PROSECUTORIAL ACCOUNTABILITY AFTER *CONNICK V. THOMPSON*

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I. INTRODUCTION

From the recent case of false rape allegations against Duke University lacrosse players in which the prosecutor intentionally manipulated evidence, made false statements to the court, and made inflammatory comments to the media,[1] to the recent withholding of exculpatory evidence in the prosecution of recently deceased, former Senator Ted Stevens[2] and the openly racially motivated prosecution in the recent Jena Six case,[3] prosecutorial misconduct has been a recurrent news feature. Further, the Supreme Court has granted certiorari in three cases seeking civil liability for prosecutorial misconduct in the last few terms.[4]

Many recent articles have been written about the spate of high-profile cases of prosecutorial misconduct and what to do about such misconduct.[5]

1. Amended Findings of Fact, Conclusions of Law and Order of Discipline, N.C. State Bar v. Nifong, No. 06 DHC 35 (July 24, 2007), *available at* http://www.ncbar.gov/orders/06dhc35.pdf (disbarring District Attorney Michael B. Nifong, prosecutor in the March 2006 Duke University lacrosse rape scandal, for sanctionable actions including dishonesty, fraud, deceit, and misrepresentation); Lara Setrakian & Chris Francescani, *Former Duke Prosecutor Nifong Disbarred*, ABC NEWS (June 16, 2007), http://abcnews.go.com/TheLaw/story?id=3285862&page=1.

2. Nedra Pickler, *Justice Dept. Lawyers in Contempt for Withholding Stevens Documents*, WASH. POST (Feb. 14, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303092.html.

3. Darryl Fears, *Louisiana Appeals Court Throws Out Conviction in Racially Charged 'Jena 6' Case*, WASH. POST (Sept. 15, 2007), http://www.washingtonpost.com /wp-dyn/content/article/2007/09/14/AR2007091402162.html.

4. Connick v. Thompson, 131 S. Ct. 1350 (2011); Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009); McGhee v. Pottawattamie Cnty., 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009), *and cert. dismissed*, 130 S. Ct. 1047 (2010).

5. *See, e.g.*, Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1 (2009) (discussing the necessity of a boundary on prosecutorial immunity and how to best set

Indeed, one author recently wrote a book that includes a helpful analysis of the dangers of prosecutorial misconduct in the American system, in which prosecutors have discretion regarding who and when to charge, and what and how much punishment to seek.[6] However, this Article's purpose is not simply to add to the number of articles and other works lamenting prosecutorial power or accountability for misconduct.

Part II of this Article attempts to delineate what is meant when prosecutorial misconduct is talked about, to give examples of types of misconduct, and to distinguish between actual misconduct and possible flaws in the system that are not technically misconduct.[7] It also introduces the reader to distinctions in misconduct that will be helpful later in the Article: the harmful versus not harmful distinction, the investigative versus prosecutorial distinction, and the intentional versus unintentional distinction.[8]

Part III details the current mechanisms available both inside and outside of American law that are designed to control prosecutorial misconduct.[9] In doing so, the argument draws from many prior academic articles, combining and updating their findings.[10]

Part IV details the current proposals for reform,[11] including one proposal the Supreme Court recently rejected in *Connick v. Thompson*, where the plaintiff asserted that a local government is liable under 42 U.S.C. § 1983[12] for failure to train its prosecutors to avoid misconduct.[13]

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it); Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303 (2010) (putting emphasis on the need to reform prosecutorial immunity to address wrongful conviction concerns); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53 (detailing the lack of necessity for absolute immunity to prosecutors); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275 (2004) (advocating for an independent commission to deal with the serious need of sanctioning prosecutorial misconduct); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001) (drawing attention to and analyzing the limitations of dealing with prosecutorial misconduct and how to alleviate the problem).

6. *See generally* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 3–18, 123–42 (2007).

7. *See infra* Part II.A.

8. *See infra* Part II.B.

9. *See infra* Part III.

10. *See infra* Part III.

11. *See infra* Part IV.

12. 42 U.S.C. § 1983 (2006).

Though a few of the proposals have some merit, this Article will show why none of the proposals really present a good chance of controlling prosecutorial misconduct.[14]

Part V of this Article explains why a slight modification from the "failure to train" theory in *Connick* to a theory of "failure to remedy" would create a better chance of checking misconduct than the holding in *Connick*, other current reform proposals, and existing checks to stem misconduct.[15]

II. FORMS, CLASSIFICATIONS, AND QUANTITY OF MISCONDUCT BY PROSECUTORS IN THE UNITED STATES

Before discussing the forms and classifications of misconduct, "misconduct" as used throughout this Article must be explained. For the purposes herein, the misconduct discussed is limited to actual legal violations attributable to the prosecutor. Thus, it does not include ethical violations that, while perhaps involving repugnant behavior, are legally permissible. This is also a discussion of accountability for actual categorical misconduct by prosecutors and not about wrongful convictions generally.[16]

The reason this Article is limited to actual misconduct is twofold. First, this Article is meant to address remedies for misconduct and is not a treatise on what prosecutors' roles should be in the criminal justice process or how much power they should have. Second, the federal and state courts and legislatures have been unwilling to address even clearly illegal misconduct by prosecutors.[17] Thus, while many scholars writing about the issue note the vast powers afforded to prosecutors when choosing who to prosecute for what and when, and the punishments to seek,[18] this Article will discuss the related, but distinguishable, problem of prosecutorial misconduct in the justice system itself.

Limiting this Article to misconduct and not including all wrongful convictions requires the reader to distinguish between the two. It is true the categories certainly overlap—the victim of prosecutorial misconduct

13. *See* Connick v. Thompson, 131 S. Ct. 1350, 1356 (2011) (rejecting the "failure to train" argument).

14. *See infra* Part IV.

15. *See infra* Part V.

16. *See infra* Part II.B.

17. *See infra* Part IV.

18. *See supra* note 5 and accompanying text.

both can and often does end up as the victim of a wrongful conviction. However, the categories are not equal and one does not completely encompass the other. One could be the victim of misconduct and not be convicted or could be convicted wrongfully without any prosecutorial misconduct.

The key to differentiating the two concepts is the personal focus. With a wrongful conviction, the main focus is on the criminal defendant. Specifically, if the convicted criminal defendant was not guilty of the crime he was charged with, or any other crime, the conviction can be considered wrongful in some way—the defendant will be ascribed guilt and likely punished for a crime he either did not commit or for which he legally could not have been held responsible. Similarly, if the defendant was guilty but was denied some right, whether by the prosecutor or by the court, that made his trial unfair, his conviction may be wrongful.

In contrast, when discussing prosecutorial misconduct, the focus is on the criminal prosecutor and whether the prosecutor followed his ethical duties to the court and to the defendant. If he did not, he can be found to have committed misconduct even if the misconduct is harmless and the defendant would have easily been convicted anyway.[19]

A. *Common Forms of Misconduct*

Listing all forms of prosecutorial misconduct is impossible. This Article focuses on many of the most common forms discussed by courts in the criminal procedure context when criminals appeal their convictions or sentences. When later distinguishing prosecutorial from nonprosecutorial misconduct,[20] this Article leaves out clearly nonprosecutorial forms of misconduct that may be committed by prosecutors, such as misconduct at the investigative stage.

1. *Suborning Perjury*

Possibly the most fundamental form of prosecutorial misconduct occurs when a prosecutor knowingly uses perjured testimony to secure the conviction of a defendant; this is known as "subornation of perjury."[21] The Court first recognized that this form of prosecutorial misconduct deprives a criminal defendant of his Fourteenth Amendment due-process rights in the

19. *See infra* Part II.B.3.
20. *See infra* Part II.B.2.
21. BLACK'S LAW DICTIONARY 1563 (9th ed. 2009).

famous case of *Mooney v. Holohan*.[22]

Detailing the facts of this case,[23] Thomas Mooney[24] was convicted in California of a 1916 murder and sentenced to death.[25] At trial, the prosecution presented testimony that Mooney suspected was perjured.[26] After a denied motion for a new trial, Mooney sought review from the Supreme Court of California.[27] The Attorney General of California filed a stipulation consenting to reversal, which the California Supreme Court denied because it was not properly before the court.[28] On appeal, the California Supreme Court affirmed his conviction on the merits.[29] Mooney then unsuccessfully applied to the trial court to set aside the decision, citing the attorney general's stipulation in support of his argument of possibly perjured testimony.[30] The trial court denied the motion,[31] and Mooney again unsuccessfully appealed[32] to the Supreme Court of California.[33]

22. Mooney v. Holohan, 294 U.S. 103, 112 (1935). It should be noted this was dictum in *Mooney* because the remedies available to the defendant had not been exhausted in order to fully decide the case. *See id.* at 115.

23. Many facts of this complicated case will be taken from the detailed chronology provided by the California Supreme Court in its holding that denied Mooney's state petition for habeas corpus. *See Ex parte* Mooney, 73 P.2d 554 (Cal. 1937).

24. Thomas Mooney was a radical labor activist. B.W. Gordon, Jr., Case Note, *Constitutional Law—Due Process—Failure of Police to Preserve Evidence Held Not To Be a Denial of Due Process of Law Absent Defendant's Showing Bad Faith on Part of Police*, Arizona v. Youngblood*, 109 S. Ct. 333 (1988)*, 20 CUMB. L. REV. 211, 213 (1989).

25. Mooney was allegedly involved in planting a bomb that killed ten people at a rally in San Francisco as part of his activism. *See Ex parte Mooney*, 73 P.2d at 557–58. The death sentence was commuted to a life sentence "following intervention by President Wilson." *Id.* at 558.

26. *Id.* at 559.

27. *Id.* at 558.

28. *Id.* (citing People v. Mooney, 166 P. 999 (Cal. 1917)). Mooney made a motion for reversal, but the court denied it based on its jurisdiction—it could only review the record for error of law. *Id.* at 559 (citing People v. Mooney, 167 P. 696 (Cal. 1917)).

29. *Id.* (citing People v. Mooney, 171 P. 690 (Cal. 1918)).

30. *See id.*

31. *Id.*

32. To stay execution of his sentence, Mooney also filed a procedurally deficient certificate of probable cause, which was denied. *Id.* (citing People v. Mooney, 174 P. 325, 326 (Cal. 1918)).

33. *Id.* (citing *Mooney*, 174 P. at 326).

Mooney then turned to the federal courts for relief, which failed.[34] Finally, Mooney filed an original petition for a writ of habeas corpus with the Supreme Court of the United States.[35]

The United States Supreme Court heard the petition.[36] During the original proceeding, Mooney argued the stipulation consenting to reversal filed by the attorney general, now representing the state,[37] was an admission that testimony used to convict Mooney was known to be perjured when presented at trial.[38] However, without admitting to perjury, the attorney general argued that the act of a prosecutor—the knowing use of perjured testimony, for example—did not deny due process.[39] He argued that no prosecutorial misconduct could, by itself, deny due process unless the defendant was deprived of notice and the right to be heard.[40] The Supreme Court disagreed with this interpretation of the due-process right.[41] The Court proclaimed the attorney general's interpretation of due process could not be approved, and stated:

> [W]e are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the

34. *See id.* at 559–60. First, he filed a writ of *audita querela* to the federal district court in California, which was denied because no such writ existed in California law. *Id.* at 559. Second, he filed a writ of habeas corpus in the same court, alleging knowingly perjured testimony, to which the federal district court denied relief on the procedural ground that Mooney failed to seek habeas relief in the Supreme Court of California after his failed motion for a new trial. *Id.* at 559–60. Mooney sought leave to appeal the federal court's denial of habeas, but the federal court and the federal court of appeals denied. *Id.*

35. *Id.* at 560.

36. Mooney v. Holohan, 249 U.S. 103, 104 (1935).

37. *Id.*

38. *See id.* at 110–11.

39. *Id.* at 111–12.

40. *Id.* at 112.

41. *Id.*

> rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, "whether through its legislature, through its courts, or through its executive or administrative officers."[42]

In other words, the Court in *Mooney* determined prosecutorial misconduct of that type was a violation of the Due Process Clause because it denied access to a fair trial by a governmental actor.[43] The Court later expanded this doctrine to include testimony not solicited by the prosecution but known to be false and uncorrected.[44] It now also includes the use of knowingly false evidence related to the credibility of a witness rather than the underlying events.[45]

Prosecutorial subornation of perjury was recognized not only as a form of misconduct that violated due process itself, but also as the first form of prosecutorial misconduct to create a deprivation of due process. It subsequently led to other forms of misconduct being recognized as violations of due process.

2. Brady *Violations*

One form of misconduct that arose after the recognition of suborned perjury as prosecutorial misconduct was the withholding of exculpatory evidence upon request from the defense.[46] This is a well-documented form of misconduct today.[47] It is commonly called a "*Brady* violation,"[48] which is

42. *Id.* at 112–13 (citations omitted).

43. *See id.* Despite this finding, the Supreme Court held that the opportunity had to be given again to the state to hear Mooney's claims before the Supreme Court would issue the writ in original jurisdiction. *Id.* at 115. When Mooney returned to the Supreme Court of California with a habeas claim as instructed, it was denied. *See Ex parte* Mooney, 73 P.2d 554, 596 (Cal. 1937). The Supreme Court of California held, after reviewing the enormous record of the case that had developed by 1937, that the allegation of the knowing use of perjured testimony was not supported by "substantial, credible evidence." *Id.* Shortly thereafter, Mooney finally received a gubernatorial pardon in 1937, over twenty years after his arrest. *Tom Mooney Pardon*, WHEREVER THERE'S A FIGHT, http://www.whereverntheresafight.com/node/242 (last visited Oct. 23, 2011).

44. *See* Alcorta v. Texas, 355 U.S. 28, 31–32 (1957).

45. Napue v. Illinois, 360 U.S. 264, 269 (1959).

46. Brady v. Maryland, 373 U.S. 83, 86–87 (1963).

47. Gurwitch, *supra* note 5, at 309 ("Prosecutorial suppression of exculpatory

a shorthand reference to the case of *Brady v. Maryland*.[49]

In *Brady*, the Supreme Court held that under the Due Process Clause of the Fourteenth Amendment,[50] a criminal prosecutor has an affirmative obligation to disclose any material evidence known to the prosecutor, favorable to the defendant, and requested during discovery.[51] Interestingly, the Court took its reasoning from the *Mooney* case, comparing the suppression of exculpatory evidence requested by the defense to the use of knowingly perjured testimony, and noted they both strike at the heart of the goals of a fair trial.[52] Furthermore, because a violation of this duty denies the defendant due process, a new trial is warranted, at least as to the question at issue, if this duty has been violated in a situation where it created "any reasonable likelihood [to] have affected the judgment of the jury."[53]

The duty imposed in *Brady* has been expanded since its creation, perhaps contributing to the prevalence of *Brady* violations as a main form of misconduct. For example, in *Giglio v. United States*, the Supreme Court expanded the *Brady* duty to include evidence that could be used to impeach the credibility of prosecution witnesses, even if the evidence did not directly exculpate the defendant.[54]

Most importantly, however, in *United States v. Agurs*, the Supreme Court ruled the duty announced in *Brady* extends even to material in the prosecutor's possession but not specifically asked for by the defense during discovery.[55] Prosecutors are now required to be actively on the lookout for evidence that may exculpate the defendant because such evidence now has to be turned over to the defense, even if it was never requested.[56] In other words, the *Brady* duty became an active duty for prosecutors rather than a reactive duty.

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evidence is a well-documented problem in the criminal justice system.").

49. *E.g.*, Connick v. Thompson, 131 S. Ct. 1350, 1357 (2011).

49. *Brady*, 373 U.S. 83.

50. U.S. CONST. amend. XIV, § 1.

51. *See Brady*, 373 U.S. at 87.

52. *Id.* at 86–87 (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

53. Napue v. Illinois, 360 U.S. 269, 271 (1959).

54. *See* Giglio v. United States, 405 U.S. 150, 154–55 (1972).

55. *See* United States v. Agurs, 427 U.S. 97, 110–11 (1976).

56. *See id.* at 110 (noting it is "elementary fairness" to require disclosure of "substantial value to the defense" without request).

