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I. INTRODUCTION

While certainly the vast majority of prosecutors are ethical lawyers engaged in vital public service, the undeniable fact is that many innocent people have been wrongly convicted of crimes as a result of prosecutorial misconduct.[1] Prosecutors are rarely disciplined or criminally prosecuted for their misconduct,[2] and the victims of this misconduct are generally denied any civil remedy because of prosecutorial immunities.[3]

In litigation under the major federal civil rights statute, 42 U.S.C. § 1983, two kinds of immunity apply to prosecutors: absolute immunity and qualified immunity. The immunity that applies depends on the

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1. CENTER FOR PUBLIC INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS 45–47, app. at 108–09 (2003) [hereinafter HARMFUL ERROR]; BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED app. 2, at 263 (2000); Marshall J. Hartman & Stephen L. Richards, *The Illinois Death Penalty: What Went Wrong?*, 34 J. MARSHALL L. REV. 409, 423 (2001) (detailing rates of prosecutorial misconduct in Illinois); Kenneth Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice To Win* (pts. 1–5), CHI. TRIB., Jan. 10–14, 1999; Innocence Project, *at* http://www.innocenceproject.org (last visited Dec. 3, 2004); James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973–1995* (2000), *at* http://www.justice.policy.net/jpreport/index.html (last visited Nov. 17, 2004); *see also infra* text accompanying notes 42–65.

2. HARMFUL ERROR, *supra* note 1, app. at 78–80; James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2121–24 (2000); *see also infra* text accompanying notes 123–31.

3. HARMFUL ERROR, *supra* note 1, at 43–44; Liebman, *supra* note 2, at 2121; Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3453–63 (1999).

function the prosecutor was performing at the time of the misconduct.[4] When prosecutors act as advocates, absolute immunity applies.[5] Under absolute immunity, prosecutors are immunized even when the plaintiff establishes that the prosecutor acted intentionally, in bad faith, and with malice.[6] When prosecutors act as investigators or administrators, qualified immunity applies.[7] Under qualified immunity, prosecutors are immunized unless the misconduct violated clearly established law of which a reasonable prosecutor would have known.[8] This functional approach to prosecutorial immunity has created confusion and conflict in the lower courts.[9] Together, these immunities deny civil remedies to innocent people who have been wrongly convicted of crimes as a result of prosecutorial misconduct. While qualified immunity strikes a balance between providing a remedy for egregious misconduct and protecting the honest prosecutor from liability,[10] absolute immunity should be reconsidered.

In adopting absolute prosecutorial immunity, the Supreme Court relied on historical understandings and contemporary policies.[11] Both justifications are dubious. According to the Court's interpretation of history, Congress intended to retain well-established common-law

4. Kalina v. Fletcher, 522 U.S. 118, 127–29 (1997); Buckley v. Fitzsimmons, 509 U.S. 259, 268–69 (1993); Burns v. Reed, 500 U.S. 478, 486 (1991).

5. *Burns*, 500 U.S. at 487–96 (holding that a prosecutor is absolutely immune from liability for false statements in a probable cause hearing); Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (holding that a prosecutor is absolutely immune from liability for using false testimony at trial); *see also infra* Parts III and IV.

6. *Kalina*, 522 U.S. at 124; *Imbler*, 424 U.S. at 427; *see* Williams, *supra* note 3, at 3457–61 (collecting cases in which prosecutors received absolute immunity for inducing perjury, failing to disclose exculpatory evidence, fabricating evidence and presenting false testimony, improperly influencing witnesses, initiating a prosecution without probable cause, and breaching plea agreements).

7. *Kalina*, 522 U.S. at 122–23 (holding that a prosecutor who swore to false facts in an affidavit is entitled to qualified immunity, not absolute immunity); *Buckley*, 509 U.S. at 272–76 (holding that a prosecutor who conspired with police to manufacture false evidence is entitled to qualified immunity, not absolute immunity); *Burns*, 500 U.S. at 492–96 (holding that a prosecutor receives qualified immunity for giving legal advice to the police); *see* Williams, *supra* note 3, at 3461–63 (collecting cases in which prosecutors received qualified immunity for providing incorrect information in a search warrant, failing to protect witnesses at risk of violence, leaking false and defamatory information to the media, conducting illegal wiretaps, and participating in illegal searches and seizures).

8. *Buckley*, 509 U.S. at 268.

9. *See infra* Part IV.B.

10. *See infra* Part V.B.5.

