal Justice Prosecution Function & Defense Function [sections] 3-3.11(a) (3d ed. 1993) (emphasis added).

(422) Rosen found similarly confounding determinations by bar associations regarding the few other cases where disciplinary action was considered. See Rosen, supra note 396, at 720-31. Gershman's ongoing work on the subject of prosecutorial misconduct also details a complete failure by bar associations to act against prosecutors -- unless a prosecutors dares to "sting" a fellow lawyer. GERSHMAN, supra note 395, at 13-20 (discussing in re Friedman, 392 N.E.2d 1333 (Ill. 1979)). My own search of published cases found 31 cases since 1958 involving the disbarment of prosecutors. Nearly all concerned actions taken after a criminal conviction, such as narcotics offenses or bribery. Of the prosecutors disbarred, only two involved conduct that possibly could give rise to a section 1983 suit, but nothing along the lines of in-court misconduct. See D'Arcy v. New York State Bar Ass'n, 374 N.Y.S.2d 222 (App. Div. 1975) (disbarring a district attorney after conviction for false imprisonment of young women); Stern v. Texas ex rel Ansel, 869 S.W.2d 614 (Text Ct. App. 1994) (holding that prosecutor who disclosed grand jury testimony contradicting public statements made by sheriff violated the law and was subject to statutory removal). Consequently, I share the mildly stated sentiments of Professor Gershman that "[a]lthough bar associations frequently make bold and lofty pronouncements about self-policing and requiring attorneys to conform to the high standards of the profession, a review of their records of disciplining prosecutors for misconduct is disappointing." Gershman, supra note 395, at [sections] 13.9.

(423) No. CR-79-65 (W.D.N.Y. 1979).

(424) Rosen, supra note 396, at 726 (quoting United States v. Brophy, No. CR-79-65 (W.D.N.Y. 1979)).

(425) See Rosen, supra note 396, at 726.

(426) Id. at 726 (quoting Brophy v. Committee on Professional Standards, 442 N.Y.S.2d 818 (App. Div. 1981)). No elucidation of the facts of the Brophy case accompanied the opinion.

(427) Cooney v. Park County, 792 P.2d 1287, 1309 (Wyo. 1990) (Urbigkit, J., dissenting), cert. granted and judgment vacated, 501 U.S. 1201 (1991).

(423) Houston v. Partee, 978 F.2d 362, 369 (7th Cir. 1992), cert. denied, 113 S. Ct. 1647 (1993); see supra notes 220-24 and accompanying text.

(429) West's Legal Directory (June 10, 1993).

(430) Telephone Interview with Illinois Attorney Registration and Disciplinary Commission [name withheld] (June 15, 1995).

(431) Carter v. Burch, 34 F.3d 257, 260 (4th Cir. 1994), cert. denied, 115 S. Ct. 1101 (1995); see supra notes 225-33 and accompanying text.

(432) Telephone Interview with Loudon County District Attorney's Office [name withheld] (June 15, 1995).

(433) Virginia State Bar ex rel Seventh Dist. Comm. v. Burch, Chancery No. 15740 (Loudon Co. Cir. October 17, 1994) (unpublished order on file with the Albany Law Review). The court found the bar "failed to prove by clear and convincing evidence" a violation of a prosecutor's duty to disclose under Rule 8-102(A)(4). Id at 1.

(434) Read v. Virginia State Bar, 357 S.E.2d 544 (Va. 1987). See supra notes 405-22 and accompanying

text.

(436) In re Read, No. 94-080-0771; 0842 (Va. State Bar Disciplinary. Comm., 6th Dist. March 25, 1994). According to the order, Read suffered from a "serious personality disorder which interfered with his capacity to conduct a law practice." He had been suspended from practice for three years for making unwanted sexual advances against his clients from 1979 through 1984 and for an unnamed emotional malady. Virginia State Bar, supra note 405.

(436) Hill v. City of New York, 45 F.3d 653, 658 (2d Cir. 1995).

(437) West's Legal Directory (February 19, 1996). Richard Adago joined Hoffinger, Friedland, Dobrish, Bernfeld & Stern, in 1993, within a year after the case against Hill was dismissed. Id.

(438) Id. The case against Adago is still pending. Mr. Adago's attorney denies Hill's allegations, and has stated that Adago was under no legal obligation to turn over the first videotape to Ms. Hill any sooner than he did, because it was not exculpatory Brady evidence but merely an inconsistent statement by the victim. Deborah Pines, Court Refuses to Dismiss Claims Against Child Abuse Prosecutor, N.Y. L.J. Jan. 19, 1995, at 1.

(439) Monell v. Department of Social Servs., 436 U.S. 658, 700 (1978).

(440) Id. at 717 (Rehnquist, J., dissenting).

(441) Imbler v. Pachtman, 424 U.S. 409, 416 (1976) (observing that the gravamen of Imbler's complaint was that Pachtman intentionally and negligently allowed Costello to give false testimony).

(442) Id. This claim concerned the alleged suppression of a fingerprint expert. Id. at 414-15.

(443) Id. Imbler claimed that Pachtman prosecuted him even though Pachtman knew that Imbler had passed a lie detector test, and that a police artist altered a suspect sketch drawn shortly after the crime to more closely resemble Imbler. Id.

(444) Heck v. Humphrey, 114 S. Ct. 2364, 2372 (1994).

(445) Cf. Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75, 84-85 (1984).

(446) See supra note 381 and accompanying text.

(447) See supra notes 124-38 and accompanying text; see also Hill v. City of New York, 45 F.3d 653, 662 (2nd Cir. 1995) (noting prosecutorial immunity still reaches Brady claims).

(448) Some states have res judicata rules that would bind all parties to the probable cause determination made below. See, e.g., Hubbert v. City of Moore, 923 F.2d 769, 772-73 (10th Cir. 1991) (holding that probable cause determination at preliminary hearing binds subsequent civil suits under Oklahoma law). As always with collateral estoppel, the arrestee turned plaintiff must have had a full and fair opportunity to litigate the probable cause issue, including the chance "to present evidence, review evidence the prosecution presented, and cross-examine the witnesses against her." Id. at 773. If the trial court finds no genuine issue of fact existed as to the "full and fair opportunity," preclusion is permitted.

(449) Imbler v. Pachtman, 424 U.S. 409, 413 (1976) (quotation omitted).

(450) Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991).

(451) See Earl Maltz, The Nature of Precedent, 66 N.C. L. Rev. 367, 368-72 (1988).

(452) Imbler, 424 U.S. at 431.

(453) See, e.g., Ky. Rev. Stat. Ann. [sections] 15.753 (Baldwin 1994). This statute is entitled and pertains to "Indemnification From Financial Loss in Legal Actions for Attorney General, Commonwealth's Attorneys, County Attorneys, and Their Staffs." Id.

(454). See, e.g., Conn. Gen. Stat. Ann. [sections] 53a-155 (West 1995) (making it a class D felony to alter, destroy or fabricate evidence believed to be used before an official proceeding); accord Fla. Stat. Ann. [sections] 918.13 (West 1995) (declaring that "[t]ampering with or fabricating physical evidence" is a felony of the third degree); N.J. Stat. Ann. [sections] 2C:28-5 (West 1995) (noting that tampering with witnesses is a second degree crime).

(455) Buckley v. Fitzsimmons, 113 S. Ct. 2606, 2620 (1993) (Scalia, J., concurring); Buckley v. Fitzsimmons, 919 F.2d 1230, 1244 (7th Cir. 1990).

(456) Buckley, 113 S. Ct. at 2620.

(457) 475 U.S. 335, 339 (1986); see also DeLoach v. Bevers, 922 F.2d 618, 621 (10th Cir. 1990) (holding officer who suppressed exculpatory medical evidence could not "hide behind the decisions of others" to prosecute the case), cert. denied, 502 U.S. 814 (1991), Robinson v. Maruffi, 895 F.2d 649, 655-56 (10th Cir. 1990) (holding police officers who conspire to give false evidence against person who is later indicted and forced to go to trial cannot claim the grand jury provided an intervening cause for plaintiff s harms); Dick v. Watonwan County, 562 F. Supp. 1083 (D. Minn. 1983) (finding county welfare agents who presented false and misleading evidence before judge who routinely grants their orders could not claim a break in the causal chain, and may still be liable), rev'd on other "rounds 738 F.2d 939, 1098-1104 (8th Cir. 1984).

(458) Buckley, 113 S. Ct. at 2617. The Court stated:

A prosecutor may not shield his investigative work with the aegis of

absolute immunity merely because, after a suspect is eventually arrested,

indicted, and tried, that work may be retrospectively described as

`preparation' for a possible trial; every prosecutor might then shield

himself from liability for any constitutional wrong against innocent

citizens by ensuring that they go to trial.

Id.

(459) Buckley, 113 S. Ct. at 2623 (Kennedy, J., concurring in part and dissenting in part).

(460) Anthony v. Baker, 955 F.2d 1395, 1399 (10th Cir. 1992) (finding complaining witnesses who presented false evidence to a grand jury did not enjoy absolute immunity either before or after 1871); White v. Frank, 855 F.2d 956, 961 (2nd Cir. 1988) (distinguishing between the completely immunized tort of giving false testimony and the qualifiedly immunized tort of a complaining witness initiating a baseless prosecution). Resolution of whether a party was a "lay witness" entitled to absolute immunity or a "complaining witness" would be required, but this inquiry has long since been part of a malicious

prosecution claim. Anthony, 955 F.2d at 1399 n.2.

(461) J San Filippo v. United States Trust Co., 737 F.2d 246, 254-56 (2nd Cir. 1984), cert. denied, 470 U.S. 1035 (1985); See Jennifer S. Zbytowski, The Case Against Section 1983 Immunity For Witnesses Who Conspire With A State Official to Present Perjured Testimony, 93 Mich. L. Rev. 2192, 2208-16 (1995) (examining the common law history of witness immunity and finding that in 1871 conspiring to present perjured testimony would not have been immune conduct).

(462) See, e.g., Sanders v. English, 950 F.2d 1152 (5th Cir. 1992); Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985); Singleton v. City of New York, 632 F.2d 185 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981); Morrison v. Jones, 551 F.2d 939 (4th Cir. 1977).

(463) See, e.g., Cloutier v. Town of Epping, 714 F.2d 1184 (1st Cir. 1983); Martin v. King, 417 F.2d 458 (10th Cir. 1969).

(464) Albright v. Oliver, 114 S. Ct. 807 (1994).

(465) The Second Circuit recently summarized the lower court's reception of the Albright decision:

We are not alone in our reluctance to take on Albright. Many other

circuits have similarly avoided addressing the impact of Albright on their

extant malicious prosecution law when it was plain that a plaintiff could

not have satisfied pre-Albright requirements, which were not clearly done

away with by Albright.

Pinaud v. County of Suffolk, 52 F.3d 1139, 1154 n.15 (2d Cir. 1995) (citations omitted).

(466) Siegert v. Gilley, 500 U.S. 226, 231 (1991) (holding that when a defendant asserts qualified immunity the court should first inquire whether the complaint asserts a violation of Constitutionally protected rights).

(467) No one could better testify about the absurdity of deciding the immunity question before deciding if there is a cognizable claim than Stephen Buckley. After three trips to the court of appeals and two to the Supreme Court, Buckley eventually achieved little in his lawsuit against the prosecutors who allegedly framed him. On remand, the district court dismissed Buckley's false arrest claim against the prosecutors because he based the claim on a substantive Due Process argument not supported in Albright. Buckley v. Fitzsimmons, No. 88C-1939, 1996 WL 10899 (N.D. Ill. Jan. 9, 1996). As the arrest was secured by a warrant, the court found that no liability could lie with the prosecutor for the extensive pre-trial detention. Id. at *3.

(468) See Cleary, supra note 395, at 44-46 (discussing those laws, their narrow application, and their small compensations).

(469) United States v. Modica, 663 F.2d 1173, 1185 (2d Cir. 1981), cert. denied, 456 U.S. 989 (1982).

(470) See Jon O. Newman, How to Protect Other Rodney Kings, N.Y. Times, May 1, 1992, at 35. Jon Newman, the Chief Judge of the Second Circuit, observed that criminal prosecution of civil rights abusers is an inadequate deterrent because of "the inevitable reluctance of the ordinary citizen to brand a law enforcement officer as a criminal . . . even if they think he acted improperly." Id; see also Petitioner's Brief at 30, Buckley v. Fitzsimmons, 113 S. Ct. 2606 (1993) (discussing several Illinois cases where serious

instances of prosecutorial abuse went unprosecuted).

(471) Imbler v. Pachtman, 424 U.S. 409, 428 (1976) (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949), cert. denied, 339 U.S. 949 (1950)).

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http://www.victimsofthestate.org/CA/indexLA.html

Los Angeles County, CA	Paul Kern Imbler	Jan 4, 1961
Paul Kern Imbler was convicted of the shooting murder of Morris Hasson. Hasson was the owner of the Purity Market on West Eighth Street in Los Angeles. The conviction was due to prosecutorial concealment of exculpatory evidence and police manufacturing of evidence. Imbler was sentenced to death, but he was granted a stay of execution 7 days before it was scheduled to take place. After Imbler's exoneration in 1971, he sued the prosecutor for damages, but the U.S. Supreme Court dismissed the suit on the grounds of prosecutorial immunity. (*ISI*) (Imbler v. Pachtman) [7/05]		

The Citation to “ISI” is to “In Spite of Innocence” by Michael Radelet, Hugo Adam Bedau and Constance Putnam.

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“Leading the re-examination of the case were Russell Carroll, an investigator with the public defender’s office in Los Angeles, and Dr. LeMoyne Snyder, an associate of Erle Stanley Gardner’s with the Court of Last Resort.”

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“And the polygraph evidence used against him was unreliable. Snyder was the father of polygraph testing in police investigations, inaugurating its use in Michigan in 1931. When he finally located the polygraphg test results used by the prosecution against Imbler, he concluded they proved nothing. (Later, a Los Angeles Police Department polygraph expert confirmed Snyder’s judgment.)”