Of course, limitations on *Brady* have arisen.[57] For example, prosecutors need not affirmatively seek out evidence that may be exculpatory and, therefore, they do not violate *Brady* by not knowing about subsequently found exculpatory evidence.[58] Courts have held that prosecutors also need not disclose evidence already known to the defendant or capable of being possessed by the defendant to avoid a *Brady* violation.[59] However, by far the most important limitation on *Brady* is that the duty to disclose only applies to "material" evidence.[60] Material, for this purpose, has been defined by the Supreme Court as not simply evidence which could be relevant, but evidence which is reasonably likely to make a difference in the case as a whole.[61] Despite these limitations, the *Brady* rule and its expansions have left an area for prosecutors to err, whether intentional or not.

3. *Jury Selection Violations*

Another area in which prosecutorial misconduct is frequently discussed is jury selection.[62] Since the Supreme Court's ruling in *Strauder v. West Virginia* in 1879, a state may not enforce a statute prohibiting nonwhites from serving as jurors.[63] However, prosecutors still have ways of excluding jurors from serving on the basis of race. During the jury

57. *See, e.g.*, *id.* at 112–13 (detailing the limits regarding materiality used by courts).

58. *See, e.g.*, Mendoza v. Miller, 779 F.2d 1287, 1297 (7th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986) ("[T]he rule requiring prosecutors in criminal proceedings to disclose information is limited to information known to the prosecution." (citation omitted)).

59. *See, e.g.*, United States v. Paulino, 299 F. Supp. 2d 332, 345 (S.D.N.Y. 2004) (finding no *Brady* violation when defense counsel had equal access as the prosecutor to witness); Jefferson v. State, 234 S.E.2d 333, 335 (Ga. Ct. App. 1977) (finding no *Brady* violation where defendant and counsel were aware of letter's existence and content but did not utilize it); McDaniel v. State, 356 So. 2d 1151, 1155 (Miss. 1978) (finding no *Brady* violation when information was inspected by trial court three times and defendant, through his witness, knew of information and content).

60. Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is *material* . . . ." (emphasis added)); *Agurs*, 427 U.S. at 112–13.

61. *See id.* ("[T]he omitted evidence creates a reasonable doubt that did not otherwise exist . . . .").

62. *See, e.g.*, EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4–8 (2010), *available at* http://www.law.berkeley.edu/files/IllegalRacialDiscriminationJurySelection.pdf.

63. Strauder v. West Virginia, 100 U.S. 303, 310 (1879).

selection process, both the prosecutor and the defense are allowed to challenge jurors for cause—"challenges for cause"[64]—and, subject to a few limitations, dismiss certain jurors for any reason they wish—"peremptory challenges."[65] However, both prosecutors and defense attorneys have used peremptory challenges to remove members based on race.[66] Most infamously, prosecutors used this tactic against black defendants by using peremptory challenges to remove black jurors.[67]

To combat this practice, the Supreme Court, for the first time in *Batson v. Kentucky*, allowed criminal defendants to tangibly challenge the selection of a juror based mainly upon the peremptory challenges of a prosecutor in the case against him.[68] The Court has since expanded this application to cases in which the defendant and the excluded jurors are not of the same race[69] or the juror exclusion is based upon gender.[70]

Under *Batson*, the party opposing the peremptory challenge must first make a prima facie showing of why the challenge was race- or gender-based.[71] The party who exercised the peremptory challenge must then provide a neutral explanation.[72] The trial court then decides if the challenge is legitimate; the opposing party may provide argument as to why the reason provided was not valid but was instead pretextual.[73] Despite the procedural right afforded to the defendant in *Batson*, the very nature of peremptory challenges still provides a way for the unscrupulous attorney to

64. BLACK'S LAW DICTIONARY 261 (9th ed. 2009).

65. *Id.* at 261–62 (noting the opposing party may challenge a peremptory challenge by providing a prima facie showing of discrimination of race, ethnicity, or sex).

66. *See generally* Georgia v. McCollum, 505 U.S. 42 (1992).

67. EQUAL JUSTICE INITIATIVE, *supra* note 62, at 11–12.

68. Batson v. Kentucky, 476 U.S. 79, 96–98 (1986) (overruling Swain v. Alabama, 380 U.S. 202 (1965)). Prior to *Batson*, a defendant could only challenge the pool from which a jury was chosen or provide multiple examples of cases in which the same prosecutor's office used peremptory challenges to exclude members of a certain race. *See Swain*, 380 U.S. at 222 (recognizing a burden on the defendant fighting peremptory challenges appearing to be made on race by the prosecution of showing the prosecution was intentionally doing so). *Batson* held this standard proved ineffectual for preventing jury discrimination. *See Batson*, 476 U.S. at 96–98.

69. Powers v. Ohio, 499 U.S. 400, 415 (1991) (involving a white defendant with black jurors excluded).

70. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994).

71. *Batson*, 476 U.S. at 96–97 (detailing three steps for the prima facie showing).

72. *Id.* at 97–98.

73. *Id.* at 98.

exclude jurors on the basis of race or gender and then to provide reasons that are mistaken by the trial court as passing *Batson* muster.

4. *Speedy Trial Violations*

The prosecutor may also commit misconduct by unduly delaying a prosecution, thereby denying a criminal defendant his right to a speedy trial.[74] Though contained in the Sixth Amendment to the Constitution,[75] the right to a speedy trial was first applied to the states in the 1967 case of *Klopfer v. North Carolina*.[76]

In determining whether the right of a criminal defendant to a speedy trial has been violated, courts utilize a four-factor test from *Barker v. Wingo*, which includes the length of the delay, which parts of the delay were the fault of the prosecution, the prejudice incurred by the defendant because of the delay, and the degree to which the defendant has asserted his right to a speedy trial.[77] The uncertainty in this balancing test leaves an abundance of wiggle room for prosecutors to deliberately delay and not get caught, or get caught with little sanction.

5. *Selective and Vindictive Prosecutions*

Misconduct can arise even from discretionary conduct because it still has constitutional limits.[78] A prosecutor has discretion regarding who to prosecute, the extent of the charges, and what sentences, including the death penalty, he will seek.[79] Perhaps most significantly, this discretion includes what plea offers to make to a particular defendant.[80] Therefore, while it is clear a prosecutor's decision to prosecute cannot be solely based on race,[81] a criminal defendant would have a very difficult time proving the

74. *See* Klopfer v. North Carolina, 386 U.S. 213, 221–23 (1967) (holding the Sixth Amendment right to a speedy trial is fundamental and cannot be denied in this way).

75. U.S. CONST. amend. VI.

76. *See Klopfer*, 386 U.S. at 223 (holding this is a fundamental right, meaning under incorporation, it applies to states). The right to a speedy trial attaches upon formal charge or arrest. United States v. Marion, 404 U.S. 307, 320 (1971).

77. Barker v. Wingo, 407 U.S. 514, 530–33 (1972) (footnote omitted).

78. *See* United States v. Armstrong, 517 U.S. 456, 464–65 (1996) (citations omitted).

79. *See generally* DAVIS, *supra* note 6, at 3–18.

80. *See id.* at 43–44.

81. *Armstrong*, 517 U.S. at 464 (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)).

wide discretion used by the prosecutor in his individual case was race-based.[82] The Supreme Court explained that prosecutorial decisions about who to prosecute are owed a "'presumption of regularity.'"[83] Indeed, lower courts have held that a criminal defendant who argues selective prosecution on the basis of race bears a "heavy burden."[84] This heavy burden may exist particularly to show there are similarly situated possible defendants who were not prosecuted.[85] The difficulty arises because, by definition, no criminal records of the nonprosecuted cases are readily available to show selectivity. Indeed, to the present, the Supreme Court has never overturned a conviction for selective prosecution.[86]

The Supreme Court has, however, overturned convictions for vindictive prosecutions.[87] In *Blackledge v. Perry*, the Court held a presumption of vindictiveness attaches when a prosecutor substitutes a higher charge after a defendant exercises a constitutional procedural right.[88] The presumption may be rebutted when the alleged vindictiveness occurs before the first trial, such as when a defendant decides not to accept a plea agreement.[89] However, some courts have held a vindictive prosecution may still take place in the charging phase, such as when the prosecutor uses a prosecution to intimidate a defendant into not filing civil claims against the police.[90] Whether for vindictive prosecution or selective prosecution, the discretion afforded to the prosecutor itself creates the opportunity for abuse.

82. *See id.* at 464–65 (noting prosecutorial decisions are presumed to be proper absent clear and convincing evidence to the contrary).

83. *Id.* at 464 (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926)).

84. *See, e.g.*, United States v. Berrios, 501 F.2d 1207, 1211 (1974).

85. *See id.*

86. *See* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 13.4(a) (3d ed. 2007) ("[T]he United States Supreme Court has never had occasion to hold that a prosecutor's charging decision was in violation of the equal protection clause . . . .").

87. *See, e.g.*, Blackledge v. Perry, 417 U.S. 21, 28–29 (1974).

88. *Id*. North Carolina, like some states, provided a right to trial de novo in a court of general jurisdiction after being convicted in the limited misdemeanor court. *Id.* at 22. After the defendant exercised this right, the prosecutor substituted the charge with a higher felony against the defendant to "up the ante" and discourage such an appeal. *Id.* at 23.

89. *See, e.g.*, United States v. Goodwin, 457 U.S. 368, 381–83 (1982).

90. *See, e.g.*, Dixon v. District of Columbia, 394 F.2d 966, 968 (D.C. Cir. 1968).

6. *Impermissible Remarks or Attempts to Introduce Improper Evidence by the Prosecution at Trial in Violation of Due Process*

Perhaps the most visible form of misconduct is based on the prosecutor's remarks at trial that violate a defendant's right to due process. Of all the misconduct, this category is the broadest and hardest to define, list, and evaluate. Courts have often struggled to rule on whether remarks of a prosecutor are in violation of due process or simply effective trial lawyering.[91] It is also hard to know whether and when a trial court has cured the problem with an instruction to the jury to "disregard" the comment, which complicates the process.[92]

Still, courts have sometimes found such misconduct.[93] The misconduct may include references by the prosecutor to information not admissible or not in existence at all.[94] One example of this is a prosecutor's personal beliefs and opinions about a witness's veracity or the defendant's guilt,[95] as such opinions may violate due process.[96] Another example is when a prosecutor deliberately refers to inadmissible evidence after the evidence is ruled inadmissible in a pretrial motion.[97] Related to these factual issues coming into the jury's consideration, and sometimes just as problematic, is when the prosecutor misconstrues the law to the jury—such as by falsely characterizing reasonable doubt.[98] Finally, though a closing or opening argument may appeal to the jurors' emotions, some arguments go too far—such as asking a juror to put himself in the victim's shoes or arguing the broader issues of crime control in the neighborhood.[99]

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91. *See* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.7(e) (3d ed. 2007) (footnote omitted).

92. *See id.* § 24.8(a) (footnote omitted).

93. *Id*. § 24.7(e) (footnote omitted).

94. *Id.*

95. *Prosecution Function*, A.B.A., Standard 3-5.8(b), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html#5.8 (last visited Oct. 16, 2011).

96. LAFAVE ET AL., *supra* note 91, § 24.7(e) (footnote omitted).

97. *Id.* (footnote omitted). A recent infamous example of the latter was found in the highly publicized perjury trial of Major League Baseball player Roger Clemens. Nina Totenberg, *Federal Judge Rules Roger Clemens Will Face New Trial*, NPR'S NEWS BLOG (Sept. 2, 2011, 5:40 PM), http://www.npr.org/blogs/thetwo-way/2011/09/02/140154753/federal-judge-rules-roger-clemens-will-face-new-trial.

98. LAFAVE ET AL., *supra* note 91, § 24.7(e).

99. *Id*. (footnote omitted).

B. *Categorizing the Misconduct*

1. *Intentional Versus Unintentional Misconduct*

A distinction exists between intentional and unintentional misconduct. Though not legally significant when dealing with the civil immunity of the prosecutor, the distinction is significant when it comes to the culpability of the prosecutor and the mechanisms used to prevent the misconduct.[100]

While the distinction's nature is somewhat obvious, it is important to note many forms of prosecutorial misconduct are, by their very nature, intentional. For example, a prosecutor cannot unintentionally suborn perjury.[101] Similarly, if the prosecutor excludes a juror from a jury for racial reasons, his conscious use of racial categories makes the conduct intentional.

On the other hand, some forms of misconduct need not be intentional to rise to the level of misconduct.[102] For example, exculpatory evidence known to the prosecution and not disclosed to the defendant is misconduct regardless of the intent of the prosecutor.[103] Similarly, a delay caused by the prosecutor that rises to the level of a violation of the constitutional right to a speedy trial is misconduct regardless of the intent of the prosecutor.[104] Indeed, in such cases, the relevant question is not the intent of the prosecutor but the unfair and uncorrected prejudice to the defendant.[105]

100. *See, e.g.*, Van de Kamp v. Goldstein, 129 S. Ct. 855, 863–64 (2009) (discussing how absolute immunity for prosecutorial misconduct exists regardless of whether the misconduct was intentional, due to fairness principles).

101. BLACK'S LAW DICTIONARY 1563 (9th ed. 2009).

102. United States v. Agurs, 427 U.S. 97, 110 (1976) ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor." (footnote omitted)).

103. Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

104. *See* Barker v. Wingo, 407 U.S. 514, 531 (1972) (noting malicious intent to delay should be weighed heavily in the speedy trial balancing test while negligence "should be weighted less heavily but nevertheless should be considered").

105. *See id.* at 531–32.

2. *The Prosecutorial Versus Nonprosecutorial Distinction*

Another important distinction to consider when thinking about prosecutorial misconduct is the distinction between misconduct by the prosecutor in the role as a prosecutor and misconduct in some other role. The main importance of this distinction is whether the prosecutor will have absolute civil immunity.[106] Furthermore, the exact line of what are prosecutorial versus investigatory or administrative activities of the prosecutor is unclear.[107] For now, only a basic understanding of the distinction is necessary.[108]

To understand the investigatory activities of a prosecutor, it must be understood that a prosecutor's duties may entail many types of activities that do not involve taking steps in court against a particular defendant.[109] A prosecutor may consult with police about the desirability and obtainability of a search warrant[110] or whether probable cause exists for arrest.[111] The prosecutor may discuss the case with the media to solicit hints on who may have committed a particularly public crime.[112]

Similar to a prosecutor's investigative role, a prosecutor's administrative duties do not involve court-based actions against a criminal defendant. Those duties may include making decisions about personnel for whom the prosecutor is responsible, such as hiring, firing, and payroll management.[113]

106. *See infra* Part IV (discussing the tensions surrounding absolute immunity and providing possible solutions).

107. *See infra* Part III (detailing usual duties of prosecutors and the accompanying liability attached to each act).

108. The distinction between what is prosecutorial and what is investigative is discussed later. *See infra* Part III.

109. Imbler v. Pachtman, 424 U.S. 409, 431 n.33 (1976) (acknowledging a prosecutor, as the advocate for the state, will have duties outside of the courtroom).

110. *See, e.g.*, *Law Department*, CITY OF PARMA, http://www.cityofparma-oh.gov/cityhall/law.aspx (last visited Oct. 29, 2011) (specifically noting the criminal legal division "provides 24-hour per day consultation service for the Parma Police Department including availability of personnel for issuance of emergency search warrants").

111. *See, e.g.*, Burns v. Reed, 500 U.S. 478, 482 (1991).

112. *See, e.g.*, Amended Findings of Fact, Conclusions of Law and Order of Discipline, N.C. State Bar v. Nifong, No. 06 DHC 35, 3–7 (July 24, 2007), *available at* http://www.ncbar.gov/orders/06dhc35.pdf (providing a number of statements prosecutor made to the public in a high profile case).

113. *See* Van de Kamp v. Goldstein, 129 S. Ct. 855, 862 (2009).

3. *The Harmful Versus Not Harmful Distinction*

Another distinction worth discussing is that between misconduct causing harm to the defendant and misconduct not causing harm to the defendant.

While all misconduct shows problems in the justice system and casts doubt on the offending prosecutor's integrity, the misconduct may not be directly harmful. This may happen for multiple reasons. For example, a defendant who is the victim of a prosecutor's subornation of perjury may be acquitted by a jury. If acquittal occurs, the testimony's purpose of convicting the defendant has been thwarted and the misconduct is harmless. Similarly and perhaps more commonly, if the defendant would have been convicted even if the misconduct had not been committed, the misconduct is equally harmless.