11. *Kalina*, 522 U.S. at 123–29; *Buckley*, 509 U.S. at 267–71; *Burns*, 500 U.S. at 484–87; *Imbler*, 424 U.S. at 417–29.

immunities when it adopted § 1983 in 1871.[12] But even assuming Congress intended to retain the existing common-law immunities, absolute prosecutorial immunity was *not* the established law in 1871.[13] In fact, the first case affording prosecutors absolute immunity was not decided until 1896.[14] Congress could not have intended to retain this immunity when it adopted § 1983 because it simply did not exist at that time. Rather, in 1871 prosecutors would have been accorded qualified immunity, not absolute immunity.[15] Thus, the historical argument for absolute prosecutorial immunity is unfounded.

The policy reasons supporting absolute prosecutorial immunity are equally untenable. The Court has justified absolute prosecutorial immunity on the grounds that the threat of civil liability would undermine vigorous prosecutorial performance, constrain independent decisionmaking, and divert time and resources to defending frivolous litigation.[16] In short, in the Court's view, exposing prosecutors to civil liability would burden and undermine the functioning of the criminal justice system.

But contrary to this policy argument, absolute immunity is not needed to prevent frivolous litigation or to protect the judicial process. Absolute immunity protects the dishonest prosecutor but is unnecessary to protect the honest prosecutor since the requirements for establishing a cause of action and the defense of qualified immunity will protect all but the most incompetent and willful wrongdoers.[17] Specifically, under a qualified immunity regime, the victim of misconduct can only maintain an action by defeating the criminal charges[18] and proving that the prosecutor violated clearly established constitutional law[19] with a culpable state of mind.[20] And the qualified immunity defense has been strengthened to provide a complete defense at the earliest stages of

12. *Kalina*, 522 U.S. at 123; *Buckley*, 509 U.S. at 268–69; *Burns*, 500 U.S. at 484–85; *Imbler*, 424 U.S. at 417–18.

13. *See infra* Part V.A.

14. Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896) (holding that a prosecutor is entitled to absolute immunity).

15. *See infra* Part V.A.

16. *Kalina*, 522 U.S. at 124–25; *Burns*, 500 U.S. at 485–87; *Imbler*, 424 U.S. at 423–29. *See generally infra* Part IV.A.

17. *See infra* Part V.B.5.

18. Heck v. Humphrey, 512 U.S. 477 (1994); *see infra* text accompanying notes 569–84.

19. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see infra* Part V.B.5.

20. *See infra* text accompanying notes 590–600.

litigation for all but the most inexcusable misconduct.[21] Thus, qualified immunity provides prosecutors sufficient protection to ensure that they perform their functions independently, without undue timidity or distraction.[22] In short, in all cases qualified immunity for prosecutors would provide sufficient protection to the criminal justice system, while providing a necessary remedy for prosecutorial misconduct.[23]

In addition to protecting the dishonest prosecutor at the expense of the innocent victim, absolute immunity violates public policy for other reasons as well. Absolute immunity frustrates the purpose of civil rights legislation by failing to deter frequent and egregious misconduct.[24] It also hinders the development of constitutional standards and the implementation of structural solutions for systemic problems.[25] Prosecutorial liability—with the safeguard of qualified immunity to prevent vexatious litigation—is necessary to ensure the integrity of the criminal justice system.[26]

Moreover, not only is the doctrine of absolute immunity unsupported by history and contrary to public policy, but its practical application is also unnecessarily confusing and unworkable.[27] It has produced circuit splits on at least four distinct issues, which, surprisingly, have not been addressed in the scholarly commentary. First, the circuits are split on whether the criminal defendant's due process rights are violated when a prosecutor coerces a witness to testify falsely.[28] Second, they are divided on whether a prosecutor is entitled to absolute immunity when she fabricates evidence or coerces a witness to testify falsely and then uses

21. *See infra* text accompanying notes 601–19.

22. *See infra* text accompanying notes 610–19.

23. *See infra* Part V.B.

24. *See infra* Part V.B.3.

25. *See infra* Part V.B.4.

26. *See infra* Part V.B.

27. *See infra* Part IV.B.

28. *Compare* Michaels v. New Jersey, 222 F.3d 118 (3d Cir. 2000) (holding that the coercion of a witness does not violate a defendant's right to due process), *and* Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir. 1994) (same), *with* Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000) (holding that the coercion of a witness violates a defendant's due process rights). While the merits of the due process claim are distinct from the immunity defense, the operation of the absolute immunity defense produces this conflict because it resolves cases without reaching the merits of the dispute and thus impedes the resolution of the substantive issues. *See generally infra* Part IV.B.1 and Part V.B.4.

that tainted evidence in a judicial proceeding.[29] Third, the circuit decisions have taken different approaches to the probable cause requirement for absolute immunity announced in *Buckley v. Fitzsimmons*.[30] Finally, they are split on how to determine whether a prosecutor is acting as an investigator or advocate when she engages in misconduct after probable cause has been met.[31] In Justice Thomas's opinion, the Court should review the current immunity law both to consider a remedy for egregious misconduct and also to resolve the current conflicts in the courts of appeals.[32]