Bad Faith Exception to Prosecutorial Immunity for *Brady* Violations

By Bennett L. Gershman[1]

Introduction: *Imbler v. Pachtman* Thirty-Four Years Later

For those of us who teach and write about the conduct of prosecutors, reading *Imbler v. Pachtman*[2] thirty-four years later is a profoundly disturbing experience. *Imbler* is the linchpin for the doctrine that affords prosecutors absolute immunity from civil liability for actions that violate a defendant's constitutional rights. Despite its revisionist history and dubious policy, *Imbler* is one of the Supreme Court's most durable precedents, having been reaffirmed several times,[3] including as recently as last Term.[4]

The Court in *Imbler* viewed the prosecutor as a "quasi-judicial" official, much like a judge or a grand juror, for whom absolute immunity is vital to protect the judicial process from harassment and intimidation.[5] Thus, according to *Imbler*, when a prosecutor initiates a prosecution and pursues a criminal case, the prosecutor is cloaked with absolute immunity from civil liability to allow the prosecutor to make discretionary decisions fairly and fearlessly without the distraction of a flood of civil lawsuits by disgruntled defendants.[6] The Court acknowledged the hard choice between the evils inherent in either alternative but, quoting Judge Learned Hand, concluded that it is "in the

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[2] 424 U.S. 409 (1976).
[3] *See* Kalina v. Fletcher, 522 U.S. 118 (1997) (reaffirming *Imbler* and holding that prosecutor is protected by absolute immunity for preparing and filing charging documents, but not entitled to absolute immunity for execution of certification for determination of probable cause); Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (reaffirming *Imbler*, but holding that prosecutor is not entitled to absolute immunity in investigating whether boot print at scene of crime was left by suspect, and not entitled to absolute immunity for allegedly false statements made during press conference); Burns v. Reed, 500 U.S. 478 (1991) (reaffirming *Imbler* and holding that prosecutor is absolutely immune for participation in probable cause hearing, but not entitled to absolute immunity for giving legal advice to police).
[4] *See* Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009) (reaffirming *Imbler* and holding that absolute immunity applies to administrative functions of district attorney and chief supervisory prosecutor for allegedly failing to institute supervision and training programs for assistants).
[5] *Imbler*, 424 U.S. at 423–29.
[6] *Id.* at 423–26.

end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[7]

As an open question thirty-four years ago, *Imbler*'s choice to afford prosecutors absolute immunity for advocacy functions was not entirely unreasonable. Although the Court invented a specially tailored common law history for absolute immunity, and concocted a public policy to spare prosecutors from having to defend civil lawsuits, *Imbler*'s accommodation is not without contextual justification. Civil rights litigation thirty-four years ago was much less hospitable to prosecutors; qualified immunity was not nearly as protective of prosecutors as it is today.[8] Moreover, alternative sanctions for misconduct, such as criminal prosecution and professional discipline, were not clearly unavailable or ineffective; the Court was making an educated guess that these checks might serve as an effective deterrent to misconduct.[9] Further, the Court's attempt to classify a prosecutor's conduct into functional categories such as advocacy, investigation, and administration, while not seamless and easily applied, seemed rational. In any event, as the Court acknowledged, these attempts may present close questions requiring line-drawing in future cases.[10] Most importantly, however, the Court did not discuss the larger problem of prosecutorial misconduct, particularly as it relates to the prosecutor's duty to disclose exculpatory evidence; the subject was not nearly as complex and controversial as it is today.[11]

Thus, as the edifice for the doctrine that has spawned hundreds of decisions immunizing prosecutors from civil liability for acts of willful misconduct—misconduct

[7] *Id*. at 428 (quoting Gregoire v. Biddle, 177 F. 2d 579, 581 (2nd Cir. 1949)).
[8] *See infra* notes 186–191 and accompanying text.
[9] *See infra* notes 153–185 and accompanying text.
[10] *See Imbler*, 424 U.S. at 431 n.33.
[11] *See infra* Part I.

that occasionally resulted in innocent defendants being convicted and punished[12]—*Imbler* appears in retrospect to have been a gratuitous experiment in judicial administration, that not only failed to protect the judicial process but skewed the balance of power in the criminal justice system more heavily toward prosecutors.[13] Moreover, by removing a deterrent to abuse of power by prosecutors, *Imbler* encouraged dishonest prosecutors to hit below the belt and discouraged honest prosecutors from doing the right thing. Although *Imbler*'s perverse analysis of incentives and disincentives applies to the conduct of prosecutors across the board, there is one area of prosecutorial misconduct in which *Imbler*'s adoption of absolute immunity for prosecutors applies with special force: the prosecutor's decision to conceal from defendants exculpatory evidence that in some cases could be used to prove the defendant's innocence. That is the subject of this Article: why prosecutors should no longer enjoy absolute immunity from civil liability for deliberately suppressing exculpatory evidence, and why the Supreme Court, or Congress, should create an exception to absolute immunity for the deliberate suppression of exculpatory evidence. As this Article demonstrates, a prosecutor's nondisclosure of exculpatory evidence is the most pervasive type of misconduct, involves misconduct that is the least capable of being discovered and punished, and involves conduct that contributes more than any other type of misconduct to the conviction and incarceration of innocent persons. This Article therefore proposes an exception to *Imbler*'s doctrine of absolute immunity for a prosecutor's deliberate bad faith suppression of exculpatory evidence.

[12] *See infra* note 54 and accompanying text.

[13] Several commentators have proposed abolishing absolute prosecutorial immunity entirely. *See* Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHAR. L. REV. 1 (2009); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53 (2005); Douglas J. McNamara, *Buckley, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to its Absolute Means*, 59 ALB. L. REV. 1135 (1996).

Part I of this Article describes the rule from *Brady v. Maryland*,[14] which requires a prosecutor to provide a defendant with exculpatory evidence that might assist the defendant in obtaining an acquittal, and discusses the ease with which prosecutors are able to evade the rule and the difficulty of enforcing compliance. Part II discusses *Imbler*'s adoption of absolute immunity for prosecutors for conduct related to their advocacy activities and the extension of absolute immunity to a prosecutor who violates his disclosure duty under *Brady*. Part III discusses a prosecutor's accountability for *Brady* violations and examines why, in the absence of civil liability, the other potential sanctions to deter and punish prosecutors for willful violations of *Brady* are insufficient. Part IV argues that in the absence of any meaningful sanctions to make prosecutors accountable for *Brady* violations, either the courts or Congress should adopt a bad faith exception to absolute immunity when prosecutors deliberately violate *Brady*.

I. The *Brady* Rule: Easily Evaded and Virtually Unenforceable

Of all the constitutional rules in criminal procedure that impose limits on a prosecutor's conduct, the rule of *Brady v. Maryland*[15] is unique in many ways. In all other areas of criminal procedure a prosecutor is commanded by the Constitution, statutes, and ethics rules to refrain from striking foul blows.[16] *Brady* alone imposes on the prosecutor a positive duty of fairness. By tempering the prosecutor's traditional role of a zealous advocate with that of a neutral minister of justice, *Brady* promised to transform the U.S. criminal adversary system from a competitive sporting event into a

[14] 373 U.S. 83 (1963).
[15] *Id.*
[16] *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935) (although prosecutor "may strike hard blows, he is not at liberty to strike foul ones"); United States v. Myerson, 18 F.3d 153, 162 n.10 (2d Cir. 1994) (prosecutor has "special duty not to mislead").

more balanced and objective search for the truth.[17] As the Court in *Brady* observed, "society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[18] Further, in all other areas of constitutional criminal procedure in which an error has prejudiced a defendant, it is typically the prosecution that bears the burden of proving that the error was harmless.[19] Under *Brady*, however, it is the defendant who bears the burden to establish that the prosecution's suppression of favorable evidence was harmful.[20] Also, in all other areas of constitutional criminal procedure, the commission of a constitutional error requires the prosecution to meet a much more stringent burden by proving that there is no reasonable possibility that the violation would have altered the

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[17] The prosecutor's *Brady* duty is contained in FED. R. CRIM. P. 16(a)(1)(E)(i) (upon defendant's request, prosecutor must disclose evidence if "the item is material to preparing the defense"). There are widely inconsistent approaches in the U.S. courts as to what constitutes *Brady* evidence, the specific types of information required to be disclosed, when it must be disclosed, and the sanctions for noncompliance. *See* LAURAL L. HOOPER ET AL., FED. JUDICIAL CTR., TREATMENT OF BRADY V. MARYLAND MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES (2004), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/BradyMat.pdf/$file/BradyMat.pdf. Rule 16 does not explicitly require a prosecutor to disclose all exculpatory information to the defense. In 2006, the Advisory Committee on the Rules of Criminal Procedure voted eight to four to forward an amendment to the Standing Committee on Rules of Practice and Procedure recommending an amendment to Rule 16 requiring a prosecutor to disclose to the defense all exculpatory information. *See* Advisory Committee on Criminal Rules, Minutes from Teleconference (Sept. 5, 2006), *available at* http://www.uscourts.gov/rules/Minutes/CR09-2006-min.pdf. The Department of Justice strongly opposed the amendment and argued that changes in the United States Attorneys' Manual dealing for the first time with a prosecutor's disclosure obligations and establishing guidelines for disclosure would make such an amendment unnecessary. *See* U.S. Dep't of Justice, United States Attorneys' Manual 9-5.000 (2010), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm. *But see* United States v. Jones, 620 F. Supp. 2d 163, 171 (D. Mass. 2009) (noting that the change in the U.S. Attorneys' Manual "was not an unprompted effort by the Department of Justice to address a problem that it perceived and acknowledged" but "part of an ardent and, to date, successful effort of the Department to defeat a possible amendment to the Federal Rules of Criminal Procedure").

[18] *Brady*, 373 U.S. at 87. *Brady* elaborated on this theme, alluding to the inscription on the walls of the Justice Department: "The United States wins its point whenever justice is done its citizens in the courts." *Id.*

[19] *See* Chapman v. California, 386 U.S. 18, 24 (1967) (harmless error rule "put[s] the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment").

[20] *See* United States v. Bagley, 473 U.S. 667, 685 (1985) (White, J., concurring) ("I agree with the Court that respondent is not entitled to have his conviction overturned unless he can show that the evidence withheld by the Government was 'material'"); *id.* at 701 (Marshall, J., dissenting) (criticizing standard that requires defendant to "shoulder the heavy burden of proving how [the undisclosed evidence] would have affected the outcome").

verdict.[21] When a prosecutor violates due process by suppressing evidence under *Brady*, however, the defendant must prove that had it not been for the prosecutor's suppression, there is a reasonable probability that the jury's verdict would have been different.[22] A reasonable probability, according to the Court, is a probability "sufficient to undermine confidence in the outcome."[23]

Rather than producing a fundamental change in the criminal justice system, however, *Brady* became an illusory protection that is easily evaded and virtually unenforceable.[24] *Brady* represents a contradiction within the operation of the U.S. criminal adversary system. The prosecutor is at once encouraged to be a zealous advocate charged with the responsibility of winning convictions against people who break the law, but at the same time is encouraged to be a neutral minister of justice with the duty to provide the defendant with exculpatory evidence that might assist the defendant in obtaining an acquittal.[25] Although *Brady* does not require a prosecutor to provide the defense with open-ended discovery,[26] *Brady* does require a prosecutor to sift

[21] *See* Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963) ("The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."); *Chapman*, 386 U.S. at 24 ("There is little, if any, difference between our statement in *Fahy v. State of Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.").

[22] *Bagley*, 473 U.S. at 682 ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

[23] *Id.*

[24] *See* Stephanos Bibas, *The Story of* Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 154, 154 (Carol S. Steiker ed., 2006) ("Ultimately, though, our proceduralized adversarial model has rendered *Brady*, if not a dead letter, not a very vigorous one either. Judges are too weak, prosecutors are too partisan, enforcement is too difficult, discovery is too limited, and plea bargains are too widespread for *Brady* to influence many cases. *Brady* remains an important symbol but in some ways a hollow one.").

[25] *Bagley*, 473 U.S. at 696–97 (Marshall, J., dissenting) ("[F]or purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case.").

[26] *See* United States v. Agurs, 427 U.S. 97, 106 (1976) (prosecutor has "no duty to provide defense counsel with unlimited discovery"). *But see* Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1522 (2000) ("Some defense attorneys are fortunate to practice in jurisdictions that have 'open-file' discovery practices and thus receive the material early in the case.").

through her files in a conscientious effort to identify any favorable evidence that might assist in proving a defendant's innocence. Given "this obviously unharmonious role" for a prosecutor,[27] *Brady* exemplifies a remarkable faith of the Supreme Court in the capacity of prosecutors to subordinate their moral values, personal biases, and competitive instincts to the overriding objective of the pursuit of truth in the service of justice. When prosecutors "play the game to win," as they typically do,[28] carefully analyzing the evidence, reexamining the hypothesis of guilt, and identifying defects and inconsistencies are undertaken not by "minister[s] of justice,"[29] but by ardent partisans who keep score of their convictions, are motivated by the rewards of winning, and are unlikely to sacrifice the conviction of guilty defendants to an abstract principle of justice. The *Brady* rule runs counter to these considerations.

Brady's counter-intuitiveness is based not only on general observations of the interests and incentives of a prosecutor within the criminal adversary system; *Brady* compliance also runs counter to more nuanced considerations of the psychology of a prosecutor preparing for adversarial combat. Any prosecutor preparing for trial almost certainly believes the defendant to be guilty and has assembled a cache of evidence to prove the defendant's guilt. There may be evidence in the government's files that

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[27] *Bagley*, 473 U.S. at 697 (Marshall, J., dissenting).

[28] *See* Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 289–90 (2001) (observing that prosecutors readily admit that winning is important and that district attorneys offices keep track of "batting averages" of prosecutors); Ken Armstrong & Maurice Possley, *Trial & Error: Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at N1 (describing prosecutorial culture "where prosecutors recite conviction rates like boxers touting win-loss records").