While it is possible some misconduct is harmless to an individual defendant, certain categories of misconduct are harmful by definition. For example, for a *Brady* violation to occur, a prosecutor's withholding of the evidence must have been reasonably likely to have had an effect on the outcome of trial.[114] By definition, then, a *Brady* violation cannot be harmless, even to an individual defendant.[115] Similarly, if a prosecutor unduly delays prosecution causing a speedy trial violation,[116] then the defendant is potentially harmed whether or not he is later convicted, as he may be anxious about the result.[117] Furthermore, as with *Brady* violations, one of the factors in the finding of a speedy trial violation itself is how much prejudice the defendant has experienced due to the delay.[5118]

In summary, while the degree of harm imposed on defendants can vary depending on the type of misconduct—some forms of misconduct can be harmless, while others may always or nearly always be harmful—all types of misconduct are harmful to the public, whether or not the

114. *See* United States v. Agurs, 427 U.S. 97, 104, 109–10, 112–13 & n.20 (1976) (discussing *Brady*'s requirement of materiality in analyzing the necessity of granting a new trial).

115. *See id.* at 112–13.

116. *See, e.g.*, Klopfer v. North Carolina, 386 U.S. 213, 221–23 (1967).

117. *See, e.g.*, United States v. Ewell, 383 U.S. 116, 120 (1966) (noting the Sixth Amendment's "guarantee [of a speedy trial] is an important safeguard fix to minimize anxiety and concern accompanying public accusation").

118. Barker v. Wingo, 407 U.S. 514, 530, 532 (1972); *see Ewell*, 383 U.S. at 120 (noting the deleterious effects on the defendant, which should be taken into consideration on a case-by-case basis); Brady v. Maryland, 373 U.S. 83, 88 (1963).

defendant is harmed.

C. *The Frequency of Prosecutorial Misconduct*

The question of the frequency of misconduct is important when discussing how to address it. As discussed, prosecutorial misconduct is always harmful in some sense, and often in a real sense to a convicted defendant.[119] However, if the misconduct is not very common, it may not be worth addressing because cracking down on uncommon misconduct may chill the efforts of good prosecutors doing good work. Furthermore, when prosecution leads to the capture and incapacitation of dangerous criminals, zealous prosecution increases the public trust in the system hurt by overzealousness.[120] In contrast, widespread prosecutorial misconduct may lead to the conviction of innocent people for crimes committed by those still free. Alternatively, widespread misconduct by prosecutors leads to a lack of public faith in the prosecutor.[121] This may lead to an unwillingness to assist the prosecutor in justified prosecutions and prosecutorial decisions. Finally, prosecutorial misconduct that is harmful to a defendant is fundamentally unjust and unfair to the defendant, often causing irreparable harm to his life, reputation, finances, or psychological well-being.[122]

Unfortunately, prosecutorial misconduct is not measured directly by government statistics and no records exist to compare misconduct of different types in different places over time. Much of the methodology for understanding the frequency of misconduct is based upon examination of cases without knowledge of the exact number of cases in a class and with records that are not generally created for the purpose of statistical research.[123]

The most important and widest study of prosecutorial misconduct in terms of geographical and chronological scope demonstrates the problems

119. *See supra* Part II.B.3.

120. *See Brady*, 373 U.S. at 87 ("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.").

121. *Cf. id.* at 87 n.2 ("'The United States wins its point whenever justice is done its citizens in the courts.'").

122. *See* Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (recognizing prosecutorial misconduct may deprive a defendant of his liberty, and immunity of the prosecutor leaves him without redress); *see also supra* Part II.B.3.

123. *See, e.g.*, *Harmful Error: Investigating America's Local Prosecutors*, CTR. FOR PUB. INTEGRITY, http://projects.publicintegrity.org/pm/ (last visited Oct. 26, 2011).

with gauging the amount of prosecutorial misconduct.[124] A 2003 study conducted by the Center for Public Integrity revealed over 11,000 cases of prosecutorial misconduct reviewed by appellate courts, and roughly 2,000 appellate cases since 1970 in which courts cited prosecutorial misconduct as a factor in the conviction reversal, charge dismissal, or sentence reduction of the case.[125] A majority of these cases were found by simply using the search term "prosecutorial misconduct" in the LexisNexis and Westlaw legal databases for all appellate cases since 1970.[126]

For a few reasons, this study gives the student of prosecutorial misconduct little information on the prevalence of misconduct. First, and most importantly, this "2,000" number does not include cases in which misconduct did not cause reversal of the conviction or reversal was caused by something else despite the presence of misconduct as a factor.[127] It also does not include unreported cases or cases not reaching the appellate level for any other reason.[128] Second, this 2,000 number does not explain what the denominator is—meaning the percentage of the reported appellate cases with misconduct compared to those that did not disclose misconduct.[129] In other words, the study does not indicate how many criminal cases were reported in LexisNexis and Westlaw since 1970 in order to provide a comparison number. Third, this 2,000 number may vastly underestimate the number of cases of misconduct because unlike crime, which is generally uniformly recorded as reported regardless if verified,[130] misconduct is likely only mentioned when a court verifies to some degree that it occurred.[131] Fourth, the study fails to mention how or if the researchers distinguished between kinds of misconduct—intentional,

124. *Id.*

125. Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, CTR. FOR PUB. INTEGRITY (June 26, 2003), http://projects.publicintegrity.org/pm/default.aspx?act=main.

126. *Methodology: How the Center Compiled Data for These Articles*, CTR. FOR PUB. INTEGRITY, http://projects.publicintegrity.org/pm/default.aspx?act=methodology (last visited Oct. 26, 2011) [hereinafter *Methodology*].

127. Weinberg, *supra* note 125.

128. *See Methodology*, *supra* note 126.

129. Weinberg, *supra* note 125.

130. *Methodology*, U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/cius2007/about/table_methodology.html (last visited Oct. 26, 2011) (explaining crime incidents found to be fraudulent after investigation are not reported by the FBI, and crime not solved and not verified is left on the Uniform Crime Reports).

131. *See Methodology*, *supra* note 126.

unintentional, prosecutorial, or investigative.[132] Finally, while the study discussed what prosecutorial misconduct was, it did not precisely define what it meant and whether unintentional or investigatory misconduct was included.[133]

Studies that are more localized in scope are usually somewhat more rigorous. One such survey, conducted by Marshall Hartman and Steven Richards published in the *John Marshall Law Review* in 2001, found twenty-one percent of conviction reversals in death penalty cases in Illinois from 1980 to 1999 were the result of prosecutorial misconduct.[134] In another study of all capital cases nationwide between 1973 and 1995, the rate of reversible error in capital cases was about sixty-eight percent,[135] with police or prosecutors suppressing evidence from the jury as one main reason for reversal.[136] The Hartman and Richards study is limited by geographical location and type of case—only death penalty reversal cases in Illinois during the 1980s and 1990s were reviewed.[137] This study also seems limited by some of the same factors limiting the study by the Center for Public Integrity—for example, the lack of a distinct definition of prosecutorial misconduct,[138] underreporting due to the fact that prosecutorial misconduct is rarely mentioned by courts unless clear evidence of misconduct is brought to its attention, and the exclusion of cases where prosecutorial misconduct was present but reversal was not ordered.[139]

Prosecutorial misconduct is prevalent in race-based jury exclusions.[140] In June 2010, the Equal Justice Initiative found counties where prosecutors excluded nearly eighty percent of black jurors with peremptory strikes.[141] In one county, the study found blacks were excluded from jury service

132. *Id.*

133. *See id.*

134. *See, e.g.*, Marshall J. Hartman & Stephen L. Richards, *The Illinois Death Penalty: What Went Wrong?*, 34 J. MARSHALL L. REV. 409, 423, 449 (2001).

135. *Id.* at 409–10.

136. *See id.* at 410.

137. *See id.* at 411.

138. *See id.* at 423–24 (providing common forms of misconduct, but not clearly defining it).

139. *See id.* at 410 (noting only reversals were considered).

140. EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 4 (2010), *available at* http://www.law.berkeley.edu/files/IllegalRacialDiscriminationJurySelection.pdf.

141. *Id.* at 5, 14.

more than three times as often as whites.[142] Finally, in some counties, it found prosecutors admitted to attending training sessions in which they learned how to question black jurors to later claim race-neutral reasons for the strike.[143] However, most of these findings were from surveys in the southern United States, meaning the generalizable nature of such findings to the rest of the nation is unclear.[144]

Thus, even with regard to race-based jury exclusions, it is unclear how and to what extent prosecutorial misconduct occurs. However, that it exists and is exceedingly frequent is not disputable.

III. CURRENT WAYS OF HOLDING PROSECUTORS ACCOUNTABLE

A. *Criminal Sanctions for the Prosecutor*

Perhaps the most drastic deterrent to prosecutorial misconduct is criminal sanctions for those who abuse the rights of the criminal defendant. Federal law, codified at 18 U.S.C. § 242, criminalizes "willful" actions under color of law that violate constitutional rights.[145] Since a conviction requires intent to deprive the victim of his civil rights, this form of sanction can only be used to target intentional misconduct.[146] Even though it is for intentional situations, this statute is not a dead letter, as it has been used in many civil rights prosecutions.[147] Perhaps most famously, it was used to prosecute the police officers who assaulted Rodney King after the officers were acquitted of state crimes by an all-white jury in California.[148]

Theoretically, this statute could be used against prosecutors whether they are local, state, or federal. Indeed, in one documented case, a conviction was entered against a prosecutor under this statute;[149] however, the case appears to be the only conviction of a prosecutor for violation of 18 U.S.C. § 242 since the statute was enacted in 1866.[150]

142. *Id.* at 14.
143. *Id.* at 16.
144. *See id.* at 4.
145. 18 U.S.C. § 242 (2006).
146. *See id.* (using "willfully subjects" as the *mens rea* necessary for this crime).
147. *See, e.g.*, Koon v. United States, 518 U.S. 81, 88 (1996) (noting the federal grand jury returned an indictment under this law); United States v. Bartlett, 567 F.3d 901, 905 (2009) (affirming the conviction of Wisconsin officers under this law).
148. *Koon*, 518 U.S. at 88.
149. Brophy v. Comm. on Prof'l Standards, 442 N.Y.S.2d 818, 819 (App. Div. 1981).
150. Johns, *supra* note 5, at 71 (footnote omitted).

Additionally, prosecutors can be held in criminal contempt of court if they violate rules of the court.[151] Recently, this sanction was used against Michael Nifong, the prosecutor responsible for numerous instances of misconduct in the false rape case involving Duke University lacrosse players.[152] As one scholar pointed out, while this form of criminal sanction is slightly more common, it is less serious than sanctions under 18 U.S.C. § 242 and perhaps even less serious than professional discipline or civil damages.[153]

Moreover, criminal measures are probably overkill in many cases. For example, if a *Brady* violation results in a new trial in which the accused is convicted anyway, criminal sanctions against the prosecutor would seemingly be uncalled for despite the fact the harm was great enough to merit a new trial.

Increasing criminal prosecutions of prosecutors would be very difficult. After all, it is prosecutors who typically initiate the process of criminal sanctions.[154] Logically, prosecutors would likely be hesitant to participate in bringing charges against other prosecutors, as such action would be setting a cultural trend that could one day hit them if they step out of line. Because at least some misconduct is not intentional,[155] charging prosecutors with criminal sanctions that require intent would be inapplicable for unintentional misconduct.[156] Because these intentional measures are rare and may be overkill, they are not very effective in deterring misconduct by prosecutors.

B. *Employment and Law License Sanctions for Prosecutors*

1. *Direct Employment-Related Sanctions*

Prosecutors may also be subject to informal sanctions at their offices if they are involved in misconduct.[157] For example, a prosecutor who works at a lower level, particularly if his employment begins with a trial period, is subject to being fired or severely disciplined, while higher level prosecutors

151. *See* Brink, *supra* note 5, at 27 n.150.
152. Gurwitch, *supra* note 5, at 319.
153. *See* Brink, *supra* note 5, at 27 n.150.
154. *See* DAVIS, *supra* note 6, at 5, 12.
155. *See supra* Part II.B.1.
156. *See* 18 U.S.C. § 242 (2006).
157. Zacharias, *supra* note 5, at 762–63.

may also be censured or fired.[158] Even a chief prosecutor may be impeached or, if elected,[159] voted out of office.

It is difficult to know what effect direct employment-related sanctions have on the actions of lower level prosecutors because at the time of writing this Article, no discussion of this issue could be located in the available literature. However, given the inherent conflict of interest the sanction may produce—a sanction comes, for example, from a supervising prosecutor with the same motivation and perspective in the adversarial process as the allegedly misbehaving prosecutor—it would be difficult to rely on this approach as the sole avenue of correcting misconduct. If this were the only route, it may raise questions as to why supervisory police or correctional officers handle all instances of misconduct committed by their subordinates.

Additionally, it is a rather simple matter to see why the elected prosecutors do not suffer election consequences for prosecutorial misconduct: lack of electorate emphasis on the accountability of the office.[160] This lack of emphasis can be seen in many places. First, as law professor Angela Davis explains in her book, *Arbitrary Justice: The Power of the American Prosecutor*, most local prosecutors campaign on the basis of being tough on crime, not on running effective and honest offices.[161] Secondly, and unsurprisingly, this "tough on crime" attitude is appealing to the court of public opinion, about which it is often said that a person is guilty until proven innocent.[162] Unfair actions by prosecutors that hurt the accused are unlikely to affect members of the entire electorate, as it is statistically unlikely a member of the electorate will end up in prison.[163] At

158. *See id.* (discussing the role office supervision can play in performance reviews and discipline, possibly escalating to termination).

159. DAVIS, *supra* note 6, at 166 (noting more than ninety-five percent of chief prosecutors hold elected offices).

160. *See id.* at 166–67.

161. *Id.* at 166 (footnote omitted). This may be changing, at least with respect to mandatory three-strike laws, as evidenced by recent campaigns in California. *See, e.g.*, *Mandatory Sentencing in California: Cooley's Law*, THE ECONOMIST (July 29, 2010), http://www.economist.com/NODE/16693779.

162. *See* Joan Frawley Desmond, *Guilty Until Proven Innocent?*, NAT'L CATH. REG. (Feb. 15, 2011), http://www.ncregister.com/daily-news/guilty-until-proven-innocent.

163. *See* THOMAS P. BONCZAR, U.S. DEP'T OF JUST. BUREAU OF JUST. STATISTICS, SPECIAL REPORT, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf (showing an estimated 6.6% of all American adults, if rates remain

the same time, the public likely sees the benefits of crime control and public safety—thought to be brought on by policies that are tough on crime—as good for everyone. Indeed, for a recent, specific, and what may be powerful example of how little accountability the election process provides against misconduct, one may consider the highly publicized case of Michael Nifong, the prosecutor who committed repeated misconduct against Duke University lacrosse players falsely accused of rape.[164] Specifically, Nifong was publicly chastised by the media with evidence of his misconduct, but, despite this, was then subsequently reelected to his 2006 office.[165]

2. *Law License Sanctions*

Another sanction having consequences for employment is the effect the misconduct may have on the prosecutor's law license. At least one thorough scholarly review of professional sanctions for prosecutorial misconduct has already been completed by law professor Fred Zacharias.[166] In 2001, Professor Zacharias attempted to study the issue "dispassionately," by conducting both an empirical and theoretical look at professional discipline for prosecutors in order to separate his analysis from those who engage in what he calls extensive "hand-wringing" on the issue.[167] Part of his conclusion is, for a number of possible reasons, that attorney-discipline authorities are less likely to bring charges or successfully inflict sanctions against prosecutors for prosecutorial misconduct.[168]

His conclusions are empirically and logically well-founded. On the empirical side, Professor Zacharias attempted to compare and contrast the manner in which prosecutors are disciplined by professional authorities and

unchanged, will go to prison at some point in their lifetime).

164. Amended Findings of Fact, Conclusions of Law and Order of Discipline, N.C. State Bar v. Nifong, No. 06 DHC 35, 20–22 (July 24, 2007), *available at* http://www.ncbar.gov/orders/06dhc35.pdf (providing the lawful reasons Mr. Nifong was disbarred).

165. *See* KC Johnson, *Overall Case Narrative*, DURHAM-IN-WONDERLAND (Oct. 11, 2007, 12:44 AM), http://durhamwonderland.blogspot.com/2007/03/overall-case-narrative.html (outlining a history of the Nifong case); *see also Nifong Re-Elected as Durham County DA*, WRAL.COM (Nov. 7, 2006), http://www.wral.com/news/local/story/1088392/.

166. *See generally* Zacharias, *supra* note 5 (discussing professional sanctions for prosecutorial misconduct).

167. *Id.* at 721, 723.