The reconsideration of absolute prosecutorial immunity is especially urgent for two reasons: (1) recent empirical studies establish that prosecutorial misconduct is a significant factor contributing to numerous wrongful convictions of innocent people;[33] and (2) emerging circuit splits on the application of the absolute prosecutorial immunity doctrine suggest that it is becoming increasingly unworkable and is in fact undermining the goals it was designed to achieve.[34]

First, a 2003 study presents alarming evidence of the frequency of prosecutorial misconduct resulting in the wrongful conviction of hundreds of innocent people.[35] This conclusion is reinforced with the ongoing investigation by the Innocence Project at Benjamin N. Cardozo School of Law, which reported that, as of January 2005, 154 people who served time in prison for crimes they did not commit have been exonerated by DNA evidence.[36] In many of these cases, prosecutorial

29. *Compare Michaels*, 222 F.3d 118 (holding that absolute immunity applies), *with* Milstein v. Cooley, 257 F.3d 1004 (9th Cir. 2001) (holding that qualified immunity applies), *and Zahrey*, 221 F.3d 342 (same). *See generally infra* Part IV.B.2.

30. 509 U.S. 259 (1993). *Compare* Spurlock v. Thompson, 330 F.3d 791, 796–98 (6th Cir. 2003) (applying absolute immunity despite absence of probable cause), Moore v. Valder, 65 F.3d 189, 191–95 (D.C. Cir. 1995) (same), Kohl v. Casson, 5 F.3d 1141, 1146 (8th Cir. 1993) (same), *and* Hill v. City of New York, 45 F.3d 653, 661–62 (2d Cir. 1995) (applying absolute immunity where probable cause was based on coerced testimony), *with Milstein*, 257 F.3d at 1011 (applying qualified immunity where the finding of probable cause was based on false evidence). *See generally infra* Part IV.B.3.

31. *Compare Hill*, 45 F.3d at 662–63 (holding that whether a prosecutor is acting as an investigator or as an advocate depends on an objective analysis), *with* Cousin v. Small, 325 F.3d 627, 633–36 (5th Cir. 2003) (holding that whether a prosecutor is acting as an investigator or as an advocate depends on his or her subjective state of mind). *See generally infra* Part IV.B.4.

32. *See* Michaels v. McGrath, 531 U.S. 1118, 1119 (2001) (Thomas, J., dissenting from denial of cert.).

33. *See infra* Part II.

34. *See infra* Part IV.B.3 and 4.

35. HARMFUL ERROR, *supra* note 1.

36. Innocence Project, *supra* note 1.

misconduct contributed to the wrongful convictions.[37] Based on these studies, one can no longer dismiss the problem of prosecutorial misconduct as infrequent nor pretend that sufficient safeguards exist in the system to protect the innocent from wrongful convictions.

Second, the doctrine of absolute prosecutorial immunity is proving increasingly problematic in the lower courts. Attempting to apply the current absolute immunity defense, the Fifth and Ninth Circuits have recently applied a subjective standard to the determination of whether a prosecutor was acting as an advocate or an investigator.[38] This standard requires extensive discovery into the details of the criminal investigation and creates questions of fact as to the prosecutor's subjective state of mind, which cannot be readily resolved by pretrial motions.[39] This approach effectively defeats the entire purpose for the immunity defenses, which is to protect officials not only from the burden of liability, but also from the burden of litigation.[40] In other words, in these circuits—and in others that may follow their lead—the current immunity doctrine not only deprives the victim of a needed remedy, it also deprives honest prosecutors of the protection they deserve from burdensome and distracting litigation.

This Article begins by outlining the significance of the problem of absolute prosecutorial immunity. Specifically, Part II discusses the frequency of prosecutorial misconduct and wrongful convictions and explains the inadequacy of current deterrents and corrective mechanisms. I begin with this exposition of the problem because in developing the absolute immunity doctrine the federal courts have not taken into account the vast and mounting evidence of frequent and unchecked prosecutorial misconduct resulting in the wrongful incarceration of many innocent people. Rather, courts confidently assert that civil liability is unnecessary because other mechanisms are sufficient to deter and correct prosecutorial misconduct.[41] Absolute immunity would not be a serious

37. *Id*.

38. KRL v. Moore, 384 F.3d 1105, 1110–12 (9th Cir. 2004); Genzler v. Longanbach, 384 F.3d 1092, 1098–1100 (9th Cir. 2004); Broam v. Bogan, 320 F.3d 1023, 1033 (9th Cir. 2003); Cousin v. Small, 325 F.3d 627, 633–35 (5th Cir. 2003); *see infra* Part IV.B.4.