[29] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1981) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); ABA STANDARDS FOR CRIMINAL JUSTICE: Prosecution Function and Defense Function, Standard 3-1.2(c) (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); NAT'L PROSECUTION STANDARDS § 1.1 (Nat'l Dist. Attorneys Ass'n, 2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished.").

contradicts guilt and that a rational prosecutor may view as favorable to the defendant and subject to *Brady* disclosure, but a rational prosecutor who has carefully analyzed her proof in preparation for trial reasonably might view this contradictory evidence as irrelevant, unpersuasive, or unreliable and certainly not of such probative value to reach the high threshold of materiality that is required for disclosure under *Brady*.[30] To be sure, a prosecutor has no discretion under *Brady* to refuse to search for materially favorable evidence, but a prosecutor has unfettered discretion to decide whether any of that evidence must be disclosed. Given the mindset of prosecutors preparing for trial, it is very likely that prosecutors are predisposed to view their disclosure obligations quite narrowly.[31]

Leaving aside intuitive judgments about a prosecutor's mental state and so-called "conviction mentality," it is increasingly recognized by specialists in cognitive psychology that a prosecutor's predisposition is to ignore *Brady*. Experts who study the existence and impact of various cognitive biases on prosecutors recognize that prosecutors ordinarily make professional decisions based on their personal beliefs, values, and incentives, and that these decisions may result in the subversion of justice, even unintentionally.[32] These studies have examined the capacity of prosecutors to

[30] *See infra* notes 39–48 and accompanying text.

[31] *See* Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 559 (1977) (prosecutors are convinced that the defendant is guilty and view contradictory evidence as "irrelevant or petty incongruity"); Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 690 n.24 (2006) (citing anecdotal evidence confirming prosecutors' restrictive view of *Brady* obligation). For a recent example of this prosecutorial mindset in a highly publicized prosecution of a United States Senator, see Transcript of Hearing on Motion to Dismiss at 4–7, United States v. Stevens, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 08-231 (EGS)). The district judge identified at least twelve instances where the prosecution team "was caught making false representations and not meeting its discovery obligations." *Id.* As the court listed the violations, it noted the government's responses: "testimony was immaterial"; government acted in "good faith"; "just a mistake"; "mistaken understanding"; evidence was "immaterial"; nondisclosure was "inadvertent"; nondisclosure was "unintentional"; documents were "immaterial"; complaint by FBI agent against prosecutors for their misconduct had "no relevancy" and could be adequately addressed by the Office of Professional Responsibility.

[32] *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 296–307 (2006) (describing case studies in tunnel vision by prosecutors that

maintain the neutrality and objectivity that compliance with *Brady* requires and have described the kinds of pressures and biases that operate on virtually all of the discretionary decisions that prosecutors make, including the ability to maintain an open mind.[33] For instance, a prosecutor who is convinced of a defendant's guilt—and what prosecutor is not convinced?—may exhibit so-called "tunnel vision" whereby she ignores, overlooks, or dismisses evidence that might be favorable to a defendant as being irrelevant, incredible, or unreliable.[34] Similar kinds of cognitive biases that operate on a prosecutor's decision-making include "confirmation bias" that credits evidence that confirms one's theory of guilt and discounts evidence that disconfirms that theory,[35] "selective information processing" that inclines one to weigh evidence that supports one's belief in the defendant's guilt more heavily than evidence that contradicts those beliefs,[36] "belief perseverance" that describes a tendency to adhere to one's chosen theory even though new evidence comes to light that completely undercuts that theory's evidentiary basis,[37] and "avoidance of cognitive dissonance" under which a person tends to adjust her beliefs to conform to her behavior.[38] All of these biases plainly are impediments to rational decision-making and make it perfectly understandable that a prosecutor, wearing the mantle of a zealous advocate seeking to win a conviction, is likely to overestimate the strength of her case and underestimate the probative value of

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subverted justice).

[33] *See* Alafair S. Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006) (describing prosecutorial decision-making as often "irrational" because of cognitive biases). Having served as a prosecutor for several years, and as a long-time observer of prosecutorial conduct, I am inclined to agree with much of Professor Burke's commentary.

[34] *See* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L. J. 475 (2006); Findley & Scott, *supra* note 32.

[35] *See* Burke, *supra* note 33, at 1594–96.

[36] *Id.* at 1596–99.

[37] *Id.* at 1599–1602.

[38] *Id.* at 1601–02.

evidence that contradicts or undermines her case. This latter evidence is precisely the kind of evidence that a prosecutor is required to identify and disclose under *Brady*.

Finally, apart from the adversarial pressures on prosecutors that discourage *Brady* compliance, compounded by the cognitive biases that make compliance even more unlikely, the judiciary's permissive interpretation of the prosecutor's duty under *Brady* affords prosecutors a virtual license to evade *Brady* with impunity. *Brady*, as originally understood, required a prosecutor to make a prospective, pretrial determination as to the probative value of certain evidence in her possession that might be materially favorable to the accused and to immediately disclose that evidence.[39] However, this prospective duty of the prosecutor mutated into a retrospective, post-conviction determination by an appellate court as to whether the prosecutor's nondisclosure, in the context of the entire record at trial, makes it reasonably probable that, had the evidence been disclosed, the defendant would have been found not guilty.[40] By adopting this retrospective, post-trial standard to define the scope of the defendant's constitutional right to certain evidence prior to trial, the Court has made it easier for prosecutors to evade their *Brady* duty

[39] *See* United States v. Coppa, 267 F.3d 132, 141 (2d Cir. 2001) (suggesting that Court in *Brady* "appears to be using the word 'material' in its evidentiary sense, i.e., evidence that has some probative tendency to preclude a finding of guilt or lessen punishment").

[40] United States v. Bagley, 473 U.S. 667, 699–700 (1985) (Marshall, J., dissenting) (*Brady* duty defined "not by reference to the possible usefulness of the particular evidence in preparing and presenting the case, but retrospectively, by reference to the likely effect the evidence will have on the outcome of the trial"). *See Coppa*, 267 F.3d at 142:

> The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made. To put it another way, *Bagley* makes the *extent* of the disclosure required by *Brady* dependent on the anticipated *remedy* for violation of the obligation to disclose: the prosecutor must disclose evidence if, without such disclosure, a reasonable probability will exist that the outcome of a trial in which the evidence had been disclosed would have been different
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> (emphasis in original).

simply by claiming that they believed it inconceivable that any evidence they possessed would create a reasonable probability that the defendant would be found not guilty. What rational prosecutor would ever reach such a conclusion?[41] Under this perverse standard of constitutional due process, a prosecutor is encouraged to play games,[42] to "gamble" and "play the odds,"[43] to "bury [his] head[ ]in the sand,"[44] to play "hide" and "seek" with the accused,[45] and require the accused to undertake a scavenger hunt for hidden *Brady* clues.[46] Further emboldening a prosecutor to evade *Brady* with impunity is the knowledge that the undisclosed evidence probably will remain hidden forever,[47] and even

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[41] Consider Professor Scott Sundby's tongue-in-cheek rumination about a hypothetical "ethical" prosecutor's mental process in deciding whether a particular piece of evidence is material under *Brady* and therefore must be disclosed:

> This piece of evidence is so exculpatory in nature that it actually undermines my belief that a guilty verdict would be worthy of confidence. Under *Brady*, therefore, I need to turn this evidence over to the defense. Then, once I turn the evidence over and satisfy my constitutional obligation, I can resume my zealous efforts to obtain a guilty verdict that I have just concluded will not be worthy of confidence.

See Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 McGeorge L. Rev. 643, 653 (2002) (emphsis omitted).

[42] *See* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531 (2007).

[43] *Bagley*, 473 U.S. at 701 (Marshall, J., dissenting) (*Brady* standard of materiality "invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive").

[44] United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990). *See* Gershman, *supra* note 42, at 551 ("The prosecutor's claim of ignorance as an excuse for compliance with *Brady* resembles a defendant's claim of ignorance as an excuse to avoid criminal liability."). *But see* David Luban, *Contrived Ignorance*, 87 Geo. L. J. 957, 976 (1999) ("[I]n legal ethics, unlike criminal law, there is no willful blindness doctrine.").

[45] Banks v. Dretke, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecution may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendant due process.").

[46] *Id*. at 695 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.").

[47] Imbler v. Pachtman, 424 U.S. 409, 443–44 (1976) (White, J., concurring) ("The judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface."); United States v. Alvarez, 86 F.3d 901, 905 (9th Cir. 1996) ("[T]he government's failure to turn over exculpatory information in its possession is unlikely to be discovered and thus largely unreviewable."); United States v. Oxman, 740 F.2d 1298, 1310 (3d Cir. 1984) ("[W]e are left with the nagging concern that material favorable to the defense may never emerge from secret government files."), *vacated sub nom.* United States v. Pflaumer, 473 U.S. 922 (1985). *See also* Elizabeth Napier Dewar, *A Fair Trial Remedy for Brady Violations*, 115 Yale L. J. 1450, 1455 (2006) ("Defendants only rarely unearth suppressions."); Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 Forham L. Rev. 1537, 1579 (2000) (arguing that in most cases "withheld evidence will never see the light of day"); Bibas, supra note 24, at 142 ("Because *Brady* material is hidden in

if the evidence ever does surface, the obstacles to a defendant successfully using it are daunting.[48]

Thus, given a prosecutor's predisposition and incentives to evade *Brady*, it should come as no surprise that *Brady* violations are serious, pervasive, and rarely subject to sanctions of any kind. The ease with which *Brady* evidence may be concealed and kept hidden may lead one to surmise that the documented violations represent only a fraction of the total number of *Brady* violations. Moreover, since no records or statistics are kept by courts, prosecutor offices, or other government agencies of the incidence of prosecutorial misconduct, the effort to document and measure misconduct is difficult. Nevertheless, a large and growing body of empirical and anecdotal evidence exists suggesting that *Brady* violations are the most common type of prosecutorial misconduct.[49] This evidence suggests that violations often occur in the same prosecutor's

prosecutors' and police files, defense lawyers probably will never learn of its existence. Most defendants lack the investigative resources to dig up *Brady* material.").

[48] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (imposing stringent pleading requirements under which plaintiff needs to show that claim is facially plausible and contains sufficient factual content that allows court to draw reasonable inference that defendant is liable for misconduct).

[49] *See* JOHN F. TERZANO ET AL, THE JUSTICE PROJECT, IMPROVING PROSECUTORIAL ACCOUNTABILITY – A POLICY REVIEW 9 (2009) ("Suppression of exculpatory evidence is the most widespread and common form of prosecutorial misconduct.").

office,[50] are often committed by the same prosecutor,[51] occur disproportionately in capital cases,[52] and, tragically, have been a principal cause of convictions of innocent persons.[53]

The documentation of widespread violations of *Brady* is striking. A 1999 national study by the *Chicago Tribune* of 11,000 homicide convictions between 1963 and 1999 found that courts reversed 381 of these convictions for *Brady* violations.[54] Sixty-seven of these defendants had been sentenced to death,[55] many of whom were subsequently exonerated.[56] A 2003 report by the Center for Public Integrity analyzed 11,452 post-1970 convictions that appellate courts reviewed for prosecutorial misconduct and found reversible misconduct in 2,012 cases, the majority of them for *Brady* violations.[57] A 2000 Columbia Law School study of error rates in capital cases found

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[50] *See* STEVE WEINBERG, CTR. FOR PUBLIC INTEGRITY, BREAKING THE RULES: WHO SUFFERS WHEN A PROSECUTOR IS CITED FOR MISCONDUCT? 3-4 (2003) (analyzing 11,451 cases since 1970 in which charges of prosecutorial misconduct were reviewed by appellate courts and finding that in many instances the misconduct occurred in the same office, often by the same prosecutor); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U.D.C. L. REV. 275, 281–282 (2004) (noting seventy-two reported cases of prosecutorial misconduct from the Bronx District Attorney's Office between 1975–1996, eighteen of which involved reversals of convictions based on prosecutorial suppression of exculpatory evidence).

[51] *See* WEINBERG, *supra* note 50, at 3 (study finds many "recidivist prosecutors" around the country had "bent or broken the rules multiple times").

[52] *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995 5 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (noting that prosecutorial suppression of exculpatory evidence accounted for 16% to 19% of reversible errors); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23–24, 57 (1987) (finding that thirty-five of 350 wrongful capital convictions resulted from prosecutorial suppression of exculpatory evidence). Most of the post-*Brady* decisions of the U.S. Supreme Court addressing a prosecutor's nondisclosure of exculpatory evidence occurred in capital cases.

[53] *See* Weinberg, supra note 50, at 2 (noting that in twenty-eight cases involving thirty-two defendants, misconduct by prosecutors, including suppression of exculpatory evidence, led to the conviction of innocent persons); United States v. Jones, 620 F. Supp. 2d 163, 170 (D. Mass. 2009) (noting that "in response to a disturbing number of wrongful convictions resulting in death sentences, in 2002 the Illinois Commission on Capital Punishment recommended that the Illinois Supreme Court 'adopt a rule defining 'exculpatory evidence' in order to provide guidance to counsel in making appropriate disclosures.'"); Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 688 n.18 (2006) (listing several cases in which a prosecutor's suppression of exculpatory evidence led to the conviction of innocent persons).

[54] Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 3.

[55] *Id.*

[56] *Id.* Six months after the *Chicago Tribune* series was published, several more people convicted of murder received new trials based on a finding that prosecutors failed to disclose evidence favorable to the defense. *See* Maurice Possley and Ken Armstrong, *Historic Case Sent Ripples Through Legal Community*, CHI. TRIB., June 6, 1999, at 1.

[57] *See* 1WEINBERG, *supra* note 50, at 2.

that, apart from errors relating to incompetent counsel, the most frequent basis for reversible error in capital cases was *Brady* violations.[58] A report by the California Commission on the Fair Administration of Justice examined 2,130 state cases that raised claims of prosecutorial misconduct over a ten-year period ending in 2006.[59] Misconduct was found in 443 of these cases, or 21 percent. Violations of *Brady* were one of the most common forms of misconduct. An examination by the *Pittsburgh Post-Gazette* in 1998 of over 1,500 cases found that *Brady* violations were pervasive and that courts hardly ever reversed convictions.[60]

In addition to these empirical studies, the widespread incidence of *Brady* violations is also a matter of increasing concern to the courts. Dozens of cases in the federal courts since 2007 have found serious *Brady* violations.[61] In an extraordinary

[58] *See* LIEBMAN ET AL., *supra* note 52, at 5.

[59] See CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON REPORTING MISCONDUCT 3 (2007) ("The most common forms of misconduct found were failing to disclose exculpatory evidence and improper argument.").

[60] *See* Bill Moushey, *Win at All Costs*, PITTSBURGH POST-GAZZETTE, Nov. 24, 1998, *available at* http://www.post-gazette.com/win (study of over 1,500 cases nationwide during past decade found hundreds of cases in which prosecutors intentionally concealed exculpatory evidence).