168. *See id.* at 754–55.

the way other attorneys are disciplined.[169] To do this, he first made an exhaustive study of reported cases involving professional discipline of prosecutors and compared it to reported cases involving all lawyers.[170] He found prosecutors, as well as criminal defense counsel, were far less likely to be disciplined than attorneys handling civil cases.[171] He also found the proceedings were most likely to be brought against prosecutors motivated by personal greed, such as bribery to drop charges, not excessive zeal in trying to convict.[172] Though he admitted his methodology was flawed,[173] his findings revealed a vastly greater number of disciplinary cases in the civil context than the criminal context.[174] Indeed, because he only studied the rate of professional sanctions against prosecutors relative to private counsel,[175] he did not concern himself with the frustrating problem of trying to figure out how much misconduct exists in the first place. In other words, in this case, there was no need to know the total number of cases of misconduct relative to those sanctioned—only the sanctions of prosecutors relative to others were necessary.

Further, his empirical findings were later supported in 2003, when the Center for Public Integrity conducted a survey of the forty-four cases it found since 1970 in which prosecutors faced disciplinary action for "misconduct that affected the fundamental fairness of pending criminal proceedings or infringed on the constitutional rights of criminal defendants."[176] Putting the small number of cases aside, only two of the forty-four cases resulted in disbarment.[177] Misconduct, such as suborning perjury and hiding exculpatory evidence, sometimes resulted in only sixty-day suspensions.[178] This separate finding by the Center for Public

169. *See generally id.* at 723–54 (providing an overall analysis of how the rules apply and may apply differently to the prosecution).

170. *Id.* at 743–55.

171. *Id.* at 754.

172. *See id.* at 757.

173. *Id.* at 743 (noting the data was limited to public record and alternative interpretations of raw results).

174. *Id.* at 754 ("[M]ost discipline occurs in cases involving the private civil bar. Discipline for lawyers in criminal cases . . . is quite rare.").

175. *Id.* at 743–44.

176. *See* Neil Gordon, *Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct*, CTR. FOR PUB. INTEGRITY, http://projects.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=39 (last visited Oct. 26, 2011).

177. *Id.*

178. *See id.* (providing numerous examples of misconduct in a chart with the

Integrity—utilizing a different methodology and coming to the same conclusion—supports Zacharias's conclusions.

On the theoretical side, Zacharias's findings were also supported by strong logical arguments. Among other arguments, he noted prosecutors do not have clients in the typical sense of the word[179]—their "client" is perhaps the crime victim, or perhaps the sovereign, depending on the philosophy of the prosecutor. Additionally, clients, in the true sense of the word, are one of the groups most likely to report misconduct of attorneys to disciplinary authorities.[180] He also points out prosecutors who commit misconduct are often elected, meaning bar authorities may feel they are trampling on the decisions of the electorate and being politically unpopular.[181] Complementing this problem, he argues, is that prosecutors are likely to move on from prosecution, most prosecutors are not career prosecutors, and specific deterrence of the conduct is thus made less important because overly zealous prosecutors are likely to move on to other things before disciplinary proceedings can be brought and completed.[182]

Whether on the logical or empirical side, it seems bar sanctions are unlikely to restrain misconduct due to their low probability of occurring and because lighter sanctions are often imposed when they do occur.

C. *The Criminal Procedural Process*

Probably the most "front line" defenses of prosecutorial misconduct in the trial process are the procedural rights and privileges afforded to the defendant. These include the right to discovery,[183] the right to confront witnesses,[184] the right to an attorney,[185] the right to an appeal,[186] and the

corresponding discipline).

179. *See* Zacharias, *supra* note 5, at 758. Zacharias's argument is made stronger by noting the state and the victims, who prosecutors are said to represent, actually benefit from overzealous conduct. *Id.*

180. *See* Stephen E. Schemenauer, Comment, *What We've Got Here . . . Is a Failure . . . to Communicate: A Statistical Analysis of the Nation's Most Common Ethical Complaint*, 30 HAMLINE L. REV. 629, 644 (2007).

181. Zacharias, *supra* note 5, at 761.

182. *Id.* at 762.

183. *See generally* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 952–98 (5th ed. 2009).

184. *See* U.S. CONST. amend. VI; *see also* LAFAVE ET AL., *supra* note 183, at 1125–40, 1159.

185. *See* U.S. CONST. amend. VI; *see also* LAFAVE ET AL., *supra* note 183, at

right to collaterally attack a conviction with writs of habeas corpus.[187] All of these tools are in place to prevent wrongful convictions of the defendant, and, indeed, such protections can be useful in preventing misconduct. For example, a prosecutor who knows his conduct is likely to lead to an appellate reversal or a mistrial would presumably be less likely to go ahead with it, particularly if he could safely secure a conviction without resorting to misconduct. For a number of reasons, this is also an ineffective control on prosecutorial misconduct.

To understand one reason why, one must recall what prosecutorial misconduct is and the distinction between prosecutorial misconduct and wrongful convictions: wrongful convictions refer to situations when a criminal defendant has been convicted and should not have been, while misconduct refers to the actions of the prosecutor.[188] Thus, misconduct can occur in cases in which there is no wrongful conviction and vice versa.[189] However, because the protections afforded a criminal defendant are designed not to reign in prosecutors but rather to guard against wrongful convictions, such protections fall short of deterring misconduct. For example, in the appeals or collateral review process, an appellate court may designate forms of misconduct as "harmless error"—"error that does not affect a party's substantive rights or the case's outcome"[190]—which essentially means that despite the misconduct, the defendant would have been convicted anyway.[191] This demonstrates an important instance where the prosecutor's misconduct goes without sanction by the trial and appeals process because the misconduct does not increase the possibility of a wrongful conviction, despite its wrongfulness.

Previous articles on prosecutorial accountability have pointed out other manifestations of the focus on the defendant rather than the prosecution during the trial and appeals process.[192] For example, Margaret Johns pointed out that prosecutors who are scolded by trial courts and

578–93.

186. *See generally* LAFAVE ET AL., *supra* note 183, at 1293–95.

187. *See generally id.* at 1333.

188. *See supra* Part II.

189. *Id.*

190. BLACK'S LAW DICTIONARY 622 (9th ed. 2009).

191. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 638 (1993) (finding and applying harmless error with the prosecutor's misuse of evidence at the trial).

192. *See, e.g.*, Johns, *supra* note 5, at 68 ("Even when the appellate court reverses a conviction on grounds of prosecutorial misconduct, the prosecutor who engaged in the misconduct generally escapes any repercussions.").

appellate courts for misconduct are rarely identified by name in the case, as the name of the prosecutor is irrelevant to the appeal.[193]

Other reasons the trial and appeals process do not effectively root out misconduct are the problems of detection and proof. In many of the main types of misconduct, an information gap exists between the court and the prosecutor.[194] That is, only the prosecutor knows what is in the prosecutor's file, so unless someone else learns the prosecutor has withheld exculpatory evidence, the trial and appellate courts cannot effectively take action. Similarly, only the prosecutor and his cooperating witnesses would know if the prosecutor has suborned perjury, and only the prosecutor knows for sure if the prosecutor used race as a consideration in making charges or striking jurors.[195]

Thus, the low probability of particularly dishonest conduct being caught in the criminal appeals process and a narrow focus on its effect on the defendant rather than its reprehensibility[196] combine to make the normal criminal process unlikely to root out misconduct.

D. *Wrongful Conviction Compensation Legislation or Private Bill Compensation*

Indemnification statutes exist in a number of jurisdictions to monetarily compensate those who have been wrongfully convicted.[197] The law provides absolute immunity from civil liability for prosecutors,[198] and these statutes represent what is possibly the only way for those wrongfully convicted to gain monetary relief for wrongful convictions after release.[199] However, this legislation fails to deter misconduct for the same reasons as many of the other checks on misconduct.

First, similar to the trial and appeals process, the purpose of a proceeding under a wrongful conviction statute is to compensate the wrongfully convicted, not to publicize the nature of the misconduct.[200]

193. *Id.* (footnote omitted).

194. *See supra* Part II.A.

195. *See supra* Part II.A.1–2.

196. *See supra* notes 193–95 and accompanying text.

197. Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 73 n.1 (1999).

198. *See infra* Part III.F.

199. It should be noted that Bernhard refers to these statutes as "indemnification legislation." Bernhard, *supra* note 197, at 73.

200. *See id.* at 101 (naming compensation of the innocent as the purpose of

Indeed, wrongful conviction statutes do not even necessarily require misconduct, but instead only require the satisfaction of other elements to show the conviction itself is wrongful.[201] Again, the same detection and proof problems of finding perjured testimony, withheld evidence, and racial preferences exist in the context of wrongful conviction statutes.[202]

Second, as Adele Bernhard, the leading authority on wrongful conviction compensation statutes, has demonstrated, the statutes do not exist in all jurisdictions.[203] Those that have them often have minimal compensation[204] and onerous requirements the wrongfully convicted must satisfy to receive the minimal compensation.[205] As Bernhard explains, even if the courts have established a defendant's actual innocence in some states—instead of merely determining he was not responsible or not demonstrably guilty or fairly convicted—and the defendant already served prison time, he must still get a pardon at the discretion of the state's governor to be eligible for wrongful conviction compensation.[206] It is not hard to imagine why getting a pardon is difficult in any situation,[207] yet it is particularly easy to imagine why a governor would question the need to pardon the already innocent.

Further, as noted, many states have a statutory maximum on the amount a prisoner can recover.[208] In one state, it is as low as $10,000, notwithstanding the number of years a person has been in prison.[209] Some states prevent those who plead guilty from receiving compensation even if they were demonstrably innocent but were intimidated into pleading

these statutes).

201. *See id.* at 101–02, 108–10 (stating the common elements of proving wrongful conviction do not specifically include proof of misconduct).

202. *See supra* Part II.A.

203. *See* Bernhard, *supra* note 197, at 73–74 (discussing injustice without indemnification statutes).

204. *See id.* at 105–08 (noting California, Wisconsin, and West Virginia limit awards to $10,000 total, $5,000 per year, or $25,000 total, and $50,000, respectively).

205. *See id.* at 101–05, 108–10 (explaining an individual must satisfy the following requirements: claim filing or conditions precedent; "burdens of proof"; "absence of behavior contributing to conviction"; "forum of adjudication"; two-year time limit; "retroactivity"; and "claim preclusion").

206. *Id.* at 102–03 (delineating the inherent unfairness in this pardon system).

207. *See id.* at 103 (describing the "unanticipated and arbitrary results" of a pardon system).

208. *See id.* at 105–08.

209. *See id.* at 105 (noting California "permits no award greater than $10,000").

guilty.[210] Finally, with regard to private bills from the legislature—laws passed by a legislature to specifically compensate a person who cannot be legally compensated in court but who deserves compensation for a state action[211]—Bernhard notes many state constitutions have been interpreted to prevent such bills from being valid.[212] Even when not precluded, such bills may depend too much on the wrongfully convicted person being politically popular or influential enough to plead his case to the legislature.[213]

Thus, wrongful conviction statutes and private bills, as well as their checks, suffer from similar problems in being a deterrent to prevent misconduct; there are detection problems, and they are not focused on misconduct, not employed often enough, and not robust enough when employed.

E. *Journalistic Shaming of Prosecutorial Misconduct*

Journalistic shaming is another device currently used to deter prosecutorial misconduct.[214] The theory is that publication of negative accounts of prosecutors' work in the media will cause potential misbehaving prosecutors to take note and realize they should not follow in the ways of the disgraced prosecutor. However, like other current checks on prosecutorial misconduct, this method is also inadequate.

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210. *See id.* at 108 (classifying a guilty plea as "behavior contributing to conviction" to preclude recovery).

211. *See id.* at 93 ("Moral obligation bills are specifically drafted acts generally used to pay otherwise unenforceable claims on behalf of individuals harmed by the state.").

212. *Id.* at 94.

213. *See id.* at 94–95. A similar, yet slightly different mechanism, the so-called "Hyde Amendment," is available in federal court. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119 § 617, 111 Stat. 2440, 2519 (codified at 18 U.S.C. § 3006A (2006)). This statute grants attorneys' fees to prosecutions that eventually resolve in favor of the defense and are brought frivolously or in bad faith. *Id.* However, this also would not apply to deter most prosecutorial misconduct. First, indigent federal defendants would have no claim to use as a vehicle for publicizing the misconduct, as they are specifically excepted from the statute. *See id*. Further, as explained previously, much misconduct does not occur in cases where the defendant becomes a "prevailing party," either because the misconduct was later cured by a second trial or was later deemed harmless error. Finally, and most obviously, most prosecutions for crimes take place at the state level and thus the Hyde amendment would not be relevant, as it only allows claims based on bad faith federal prosecutions. *See id.*

214. DAVIS, *supra* note 6, at 171–76.

Some of the main reasons journalistic shaming does not adequately deter misconduct are explained by Professor Angela Davis in *Arbitrary Justice: The Power of the American Prosecutor*.[215] For example, she notes most Americans receive their knowledge of the justice system through the news media, especially television.[216] Further, the media often report on crime—perhaps too often.[217] Noting the journalistic adage, "if it bleeds, it leads," Davis argues the overreporting of crime itself may cause the populace to believe crime runs rampant and needs to be controlled further, which is a far cry from reporting on prosecutorial misconduct.[218] Further, Davis argues, much of what the news media covers concerning the justice system are things such as celebrity trials and other high-profile cases where the defendants have excellent legal representation, which is not an accurate microcosm of the actual justice system.[219] Indeed, one of the most recent high-profile cases of prosecutorial misconduct[220] was against wealthy university lacrosse players who had excellent legal representation[221] and whose story may never have come to media attention were it not for the toxic dynamics of the particular parties and allegations. Another such case where a criminal defendant was victimized by prosecutorial misconduct but had excellent legal representation[222] was against former United States Senator, the late Ted Stevens of Alaska.[223]

Davis also cites another problem with the popular media's portrayal of the image of the prosecutor, noting how it seems most popular crime shows of late feature a prosecutorial role that often portrays the prosecutor's office quite extensively—especially the *Law and Order* series

215. *Id.* at 171–73.

216. *Id.* at 172.

217. *Id.* at 173.

218. *Id.*

219. *Id.* at 172.

220. Amended Findings of Fact, Conclusions of Law and Order of Discipline, N.C. State Bar v. Nifong, No. 06 DHC 35 (July 24, 2007), *available at* http://www.ncbar.gov/orders/06dhc35.pdf (disbarring Mr. Nifong, the prosecutor in that case).

221. *Q&A: Jim Cooney Talks About Handling Duke Lacrosse Case*, WOMBLE CARLYLE (June 5, 2007), http://www.wcsr.com/news/qa-jim-cooney-talks-about-handling-duke-lacrosse-case.

222. *See Ted Stevens' Attorney Fees at Least $1 Million*, THE BLT: THE BLOG OF LEGALTIMES (May 15, 2009), http://www.legaltimes.typepad.com/blt/2009/05/ted-stevens-attorney-fees-at-least-1-million.html.

223. *See* Pickler, *supra* note 2.

and its spin-offs, which are still running.[224] There is an imbalance in popular perception of prosecutors as the heroes and defense attorneys as the "bad guys."[225] Thus, the public perception of prosecutors as heroes and current journalistic patterns and viewership are not adequate to substantially deter prosecutorial misconduct.

F. *Civil Liability of the Prosecutor and Supervisory Prosecutors*

The main reason the threat of civil liability is not an adequate deterrent to prosecutorial misconduct is the absolute immunity of prosecutors in civil liability,[226] which applies in nearly all cases. To understand immunity, one must recall the distinction between misconduct that is prosecutorial and misconduct that is not prosecutorial, but is rather investigative or administrative.[227]

1. *Absolute Immunity for Prosecutorial Duties*

Regarding actual prosecutorial duties, all criminal prosecutors are afforded absolute immunity from civil liability[228] for suits under federal law.[229] This immunity applies to civil actions brought under federal law, whether or not the misconduct was intentional, the action had an effect on the criminal case, or the conduct deprived a defendant of constitutional rights.[230] This absolute immunity has also been applied by a number of states to state law claims against prosecutors.[231] Recently, it has also been

224. DAVIS, *supra* note 6, at 173–76.

225. *See id.* at 174 ("*Law and Order* and other crime shows almost always portray prosecutors as heroes who put away the bad guys.").

226. *See* Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (noting the disparity absolute immunity creates, but still recognizing it).

227. *See supra* Part II.B.2.

228. *See Imbler*, 424 U.S. at 431.