[61] For recent cases in the U.S. Supreme Court involving *Brady* violations, see Cone v. Bell, 129 S. Ct. 1769 (2009) (remanded for hearing into prosecutor's suppression of evidence regarding seriousness of defendant's drug problem); Youngblood v. West Virginia, 547 U.S. 867 (2006) (suppression of evidence indicating that testimony of key witness was false).

For recent *Brady* cases (not an exhaustive list) in which the Circuit Courts of Appeals granted relief or criticized prosecutors for nondisclosures, see United States v. Robinson, 583 F.3d 1265 (10th Cir. 2009) (nondisclosure of mental health records of confidential informant requires vacating conviction); Simmons v. Beard, 581 F.3d 158 (3d Cir. 2009) (suppression of evidence discrediting key witness violates due process); Montgomery v. Bagley, 581 F.3d 440 (6th Cir. 2009) (suppression of police report undermining credibility of key witness violates due process); United States v. Lee, 573 F.3d 155 (3d Cir. 2009) (nondisclosure of back of hotel registration card suggesting defendant had registered in hotel required vacating conviction); United States v. Burke, 571 F.3d 1048 (10th Cir. 2009) (court greatly concerned that prosecutor's belated disclosure "encourages gamesmanship" and "creates dangerous incentives [to misconduct]" but defendant did not show material prejudice); United States v. Torres, 569 F.3d 1277 (10th Cir. 2009) (failure to disclose that confidential informant had been retained by government on two previous occasions required vacating conviction); United States v. Price, 566 F.3d 900 (9th Cir. 2009) (nondisclosure of extensive criminal history of key government witness requires vacating conviction); Douglas v. Workman, 560 F.3d 1156 (10th Cir. 2009) (suppression of deal with key witness violates due process); United States v. Mauskar, 557 F.3d 219, 232 (5th Cir. 2009) (court "deeply concerned" at prosecutor's belated disclosure of key evidence and at prosecutor's justification which is "beneath a member of the Bar representing the United States before this Court" but defendant failed to prove prejudice); United States v. Gibson, 328 F. App'x 860 (4th Cir. 2009) (new trial ordered on some counts based on prosecutor's discovery violation); Harris v. Lafler, 553 F.3d 1028 (6th Cir. 2009)

decision last May in *United States v. Jones*,[62] United States District Judge Mark L. Wolf castigated the federal prosecutor for her "egregious" *Brady* violation, stating that "this case extends a dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court."[63] Judge Wolf appended appellate and federal district court decisions in which the courts vacated convictions for

(suppression of evidence that key witness promised substantial benefits for his testimony); United States v. Triumph Capital Group, Inc., 544 F.3d 149 (2d Cir. 2008) (new trial ordered based on prosecutor's "inexplicably withholding" material exculpatory and impeachment evidence); United States v. Aviles-Colon, 536 F.3d 1 (1st Cir. 2008) (nondisclosure of DEA reports materially prejudicial and new trial ordered); United States v. Lopez, 534 F.3d 1027 (9th Cir. 2008) (prosecutor's *Brady* violation "troubling" but motion for new trial denied); D'Ambrosio v. Bagley, 527 F.3d 489 (6th Cir. 2008) (suppression of several items of exculpatory evidence that substantially contradicts testimony of state's only eyewitness); United States v. Rittweger, 524 F.3d 171, 180 (2d Cir. 2008) (court "troubled" and "disappointed" by prosecutor's belated disclosure of exculpatory evidence; prosecutor's argument that evidence not material disingenuous but defendant failed to show prejudice); United States v. Chapman, 524 F.3d 1073 (9th Cir. 2008) (prosecutor's "unconscionable," "willful," and "bad faith" violation of discovery obligations and "flagrant" misrepresentations to court justified mistrial); United States v. Zomber, 299 F. App'x 130 (3d Cir. 2008) (prosecutor's discovery violation requires reversal of conviction and new trial); United States v. Garcia, 271 F. App'x 347 (4th Cir. 2008) (prosecutor's failure to disclose key impeachment evidence not prejudicial because defendant's counsel uncovered information day before witness testified); United States v. Butler, 275 F. App'x 816 (11th Cir. 2008) (suppression of impeachment evidence but no new trial); United States v. White, 492 F.3d 380 (6th Cir. 2007) (remanded for hearing on *Brady* violation but court observes that given conflicting statements "United States Attorney's word is worth considerably less"); Jackson v. Brown, 513 F.3d 1057 (9th Cir. 2008) (suppression of evidence of cooperation agreement with key witness); United States v. Jernigan, 492 F.3d 1050 (9th Cir. 2007) (en banc) (prosecutor suppresses evidence that other similar bank robberies were committed by someone after defendant's arrest who bore striking resemblance to defendant); United States v. Garner, 507 F.3d 399 (6th Cir. 2007) (belated disclosure of evidence used to impeach government's key witness violates due process); United States v. Velarde, 485 F.3d 553 (10th Cir. 2007) (suppression of evidence undermining credibility of key witness violates due process); United States v. Rodriguez, 496 F.3d 221 (2d Cir. 2007) (remanded for *Brady* hearing after prosecution witness admits lies in initial interviews and prosecutor seeks to avoid disclosure by not taking notes); Trammel v. McKune, 485 F.3d 546 (10th Cir. 2007) (in theft prosecution, suppression of receipts linking third party to theft violated due process); United States v. Chases, 230 F. App'x 761 (9th Cir. 2007) (no reversal but court admonishes prosecution for "shocking sloppiness" in carrying out its disclosure duty); Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006) (nondisclosure of recantation by key government witness was "blatant" and "so outrageous" as to undermine defendant's guilty plea); United States v. Risha, 445 F.3d 298 (3d Cir. 2006) (suppression of evidence discrediting testimony of key witness violates due process).

For recent cases in the district courts (not an exhaustive list) where relief was granted based on *Brady* violations, see United States v. Shaygan, 661 F. Supp. 2d 1289 (S.D. Fla. 2009); United States v. Stevens, 593 F. Supp. 2d 177 (D.D.C. 2009); United States v. Jones, 620 F. Supp. 2d 163 (D. Mass. 2009); United States v. Fitzgerald, 615 F. Supp. 2d 1156 (S.D. Cal. 2009); Cardoso v. United States, 642 F. Supp. 2d 251 (S.D.N.Y. 2009); Hernandez v. City of El Paso, 662 F. Supp. 2d 596 (W.D. Tex. 2009); United States v. Quinn, 537 F. Supp. 2d 99 (D.D.C. 2008); United States v. Freeman, No. 07-CR-843, 2009 WL 2748483 (N.D. Ill. Aug. 26, 2009) (prosecutor's misconduct in allowing witness's false testimony to materially prejudice defendants requires new trial); Sykes v. United States, 897 A.2d 769 (D.C. 2006).

[62] 620 F. Supp. 2d 163 (D. Mass. 2009).

serious *Brady* violations.[64] In two recent highly-publicized prosecutions—the Duke lacrosse case and the federal trial of then-Senator Ted Stevens—*Brady* violations were discovered that were so serious as to result in the criminal contempt conviction and disbarment of the Duke prosecutor, Michael Nifong,[65] and the vacating of Stevens' conviction by the federal district court, the dismissal of the charges, and the commencing of criminal contempt proceedings against six prosecutors for obstruction of justice.[66] What is so disconcerting about the misconduct by the prosecutors in the Duke lacrosse and Stevens cases is the realization that if a prosecutor is willing to violate *Brady* in a case of such high public visibility and media scrutiny, this suggests that a prosecutor will violate *Brady* with impunity in the thousands of cases involving anonymous and invisible defendants.

II. *Imbler*'s Adoption of Absolute Prosecutorial Immunity

Thirty-four years ago, the issue of whether prosecutors were entitled to immunity from civil liability for *Brady* violations—indeed, whether prosecutors enjoyed any immunity at all for their misconduct—had not been decided by the Supreme Court. *Imbler v. Pachtman* answered these questions. Paul Imbler was convicted in 1961 of robbing and murdering Morris Hasson, the operator of a market in Los Angeles, California, and was sentenced to death.[67] The prosecution's key witness was Alfred

[63] *Id.* at 165.
[64] *Id*. at 185–193.
[65] *See* Duff Wilson, *Hearing Ends in Disbarment For Prosecutor in Duke Case*, N.Y. TIMES, June 17, 2007, at 21; Shaila Dewan, *Duke Prosecutor Is Jailed; Students Seek Settlement*, N.Y. TIMES, Sept. 8, 2007, at A8. *See* Amended Findings of Fact, Conclusions of Law and Order of Discipline, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of the N.C. State Bar July 31, 2007), *available at* http://www.ncbar.gov/Nifong%20Final%20Order.pdf.
[66] *See* Transcript of Hearing on Motion to Dismiss, United States v. Stevens, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 08-231 (EGS)) (district court appoints special prosecutor to investigate and prosecute the matter). *Id.* at p. 46–47.
[67] Imbler v. Pachtman, 424 U.S. 409, 411–12 (1976). An alleged accomplice in the Hasson killing, Leonard Lingo, was himself killed ten days later while attempting a robbery in Pomona, California. A subsequent investigation led by the Los Angeles District Attorney determined that Lingo was involved in the Hasson

Costello, who positively identified Imbler as the gunman.[68] Imbler raised an alibi defense.[69] After the state supreme court affirmed the conviction and sentence, the trial prosecutor, Deputy District Attorney Richard Pachtman, wrote to the Governor of California describing new witnesses who corroborated Imbler's alibi as well as new evidence that undermined Costello's credibility.[70] Imbler thereupon filed a state habeas corpus petition based on this new evidence but, after a hearing, the writ was denied.[71] For unrelated reasons, Imbler's death sentence was overturned.[72] A few years later Imbler filed a federal habeas corpus petition raising the same grounds that were rejected by the state court.[73] Deciding the petition on the written record without holding a hearing, the federal district court found eight instances of misconduct at Imbler's trial whose cumulative effect warranted issuance of the writ.[74]

According to the district court, the misconduct consisted of six instances during Costello's testimony in which the prosecutor elicited false and misleading testimony from

killing and that Imbler killed Hasson.

[68] *Id*. at 412. The prosecution also introduced several other eyewitnesses whose testimony supported Costello.

[69] *Id*. Imbler claimed he spent the night of the killing bar hopping with several persons and that he met Lingo for the first time the morning before the Pomona robbery. A witness corroborated his alibi.

[70] *Id*. Pachtman's letter described newly discovered corroborating witnesses for Imbler's alibi as well as new revelations about Costello's background, which indicated that he was less trustworthy than he had represented originally to Pachtman and in his testimony. The letter was dated August 17, 1962. Imbler's execution, which was originally scheduled for September 12, 1962, was stayed.

[71] *Id.* at 413. A referee was appointed to conduct the hearing at which Costello was the "main attraction." He recanted his trial identification of Imbler and admitted embellishing his background during his trial testimony. The corroborating witnesses uncovered by Pachtman also testified. Imbler's counsel described Pachtman's post-trial investigation as "in the highest tradition of law enforcement and justice" and a premier example of "devotion to duty." However, he also charged that Pachtman knowingly used Costello's false testimony at Imbler's trial. In a thorough opinion by Justice Roger Traynor, the California Supreme Court unanimously rejected these contentions and denied the writ. *See In re* Imbler, 387 P.2d 6, 10–14 (Cal. 1963). The California court agreed with the referee's finding that Costello's recantation lacked credibility compared to his original identification, and that the new corroborating witnesses who testified at the hearing were unreliable. *Id.*

[72] *Imbler*, 424 U.S. at 414.

[73] *Id.*

[74] *See* Imbler v. Craven, 298 F. Supp. 795, 812 (C.D. Cal. 1969).

Costello about "his criminal background, his education, and his current income."[75] Although Pachtman lacked actual knowledge of the falsity, according to the district court, he had "cause to suspect" it.[76] The other two instances of misconduct were suppressions of evidence by a police fingerprint expert who testified at the trial,[77] and by a police investigator who altered an artist's sketch to resemble Imbler more closely.[78] The Ninth Circuit Court of Appeals affirmed, finding that the district court had merely reached different conclusions than the state court in applying federal constitutional standards to the facts.[79] The state chose not to retry Imbler and he was released.[80]

Imbler thereafter filed a civil rights lawsuit under 42 U.S.C. § 1983 against Pachtman and various officers of the Los Angeles police department alleging a conspiracy to deprive him of his liberty in violation of due process.[81] Imbler's complaint essentially tracked the district court's opinion in alleging that Pachtman intentionally and negligently allowed Costello to give false testimony; that Pachtman was chargeable with the fingerprint expert's suppression; that Pachtman knew that a lie detector test had cleared Imbler; and that Pachtman had used at trial the altered artist's sketch.[82] The district court granted Pachtman's motion to dismiss the complaint, holding that public prosecutors repeatedly had been afforded immunity from civil liability for "acts done as part of their traditional official functions."[83] The Court of Appeals for the Ninth Circuit

[75] *Imbler*, 424 U.S. at 414 n.8 (referring to district court's finding that Costello had "lied flatly" about his criminal record, education, and current income).
[76] *Id.*
[77] *Id.* at 414–15.
[78] *Id.* at 415–16.
[79] Imbler v. California, 424 F.2d 631, 632 (9th Cir. 1970).
[80] *Imbler*, 424 U.S. at 415.
[81] *Id.* at 415–16.
[82] *Id.* at 416.
[83] *Id.*

affirmed, finding that Pachtman's acts were committed during prosecutorial activities that were "an integral part of the judicial process."[84]

The Supreme Court granted certiorari to consider the "important and recurring issue of prosecutorial liability" under § 1983 of the Civil Rights Act of 1871.[85] The Court acknowledged at the outset that § 1983, the statutory remedy for the deprivation of constitutional rights caused by an official's abuse of power,[86] contains no immunities for prosecutors.[87] The Supreme Court assumed, however, that Congress did not intend to abrogate all of the immunities that existed at common law, and the Court identified those immunities that were available for certain parties at common law.[88] Thus, according to the Court, absolute immunity was available at common law for judges,[89] legislators,[90]

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[84] Imbler v. Pachtman, 500 F.2d 1301, 1302 (9th Cir. 1974) (quoting Marlowe v. Coakley, 404 F.2d 70 (9th Cir. 1968)).

[85] *Imbler*, 424 U.S. at 417.

[86] *See* Monroe v. Pape, 365 U.S. 167, 172 (1961). Section 1983 of the U.S. Code, originally enacted as part of the Civil Rights Act of 1971, states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> 42 U.S.C. § 1983 (2006).

[87] *Imbler*, 424 U.S. at 417. Indeed, in 1871, when § 1983 was enacted, public prosecutors did not exist in their modern form and criminal prosecutions ordinarily were instituted by private citizens. *See* Kalina v. Fletcher, 522 U.S. 118, 132 (1997) (Scalia, J., concurring) (noting that at common law private citizens typically performed the functions currently delegated to public prosecutors); Burns v. Reed, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in part and dissenting in part) (noting that "prosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial"). It was twenty-five years after the date noted by Justice Scalia that a state court would address for the first time a prosecutor's immunity from civil liability. *See* Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896) (holding prosecutor absolutely immune in civil action alleging that prosecutor maliciously and without probable cause added plaintiff's name to grand jury true bill after grand jury refused to indict plaintiff and which resulted in plaintiff's arrest and incarceration).

[88] *Imbler*, 424 U.S. at 417–-19. The Court cited *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), for the conclusion that "immunities 'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of § 1983."

[89] *Imbler*, 424 U.S. at 418, 423 n.20 ("The immunity of a judge for acts within his jurisdiction has roots extending to the earliest days of the common law.").

[90] *Id.* at 418 ("Regardless of any unworthy purpose animating their actions, legislators were held to enjoy under this statute their usual immunity when acting 'in a field where legislators traditionally have power to

grand jurors,[91] and other government officials such as assessors, highway officers, and members of township boards.[92] In addition, absolute immunity, referred to as "defamation immunity," was available to any person for statements that were made in the course of judicial proceedings.[93] However, absolute immunity was not afforded to other government officials; only a qualified immunity, referred to at common law as "quasi-judicial immunity," was afforded.[94] Qualified immunity was available to government officials such as governors,[95] other executive branch officials,[96] and police officers.[97]

With respect to a prosecutor's immunity at common law, *Imbler* concluded, as had several lower courts, that it was "well settled" that a prosecutor enjoyed absolute immunity when he acted within the scope of his prosecutorial duties.[98] This created inconsistencies within the *Imbler* opinion. Prosecutors are members of the executive branch and, as the Court noted, executive branch officials such as governors and police officers at common law received only qualified immunity.[99] *Imbler* also referred to a prosecutor as a "quasi-judicial" official and, at common law, absolute immunity was not

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act.'") (quoting Tenney v. Brandhove, 341 U.S. at 379).

[91] *Imbler*, 424 U.S. at 423 n.20 (noting that the immunity of grand jurors enjoys "an almost equally venerable common law tenet" as that of judges).

[92] For discussion of these immunities, see *Burns v. Reed*, 500 U.S. at 499–500 (Scalia, J., concurring in part and dissenting in part). According to Justice Scalia, "prosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial (wherefore they are entitled to *qualified* immunity under § 1983)." *Id.* at 500 (emphasis in original).

[93] *Imbler*, 424 U.S. at 426 n.23 ("In the law of defamation, a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding. In the case of lawyers the privilege extends to their briefs and pleadings as well.").

[94] *Id.* at 420, 423 n.20 (referring to grand jurors and prosecutors as "quasi-judicial" officers); *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part) (noting that quasi-judicial immunity afforded an official only qualified immunity); *Kalina*, 522 U.S. at 132 (Scalia, J., concurring) (noting that at common law, the discretionary decisions of public officials that did not involve actual adjudication were protected by "quasi-judicial" immunity, which is "more akin to what we now call 'qualified,' rather than absolute immunity").

[95] *Imbler*, 424 U.S. at 419. *See also* Scheuer v. Rhodes, 416 U.S. 232 (1974).

[96] *Imbler*, 424 U.S. at 419. *See also* Scheuer, 416 U.S. at 247.

[97] *Imbler*, 424 U.S. at 418–19. *See also* Pierson v. Ray, 386 U.S. 547, 555–57 (1967).

[98] *Imbler*, 424 U.S. at 424, 424 n.21 (citing cases).

[99] *Id.* at 418–19.

available to quasi-judicial officials.[100] Nonetheless, *Imbler* emphasized the prosecutor's "functional comparability" to judges and grand jurors to the extent that all of these parties make discretionary decisions on the basis of evidence presented to them in court.[101] Despite these analytical gaps and inconsistencies, *Imbler* extrapolated from the common law two broad categories in which absolute immunity for prosecutors would be available: first, suits for malicious prosecution,[102] and second, suits alleging courtroom misconduct that involves the examination of witnesses and arguments to the jury.[103]

Imbler, however, extended a prosecutor's absolute immunity beyond these two categories. Relying on public policy, *Imbler* reasoned that if a prosecutor was constrained in making "every decision" by the threat of a civil lawsuit, the public trust in the prosecutor's office might be compromised.[104] *Imbler* speculated that lawsuits against prosecutors "could be expected with some frequency,"[105] and as a consequence would divert the prosecutor's energy and attention to her work.[106] *Imbler* further argued, but did not elaborate, that affording prosecutors only qualified immunity would have an adverse effect on the criminal justice system because a prosecutor would face "greater difficulty" in meeting the standard of qualified immunity than other executive or administrative

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[100] *See supra* note 94 and accompanying text.
[101] *Imbler*, 424 U.S. at 423 n.20 ("Courts that have extended the same immunity to the prosecutor have sometimes remarked on the fact that all three officials—judge, grand juror, and prosecutor—exercise a discretionary judgment on the basis of the evidence presented to them. It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well.") (citations omitted).
[102] *Id.* at 422–24.
[103] *Id.* at 426 n.23.
[104] *Id.* at 424–25 ("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.").
[105] *Id.* at 425.
[106] *Id.* ("[I]f 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").

officials.[107] Moreover, a prosecutor might be discouraged from presenting evidence whose accuracy might be questionable, or from making arguments about that evidence, if the use of and arguments about that evidence exposed her to personal liability.[108] In sum, according to *Imbler*, "the ultimate fairness of the operation of the system itself would be weakened by subjecting prosecutors to § 1983 liability."[109]

Although *Imbler* recognized that a genuinely wronged defendant would be without a civil remedy against a malicious and dishonest prosecutor, the *Imbler* Court believed that the alternative would disserve the broader public interest.[110] It surmised that a defendant might even be prejudiced if she were able to pursue a § 1983 lawsuit against a prosecutor because a court that reviewed the prosecutor's conduct might skew its decision to protect the prosecutor from potential civil liability.[111] Moreover, *Imbler* asserted, alternative sanctions to civil lawsuits against prosecutors were available to deter a prosecutor's malicious and dishonest behavior. The availability of criminal charges against a prosecutor,[112] as well as the availability of professional discipline by bar associations,[113] the Court suggested, would "not leave the public powerless."[114] "These checks," said the Court, "undermine the argument that the imposition of civil liability is

[107] *Id.* ("It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials."). The Court noted that prosecutors operate under "serious constraints of time and even information," but did not explain why other executive and administrative officials who receive qualified immunity but who operate under similar constraints would not face the same burdens as prosecutors). *Id.*
[108] *Id.* at 426 (noting that "[t]he veracity of witnesses in criminal cases frequently is subject to doubt," and "[i]f prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence").
[109] *Id.* at 427.
[110] *See supra* note 5 and accompanying text.
[111] *Id.* at 428 (qualifying a prosecutor's immunity "often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice"); *Id.* at 428 n.27 ("consideration of the habeas petition could well be colored by an awareness of potential prosecutorial liability").
[112] *Id.* at 429.
[113] *Id.*
[114] *Id.*

the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime."[115]

Imbler did not demarcate precisely the scope of absolute immunity that it afforded prosecutors. *Imbler* used various formulations to describe the extent of a prosecutor's immunity, stating that absolute immunity would be available for prosecutors in "initiating a prosecution,"[116] "presenting the state's case,"[117] performing activities that are "an integral part of the judicial process,"[118] performing activities that are "intimately associated with the judicial phase of the criminal process,"[119] and performing functions as an "advocate,"[120] although noting that an advocate's duties may also include actions preliminary to the initiation of a prosecution as well as actions outside the courtroom.[121] *Imbler* cautioned that absolute immunity would not necessarily be afforded to prosecutors for administrative and investigative activities and concluded that "[d]rawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them."[122]

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[115] *Id.*
[116] *Id.* at 431, 421.
[117] *Id.* at 431.
[118] *Id.* at 430 (quoting Imbler v. Pachtman, 500 F.2d 1301, 1302 (9th Cir. 1974)).
[119] *Id.* at 430.
[120] *Id.* at 431, 431 n.33.
[121] *Id.* at 431 n.33.
[122] *Id.* The Supreme Court has not decided whether absolute immunity extends to a prosecutor's post-conviction functions, such as prosecuting an appeal, opposing habeas petitions, or reviewing newly discovered evidence. Circuit Courts of Appeal have reached different conclusions. Compare Warney v. Monroe County, 587 F.3d 113 (2d Cir. 2009) (prosecutors entitled to absolute immunity for post-conviction review and testing of DNA evidence) and Carter v. Burch, 34 F.3d 257 (4th Cir. 1994) (absolute immunity for handling direct appeal and post-conviction motions) with Yarris v. County of Delaware, 465 F.3d 129 (3d Cir. 2006) (no absolute immunity unless prosecutor personally involved as state's advocate in post-conviction proceedings) and Houston v. Partee, 978 F.2d 362 (7th Cir. 1992) (no absolute immunity where prosecutor did not personally prosecute appeal). For a discussion on prosecutorial conduct in the post-conviction context, see Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004) (explaining prosecutorial resistance to post-conviction claims of innocence as attributable to personal incentives to maintaining convictions, logistical barriers to confronting innocence claims, and political consequences in responding to such claims).

Imbler did not explicitly address whether absolute immunity extends to a prosecutor who violates his constitutional duty to disclose material exculpatory evidence to a defendant under *Brady v. Maryland*.[123] Imbler's lawsuit against Pachtman was based almost entirely on allegations that Pachtman knowingly allowed a key eyewitness at Imbler's capital murder trial to testify falsely without correcting that testimony.[124] Imbler included counts charging suppression of evidence by the police and claimed that Pachtman was vicariously responsible for that suppression.[125] The Supreme Court discussed Imbler's *Brady* claim in a lengthy footnote at the end of its opinion, largely in response to Justice White's concurring opinion, joined by Justices Brennan and Marshall, which argued against extending absolute immunity to *Brady* violations.[126]

Justice White did not disagree that absolute immunity would be appropriate when a prosecutor is sued civilly for knowingly eliciting and using false testimony to prove a defendant's guilt. Justice White drew this conclusion based on his understanding that a prosecutor's absolute immunity at common law extended to two kinds of lawsuits: suits for malicious prosecution[127] and suits for defamatory remarks made during judicial proceedings.[128] As to the immunity for malicious prosecution, Justice White observed that this immunity was necessary to protect the judicial process because, absent immunity, prosecutors might be afraid to bring proper charges against a defendant for

[123] 373 U.S. 83 (1963).
[124] *Imbler*, 424 U.S. at 416.
[125] *Id.*
[126] *Id.* at 431 n.34.
[127] *Id.* at 438 (White, J., concurring) ("I agree with the majority that, with respect to suits based on claims that the prosecutor's decision was malicious, and without probable cause . . . the judicial process is better served by absolute immunity than by any other rule.").
[128] *Id.* at 440 (noting that function of a judicial proceeding is "to determine where the truth lies," and that those parties involved in judicial proceedings should be encouraged to make full disclosure of all relevant information).

fear of being sued if the defendant was acquitted.[129] As to the immunity for statements made in court, Justice White observed that this immunity was also necessary to protect the judicial process by encouraging those persons involved in judicial proceedings to make complete and candid disclosures of all relevant information without fear of being sued for false and defamatory testimony and arguments.[130] Indeed, Justice White observed that it is precisely the function of a judicial proceeding to determine the truth, and since it is often impossible for attorneys to be absolutely certain of objective truth and falsity, a prosecutor should be given every incentive to submit the testimony of witnesses to the crucible of the judicial process without being subjected to liability based on the claim that he knew or should have known that the testimony of the witness was false.[131]

However, according to Justice White, the majority extended to prosecutors an immunity that was not available at common law: immunity for the suppression of exculpatory evidence.[132] Rather than protecting the judicial process, affording a prosecutor absolute immunity for such conduct in fact undermines the judicial process by removing an incentive to prosecutors to disclose material evidence that is favorable to the defendant.[133] Accusing the majority of an illogical extension of immunity, Justice White explained that whereas it is sensible to afford defamation immunity to prosecutors to

[129] *Id.* at 438 ("If suits for malicious prosecution were permitted, the prosecutor's incentive would always be not to bring charges.").
[130] *Id.* at 439.
[131] *Id.* at 440 ("I agree with the majority that history and policy support an absolute immunity for prosecutors from suits based solely on claims that they knew or should have known that the testimony of a witness called by the prosecution was false."). Justice White appended a clarifying footnote that absolute immunity should not apply to independent claims that the prosecutor withheld facts tending to demonstrate the falsity of the witness's testimony in constitutionally material respects. *Id.* at 440 n.5.
[132] *Id.* at 441 ("I disagree with any implication that the absolute immunity extends to suits charging unconstitutional suppression of evidence.").
[133] *Id.* at 442 ("[O]ne would expect that the judicial process would be protected and indeed its integrity enhanced by denial of immunity to prosecutors who engage in unconstitutional conduct").

encourage prosecutors to elicit all relevant information to assist the fact-finder in arriving at the truth, "it would stand this immunity rule on its head" to apply it to a prosecutor who withholds relevant information from the fact-finder and thereby prevents the fact-finder from arriving at the truth.[134] Thus, according to Justice White, immunizing a prosecutor for not disclosing exculpatory evidence to the defendant encourages nondisclosure and discourages disclosure.[135] Denying immunity to a prosecutor for withholding evidence encourages disclosure and discourages nondisclosure.[136] Justice White acknowledged that denying absolute immunity to a prosecutor for failing to disclose exculpatory evidence might encourage a prosecutor to disclose more evidence than *Brady* required,[137] but such broader disclosure, he argued, "would hardly injure the judicial process."[138] "Indeed, it [would] help it."[139]