229. 42 U.S.C. § 1983 (2006).

230. *See Imbler*, 424 U.S. at 428–29 (noting the peculiar position of a prosecutor having other checks to refrain misconduct than civil liability).

231. CAL. GOV'T CODE § 821.6 (2011); N.Y. PUB. OFF. LAW § 17 (2011) ("the provisions of this section shall not be construed in any way to impair, alter, limit, modify, abrogate or restrict any immunity available to or conferred upon any unit, entity, officer or employee of the state or any other level of government"); Bradley v. Medical Bd., 56 Cal. App. 4th 445, 456 (1997) (applying federal law); White v. Brinkman, 23 Cal. App. 2d 307, 313 (1937) ("The immunity applies even despite malicious or corrupt conduct in the exercise of jurisdiction."); Hansen v. State, 503 So. 2d 1324, 1326 (Fla. Dist. Ct. App. 1987); Berry v. State, 400 So. 2d 80, 84 (Fla. Dist. Ct. App. 1981) (holding state statute waiving sovereign immunity in certain circumstances did not abrogate "the long-held common law immunity of public prosecutors");

extended to cover those administrative duties intimately associated with the prosecutorial process, such as the supervision of the conduct of a subordinate prosecutor.[232] The only other officials to receive such wide absolute civil immunity for their official functions are the President of the United States acting in an official capacity, judges and judicial witnesses acting in a quasi-judicial capacity, and members of legislative bodies, such

Aboufariss v. City of De Kalb, 305 Ill. App. 3d 1054, 1065 (1999) ("A prosecutor acting within the scope of her prosecutorial duties enjoys immunity from civil liability, the same immunity afforded to the judiciary." (citing Coleson v. Spomer, 31 Ill. App. 3d 563, 567, 334 N.E.2d 344 (1975))); Weimann v. County of Kane, 150 Ill. App. 3d 962, 970 (1986) ("The law is clear that prosecutors are immune from liability for any activities 'intimately associated with the judicial phase of the criminal process.'" (quoting Woods v. Carey, 563 F. Supp. 212 (N.D. Ill. 1983))); Bloss v. Williams, 15 Mich. App. 228 (1968) (extending judicial immunity to prosecutors); Murph v. State, 98 Misc. 2d 324, 326 (N.Y. Ct. Cl. 1979) (holding that under N.Y. PUB. OFF. LAW § 2 "District Attorneys, and by implication, Assistant District Attorneys are classified as 'local officers', as are municipal police officers. Such liability as may exist for their acts devolves upon the governmental subdivision which employs them, in this case the City of New York."); Willitzer v. McCloud, 6 Ohio St. 3d 447, 449 (1983) ("[P]rosecutors are considered 'quasi-judicial officers' entitled to absolute immunity granted judges, when their activities are 'intimately associated with the judicial phase of the criminal process.'" (quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976))); Carlton v. Davisson, 104 Ohio App. 3d 636, 650 (1995) (extending absolute prosecutorial immunity to "the prosecutor's functions in initiating a prosecution and presenting the state's case . . ."); Shell v. State, 893 S.W.2d 416, 421 (Tenn. 1995) (explaining despite TENN. CODE ANN. § 9-8-307(h) rendering state officers and employees liable in their individual capacities for malicious acts, "it is settled that prosecutors are immune from actions for malicious prosecution under both § 1983 and state common law" (citing Imbler v. Pachtman, 424 U.S. 409 (1976); Willett v. Ford, 603 S.W.2d 143 (Tenn. App. 1979))); *Willett*, 603 S.W.2d at 146–47 (holding absolute prosecutorial immunity applies to both common law actions and actions under 42 U.S.C. § 1983); Charleston v. Pate, 194 S.W.3d 89, 90-91 (Tex. App. 2006) (holding chief prosecutors, as well as their assistants, are protected by absolutely immunity for performing acts "representing the government in filing and presenting criminal cases, as well as other acts that are 'intimately associated with the judicial process'" (citations omitted)); Hawkins v. Walvoord, 25 S.W.3d 882, 891–92 (Tex. App. 2000) ("The common law immunity of a prosecutor is based upon the same considerations that underlie the common law immunities of judges acting within the scope of their duties. A prosecutor's absolute immunity extends to activities intimately associated with the judicial phase of the criminal process."); Kimmell v. Leoffler, 791 S.W.2d 648 (Tex. App. 1990), *abrogated on other grounds by* Ruiz v. Conoco, Inc., 868 S.W.2d 752 (Tex. 1993); *cf.* MICH. COMP. LAWS § 691.1407 (2011) ("A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.").

232. Van de Kamp v. Goldstein, 129 S. Ct. 855, 862–63 (2009).

as Congress and state legislatures.[233] Other officials, including the attorney general[234] and police officers, are not afforded this level of immunity but instead receive only qualified immunity.[235] Notably, the only official receiving absolute immunity who is not neutral to the justice process—such as a witness, judge, or legislator—but acts in an argumentative and adversarial role is the prosecutor.

The reasons for this total immunity were explained by the Supreme Court in the 1976 case of *Imbler v. Pachtman*.[236] The plaintiff, Paul Imbler, was an admitted accomplice to a bank robbery involving the death of a market owner.[237] Suspecting Imbler of a previous robbery involving a death as well, prosecutors charged Imbler with felony murder for the death in the previous robbery.[238]

Maintaining his innocence in the first robbery and resulting death, Imbler went to trial.[239] The prosecution provided eyewitness testimony of one witness who, though unable to identify Imbler from the first robbery, identified Leonard Lingo, whom Imbler admitted knowing and participating with in the second robbery.[240] The prosecution also produced three witnesses who positively identified Imbler.[241]

Imbler's defense provided an alibi witness, who testified to having bar-hopped with Imbler the night of this first robbery.[242] Imbler also testified for himself, maintaining he first met Lingo the morning before the second, admitted robbery.[243] Imbler was convicted and sentenced to death, and his conviction and sentence were upheld on appeal.[244]

After the conviction, a subsequent prosecutorial investigation found corroborating witnesses for Imbler's alibi as well as information calling into

233. Mitchell v. Forsyth, 472 U.S. 511, 520 (1985) (citations omitted).

234. *Id.*

235. *See* 42 U.S.C. § 1983 (2006) (providing liability to state actors depriving constitutional and statutory rights of a citizen).

236. *Imbler*, 424 U.S. at 420–29.

237. *Id.* at 411.

238. *Id.*

239. *See id.*

240. *Id.*

241. *Id.* at 411–12.

242. *Id.* at 412.

243. *Id.*

244. *Id.* (citing People v. Imbler, 371 P.2d 304 (Cal. 1962)).

doubt the credibility of the prosecution's eyewitnesses.[245] In response, Richard Pachtman, the prosecutor at Imbler's trial, wrote to the Governor of California to describe the evidence.[246] Imbler's scheduled execution was stayed shortly thereafter.[247] Imbler sought postconviction relief in the California courts where a hearing was held and the new evidence presented.[248] Furthermore, at the hearing, one of the prosecution's witnesses recanted.[249] Despite the prosecutor coming forward and saving Imbler with his investigation letter to the Governor—and despite the prosecutor's contention the new evidence did not turn up until after the trial—Imbler's counsel accused the prosecutor of knowingly using false testimony at trial and covering up exculpatory evidence.[250]

In any case, Imbler lost in the state court's postconviction proceeding.[251] The state court found the recanting by the prosecutor's witness less credible than his original testimony and found the new corroborating alibis lacked credibility as well.[252] Imbler later sought and was granted a federal writ of habeas corpus ordering Imbler be retried within sixty days or freed.[253] The federal district court, which held no hearing but reread the record, found the prosecution indeed engaged in the misconduct claimed by Imbler's counsel.[254] When prosecutors appealed this finding, the Court of Appeals for the Ninth Circuit upheld the writ.[255]

245. *Id.*

246. *Id.* at 412–13.

247. *Id.* at 413 n.5 (providing it was unclear if this stay was in direct response to the letter).

248. *Id.* at 413.

249. *Id.*

250. *Id.*

251. *Id.* at 413–14 (citing *In re* Imbler, 387 P.2d 6 (Cal. 1963)).

252. *Id.* at 414 (citations omitted).

253. *Id.* at 414–15.

254. *Id.* at 414.

255. *Id.* at 415. In 1976, federal courts were more likely to grant a writ of habeas corpus when reviewing state convictions than they are today, due to a short statute of limitations and high deference owed to the state courts. *Compare id.* (granting the writ of habeas corpus), *with* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 104–05, 110 Stat. 1214, 1218–20 (creating limits on federal habeas corpus, including a one-year statute of limitations and deference to state court findings of law). Thus, the court was permitted to issue the writ many years after the new evidence was found and the state court proceedings were finished. It did so without deference to the legal findings of the state courts. *Imbler*, 424 U.S. at 414–15. New limits would likely make the issuance of this writ almost impossible today.

The state elected not to retry Imbler, and he was freed.[256]

In this rather dubious context, Imbler filed civil suits against state actors, including the same prosecutor who originally came forward with the new evidence.[257] His complaint under 42 U.S.C. § 1983 and other related statutes sought $2.7 million in damages from each defendant and $15,000 in attorney's fees.[258]

Refusing to accept the stringent textual reading of § 1983,[259] the Supreme Court formulated and applied the doctrine of absolute immunity to prosecutorial functions.[260] In doing so, it relied on its prior decisions that exempted other absolutely immune officials, such as legislators, from liability on the theory that § 1983 was never intended to abrogate such common, existing immunities.[261] The Court then cited state cases from as early as 1896 involving prosecutors who brought charges without probable cause, and it showed that absolute prosecutorial immunity had long existed under state law.[262]

The Court then explained the public policy reasons for absolute prosecutorial immunity.[263] The first reason cited was the danger of frequent litigation and the potential to undermine the duties of the prosecutor.[264] The Court explained the burden of litigation would pressure the prosecutor to be mindful that any actions taken could eventually be the subject of litigation, which would cool the prosecutor's ability to zealously prosecute wrongdoers.[265] Defendants would frequently file suits against the prosecutor, believing that any acquittal or other failure to get a conviction would create a potential civil suit against an allegedly dishonest prosecutor.[266] It reasonably follows that frequent and frivolous litigation could not only cool the zeal of the prosecutor, but also clog the courts with needless litigation and subject prosecutors to defending such frivolous litigation. This argument is strengthened by the fact that criminal

256. *Imbler*, 424 U.S. at 415.
257. *Id.*
258. *Id.* at 415–16.
259. *See id.* at 417.
260. *Id.* at 427.
261. *See id.* at 417–18.
262. *See id.* at 421–24.
263. *Id.* at 424.
264. *Id.*
265. *Id.* at 424–25.
266. *See id.* at 425 ("[A] defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions.").

defendants are often insolvent,[267] which makes monetary sanctions—the normal remedy and deterrent for filing frivolous lawsuits[268]—a worthless endeavor. The *Imbler* Court then added that qualified immunity—the immunity given to other officials—was not enough to shield prosecutors from litigation because qualified immunity, at the time of the decision, required the prosecutor to show good faith.[269] Good faith was a factual question requiring factual discovery, such as interrogatories and depositions, and that alone was too burdensome even if the prosecutor ultimately escaped liability.[270]

The other reasons the Court cited in favor of absolute immunity were focused on the possibility of unfair liability to the prosecutor.[271] The Court feared such liability might subject even honest prosecutors to potential liability that would essentially require a civil court to retry the criminal case in a new forum.[272] The Court acknowledged in this second consideration that the prosecutor was not unlike other officials, such as police officers, who received only qualified immunity;[273] however, the Court explained that the time pressures of the prosecutor's office, paired with the limited information a prosecutor has, make it more difficult for prosecutors to establish their immunity or innocence.[274] Similarly, the Court noted subjecting the prosecutor to damages for prosecutorial misconduct may deter courts from making findings for the defense in the criminal case because judges would know the rulings could give rise to future damages to the prosecutor for "mistaken judgment."[275]

The Court also rejected counterarguments that the cost of absolute immunity to genuine litigants was too great.[276] After pointing out that

267. *See* Pamela S. Karlan, *Fee Shifting in Criminal Cases*, 71 CHI.-KENT L. REV. 583, 583 (1995) (footnote omitted) ("Estimates of the percentage of criminal defendants represented by appointed counsel . . . generally hover around seventy-five to eighty percent.").

268. *See* FED. R. CIV. P. 11(c) ("[T]he court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.").

269. *See Imbler*, 424 U.S. at 425.

270. *See id.* (describing this as a "virtual retrial").

271. *Id.*

272. *Id.*

273. *Id.*

274. *See id.* at 425–26.

275. *Id.* at 427.

276. *Id.* at 427–28 ("'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

prosecutors remain subject to criminal liability, the Court noted in a notoriously, and ironically, often-cited passage,

> [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. 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.[277]

After *Imbler*, the prosecutorial immunity doctrine was limited somewhat because prosecutors enjoy only qualified immunity when they act in an investigative and administrative function,[278] so long as the administrative function is not intimately associated with prosecution.[279] However, for prosecutorial misconduct that is part of the actual trial and prosecutorial function of a prosecutor,[280] prosecutors continue to enjoy absolute civil immunity regardless of how egregious, harmful, and clearly unconstitutional their conduct.[281]

2. *Qualified Immunity for Other Duties*

As discussed above, when a prosecutor is acting in an investigative or administrative capacity, his immunity is only qualified.[282] Qualified immunity, however, has undergone a major shift since the time of *Imbler*.

In *Harlow v. Fitzgerald*,[283] decided six years after *Imbler* in 1982, the Supreme Court responded to a serious problem with the doctrine of qualified immunity that most officials enjoy.[284] The Court noted previously in deciding whether qualified immunity attached to regular officials that

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to do their duty to the constant dread of retaliation.'" (citations omitted)).

277. *Id.* at 429 (footnote omitted).

278. *See, e.g.*, Burns v. Reed, 500 U.S. 478, 496 (1991) (rejecting extension of absolute immunity when "giving legal advice to the police").

279. *Cf.* Van de Kamp v. Goldstein, 129 S. Ct. 855, 861–62 (2009) (holding administrative duties requiring "legal knowledge and the exercise of related discretion" warrant absolute immunity).

280. *See supra* Part II.B.

281. *See Van de Kamp*, 129 S. Ct. at 860–61 (recognizing the holding of *Imbler*).

282. *See supra* notes 278–79 and accompanying text.

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

284. *See id.* at 815–19.

the main question had been whether the official acted in "good faith."[285] That is, the question included whether their conduct was malicious or an oversight.[286] Explaining that the purpose of immunity is to root out frivolous litigation and to allow officials to defeat such lawsuits without going to trial or engaging in excessive litigation,[287] the Court noted that having good faith as the test for qualified immunity was incompatible with this purpose[288]—good faith is a factual, subjective issue of intent, which requires evidence to decide.[289] Because taking evidence is a time-consuming procedure requiring depositions, interrogatories, and even trials, the good faith or subjective standard of immunity, which had controlled until that point, was overruled.[290] Instead, the Court prescribed the current doctrine of qualified immunity.[291] Under *Harlow*, the test for qualified immunity is whether the plaintiff charges in the pleadings that the government official violated "clearly established" law or only violated the law in such a way that reasonable officials could not have been on notice that the law would evolve to make their conduct unconstitutional.[292] Notably, this is a legal, not a factual, question. Under the new standard, a court can decide whether the plaintiff is alleging a clearly established violation of the law or a violation that is only questionably unconstitutional, even if the court ultimately decides it is unconstitutional.[293]

As later discussed, some have made the repeatedly unheeded argument that this change in qualified immunity justifies the abrogation of all absolute immunity because absolute immunity was at least partially based on the inability of the then-controlling doctrine of qualified immunity to prevent time-consuming, fact-intensive, frivolous litigation against prosecutors.[294] Regardless, it is this level of immunity that applies to prosecutors acting as investigative officials.[295] Thus, even where the prosecutor is not entirely immune from liability, substantial legal hurdles

285. *See id.* at 815 (citations omitted).
286. *Id.* (citing Wood v. Strickland, 420 U.S. 308, 322 (1975)).
287. *See id.* at 807–08 (analyzing the importance of immunity as a whole).
288. *See id.* at 815–16.
289. *Id.* at 816.
290. *Id.* at 816–18.
291. *See id.* at 818–19.
292. *Id.*
293. *See id.*
294. *See infra* Part IV.A.2.
295. *Harlow*, 457 U.S. at 818–19.

continue to affect a prospective plaintiff, even for investigatory actions taken by the prosecutor. Further, qualified immunity focuses on the investigative functions of a prosecutor,[296] not on a prosecutor acting as a manager or police officer. Other actors, such as police, are focused targets for preventing misconduct at the investigatory stage.