Moreover, according to Justice White, constitutional violations that are committed by prosecutors in open court—such as improper summations, introduction of hearsay testimony in violation of the Confrontation Clause, and knowingly presenting false testimony—are clearly integral parts of the judicial process.[140] Justice White suggested that such violations may be corrected by the judicial process. However, in his opinion, there is no way that the judicial process can correct a prosecutor's suppression of exculpatory evidence, for such conduct is hidden from the judicial process and the suppressed evidence may never be discovered.[141] It is therefore all the more important,

[134] *Id.* at 442–43.
[135] *Id.* at 443.
[136] *Id.*
[137] *Id.* ("A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required.").
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.* at 443–44 ("[T]he judicial process has no way to prevent or correct the constitutional violation of suppressing evidence [since] the judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface.").

he argued, to deter such violations by permitting § 1983 damage actions in those cases where violations are exposed.[142] "The stakes are high," Justice White observed,[143] citing *Hilliard v. Williams*,[144] in which the prosecutor's suppression of exculpatory evidence resulted in the conviction and punishment of an innocent defendant. The injury to the judicial process from allowing prosecutors to evade civil liability for such misconduct is easy to identify, according to Justice White.[145] However, he added, it is "virtually impossible" to identify any injury to the judicial process from permitting such suits.[146]

The majority saw no difference in principle between a prosecutor knowingly presenting false testimony and a prosecutor suppressing evidence that would demonstrate that falsity. "The distinction is not susceptible of practical application," the majority contended.[147] Moreover, the majority argued, to require a prosecutor to make a "full disclosure" of potentially exculpatory evidence to obtain absolute immunity would place upon the prosecutor a duty that might far exceed the disclosure requirements of *Brady*.[148] Further, the majority claimed, denying immunity to the prosecutor would "weaken the adversary system" as well as "interfere with the legitimate exercise of prosecutorial discretion."[149]

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[142] *Id.* at 444.
[143] *Id.*
[144] 465 F.2d 1212 (6th Cir. 1972) (no absolute immunity for prosecutor in civil complaint charging prosecutor with deliberate suppression of exculpatory evidence), *cert. denied*, 409 U.S. 1029 (1972). On remand, the Sixth Circuit vacated its prior decision and remanded to the district court. Hilliard v. Williams, 540 F.2d 220, 221 (6th Cir. 1976) (prosecutor absolutely immune from civil liability for suppressing exculpatory police report and instructing witness to testify falsely).
[145] *Imbler*, 424 U.S. at 444–45 (White, J., concurring).
[146] *Id.* ("Where the reason for the rule extending absolute immunity to prosecutors disappears, it would truly be 'monstrous to deny recovery.'") (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).
[147] *Id.* at 431 n.34 (majority opinion) ("A claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested.").
[148] *Id.*
[149] *Id.* The majority suggested that there was no principled distinction between a prosecutor knowingly using perjured testimony and knowingly suppressing information demonstrating the falsity. *Id.* ("As a matter of principle, we perceive no less an infringement of a defendant's rights by the knowing use of perjured testimony than by the deliberate withholding of exculpatory information."). However, the majority likely was aware that the distinction was neither unprincipled nor abstract. As the Court would

In sum, *Imbler* adopted a broad rule of absolute immunity when prosecutors engage in advocacy activities related to the adjudicative process. Particularly with respect to a prosecutor's nondisclosure of exculpatory evidence, *Imbler* viewed the prosecutor's conduct as within this broad spectrum of advocacy conduct. *Imbler* did not recognize the uniqueness of the *Brady* rule, did not take into account the mindset of prosecutors that invites them to hide exculpatory evidence, and failed to appreciate the ease with which prosecutors are able to violate *Brady*. *Imbler* was concerned that a civil action against a prosecutor would dampen the prosecutor's "courage," "independence," and "energy,"[150] and that an "honest" prosecutor would have greater difficulty in defending himself from "error" and "mistaken judgment" than other officials cloaked with qualified immunity.[151] Moreover, although Pachtman was accused of *Brady* violations, the Court appeared to view his conduct at most as an error, as a mistake of judgment, or as negligent rather than as willful misconduct. Given the record in that case, it is neither surprising nor counterintuitive that *Imbler* chose to minimize the need for a civil remedy with respect to a prosecutor's conduct generally, and with respect to a prosecutor's *Brady* violations in particular. It is also noteworthy that the Court focused on the prosecutor's conduct in open court and the advocacy decisions that a prosecutor makes before and during a trial that are subject to judicial review. The Court lumped together all of the conduct of a prosecutor that is related to the trial, including all actions undertaken before trial, in secret, shielded from public scrutiny, and not subject to

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hear in oral arguments the following month and decide later that Term in *United States v. Agurs*, 427 U.S. 97 (1976), a prosecutor's knowing use of false testimony and a prosecutor's suppression of exculpatory evidence were distinct violations. *Id.* at 103–04. Moreover, in contrast to *Imbler*, the Court in *Agurs* described the prosecutor's duty to disclose exculpatory evidence as grounded in elementary notions of fairness to serve the cause of justice rather than as a function of a prosecutor's role as an advocate seeking to win a conviction. *Id.* at 111 (noting "prosecutor's obligation to serve the cause of justice").

[150] *Imbler*, 424 U.S. at 423, 425.

[151] *Id.* at 425, 427.

judicial oversight, such as *Brady* decisions. To the extent that the Court assumed that a prosecutor's duty under *Brady* to disclose evidence is undertaken as an "advocate" rather than as a "minister of justice," the Court lost sight of the special responsibilities assigned to the prosecutor by *Brady*. By removing the sanction of civil liability from such misconduct, *Imbler* gave prosecutors a further incentive to disregard their constitutional responsibilities.

IV. Accountability of Prosecutors for *Brady* Violations

Imbler acknowledged that, by creating the immunity, it left a wronged defendant without a civil remedy.[152] However, the Court added, this absence "does not leave the public powerless to deter misconduct or to punish that which occurs."[153] According to *Imbler,* the policy considerations that mandate civil immunity for prosecutors do not place prosecutors beyond the reach of the criminal law, suggesting that prosecutors would be subject to criminal prosecution for willful criminal acts.[154] *Imbler* also observed that a prosecutor, who "stands perhaps unique, among officials whose acts could deprive persons of constitutional rights," would be subject to professional discipline by bar associations.[155] "These checks," *Imbler* asserted, "undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime."[156]

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[152] *Id.* at 427 ("To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.").
[153] *Id.* at 429.
[154] *Id.* ("This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights . . . . The prosecutor would fare no better for his willful acts.").
[155] *Id.* (suggesting that a prosecutor is "perhaps unique . . . in his amenability to professional discipline by an association of his peers").
[156] *Id.*

Imbler's confidence that prosecutors would face both criminal and professional sanctions for their misconduct has proven to be dramatically mistaken. One of the central themes in criminal procedure and professional ethics since *Imbler* has been the lack of accountability of prosecutors for their misconduct, especially that which involves the

deliberate suppression of exculpatory evidence.[157] As noted above,[158] a significant body of empirical and anecdotal evidence demonstrates that *Brady* violations are becoming the norm rather than the exception. Yet paradoxically, despite this systemic malfunction, there also appears to be a systemic inability to fix the problem.

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[157] *See* JOHN F. TERZANO ET AL., THE JUSTICE PROJECT, IMPROVING PROSECUTORIAL ACCOUNTABILITY: A POLICY REVIEW (2009), *available at* http://www.thejusticeproject.org/wp-content/uploads/pr-improving-prosecutorial-accountability1.pdf (describing prevalence of prosecutorial misconduct, absence of significant restraints on misconduct, and recommending ways to improve accountability); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 756–762, 774 (2001) (noting rarity of discipline against prosecutors); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 277 (2004) (professional discipline for prosecutor's misconduct "is often nil"); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998) ("[T]here is a notable absence of disciplinary sanctions against prosecutors, even in the most egregious cases."); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1596 (2003) (noting that existing rules of ethics fail to regulate large areas of prosecutors' professional conduct); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) ("[D]isciplinary charges have been brought infrequently and meaningful sanctions [have been] rarely applied."); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 898 (1997) (noting that disciplinary process "has been almost totally ineffective in sanctioning even egregious *Brady* violations"); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 282 (2007) (describing the disciplinary process as "woefully inadequate in holding prosecutors accountable for misconduct"). *See also* Armstrong & Possely, *supra* note 54 (1999 study of 381 cases in which courts dismissed homicide convictions based on *Brady* violations revealed that not one prosecutor was publicly sanctioned by a state disciplinary authority or criminally prosecuted for withholding evidence or presenting false evidence); WEINBERG, *supra* note 50, at 79 (finding only 44 cases of professional discipline of prosecutors out of 2,012 cases reversed since 1970 due to misconduct; of the 44 cases, seven resulted in dismissal of the complaint, 20 in a reprimand or censure, 12 in a suspended license, two in disbarment, 24 in a fine, and three in remand for further proceedings); Mike Zapler, *State Bar Ignores Errant Lawyers*, SAN JOSE MERCURY NEWS, Feb. 12, 2006, at 1 (finding that of 1,464 lawyer discipline cases published in the California Bar Journal between 2001 and 2005, only one case involved disciplinary action against a prosecutor for misconduct).

Professional discipline by the U.S. Justice Department's Office of Professional Responsibility (OPR) also has been criticized as inadequate. *See* DAVID BURNHAM, ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE 331 (1996) ("The systemic failure of this tiny, extremely passive unit to confront directly the misconduct of Justice Department officials must be considered one of the most serious lapses in the department's recent history."); Greg Rushford, *Watching the Watchdog: Veteran Justice Department Ethics Officer Faces Questions About His Own Actions*, LEGAL TIMES, Feb. 5, 1990, at 1 (criticizing effectiveness of Office of Professional Responsibility). *See also* United States v. Hastings, 461 U.S. 499, 522 (1983) (Brennan, J., concurring in part and dissenting in part) ("Prior experience, for example, might have demonstrated the futility of relying on Department of Justice disciplinary proceedings."); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 16 n.75 (2009) (noting that OPR oversight of federal prosecutors is "uncertain"). In the aftermath of his dismissal of the conviction of then-Senator Ted Stevens of Alaska based on the prosecutors' withholding exculpatory evidence, Federal District Judge Emmet G. Sullivan appointed a

Imbler's expectation that prosecutors who violate the law would face criminal penalties seemed extreme at the time, and the prospect seems even more farfetched today. To support its view of the likelihood of criminal prosecutions against prosecutors, *Imbler* cited a California case, *In re Branch*,[159] and stated that "California also appears to provide for criminal punishment of a prosecutor who commits some of the acts ascribed to respondent by petitioner."[160] The Court's extrapolation of a general principle from a case that does not even support that principle[161] was illogical then and is even more unsupportable today. In fact, criminal sanctions against a prosecutor are hardly ever enforced, in California or anywhere else in the United States.[162] An extensive search

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special prosecutor to investigate whether the six Justice Department prosecutors should face criminal charges for their misconduct. The judge expressed little confidence that the Office of Professional Responsibility would conduct a proper and effective inquiry. *See* Transcript of Hearing on Motion to Dismiss at 45–46, United States v. Stevens, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 08-231 (EGS)) (expressing obvious lack of confidence in OPR's claim, made six months earlier, to conduct an investigation, and that to date, "the silence has been deafening"; court also finds "shocking but not surprising" the lack of response by then-U.S. Attorney General Michael Mukasey to numerous letters from defense counsel urging commencement of formal investigation of prosecutors).

[158] *See supra* notes 49–66 and accompanying text.

[159] 449 P.2d 174 (Cal. 1969).

[160] *Imbler*, 424 U.S. at 429 n.29. The Court's reference to *Branch* is perplexing and somewhat disingenuous. *Branch* reviewed a habeas petition by a California inmate convicted of possessing deadly weapons in his cell, who claimed that his attorney failed to conduct an adequate investigation that other prisoners had committed the same offense. The attorney at a hearing stated that he refused to act upon the petitioner's request because he had good reason to believe that the proposed testimony would be perjured. The appellate court noted that "an attorney may not knowingly allow a witness to testify falsely," and that "an attorney who attempts to benefit his client through the use of perjured testimony may be subject to criminal prosecution." *Branch*, 449 P.2d at 181. Thus, *Branch* did not involve the prosecution of a prosecutor, as the Court's citation would lead one to believe, nor did *Branch* suggest that a prosecutor would be subject to criminal charges, or that any prosecutor had ever been prosecuted in California for suborning perjury. Indeed, of the many hundreds of reported cases in California and the U.S. in which prosecutors were found to have knowingly elicited false testimony, not one of those prosecutors as far as I have been able to determine has ever been subjected to criminal prosecution for suborning perjury.

[161] *Branch*, 449 P.2d at 181.