Immunity, though perhaps the biggest hurdle, is not the only issue in a civil case against a prosecutor brought by a former criminal defendant. Even where a prosecutor is not immune, the plaintiff must still prove the prosecutor has violated his rights.[297] Furthermore, if the misconduct had an effect on the criminal case, under *Heck v. Humphrey* suits against government officials for actions that would call into question the legality of the conviction or sentence—such as harmful prosecutorial misconduct—have to wait for a resolution of the criminal case in favor of the criminal defendant before a § 1983 cause of action can arise.[298] Because of this wait, the criminal defendant's evidence against the prosecutor may go stale, witnesses may die, and memories may fade. Notably, because *Heck* requires such cases be dismissed before discovery if the plaintiff has not met his burden, the plaintiff must often wait until long after the deed to even discover evidence of the misconduct. Finally, with regard to federal prosecutors, an additional problem arises because the § 1983 cause of action—which would hold state and local prosecutors liable for deprivation of rights when not immune—does not apply to federal officials by its text.[299] Instead, litigants who get past immunity may need the courts to find a federal cause of action against the prosecutors by implication, similar to what was done for federal law enforcement officials for violations of the Fourth Amendment.[300] Even when a federal right is violated and no other remedies seem readily available, the courts have been unwilling to read in a private right of action,[301] even for the deprivation of established rights, unless Congress has been clear about its intent to protect the right with the

296. *See supra* Part III.F.2.

297. *See* 42 U.S.C. § 1983 (2006).

298. *See* Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (footnote omitted).

299. *See* 42 U.S.C. § 1983 (referring to violations by "every person . . . under color of any statute, ordinance, regulation . . . of any State or Territory or the District of Columbia").

300. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (finding an implicit cause of action under federal law).

301. *See, e.g.*, Wilkie v. Robbins, 551 U.S. 537, 567 (2007) (declining to find an implied right of action against the federal government regarding retaliation for invoking land rights under federal law).

threat of private lawsuits.[302] Similarly, the prosecutor may not be indemnified by his employer even when a judgment is entered against a prosecutor individually, depending on the nature of the misconduct—the more egregious and intentional the misconduct, the less likely the prosecutor is to be indemnified.[303] This may leave a "successful" plaintiff with a worthless judgment against an insolvent party.[304]

Thus, because of absolute or qualified immunity and the perils of civil litigation, civil lawsuits are not an effective deterrent for prosecutorial misconduct.

IV. PROPOSALS TO REFORM PROSECUTORIAL ACCOUNTABILITY

Current proposed reforms for the problem of misconduct without any real check on the corrupt prosecutor range from the logically rational but politically rejected or impossible, to the possible but inadequate.

A. *Calls for an End to Absolute Prosecutorial Civil Immunity*

An often-repeated reform proposal is the call for an end to absolute prosecutorial civil immunity for clearly unconstitutional or intentionally harmful misconduct.[305] The idea is that removing full immunity will deter prosecutors from committing misconduct because they risk being held personally liable.[306]

1. *Early Calls for the End of Absolute Prosecutorial Civil Immunity*

The decision in *Imbler* granting absolute immunity for all prosecutorial functions was first criticized in the concurrence by Justice

302. *See id.* at 561–62.

303. *Cf.* 28 U.S.C. § 1346(b) (2006) (excepting most intentional torts from indemnification by the federal government). Many state governments model their tort claims acts after this statute and do not indemnify intentional torts by governmental employees. *See, e.g.*, MD. CODE ANN., STATE GOV'T § 12-304(b) (LexisNexis 2009).

304. The claims do not receive priority in the distribution of assets in bankruptcy, especially among the unsecured creditors who take only if assets that are at least partially unencumbered by liens exceed the exemption amount. *See* 11 U.S.C. § 507 (2006). Further, though "malicious" torts are not dischargeable in bankruptcy and a creditor may collect from postbankruptcy assets, this does not ensure any such assets will ever exist. *See id.* § 523(a)(12).

305. *See generally* Imbler v. Pachtman, 424 U.S. 409, 432–44 (1976) (White, J., concurring); Johns, *supra* note 5, at 106–07.

306. *Imbler*, 424 U.S. at 444.

White.[307] Justice White agreed the early common law absolute immunity for prosecutors was for malicious prosecution and defamation—that is, actions in choosing to prosecute and statements made during the course of trial.[308] He also agreed that lowering the immunity to the good faith form of qualified immunity, in place at the time for most officials, would not be enough to prevent the chilling of prosecutorial zeal.[309] Prosecutors who were not sure of the credibility of a witness or did not know if that witness was lying might not put a witness on the stand for fear of a future civil suit claiming the prosecutor knew of the falsehood.[310] Similarly, prosecutors who did not know which charges were true and which were not prior to charging may not charge slightly weaker claims for fear of a future civil suit.[311] Thus, Justice White agreed with the majority that the prosecutor should maintain absolute immunity for these actions to protect the judicial process.[312] However, Justice White could not see how absolute immunity for other prosecutorial functions, such as withholding evidence, would help the process.[313] Indeed, he thought a prosecutor who turned over evidence with even a slight chance of being exculpatory—so as to prevent civil liability—would help the truth-seeking process rather than force a prosecutor to shy away from bringing charges, testimony, or arguments to the court's attention for fear of future liability.[314] Justice White thus concurred in the judgment because Imbler's claims rested mostly on alleged subornation of perjury, but Justice White also warned against extending absolute immunity as far as the majority had.[315] The majority's response to Justice White's arguments was that both perjured testimony and withholding evidence were just as bad for the system of justice, and claims for knowing use of perjured testimony could be reframed as hiding the exculpatory impeachment evidence.[316]

Unfortunately, it is possible the majority missed Justice White's point in distinguishing the two types of cases. Justice White's idea was that, while it is true withholding exculpatory evidence and suborning perjury

307. *Id.* at 432–47.
308. *Id.* at 441.
309. *Id.* at 437–38 (citations omitted).
310. *See id.* at 439–40.
311. *See id.* at 438.
312. *Id.* at 440.
313. *See id.* at 441–42.
314. *Id.* at 442–43.
315. *Id.* at 441.
316. *Id.* at 431 n.34 (majority opinion).

could be just as bad for the defendant, the point of immunity is to free the prosecutor from burdens that might cause a prosecutor to withhold questionable evidence from the case, which limits the pool of available evidence.[317] However, immunizing prosecutors for withholding *Brady* material has the exact opposite effect.[318] Namely, it lowers the deterrent value for prosecutors who withhold known evidence.[319] Of course, Justice White's view did not control because he was joined by only two of the seven other Justices on the Court who voted in the case.[320]

Further, the fear that a perjury claim could be reframed as a *Brady* claim[321] has proven unfounded. Indeed, even separating different types of *Brady* material has been done by the courts. For example, evidence that challenges the credibility of a witness for the prosecution[322] is of a different category than true *Brady* material, which tends to show the actual innocence of the criminal defendant[323]—the former category was not recognized as exculpatory material by the Supreme Court until years after the duty to disclose was first placed on prosecutors.[324]

Academic criticisms of *Imbler* were not far behind Justice White. As early as 1978, Lawrence Morrison railed against the *Imbler* decision in the *Southwestern University Law Review*.[325] Among his arguments, he wondered why, if the frivolous litigation concerns of the *Imbler* majority are so serious, other criminal justice officials, such as police and corrections officials, do not also share the same immunity level prosecutors do.[326] This is an important point. After all, the same litigious population of criminal defendants who might construe a lack of a guilt finding as ill will on the part of the prosecutor may also construe searches and prison conditions as illegal when they are not. Further, such officials vastly outnumber prosecutors[327] and they deal with the same potential litigants on a daily

317. *See id.* at 442–43 (White, J., concurring).

318. *See id.* at 443–44.

319. *See id.*

320. *Id.* at 432. Justice White was joined by Justice Brennan and Justice Marshall, while Justice Stevens did not vote. *Id.*

321. *Id.* at 431 n.34 (majority opinion).

322. *See* Napue v. Illinois, 360 U.S. 264, 269 (1959).

323. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

324. *See* Mooney v. Holohan, 294 U.S. 103, 112 (1935).

325. Lawrence Clyde Morrison, Note, *Absolute Immunity for Prosecutors; Too Broad a Protection:* Imbler v. Pachtman, 10 SW. U. L. REV. 305 (1978).

326. *See id.* at 319.

327. *See Occupational Employment and Wages*, U.S. DEP'T OF LABOR:

basis.[328] Therefore, these officials have a greater risk of litigation than prosecutors who are only involved in the court process. The argument from the *Imbler* Court—that prosecutors might not zealously prosecute for fear of litigation[329]—could also apply to these other justice officials. For example, imagine a corrections officer using less force than necessary to protect other inmates for fear of litigation. Yet, corrections officers do not receive absolute immunity.[330]

Morrison's argument can also be used against the *Imbler* Court's second reason for imposing absolute immunity—that prosecutors are somehow more likely than other officials to have trouble proving their qualified immunity because of time constraints and limited information.[331] Given that other officials in the criminal justice system who only receive qualified immunity, including police and corrections officers,[332] often make split second decisions about use of force in high intensity situations, the idea that prosecutors' limited information or time makes them special rings somewhat hollow.

2. *Later Calls for the End of Absolute Immunity for Prosecutors Based on Subsequent Developments in the Law and Culture*

After the cases of *Harlow*[333] and *Heck*,[334] new arguments against absolute immunity surfaced. The argument presented by *Harlow* has already been discussed:[335] the new form of qualified immunity created by *Harlow* cuts down on the litigation required to receive qualified immunity and makes the need for absolute immunity to prevent excessive litigation less forceful.[336] Similarly, the argument from *Heck* was previously alluded to: a prisoner must have questions of the validity of his conviction—such

BUREAU OF LABOR STATISTICS (May 17, 2011, 10:00 A.M.), http://bls.gov/news.release/ocwage.htm (reporting a vastly higher number of police and correctional officers in the protective services than the number of all attorneys).

328. BUREAU OF LABOR STATISTICS, POLICE AND DETECTIVES 2 (2010–2011 ed.), *available at* http://bls.gov/oco/pdf/ocos160.pdf.

329. Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976).

330. *See* Morrison, *supra* note 325, at 319 (providing an example of a police officer who could be litigated against while the prosecutor is still protected).

331. *See Imbler*, 424 U.S. at 425.

332. *See* Pierson v. Ray, 386 U.S. 547, 555 (1967).

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

334. Heck v. Humphrey, 512 U.S. 477 (1994).

335. *See supra* Part III.F.2.

336. *See Harlow*, 457 U.S. at 818–19.

as prosecutorial misconduct, dramatically lowering the class of plaintiffs, or reducing the freshness of the evidence[337]—resolved in his favor prior to proceeding with any litigation against officials.[338]

These two arguments were discussed with force in the legal academic community following those cases. For example, as recently as 2005, Professor Margaret Johns of the University of California Davis School of Law wrote a scathing attack on prosecutorial immunity which was published in the *Brigham Young University Law Review* and widely cited in other law journals.[339] In addition to making the arguments against absolute immunity from *Heck* and *Harlow*,[340] Professor Johns presented other arguments against absolute immunity—for example, that the line between prosecution and investigation is confused,[341] and that the historical immunity for prosecutors is not as absolute as the Court thought in *Imbler*.[342]

a. *Confusion between "investigatory" and "prosecutorial."* First, Johns noted, there has been some confusion regarding where to draw the line between investigative and prosecutorial misconduct.[343] For example, she noted the Supreme Court held in *Burns v. Reed* that a prosecutor providing incorrect advice to the police regarding when they may question a suspect to elicit information then used to generate probable cause for an arrest was investigatory and only subject to qualified immunity.[344] It seemed after this opinion that probable cause was the dividing bright-line test for prosecutors between absolute and qualified immunity.[345]

However, she noted later in *Buckley v. Fitzsimmons* that the probable cause test was questioned.[346] The Court explained that even when the prosecutor takes fabricated evidence, uses it to procure probable cause in the investigation, and later uses it at trial, the prosecutor is not entitled to

337. *See supra* Part III.F.2.
338. *Heck*, 512 U.S. at 486–87.
339. *See* Johns, *supra* note 5, at 53–59.
340. *See id.* at 131–39.
341. *Id.* at 80, 103–09.
342. *See id.* at 107–17.
343. *Id.* at 80.
344. *Id.* at 83 (citing Burns v. Reed, 500 U.S. 478, 487 (1990)).
345. *Id.* at 103.
346. *See id.* at 86 (citing Buckley v. Fitzsimmons, 509 U.S. 259, 274 n.5 (1993)) (providing that the court noted absolute immunity does not automatically attach after meeting probable cause).

absolute immunity because the prosecutor did not use it as an advocate.[347] Though this upheld the preprobable cause rule, the Court was careful to note that if the prosecutor's purpose was adversarial rather than investigatory when procuring the evidence, absolute immunity would apply.[348] Therefore, *Buckley* raised the notion that the motive of the prosecutor, and not the timing of the misconduct, was the key to which form of immunity applied.[349]

The confusion came to a fore in the United States Supreme Court's opinion in *Kalina v. Fletcher*.[350] There the Court held that a prosecutor who provided testimony and charging documents for an arrest warrant before probable cause was established[351] was functioning in a prosecutorial capacity and protected by absolute immunity.[352] The Court reasoned the prosecutor was not testifying to the facts in the affidavit, but rather arguing those facts supported probable cause, which is done as an advocate and not as an investigator.[353] This holding further blurred the line of the probable cause requirement because it represented a way in which misconduct could be absolutely immune even before probable cause.[354]

The line continues to be blurred as of this writing.[355] Circuits have split on the question of what immunity applies when a prosecutor, before probable cause is issued, coerces a witness into perjury for the purpose of using that evidence at trial.[356] In these cases, the prosecutor did not use the evidence at the preprobable cause stage[357] unlike in *Buckley*.[358] The question is tough: is the prosecutor acting as an investigator because the

347. *See Buckley*, 509 U.S. at 275.

348. *Id.* at 273.

349. *See id.* at 275–76.

350. Kalina v. Fletcher, 522 U.S. 118 (1997).

351. *Id.* at 121.

352. *Id.* at 130–31.

353. *Id.*

354. *See id.*

355. *See, e.g.*, McGhee v. Pottawattamie Cnty., 547 F.3d 922, 933 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009), *and cert. dismissed*, 130 S. Ct. 1047 (2010) (holding that attorneys were not qualifiedly immune from allegations that they violated suspects' rights before filing formal charges).

356. Johns, *supra* note 5, at 89, 93–96.

357. *See, e.g.*, Milstein v. Cooley, 257 F.3d 1004, 1011 (9th Cir. 2010); Zahrey v. Coffey, 221 F.3d 342, 342 (2d Cir. 2000); Michaels v. New Jersey, 222 F.3d 118, 123 (3d Cir. 2000).

358. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 264 (1993) (describing how the evidence was used at the special grand jury).

fabrication is preprobable cause and part of gathering evidence—both of which seem to point toward an investigatory function like in *Buckley*—or is he acting as an adversary because his conduct has the ultimate motive of trial use—which is clearly prosecutorial?[359] The courts have also split on the related question as to whether the preprobable cause fabrication of testimony, if not immune, is even a constitutional violation at all because the evidence has not yet been used against the defendant.[360] The Supreme Court tried to resolve the question in the October 2009 term, but the case settled after the Court granted certiorari.[361] Thus, the confusion for the line between investigation and prosecution remains and continues to frustrate the courts. Given the other reasons for switching to qualified immunity, it is arguable this confusion creates yet another reason to abandon absolute immunity.

b. *Professor Johns's argument that absolute immunity is not as historically justified as the* Imbler *Court believed.* Professor Johns also argues absolute immunity is not as historically justified as the *Imbler* Court believed.[362] Specifically, she takes note that the Court determined § 1983, which created the private civil cause of action for violations of the Constitution under color of state or local law,[363] was never intended to abrogate immunities existing when it was passed.[364] In response to this, she argues that the first reported American case of a prosecutor said to have absolute immunity actually postdated the passing of the civil action for violation of constitutional rights.[365] She contrasts this with the common law absolute immunity of judges and legislators, which was fully developed in America at the time of the passing of § 1983.[366] Thus, she argues, it cannot be possible that incorporating absolute immunity for prosecutors into the statute is justified when the common law immunity was not fully developed until later.[367]

359. *See* Johns, *supra* note 5, at 103–04.

360. *See id.* at 90–93.

361. *See* McGhee v. Pottawattamie Cnty., 547 F.3d 922, *cert. granted*, 129 S. Ct. 2002 (2009), *and cert. dismissed*, 130 S. Ct. 1047 (2010).

362. Johns, *supra* note 5, at 117.

363. Civil Rights Act of 1871, ch. 22, 17 Stat. 13, 18 (1871) (codified at 42 U.S.C. § 1983 (2006)).

364. Johns, *supra* note 5, at 107 (footnote omitted).

365. *Id.* at 108 (citing Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896)).

366. *Id.* at 107 (footnote omitted).

367. *Id.* at 108.

To further support her contention, she points out public prosecution did not exist in many jurisdictions in the United States when § 1983 was enacted.[368] Though she does not make it explicit, the professor's argument is strengthened by the fact that many of the things now thought of as prosecutorial misconduct, such as perjured testimony and withheld exculpatory evidence, were not even recognized by the Supreme Court as misconduct until years into the twentieth century[369]—long after 1871, when § 1983 was passed.[370] Finally, perhaps lending the most support to Johns' arguments is that Justice Scalia—who is no lesser a student of the historical meaning of the law—appears to agree with her historical assessment of absolute immunity for prosecutors.[371] However, Justice Scalia has voted to uphold this immunity on grounds of stare decisis.[372]

3. *The Argument that an Increase in Unchecked Prosecutorial Abuse Requires a Reexamination of the Policies Behind the Doctrine*

Other academic writers argue, like Professor Johns, that new developments in the real world of prosecutors dictate a reexamination of the absolute immunity declared in *Imbler* based on policy grounds.[373] They argue prosecutors are increasingly pressured to convict and not to do justice.[374] Malia N. Brink argues the role of media has increased, putting greater pressure on prosecutors.[375] Both Brink and Johns argue new evidence has come forward about the severity of misconduct and the lack of administrative sanctions since *Imbler*.[376] Mostly, these arguments rehashed the policy arguments in *Imbler*,[377] and were at times poised right before a particularly important case regarding the line between

368. *See id.* at 108–10 (stating that, at that time, most victims retained private counsel to prosecute perpetrators because public prosecution as it is known today did not exist).

369. *See supra* Part II.A.

370. Civil Rights Act of 1871, ch. 22, 17 Stat. 13, 18 (1871) (codified at 42 U.S.C. § 1983 (2006)).

371. Kalina v. Fletcher, 522 U.S. 118, 132 (1997) (Scalia, J., concurring) ("There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted.").

372. *Id.* at 135.

373. *See, e.g.*, Brink, *supra* note 5, at 2.

374. *Id.* at 9; Johns, *supra* note 5, at 68.

375. Brink, *supra* note 5, at 9.

376. *See id.* at 18–19; Johns, *supra* note 5, at 59–60.

377. *See* Imbler v. Pachtman, 424 U.S. 409, 424–27 (1976).

investigation and prosecution.[378]

4. *Why the Court Will Not Overrule Absolute Immunity in the Near- or Long-Term Future*

Advocates of overruling *Imbler* certainly make good points.[379] However, their arguments appear doomed to fail, as a number of things show the Supreme Court is committed to absolute immunity for prosecutors and has plenty of arguments to respond to calls for the overruling of absolute immunity.

The best indication the Supreme Court is committed to absolute immunity is the Court's most recent case on the distinction between prosecution and administration, *Van de Kamp v. Goldstein*,[380] which was decided during the October 2008 term. To understand this case, it is best to recall from *Imbler* that the Court declared administrative roles, as opposed to prosecutorial roles, would not necessarily be included within the scope of absolute immunity.[381] *Van de Kamp* involved the withholding of exculpatory material that called into question the credibility of a witness for the prosecution[382]—material under *Brady*[383] that prosecutors are bound to turn over. [384] The Court noted the defendant–prosecutor and supervisors would be immune from a § 1983 suit that claimed they withheld evidence during the trial phase.[385] Presumably to bypass this problem, the plaintiff sued the prosecutor's supervisor, not the prosecutor, for failure to train his subordinate not to withhold *Brady* material.[386] The plaintiff alleged the supervisor had not set up a system in the jurisdiction for ensuring subordinate prosecutors were aware of, and able to execute, their duty to turn over exculpatory evidence.[387]

In a rather short opinion, the Supreme Court unanimously rejected Goldstein's theory.[388] Recognizing the prosecutor's supervisor, Van de

378. Brink, *supra* note 5, at 2; Johns, *supra* note 5, at 80.
379. *See supra* Parts III–IV.
380. Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009).
381. *See Imbler*, 424 U.S. at 430–31.
382. *Van de Kamp*, 129 S. Ct. at 859.
383. Brady v. Maryland, 373 U.S. 83, 87 (1963).
384. Napue v. Illinois, 360 U.S. 264, 269 (1959).
385. *Van de Kamp*, 129 S. Ct. at 862.
386. *Id.* at 859, 861.
387. *Id.* at 859.
388. *Id.* at 864–65.

Kamp, was indeed acting in an administrative rather than prosecutorial role when supervising his subordinates,[389] the Court decided to expand absolute immunity to certain administrative functions.[390] The Court found Van de Kamp's duty to supervise prosecutors and prevent misconduct was intimately associated with the same trial and advocacy-related functions of a typical prosecution.[391] Liability from such duties was protected with absolute immunity in *Imbler*.[392] Specifically, the Court believed substituting the supervisory prosecutor for the actual prosecutor as defendant would not alleviate the concerns of *Imbler*.[393] For example, the Court explained that the threat of frivolous litigation hurting the prosecutor's office was the same whether it was the prosecutor or the prosecutor's supervisor who could be sued.[394] In other words, *Imbler* was not just about protecting the prosecutor himself, but rather the process of prosecution.[395] The Court also noted *Imbler*'s concern about the honest prosecutor being subject to liability was implicated because a supervisory prosecutor's system could be quite complex and even a good faith effort could subject him to liability if a court found it inadequate.[396]

The Court was also bothered by the fact that, under Goldstein's theory of liability, many anomalies would result.[397] Specifically, supervisory prosecutors could be liable for negligently failing to instruct prosecutors on the importance of producing exculpatory evidence, while subordinate prosecutors would be immune from intentional misconduct—including willful subornation of perjury.[398] Further, small office prosecutorial supervisors—where supervisors were involved in nearly every case—would retain immunity because of their trial involvement, while prosecutorial supervisors who were strictly administrative—such as those in larger offices—would be subject to liability.[399] Finally, the Court worried *Imbler*'s absolute immunity—intended to prevent the taking of evidence—would be

389. *Id.* at 861.

390. *Id.* at 861–62.

391. *Id.* at 862.

392. *See id.* at 863 (citing Imbler v. Pachtman, 424 U.S. 409, 424 (1976)).

393. *Id.*

394. *Id.*

395. *See id.* at 864 ("[T]he impediments to the fair, efficient functioning of a prosecutorial office that liability could create lead us to find that *Imbler* must apply here.").

396. *Id.* at 863.

397. *Id.*

398. *Id.*

399. *Id.*

easily bypassed by styling the complaint against a supervisor rather than the officer under Goldstein's theory.[400] Factual litigation would ensue, causing a burden on the office regardless of merit.

Thus, the Court unanimously rejected Goldstein's attempt at limiting immunity around the edges.[401] If the Court reacted that way to limiting immunity, it is logical to think it would be even more averse to overruling *Imbler* entirely. Furthermore, overruling *Imbler* would require an analysis of *Imbler*'s stare decisis value. As noted above, Justice Scalia has upheld absolute immunity on stare decisis grounds, despite his belief it is historically unjustified.[402] Particularly important to the analysis is the fact that prosecutors have come to rely on their absolute immunity, and reliance is a key consideration in stare decisis.[403] Additionally, because prosecutorial immunity is not a constitutional issue but is instead a common law principle—which the Court has held was not altered by the passage of § 1983[404]—the principle of stare decisis can be said to have extra force.[405] That force does not affect Congress's ability to alter the construction of § 1983 to exclude absolute immunity for prosecutors if the doctrine was so unworkable as to need reexamination.[406] Thus, while abundant policy, historical, and legal considerations favor the rejection of absolute prosecutorial immunity and perhaps favor replacing it with qualified immunity, the current Court is not inclined to do so on policy grounds. Future courts may rely heavily on stare decisis considerations in refusing to do so even if they disagree.

5. *Congress Will Not Remove Absolute Immunity for Prosecutors*

The last stare decisis consideration weighing against overruling *Imbler*, namely that Congress could amend the doctrine of absolute immunity if it wanted to, begs the question of whether Congress will do so. Proponents of Congress taking this action should not be optimistic for a number of reasons.

First, doctrines like immunity are extremely complex and inherently

400. *Id.*
401. *See id.* at 864.
402. *See supra* notes 371–72 and accompanying text.
403. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855–56 (1992).
404. Imbler v. Pachtman, 424 U.S. 409, 421–24 (1976).
405. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (citation omitted) (explaining the special justification needed to depart from the doctrine).
406. *Id.* at 172–73.

associated with the function and efficiency of the judicial process and administration.[407] Nowhere is Congress's inclination toward leaving such policies to the courts better shown than in the way Congress has approved the Federal Rules of Evidence and the Federal Rules of Civil Procedure.[408] Both sets of rules are first circulated as drafts by academics and the courts and then later adopted by Congress, pursuant to the Rules Enabling Act.[409]

Also, members of Congress, like other political actors, generally do not like being perceived as "soft on crime,"[410] and any law exposing prosecutors to further liability may subject Congress to political attack for being soft on crime. When Congress does make statutory reform for the benefit of criminal defendants, it may need a nudge from the courts.[411] A good example of this is the recently passed law that equalizes the sentences for crack cocaine and powder cocaine.[412] Though people had been criticizing the disparity long before the law was passed,[413] including the United States Sentencing Commission,[414] it was not until the Supreme Court allowed sentencing judges to consider the then-existing discrepancy in sentencing between "coke" and "crack"[415] that the equalization act was signed into law.[416] Another barrier to a congressional fix is the fact that there is not a great constituency for it. Criminals do not vote, and most people will never serve time in the future for an offense.[417] Finally, liability and litigation cost money, and prosecutors would need to either carry

407. *See supra* Part III.F.

408. *See* Rules Enabling Act, 28 U.S.C. § 2072 (2006).

409. *See id.* § 2073.

410. *See supra* notes 162–64 and accompanying text.

411. *Cf.* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 12 (1997) ("[I]n criminal procedure the broad exercise of judicial power tends to be justified precisely by legislators' unwillingness to protect constitutional interests.").

412. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372.

413. *See, e.g.*, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1319 (1995); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1271–74 (1996).

414. Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,076 (May 10, 1995).

415. *See* Kimbrough v. United States, 552 U.S. 85, 91, 108–12 (2007).

416. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 12, 124 Stat. 2372.

417. *See* THOMAS P. BONCZAR, U.S. DEP'T OF JUST. BUREAU OF JUST. STATISTICS, SPECIAL REPORT, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1 (2003), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf (showing an estimated 6.6% of all American adults, if rates remain unchanged, will go to prison at some point in their lifetime).

personal insurance, or the government—and therefore the taxpayer—would need to indemnify them if Congress chose to remove absolute immunity.[418]

B. *Proposed Reforms Targeted Only at* Brady *Violations*

Regarding *Brady* violations, one suggestion has been an open file discovery rule, where the entire contents of the prosecution's folder is open to the defense counsel.[419] However, as noted by Sara Gurwitch, a supervising attorney at the New York Office of the Appellate Defender,[420] this proposal is problematic because *Brady* material may be in the form of physical evidence or credibility information may not be written in the file.[421] Other problems foreseen by the Author with this proposal are new burdensome rules for prosecutors, risking the names of confidential informants listed in a file, and the fact only *Brady* violations are addressed rather than misconduct as a whole.

Ms. Gurwitch's own proposal for accountability is for *Brady* violations to be sanctioned by an absolute bar to retrial on the charge for which a *Brady* violation is found.[422] Her theory is essentially that this form of sanction would provide a much more serious deterrent to prosecutors[423] and would be similar to the exclusionary rule for violations of the Fourth Amendment, which prevents most evidence seized in violation of the Fourth Amendment from being used at trial.[424]

Ms. Gurwitch bolsters her argument that under the current retrial remedy, a prosecutor is in no worse shape by withholding the evidence and risking retrial than he is before the first trial begins, which is often when the prosecutor chooses not to disclose the evidence.[425] In fact, she argues, the prosecutor may stand to benefit if the conviction is obtained and the misconduct is never discovered.[426] To limit overapplication of such a rule and excessive "windfall" innocence, she suggests the complete bar to retrial

418. *See* 42 U.S.C. § 1983 (2006).

419. Gurwitch, *supra* note 5, at 315.

420. *Id.* at 303.

421. *Id.* at 315–16.

422. *See id.* at 321 ("Dismissal of the indictment in a case where the prosecution intentionally and willfully withholds exculpatory evidence meeting the *Brady* materiality standard is one . . . penalty.").

423. *See id.*

424. *Id.* at 324.

425. *Id.* at 321–22.

426. *Id.* at 322.

should be limited to intentional misconduct,[427] an exception she considered somewhat akin to the "good faith reliance on a bad warrant" exception to the exclusionary rule.[428]

Frankly, however, Ms. Gurwitch's proposal suffers from the same abhorrence many feel toward the exclusionary rule, leading the Author to conclude a similar rule in the context of *Brady* would be met with the same resistance. Fourth Amendment protections have undergone significant limitation since their application to the states, in that the exclusionary remedy has been trimmed.[429] Many people simply do not understand why the guilty defendant "is to go free because the constable has blundered,"[430] and indeed this is a legitimate concern with the rule. Because of this problem and the fact that it is a proposal limited to only *Brady* violations rather than prosecutorial misconduct as a whole, Ms. Gurwitch's suggestion is likely not adequate to prevent such misconduct. Thus, these *Brady*-centered reforms are either ineffective or hard to establish as rules.

C. *Miscellaneous Suggestions of the Academy in Combating Misconduct*

Other proposals to combat misconduct exist, but, as noted by Professor Gershowitz of South Texas College of Law,[431] most of them require massive redirection of funding,[432] such as creating prosecutor grievance counsels or requiring bar authorities to investigate misconduct. As Professor Gershowitz notes, diverting funding to pursue prosecutors is unlikely.[433] Ironically, Professor Gershowitz's own proposal of creating law school projects to go after prosecutorial misconduct and report them to bar officials—similar to the Innocence Project, which pursues wrongful convictions[434]—suffers from the same problem of requiring the realignment of resources, albeit at the law school level rather than the governmental level.

427. *Id.* at 326.

428. *Id.* at 324–26.

429. *See, e.g.*, United States v. Leon, 468 U.S. 897, 922 (1984) (discussing the good faith reliance by the police exception to the exclusionary rule).

430. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

431. Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1059 (2009).

432. *Id.* at 1096.

433. *See id.*

434. *Id.* at 1097–1100.