[162] *See* Brink, *supra* note 12 at 27 ("[L]eveling of criminal charges against a prosecutor for conduct occurring in the course of a prosecution is all but unheard of"); Andrew Smith, Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1969–70 (2008) (arguing that prosecutors could be charged criminally with violating 18 U.S.C. § 242, the criminal analogue to § 1983, and noting one case in which a local prosecutor was convicted in federal court under § 242 for violating *Brady*). *See In re* Brophy, 442 N.Y.S.2d 818 (N.Y. App. Div. 1981) (Brophy convicted of § 242 misdemeanor and sentenced to pay a fine of $500; in light of his contention that his violation was "inadvertent," and his previously unblemished record, court believed a censure would be an appropriate disciplinary sanction).

using LexisNexis and Westlaw databases located not a single instance in California since *Imbler* in which a prosecutor has been criminally prosecuted for acts related to his prosecutorial duties.[163] A nationwide search for instances of criminal charges against prosecutors in the last twenty-five years turned up two criminal prosecutions stemming from highly publicized criminal cases in which prosecutors were charged with crimes related to their deliberate violations of *Brady*. In 1999 in Chicago, a special prosecutor charged county prosecutor Thomas L. Knight with obstruction of justice, perjury, and conspiracy for his suppression of "obviously exculpatory" evidence that put an innocent man on death row in the murder of a ten-year-old girl.[164] Knight was acquitted. In 2007 in Detroit, the U.S. Department of Justice charged federal prosecutor Richard Convertino with conspiracy, obstruction of justice, and making false statements in connection with his suppression of evidence in a high-profile terrorism trial in 2003.[165] Convertino was acquitted. Of the hundreds of cases involving *Brady* violations alluded to above,[166] many of which were intentional, egregious, and easily provable as an obstruction of justice, no criminal action was brought against the prosecutor even though the prosecutor in many of these cases caused the conviction and lengthy incarceration of an innocent person.[167] If *Imbler*'s prediction were even remotely accurate, one might have expected to see

[163] It goes without saying that a criminal prosecution against a prosecutor for any reason, and especially for crimes related to his prosecutorial function, would be a newsworthy event. The failure to uncover a single instance of a criminal prosecution, while not dispositive, strongly supports the conclusion.
[164] *See* Andrew Bluth, *Prosecutor and 4 Sheriff's Deputies Are Acquitted of Wrongfully Accusing a Man of Murder*, N.Y. TIMES, June 5, 1999, at A9.
[165] *See* Joe Swickard & Christina Hall, *Terror Case Prosecutor Acquitted of Rigging Trial; Jury: Convertino and Agent Didn't Hide Evidence*, DETROIT FREE PRESS, Nov. 1, 2007, at A1.
[166] *See supra* notes 49–66 and accompanying text.
[167] *See, e.g.*, WEINBERG, *supra* note 50, at 1 (finding that of the 2,012 cases in which courts reversed convictions based on prosecutorial misconduct since 1970, reversals often attributable to *Brady* violations, 32 defendants were found to be innocent); Gershman, *supra* note 53, at 688 n.18 (identifying several cases in which a prosecutor's violation of *Brady* contributed to the conviction and incarceration of an innocent person).

criminal charges brought against at least some of those prosecutors. But this has not happened.

Imbler also confidently predicted that a prosecutor would be subject to professional discipline by bar associations.[168] As with *Imbler*'s prediction of criminal prosecutions, the imposition of professional discipline against prosecutors has also been extraordinarily rare. Although state bar associations, grievance committees, and the Justice Department's Office of Professional Responsibility have regulatory authority over prosecutors and have the power to discipline prosecutors for violations of rules of professional ethics, virtually every commentator has criticized the absence of professional discipline of prosecutors, even in cases of obvious and easily provable violations and even in cases in which a court issued a stinging rebuke of the prosecutor.[169] The absence of professional discipline is particularly glaring in cases involving intentional *Brady* violations. Of all the ethical rules relating to a prosecutor's professional conduct, the ethics rule governing a prosecutor's suppression of evidence is the most explicit and easiest to enforce.[170] Nonetheless, although one might reasonably expect that professional disciplinary bodies would view such conduct as unethical and even dangerous, these bodies for a variety of reasons typically maintain a hands-off approach.[171] From an examination of the numerous instances of serious *Brady* violations

[168] Imbler v. Pachtman, 424 U.S. 409, 429 (1976).
[169] *See supra* note 157 and accompanying text.
[170] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2004); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (2004); ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 3-3.11(a) (1992), *reprinted in* PROFESSIONAL RESPONSIBILITY, STANDARDS, RULES & STATUTES 1146 (John S. Dzienkowski ed., 2001). *See also* Cone v. Bell, 129 S. Ct. 1769, 1783 n.15 ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."); Kyles v. Whitely, 514 U.S. 419, 437 (1995) (noting that *Brady* "requires less of the prosecution than the ABA Standards").
[171] *See supra* note 157 and accompanying text. Occasionally, an offending prosecutor is punished by a disciplinary body, and the event often elicits media attention. *See, e.g.*, Jeffrey Toobin, *Killer Instincts: Did a Famous Prosecutor Put the Wrong Man on Death Row*, THE NEW YORKER, Jan. 17, 2005, at 54

noted above, very few of the offending prosecutors were ever subjected to professional discipline or even investigated by disciplinary bodies.

Given this regulatory vacuum by professional disciplinary bodies, several lower courts have begun to take a much more aggressive stand against prosecutorial abuses in an effort to make prosecutors accountable for their misconduct. This is especially noticeable in cases where prosecutors have committed serious *Brady* violations. In *United States v. Stevens*, which involved the high-profile prosecution and conviction of then-Senator Ted Stevens of Alaska, Federal District Judge Emmet G. Sullivan dismissed with prejudice the charges against the defendant after finding that the prosecution had suppressed material exculpatory evidence.[172] Judge Sullivan appointed a special counsel to investigate the conduct of the offending trial prosecutors and their supervisors in the Justice Department and to consider criminal contempt and obstruction of justice charges for violating the court's order to turn over to the defense all material exculpatory evidence.[173] Similarly, in *United States v. Shaygan*,[174] after finding that the prosecution had violated *Brady*, Federal District Judge Alan S. Gold in Florida granted the defendant a monetary award under the Hyde Amendment of $601,795,[175] imposed individual

(discussing a county prosecutor who was disbarred for deliberately presenting a witness's false testimony in two death penalty trials); Wilson, *supra* note 65 (discussing the case of District Attorney Michael Nifong, prosecutor in the Duke lacrosse case, who was disbarred for suppressing exculpatory evidence).

[172] *See* Transcript of Hearing on Motion to Dismiss at 3, United States v. Stevens, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 08-231 (EGS)) ("In nearly 25 years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case.").

[173] *Id.*

[174] 661 F. Supp. 2d 1289 (S.D. Fla. 2009).

[175] The Hyde Amendment was enacted by Congress in 1998 and is located in a statutory note to 18 U.S.C. § 3006A. It provides in relevant part that courts may award attorney's fees and other litigation expenses to prevailing criminal defendants "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make the award unjust." Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997), *reprinted in* 18 U.S.C. § 3006A (2006). Since its enactment, prevailing criminal defendants applied for Hyde fees in approximately 200 reported cases, and were successful in less than 10 percent of those cases. Courts struggle to define the operative terms. *See* United States v. Gilbert, 198 F.3d 1293, 1298–99 (11th Cir. 1999) (finding that "vexatious" means "without . . . probable cause" or "without foundation, even though not brought in subjective bad faith"; "frivolous" means "groundless" and "with little prospect of success" brought primarily "to embarrass or

sanctions against the two Assistant United States Attorneys, and ordered the United States Attorney to establish procedures to improve the supervision of attorneys in the office. The conduct of the prosecutors, according to Judge Gold, raised "disturbing" and "troubling" questions about the "integrity of those who wield enormous power over the people they prosecute."[176] Judge Gold added that the U.S. Attorney General must create a culture where a "'win-at-any-cost' prosecution is not permitted," and that courts must impose sanctions for substantial prosecutorial abuses in order to "make the risk of non-compliance too costly."[177]

Finally, in *United States v. Jones*,[178] Federal District Judge Mark L. Wolf in Massachusetts found that "[t]he egregious failure of the government to disclose plainly material exculpatory evidence in this case extends a dismal history of intentional and inadvertent violations of the government's duties."[179] In a separate opinion addressing whether sanctions should be imposed,[180] Judge Wolf stated that the conduct of the prosecutor "reflects a fundamentally flawed understanding of her obligations, or a reckless disregard of them, despite many years of experience as a prosecutor, substantial training by the Department of Justice, and an explanation of her obligations by this Court."[181] Judge Wolf warned that he would institute criminal contempt proceedings

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annoy the defendant"; and "bad faith" is "the conscious doing of wrong because of dishonest purpose," or "a furtive design or ill will," requiring more than "bad judgment or negligence"). According to Judge Gold, "the position taken by [Assistant United States Attorney] Cronin [the prosecution] in filing the superseding indictment; initiating and pursuing the collateral investigation based on unfounded allegations; suppressing information about the roles of two key government witnesses as cooperating witnesses in the collateral investigation; and attempting to secure evidence from the collateral investigation that would have jeopardized the trial and severely prejudiced the defendant, constitute bad faith." United States v. Shaygan, 661 F. Supp. 2d 1289, 1321 (S.D. Fla. 2009).

[176] *Id.* at 1292.

[177] *Id.* ("It is equally important that the courts of the United States must let it be known that, when substantial abuses occur, sanctions will be imposed to make the risk of non-compliance too costly.").

[178] 609 F. Supp.2d 113 (D. Mass. 2009).

[179] *Id.* at 119.

[180] United States v. Jones, 620 F. Supp. 2d 163 (D. Mass. 2009).

[181] *Id.* at 167.

against offending prosecutors in future cases and would publicly name these prosecutors in published decisions.[182] Finally, pointing to the repeated violations by prosecutors in his court, Judge Wolf expressed dismay that it could no longer rely on the Department of Justice training programs, and therefore would arrange for its own training program to educate prosecutors on their discovery responsibilities in criminal cases.[183]

In sum, the Court in *Imbler* believed that protecting the honest prosecutor from civil liability was a "lesser evil" than affording a civil remedy to a defendant wronged by a dishonest prosecutor.[184] Nevertheless, the Court assured the public that it would not be unprotected because prosecutors who abused their power would be subject to criminal prosecution and professional discipline. Today, thirty-four years later, it is abundantly

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[182] *See* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS. L. REV. 1059 (2009). Commentators have proposed other remedies to improve prosecutorial accountability. *See, e.g.*, Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L. J. 1509 (2009); Tracy L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

[183] Apparently the stinging rebukes by the federal district judges in *Stevens*, *Shaygan*, and *Jones* did not go unnoticed by the Department of Justice. On January 4, 2010, Deputy Attorney General David W. Ogden issued three memoranda to United States Attorneys, Department Prosecutors, and Heads of Department Litigating Components providing guidance in handling criminal discovery. Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Department Prosecutors (Jan. 4, 2010), *available at* http://www.justice.gov/dag/discovery-guidance.html ("The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the department's pursuit of justice."). The Memorandum to Department Prosecutors specifically provides guidance to the "prosecution team" on where to look for *Brady* evidence, what to review, how to conduct the evidence review, and the scope, timing, and form of disclosures. The guidance is intended to supplement the United States Attorneys Manual dealing with disclosure. *See* U.S. Dep't of Justice, United States Attorneys' Manual 9-5.001 (2010), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm. Guidance is also provided by a designated criminal discovery coordinator in their office, as well as a full-time discovery expert who will be detailed to Washington from the field. *See* Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Department Prosecutors (Jan. 4, 2010) (Guidance for Prosecutors Regarding Criminal Discovery), *available at* http://www.justice.gov/dag/dag-memo.html; Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Litig. Components Handling Criminal Matters and All U.S. Attorneys (Jan. 4, 2010) (Requirement for Office Discovery Policies in Criminal Matters), *available at* http://www.justice.gov/dag/dag-to-usas-component-heads.html.

[184] Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976). The Court, citing Judge Learned Hand's opinion in *Yaselli v. Goff*, 12 F.2d 396, 404 (2d Cir. 1926), noted that "the answer must be found in a balance between the evils inevitable in either alternative [but] it has been thought better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

clear that *Imbler*'s assurance was misguided and mistaken. Indeed, the only effective sanction – enabling the injured party to sue the wrongdoer directly – was discarded.

V. Bad Faith Exception to Absolute Prosecutorial Immunity for *Brady* Violations

The extension of *Imbler* to a prosecutor's willful violation of *Brady* was an unjustified extension of absolute immunity thirty-four years ago and appears much more unwarranted today. As I have already demonstrated, *Imbler* provides tenuous support for absolute immunity for prosecutors with respect to their misconduct in general. But in view of the widespread occurrences of *Brady* violations and the lack of effective sanctions to deter such misconduct, *Imbler*'s protection of prosecutors is even more unjustified. *Imbler*'s decision to protect prosecutors not only prevents a wronged person from redressing constitutional harms caused by dishonest prosecutors; it also disserves the judicial process by undermining its integrity and fairness.

Given that *Imbler* is a longstanding precedent that has been repeatedly reaffirmed by the Court, it is unlikely that the Court will reconsider its decision to afford absolute immunity to prosecutors with respect to their advocacy functions generally. However, there are several compelling reasons that might persuade the Court or Congress to make an exception to absolute immunity when prosecutors willfully suppress material exculpatory evidence. Such an exception would likely appear more acceptable today than when *Imbler* was decided. For one thing, the framework of § 1983 litigation has changed dramatically since *Imbler*, especially with respect to the continuing need by prosecutors for absolute immunity. As the Court observed in *Burns v. Reed*,[185] the qualified immunity standard is far more protective of officials today than it was when *Imbler* was decided: "[qualified immunity] provides ample protection to all but the

[185] 500 U.S. 478, 494–95 (1991).

plainly incompetent or those who knowingly violate the law."[186] The Court since *Imbler* has "completely reformulated qualified immunity"[187] by replacing the common law subjective standard with an objective standard that allows liability only where the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[188] This change was specifically designed to protect the honest and conscientious official from the kinds of frivolous, harassing, and disruptive complaints that are made by disgruntled defendants, particularly as these complaints relate to a prosecutor's judgment calls and discretionary decisions, about which *Imbler* was critically concerned.[189] Moreover, the Court has further narrowed a prosecutor's exposure to civil liability by foreclosing civil complaints entirely unless the defendant was successful in obtaining a dismissal or acquittal of the criminal charges, further undercutting the Court's concern that prosecutors would be subjected to a constant flood of lawsuits that would drain their energy and attention.[190]

Additionally, one of the hallmarks of the *Imbler* jurisprudence has been an attempt by the Court to ensure parity in the treatment of officials engaged in the same functions.[191] Although *Imbler* did not demarcate precisely the scope of a prosecutor's absolute immunity, it did recognize that the scope of absolute immunity extended to a

[186] *Id.* at 495 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).
[187] Anderson v. Creighton, 483 U.S. 635, 645 (1987).
[188] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
[189] *See Malley*, 475 U.S. at 341 (change in qualified immunity "specifically designed to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment"). *See also* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1216 (noting that the developments in criminal litigation since *Imbler* "provide adequate protections for prosecutors without the need for absolute immunity").
[190] *See* Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (holding that, to recover damages under § 1983, a defendant who alleges that he was unconstitutionally convicted or imprisoned "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus").
[191] *See* Buckley v. Fitzsimmons, 509 U.S. 259, 288 (1993) ("[O]ne of the unquestioned goals of our § 1983 immunity jurisprudence is ensuring parity in treatment among state actors engaged in identical functions") (Kennedy, J., concurring in part and dissenting in part).