D. *The Possibility Rejected by* Connick v. Thompson

1. *The Factual Buildup*

Recently, the Supreme Court in *Connick v. Thompson* rejected the latest proposal to hold prosecutors accountable.[435] Like so many other cases involving misconduct, this one involved a *Brady* violation.[436] During his trial for murder, Thompson elected not to testify for fear that his prior armed robbery conviction[437] would come into evidence against him.[438] He was convicted of the murder and sentenced to death.[439] Fourteen years after his conviction for the murder, it was determined that prosecutors in the original robbery case intentionally suppressed a lab report showing Thompson was innocent of the robbery.[440] The problem was that Thompson likely would have testified at his murder trial had he not been convicted of armed robbery, which could have made a difference in the case.[441] Thus, Thompson's murder conviction was reversed on the grounds "that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense at the murder trial."[442] When retried on the murder following the reversal of conviction, Thompson was found not guilty.[443]

2. *Civil Immunity Was Not a Problem for § 1983 Suits Against Local Governments*

A civil suit by Thompson against his armed robbery prosecutor would have failed due to the absolute immunity of the prosecutor,[444] and perhaps this is why it was never brought. Further, though Thompson did name Harry Connick, the supervisory prosecutor, as a defendant in his official capacity for failure to train and supervise his subordinate prosecutors,[445]

435. Connick v. Thompson, 131 S. Ct. 1350, 1366 (2011).
436. *Id.* at 1356.
437. When charged with murder, Thompson was identified as the attacker in another armed robbery and subsequently convicted. *Id.*
438. *Id.*
439. *Id.* (citing State v. Thompson, 516 So. 2d 349 (La. 1987)).
440. *Id.* at 1356 & n.1 (citations omitted).
441. *See id.* at 1356–57.
442. *Id.* (citing State v. Thompson, 825 So. 2d 552 (La. Ct. App. 2002)).
443. *Id.* at 1357.
444. Imbler v. Pachtman, 424 U.S. 409, 427 (1976).
445. *Connick*, 131 S. Ct. at 1355.

this claim was dismissed before trial.[446] Notably, the recent Supreme Court decision in *Van de Kamp* dictates the dismissal of those claims, as it held supervisory prosecutors receive the same absolute immunity for failure to train that prosecutors in their prosecutorial functions enjoy.[447]

Thompson's claims were novel and the reason the case went to the Supreme Court was because his claims were against the local government entity itself. Thus, as a threshold matter, it is important to understand immunity did not bar Thompson's suit and *Connick* was not an immunity case. While individual, local government officers retain their official immunities, the local government itself—when sued under federal law—is not entitled to the sovereign immunity given to state and federal governments or the qualified immunity afforded to officials.[448] Though this seems anomalous, and a possible argument could be made for extending the official absolute immunity of individual prosecutors to their local governments, this argument must not have appealed to the Supreme Court because it denied certiorari on the immunity question in this case,[449] thus leaving intact the decision of the lower courts that denied immunity.[450] A denial of certiorari does not mean the Court disagrees or agrees with the issue proposed for certiorari; however, because the Court took the case but specifically avoided the question, the Author concludes the Court would decline to do so even had it taken up the issue.

3. *The Real Issue in* Connick*: The Theory of Liability and Why Thompson Lost*

Though immunity was a problem for plaintiff Thompson, he remained unsuccessful in the *Connick* case because Thompson was unable to show the Orleans Parish District Attorney's Office was liable under § 1983 for the misconduct of its employees.[451]

To understand why he lost, the analysis must delve into the law of vicarious liability of local governments. Normally, under state common tort law, an employer—in this case, a local government—is liable for the

446. *See id.* at 1357 (noting the *Brady* violation claim was the only one to proceed to this level).

447. Van de Kamp v. Goldstein, 129 S. Ct. 855, 861–62 (2009).

448. Owen v. Independence, 445 U.S. 622, 638 (1980).

449. *Connick*, 131 S. Ct. at 1358; *see also* Connick v. Thompson, 130 S. Ct. 1880, 1880 (2010) (granting certiorari only to the first issue).

450. *See Connick*, 131 S. Ct. at 1355–56.

451. *Id.* at 1358.

negligent, and some types of intentional, misconduct of his employee.[452] This doctrine, firmly entrenched in tort law, is known as respondeat superior.[453] This theory of respondeat superior, however, is not available in actions under § 1983.[454] Specifically, in *Monell v. Department of Social Services*, the Court held the words "cause to be subjected" in § 1983 meant there must be both a heightened culpability standard for holding local governments liable for the actions of their employees and a hibernated causal link between the governmental employer and the actor responsible before the harm becomes remediable under § 1983.[455] Therefore, as explained by the Court in *City of Canton v. Harris*,[456] a plaintiff cannot simply argue that the negligence of the office, in its failure to supervise and train, amounted to a cause of action under § 1983 unless the negligence was of so high a character as to show "deliberate indifference" to the constitutional right[457] and was the "'moving force [behind] the constitutional violation.'"[458]

Unfortunately for Thompson, he only relied on this "failure to train" liability in his suit against the district attorney's office—he claimed the district attorney did not adequately train the prosecutors in his office in their duty to disclose exculpatory evidence.[459] Though the jury found for him on this issue and the lower courts ultimately did not set aside the verdict,[460] the Supreme Court reversed, finding as a matter of law that deliberate indifference was not proven.[461] As the Court pointed out, no pattern of *Brady* violations existed in the Orleans Parish District Attorney's Office prior to the finding of this violation;[462] thus, it was nearly impossible that deliberate indifference to such violations could have arisen from only one incident.[463] Furthermore, the Court acknowledged there could potentially still be deliberate indifference without a pattern of

452. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

453. 27 AM. JUR. 2D *Employment Relationship* § 373 (2004 & Supp. 2011).

454. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691–92 (1978) (determining the legislative history does not allow this liability).

455. *See id.*

456. Canton v. Harris, 489 U.S. 378 (1989).

457. *Id.* at 366 (footnote omitted).

458. *Id.* at 389 (quoting *Monell*, 436 U.S. at 694).

459. Connick v. Thompson, 131 S. Ct. 1350, 1357 (2011).

460. *Id.* at 1357–58.

461. *See id.* at 1358, 1366.

462. *See id.* at 1360.

463. *See id.* at 1361 (discussing the "single-incident" liability on which Thompson relied).

violations in other contexts, such as when dealing with nonlawyers.[464] However, the Court explained a prosecutor's training as a lawyer should enable him to know his *Brady* duties.[465] Any violation of *Brady* is likely to be either a result of the law of large numbers or the deliberate misconduct of an individual prosecutor—both of which lower the culpability of the local government far below the deliberate indifference standard required in *Harris*.[466]

V. FORWARD FROM *CONNICK*, FAILURE TO DISCIPLINE LITIGATION

Even if *Connick* had been decided the other way, it seems clear that failure to train claims against local governments for prosecutorial misconduct are doomed to fail when the conduct of the prosecutor is intentional.[467] After all, no amount of training can prevent prosecutors, carried away in their adversarial role, from going beyond the ethical line. Furthermore, many of the types of misconduct mentioned in this Article, such as suborning perjury or a *Batson* violation, are inherently intentional.[468] What is needed is a deterrent that has a reasonable probability of detecting violators and gives an incentive to the would-be *Brady* violator or witness manipulator to avoid intentional misconduct.

As *Connick* shows, at least one avenue of litigation is not closed: a slight modification of the theory in *Connick* from suing the local government under a theory of "failure to train prosecutors to prevent misconduct," to a theory of "failure to discipline prosecutors for misconduct" may be accepted by the Court in this context. Such an approach[469] also has significant advantages over nearly all of the discussed proposed reforms[470] and the current checks on misconduct mentioned.[471]

A. *Failure to Discipline Liability Could Be Accepted by the Court*

Connick overcame one of the main hurdles in prosecutorial accountability thus far: prosecutorial immunity.[472] As explained, by suing

464. *Id.*
465. *Id.* at 1361–63.
466. *See id.* at 1365–66.
467. *Id.* at 1365.
468. *See supra* Part II.A.
469. This approach also has precedent for its use as a theory in other contexts.
470. *See supra* Part IV.B–C.
471. *See supra* Part III.
472. *See supra* Part IV.D.2.

the local government rather than the individuals directly under federal law, all immunity arguments are bypassed,[473] unless, of course, the Supreme Court decides to extend prosecutorial immunity to local government.[474] With immunity bypassed, the next obstacle is showing deliberate indifference under § 1983.[475] Where *Connick* seemed to err here, however, was not in stating a local government had deliberate indifference to prosecutorial misconduct, but in stating the proof of the deliberate indifference was failure to train the prosecutors.[476] The Author instead suggests the new theory of indifference should be failure to discipline, not failure to train.

If given the Court's blessing, the plaintiff would have to prove the local government had—at the time of the prosecutorial misconduct—a culture of turning a blind eye or having insufficient procedures to hold its own prosecutors liable in order to prove a failure to discipline case. As previously explained, the plaintiff is likely to find evidence of this in at least some jurisdictions, as current controls on prosecutors do little to deter prosecutors.[477]

1. *The Best Authority to Control Prosecutors Is Prosecutors, and "Failure to Discipline Liability" Creates an Incentive for Prosecutorial Control*

Many of the problems discussed throughout the Article regarding the current checks on misconduct stem from the problem of actually detecting the misconduct. For example, trial courts, appellate courts, or bar counsel must rely on limited information when determining whether testimony was known by the prosecutor to be false, in light of current knowledge that a witness was lying for the purpose of post-conviction remedies. Wrongly convicted persons in prison may not know about hidden exculpatory evidence and may not bring post-conviction proceedings or wrongful conviction compensation actions for many years.[478]

However, local government employers—with the authority and

473. *See supra* Part IV.D.3.

474. *See supra* Part IV.D.2 (indicating why this extension may not be happening any time soon).

475. Canton v. Harris, 489 U.S. 378, 388 (1989).

476. Connick v. Thompson, 131 S. Ct. 1350, 1358 (2011).

477. *See supra* Part III.

478. *See, e.g.*, *Connick*, 131 S. Ct. at 1355–56 (discovering undisclosed evidence after being imprisoned for eighteen years).

ability to establish internal controls and detection mechanisms for misconduct—are in a unique position to stop misconduct as they have control of the resources and decisions of the prosecutor. Further, as many bar-discipline cases start by referral from clients,[479] it may be appropriate for local governments to refer prosecutors to bar authorities for discipline instead of waiting for the bar to come to the prosecutor. As the "true client" of the prosecutor, it would be well within their right and traditional role as clients. Currently, a conflict of interest exists due to the politics and nature of prosecutor offices disincentivizing pursuit of discipline for misconduct.[480] An incentive can be created by drawing attention to this current failure to pursue discipline for misconduct.

2. *Failure to Discipline Misconduct Targets the Most Egregious of the Misconduct*

Moreover, failure to discipline liability for local governments employing prosecutors has the advantage of targeting the most egregious behavior of prosecutors. Plaintiffs suing local governments that refuse to respond to egregious cases of misconduct could demonstrate the heightened culpability standard required by *Monell* for local government § 1983 liability.[481] Moreover, it can often easily be shown that failure to discipline creates a culture of misconduct that is the true cause of the conduct in question, meeting the higher causality requirements of *Monell*.[482] Furthermore, this focus on deliberate misconduct dovetails with the true reasons and causes of the misconduct this Article has continuously recited, which are often not a lack of understanding of the rules, but a lack of incentive to follow those rules.[483]

3. *"Failure to Discipline" Leads to Sunlight on the Issue and Provides Hope for Compensation*

Furthermore, failure to discipline liability may create an incentive for local governments to keep records and statistics on incidents of misconduct and responses to them, which is somewhat lacking now.[484] These records could provide a defense to liability for more honest jurisdictions. Such

479. *See* Schemenauer, *supra* note 180, at 644 (noting "[c]omplaints are often brought by aggrieved clients" to initiate disciplinary proceedings).

480. *See supra* Part III.

481. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

482. *See id.*

483. *See supra* Parts III–IV.

484. *See supra* Part II.C.

sunlight on incidents of misconduct may pave the way for political action in favor of actual compensation for victims of misconduct and wrongful convictions. Moreover, for reasons of solvency, successful plaintiffs are more likely to collect under judgments against local governments than they are under judgments against individuals, making both compensation and deterrence stronger.

B. *"Failure to Discipline" Liability Has Worked in Other Contexts*

Perhaps recognizing the need for governmental officials to be controlled by their local governments is of importance in many contexts, failure to discipline liability has been sanctioned by courts in other contexts, including in the criminal defendant context. For example, in the police brutality context, the Second Circuit recognized failure to remedy as a form of heightened culpability and causality, and upheld it as an alternative theory for *Monell*-type liability against a department.[485] In the incarceration conditions context—specifically the failure to provide medical care to detainees—the Sixth Circuit has held the failure to punish sheriffs who do not take proper care in assuring medical care to detainees could provide a theory of *Monell* liability against the local government.[486] Therefore, prospective plaintiffs who argue failure to discipline and control prosecutors for egregious misconduct have some legal basis for use in getting such suits past the pleading stage. Moreover, states have not yet tried to place their officials entirely under state control so that sovereign immunity attaches to the actions of the governmental employer and it can escape liability. It seems they will be unlikely to do so for prosecutors because it would require realignment of the entire responsibility for prosecutors.

C. *Certain Counterarguments Do Not Pan Out Against the Idea of Liability for "Failure to Discipline" Prosecutors*

One foreseeable counterargument about liability that focuses on disciplinary action, or lack thereof, taken by the employers of prosecutors, is that subjecting employers to the threat of legal action may lead to a preemptive firing of prosecutors for every minute error; however, such an argument lacks credibility. Failure to discipline liability proposed in this Article does not look to create liability for failing to fire prosecutors for all misconduct. Instead, it looks to impose liability for failing to discipline

485. Fiacco v. Rensselaer, 783 F.2d 319, 326 (2d Cir. 1986).

486. *See* Marchese v. Lucas, 758 F.2d 181, 188–89 (6th Cir. 1985).

prosecutors for misconduct. In other words, discharge of the prosecutor would not be the only sanction for some smaller, more insignificant, unintentional prosecutorial errors. Therefore, governments would still have considerable flexibility in deciding who to fire and when. The liability proposed would seek only that the governments do not turn a blind eye to the larger, more intentional, and harmful violations.

A second counterargument is raised by Professor Lawrence Rosenthal of Chapman University School of Law.[487] Professor Rosenthal argues any liability for wrongful prosecution suffers from both practical and policy problems.[488]

On the practical side, he argues liability, even for at-fault wrongdoing of prosecutors, would not really create much of an incentive for prosecutors to avoid misconduct.[489] He explains most chief prosecutors work as independent, elected officials who do not deal with budget issues for the government and would not likely respond to monetary incentives that hurt the local government.[490] Similarly, he notes the countervailing incentive of aggressively gaining convictions—increasing the chances for misconduct—could outweigh any incentives created by the proposed liability.[491] Essentially, he argues prosecutors would respond only to political, and not economic, incentives.[492]

As an example, Professor Rosenthal notes that despite evidence sequential police "show ups" are more accurate than simultaneous show ups, police have by and large not switched to sequential show ups to prevent a possible later suit against the police.[493] Instead, the countervailing incentive of getting convictions has led police to use the simultaneous show ups anyway—even if inaccurate, simultaneous show ups are more likely to lead to a purported eyewitness match and a sequential technique is more likely to lead to a nonidentification or an identification of a nonsuspect.[494]

The response to Professor Rosenthal's practical point is to

487. Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 156–57 (2010).

488. *Id.*

489. *Id.*

490. *Id.* at 159.

491. *Id.* at 158–59.

492. *See id.* at 157.

493. *Id.* at 153–54.

494. *Id.*

acknowledge that the type of liability proposed is different from the direct liability against police for single instances of misconduct. While Professor Rosenthal perhaps has a point when the liability proposed is based upon simple negligence standards, this Article envisions a liability for failure of the local governments to respond to the most egregious misconduct, such as intentional *Brady* and *Batson* violations.[495] The political fallout of a lawsuit alleging a local government failed to respond to a pattern of violations that then gets past the summary judgment stage would have a political effect itself, which is greater than that of a single lawsuit against police for a bad show up.[496] Further, Professor Rosenthal may be right—at times, the incentive created by the proposed liability will be outweighed by other considerations[497] such as not wanting to fire a good prosecutor. However, at other times, the incentive will not be outweighed; therefore, the liability has some value at the margin, even if not all the time.

On the policy side, Professor Rosenthal also points out money used to pay for the judgments actually takes money away from the taxpayer and beneficiaries of government programs.[498] The response here is twofold. First, money should be used to pay back the victims of the government's own misconduct, arguably before it goes to the needy. Second, if government liability is based only upon a pattern of not responding to misconduct, the government can easily protect itself by showing it has taken action against dishonest prosecutors. This defensive mechanism could stop many lawsuits and eliminate the huge payouts envisioned by Professor Rosenthal.

VI. CONCLUSION

Though many mechanisms exist to control misconduct, none as of yet can really be said to be a sufficient deterrent. Further, as the main obstacle to compensation and accountability—absolute immunity—appears here to stay, every avenue should be explored to encourage the strengthening of the tools we currently have. However, with slight modifications to its theory, *Connick*'s legacy could provide a starting point for a culture of accountability and control of prosecutorial misconduct.

495. *See supra* Part II.A (discussing the differences in the common types of misconduct).

496. *See* Rosenthal, *supra* note 487, at 153–57.

497. *See id.* at 156–57.

498. *Id.* at 157 n.122.