prosecutor's "advocacy" functions, which covers trial and pre-trial decisions, including *Brady* decisions. But this does not necessarily include non-advocacy functions, such as investigative functions. This distinction was made in *Buckley v. Fitzsimmons*,[192] in which the Court observed that when a prosecutor performs investigative functions normally performed by police officials, and as to which functions the police would enjoy only qualified immunity, "it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."[193] Ensuring parity also was addressed in *Burns v. Reed*,[194] where the Court considered whether a prosecutor enjoyed absolute immunity for giving legal advice to the police. The Court concluded that "it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following that advice."[195] Moreover, in *Van de Kamp v. Goldstein*,[196] which considered a supervisory prosecutor's immunity for the supervision and training of trial prosecutors, the Court emphasized the "practical anomalies" of affording a trial prosecutor absolute immunity for his intentional misconduct but affording supervisors only qualified immunity for their negligence in training and supervising that prosecutor.[197]

The Court's concern with parity would appear to apply equally to *Brady* violations. It is well-established that a prosecutor's disclosure duty extends to evidence in the possession of the police, even if the prosecutor is unaware of that evidence.[198] To

[192] 509 U.S. 259 (1993).
[193] *Id.* at 273 (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973)).
[194] 500 U.S. 478 (1991).
[195] *Id.* at 495.
[196] 129 S. Ct. 855 (2009).
[197] *Id.* at 863.
[198] Kyles v. Whitley 514 U.S. 419, 437 (1995) (noting that a prosecutor has "a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police").

be sure, for *Brady* purposes the police are considered an "arm of the prosecutor"[199] and, as virtually every circuit has concluded, have a derivative duty under *Brady* to turn over to the prosecutor potentially exculpatory evidence.[200] Thus, if the police hide exculpatory evidence from the prosecutor, they violate their *Brady* duty and are subject to civil liability under § 1983, for which violation they receive at most only qualified immunity.[201] Thus, just as it would be incongruous to afford prosecutors absolute immunity for engaging in investigative misconduct for which police enjoy qualified immunity, and for giving bad advice to the police for which the police would receive qualified immunity if they mistakenly relied on that advice, it would seem just as incongruous to afford prosecutors absolute immunity for failing to disclose exculpatory evidence to the defendant but afford the police only qualified immunity for failing to turn that same evidence over to the prosecutor.

Finally, just as the Court has created exceptions for bad faith conduct by prosecutors that violate the constitutional rights of defendants, so too could the Court create an exception to absolute immunity for bad faith violations of *Brady*. A violation of *Brady* does not require that a prosecutor act in bad faith; the *Brady* rule reflects a "no-fault" principle that focuses on "the character of the evidence, not the character of the

[199] *See* Walker v. Lockhart, 763 F.2d 942, 958 (8th Cir. 1985) ("Police are treated as an arm of the prosecution for *Brady* purposes.").

[200] *See* Moldowan v. City of Warren, 578 F.3d 351, 381 (6th Cir. 2009) ("[V]irtually every other circuit has concluded either that the police share in the state's obligations under *Brady*, or that the Constitution imposes on the police obligations analogous to those recognized in *Brady*."); Brady v. Dill, 187 F.3d 104, 114 (1st Cir. 1999) ("[A] police officer sometimes may be liable [under § 1983] if he fails to apprise the prosecutor or a judicial officer of known exculpatory information."); Hart v. O'Brien, 127 F.3d 424, 446–47 (5th Cir. 1997) ("[A] plaintiff states a section 1983 claim against a police officer who, after learning of 'patently exculpatory evidence,' deliberately fails to disclose it to the prosecutor."); McMillian v. Johnson, 88 F.3d 1554, 1569 (11th Cir. 1996) ("Our case law clearly established that an accused's due process rights are violated when the police conceal exculpatory or impeachment evidence."); Walker v. City of New York, 974 F.2d 293, 299 (2d Cir. 1992) ("The police satisfy their obligations under *Brady* when they turn exculpatory evidence over to the prosecutors.").

[201] *Moldowan*, 578 F.3d at 377 (police officers receive only qualified immunity for violation of same legal norm underlying due process recognized in *Brady*); Geter v. Fortenberry, 882 F.2d 167, 171 (5th Cir. 1989) (affirming denial of qualified immunity for police officer who failed to disclose exculpatory evidence).

prosecutor."[202] A *Brady* violation could be committed by a conscientious prosecutor who makes a good faith effort to comply with *Brady*; one who uses her best efforts to obtain exculpatory evidence in the hands of the police, or who believes in good faith that the undisclosed evidence either is not favorable to the accused or is not material to guilt. She would still be protected by immunity. A bad faith exception to absolute immunity would focus squarely on the character and mental culpability of the prosecutor. The exception would be available in those cases when a prosecutor actually is aware that the withheld evidence is both favorable and material to the accused, and that by withholding the evidence the defendant's ability to obtain a fair trial and prove her non-guilt would be seriously impeded. A bad faith exception would be limited to those egregious cases where a prosecutor makes a conscious decision to conceal from the defendant materially favorable evidence with knowledge that this evidence would exculpate the accused or impeach the credibility of a key witness. Unquestionably, such bad faith conduct is unethical and dishonest. It manifests a conscious intention by a prosecutor to commit a fraud on the judicial process—to defraud the defendant of her right to a fair trial, the court of the assurance that its discovery orders have been complied with, and the jury of learning all of the facts that would materially assist its mission to arrive at the truth.[203] Bad faith conduct embraces the quality of "moral turpitude" that subjects the conduct of all attorneys to professional discipline.[204]

As examples of cases in which a bad faith exception could be invoked, consider the Duke lacrosse case, in which the prosecutor, who was then running for re-election,

[202] United States v. Agurs, 427 U.S. 97, 110 (1976).
[203] *See* MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (1993) (professional misconduct for lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").
[204] *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(3) ("A lawyer shall not . . . [e]ngage in illegal conduct involving moral turpitude.").

concealed from the defense the existence of DNA evidence from four unidentified men on the clothes of the rape victim and the absence of DNA evidence from any of the defendants.[205] Knowing that this disclosure would severely discredit the credibility of the victim, the prosecutor directed the laboratory official to exclude this exculpatory information from his report and then represented to the court that the report was a complete description of the laboratory's findings.[206] Similarly, in the Ted Stevens case, the trial judge identified some eleven instances of "shocking and serious" *Brady* violations, including the suppression of an interview with the government's key witness, with knowledge that disclosure of this interview would destroy or seriously undermine his credibility.[207] Finally, in the "Pottawattamie" case[208]—in which two innocent defendants spent nearly twenty years in prison for a murder—the prosecution knew that its key witness against the defendants was a "liar and a perjurer" who was not telling the truth; the prosecutor was also aware of several items of evidence that identified and powerfully implicated an alternative suspect in the killing, but hid these from the defense.[209] In all of these cases there is strong circumstantial evidence to prove the prosecutor's bad faith: actual knowledge by experienced prosecutors of the existence of exculpatory evidence; actual knowledge that the evidence if disclosed would probably—indeed, almost certainly—produce an acquittal; a powerful personal and political motive to hide the evidence; and a pattern of conduct revealing that the nondisclosure was neither inadvertent nor a good faith mistake.

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[205] *See* Wilson, *supra* note 65.
[206] *Id.* The trial court asked Nifong [the prosecutor]: "So you represent that there are no other statements from Dr. Meehan?" Nifong replied: "No other statements. . . . No other statements made to me." *Id.*
[207] *See* Transcript of Hearing on Motion to Dismiss at 3–6, United States v. Stevens, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 08-231 (EGS)).
[208] *See* Pottawattamie County v. McGhee, 547 F.3d 922 (8th Cir. 2009), *cert. granted*, 129 S. Ct. 2002 (2009), *cert. dismissed*, 130 S. Ct. 1047 (2010).
[209] *See* Harrington v. State, 659 N.W.2d 509, 524 (Iowa 2003).

Creating an exception for bad faith conduct of prosecutors that violates constitutional rules is hardly a novel proposal. The Court has recognized such an exception in several areas involving the constitutional rights of criminal defendants. For example, with respect to a prosecutor's charging function, the Supreme Court has stated that so long as a prosecutor has probable cause to believe that an accused has committed a criminal offense, the decision whether or not to prosecute rests entirely in his discretion.[210] However, the Court has created several exceptions when a prosecutor institutes charges in bad faith, such as selectively charging persons based on unconstitutional standards relating to race, religion, or other arbitrary classifications;[211] vindictively charging persons in retaliation for their exercising legal rights;[212] and bringing charges in order to harass a defendant.[213] Further, the Court has also recognized a bad faith exception to the rule that allows prosecutors virtually unfettered discretion in deciding when to bring charges.[214] Thus, when a prosecutor delays bringing charges against a defendant in order to gain a "tactical advantage" over the accused,[215] due process may be invoked to bar prosecution.[216] Although double jeopardy does not protect

[210] United States v. Armstrong, 517 U.S. 456, 464 (1996) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.") (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

[211] *Id.* ("[T]he decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification'") (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)); Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886) (defendant alleges selective prosecution when he establishes that administration of criminal law was "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive'" that the system of prosecution amounts to "a practical denial" of equal protection).

[212] *See* Blackledge v. Perry, 417 U.S. 21, 27 (1974) (prosecutor engages in "vindictive" charging in violation of due process when he brings charges in retaliation for a defendant's exercise of legal rights).

[213] *See* Perez v. Ledesma, 401 U.S. 82, 85 (1971) (federal injunctive relief warranted "in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction").

[214] *See* United States v. Lovasco, 431 U.S. 783 (1977); United States v. Marion, 404 U.S. 307 (1971).

[215] *Lovasco*, 431 U.S. at 795; *Marion*, 404 U.S. at 324.

[216] This exception would be invoked when a prosecutor intentionally waits until exculpatory evidence is lost, or where the delay prevents the defendant from learning about a witness or being able to interview him. *See, e.g.*, United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (defendant may establish due

a defendant who seeks a mistrial from being retried, the Court has created an exception to this rule in order to prevent a prosecutor from subverting a defendant's double jeopardy rights.[217] Thus, when a prosecutor engages in bad faith conduct for the purpose of provoking a defendant into seeking a mistrial, the protection of double jeopardy may be invoked to prevent the prosecutor from retrying the defendant.[218] Finally, although the government's loss or destruction of potentially exculpatory evidence does not by itself violate due process, the Court has created an exception for exculpatory evidence that was lost or destroyed by the prosecution in bad faith for the purpose of preventing its use by the defendant.[219]

A bad faith exception to absolute immunity for a prosecutor's deliberate suppression of exculpatory evidence is consistent with the Court's adoption of other exceptions for bad faith conduct by prosecutors. As noted above, the bad faith suppression of exculpatory evidence by prosecutors is a matter of increasing concern to courts and commentators, has contributed to the convictions of innocent persons, and is not subject to meaningful sanctions that might deter such misconduct. A bad faith exception would be limited to conduct by prosecutors that is deliberately undertaken to deprive a defendant of materially favorable evidence, thereby depriving a defendant of a fair trial. A "*Brady* exception" to absolute immunity would create only a modest inroad into the doctrine of absolute prosecutorial immunity; but such an exception would make a

process violation by showing that prosecutor removed witness from U.S. deliberately in order to deprive the defense of opportunity to interview him).

[217] *See* United States v. Dinitz, 424 U.S. 600, 611 (1976) (retrial barred where prosecutor engages in conduct that "is intended to provoke a mistrial or is "motivated by bad faith or undertaken to harass or prejudice" defendant); Oregon v. Kennedy, 456 U.S. 667, 676 (1982) (prosecutor's bad faith conduct that bars retrial limited to situations where prosecutor's conduct "is intended to 'goad' the defendant into moving for a mistrial").

[218] *Id.*

[219] *See* Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (due process violated if defendant shows that failure to preserve potentially useful evidence motivated by bad faith).

significant contribution to the integrity of the judicial process—which was the rationale for the *Imbler* rule in the first place—and would make prosecutors accountable for their deliberate constitutional violations. Finally, a bad faith exception might cause some prosecutors—even those prosecutors with a "win-at-all-costs" mentality—to rethink their decision to hide exculpatory evidence if they are aware that they might be prosecuting the wrong person, and that the real perpetrator is still at large. Indeed, the public backlash from the Duke lacrosse case is harmful not only to prosecutors but to future crime victims who may be discouraged from coming forward and being further victimized by an unscrupulous prosecutor.

Conclusion

Despite relying on questionable history and speculative policy, *Imbler v. Pachtman* is the foundation for the well-established rule that affords prosecutors absolute immunity from civil liability for conduct that is integrally related to the judicial process. *Imbler* held, and subsequent decisions reaffirmed, that absolute immunity extends to a prosecutor's deliberate concealment from the defense of exculpatory evidence in violation of *Brady v. Maryland*. This is so even though *Imbler*'s concern that absolute immunity is necessary to protect the integrity and fairness of the judicial process is inconsistent with affording absolute immunity for *Brady* violations.

The judicial evolution of the *Brady* rule has made it easier for prosecutors to violate *Brady*, and the lack of an effective mechanism to sanction or deter violations invites a re-thinking of the wisdom in continuing to afford prosecutors the shield of absolute immunity for willful and serious *Brady* violations. *Brady* violations appear to be more common than ever and, as Justice White noted in his concurrence in *Imbler*, "the

stakes are high." *Brady* violations deny the defendant his right to a fair trial, undermine the integrity of the judicial process, and tarnish the public's perception of the judicial process.

Consistent with other instances in which the Court has made exceptions to constitutional rules for bad faith conduct by prosecutors, this Article proposes an exception to a prosecutor's absolute immunity for bad faith conduct that involves the deliberate suppression of exculpatory evidence. Such an exception would not interfere with the policy reasons of *Imbler*. The exception would not apply to the honest and conscientious prosecutor who seeks to comply with *Brady*. It would not apply to the prosecutor who has negligently overlooked or failed to appreciate the significance of potential *Brady* evidence. The exception would apply only to those prosecutors who could be demonstrated to have suppressed evidence in bad faith intentionally to deprive the defendant of exculpatory evidence. The exception is limited. However, given the limited availability of other sanctions, such an exception would provide at the very least a meaningful remedy to individuals whose constitutional rights were violated and who were wrongfully deprived of their liberty by a prosecutor's unlawful conduct.