39. *KRL*, 384 F.3d at 1110–12; *Genzler*, 384 F.3d at 1098–1100; *Broam*, 320 F.3d at 1033; *Cousin*, 325 F.3d at 633–35; *see infra* Part IV.B.4.

40. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 813–18 (1982).

41. *See, e.g.*, Burns v. Reed, 500 U.S. 478, 492 (1991); *Mitchell*, 472 U.S. at 522 (describing the legal system as a "self-correcting" process); Butz v. Economou, 438 U.S. 478, 512–13 (1978); Imbler v. Pachtman, 424 U.S. 409, 427–29 (1976); Michaels v. New Jersey, 222 F.3d 118, 122 (3d

problem if prosecutors rarely engaged in misconduct, if corrective mechanisms were effective, and if innocent people were not wrongfully convicted. To the extent that the current absolute immunity doctrine is based on such mistaken assumptions, it is important to recognize the truth about prosecutorial misconduct.

Part III provides a brief historical background of § 1983 liability and the immunity defenses. Part IV describes the current state of the law, beginning in Part IV.A with the Court's current functional approach to prosecutorial immunity. Part IV.B details the current conflicts and confusion in the lower courts. Part V argues that absolute prosecutorial immunity should be abandoned and replaced in all circumstances by qualified immunity. Finally, Part VI presents a more modest proposal: even if absolute immunity were preserved for some core prosecutorial functions, it should not apply when the prosecutor has failed to disclose exculpatory evidence, nor should it be expanded to shield prosecutorial misconduct during the investigative phase.

II. THE SIGNIFICANCE OF PROSECUTORIAL MISCONDUCT

Four recent, major studies have confirmed the frequency of prejudicial prosecutorial misconduct.[42] All four concluded that significant numbers of innocent people have been convicted in part as a result of prosecutorial misconduct.[43] Additionally, they all found that many innocent people have been sent to death row as a result of prosecutorial misconduct.[44] Furthermore, all four concluded that prosecutors are neither criminally prosecuted nor disciplined for their misconduct.[45] In light of these findings, one can no longer indulge in the comforting but false fantasy that our criminal justice system sufficiently protects the innocent from prosecutorial misconduct and ensuing wrongful convictions.

Cir. 2000); Kulwicki v. Dawson, 969 F.2d 1454, 1464 (3d Cir. 1992) ("Harm to a falsely-charged defendant is remedied by safeguards built into the judicial system—probable cause hearings, dismissal of the charges—and into the state codes of professional responsibility.").

42. HARMFUL ERROR, *supra* note 1; SCHECK ET AL., *supra* note 1; James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839 (2000); Liebman, *supra* note 2; Armstrong & Possley, *supra* note 1.

43. HARMFUL ERROR, *supra* note 1, at i; SCHECK ET AL., *supra* note 1, app. 2; Liebman, *supra* note 2, at 2094; Armstrong & Possley, *supra* note 1, Jan. 10, 1999.

44. HARMFUL ERROR, *supra* note 1, app. at 92–107; SCHECK ET AL., *supra* note 1, at xiv; Liebman, *supra* note 2, at 2094 n.160; Armstrong & Possley, *supra* note 1, Jan 10, 1999.

45. HARMFUL ERROR, *supra* note 1, app. at 78–90; SCHECK ET AL., *supra* note 1, at 175, 180–81; Liebman, *supra* note 2, at 2121–22; Armstrong & Possley, *supra* note 1, Jan. 10, 1999.

Specifically, in 2003 the Center for Public Integrity reported its finding that since 1970 there have been over 2000 cases in which prosecutorial misconduct by state and local prosecutors was sufficiently prejudicial to require charges to be dismissed, convictions to be reversed, or sentences to be reduced.[46] In 513 additional cases, prosecutorial misconduct was discussed in dissenting and concurring opinions.[47] And in thousands of other cases, appellate courts found prosecutorial misconduct but upheld the convictions under the harmless error standard.[48] The report catalogued fifty-four cases of prosecutorial misconduct in which innocent people were convicted of serious crimes, including murder, rape, kidnapping, and robbery; in many of these cases, the innocent were sentenced to death.[49] Yet, of the 2000 cases of prejudicial prosecutorial misconduct, prosecutors were disciplined in only forty-four cases and were never criminally prosecuted.[50]

In 2000, the Innocence Project at Benjamin N. Cardozo School of Law at Yeshiva University published a major report on wrongful convictions. It revealed that as of August, 1999, DNA testing established "that 76 people had been sent to prison and death row for crimes they did not commit."[51] Prosecutorial misconduct was a factor in twenty-six percent of those cases.[52] According to this ongoing project, as of January 2005, 154 innocent people who served time in prison for crimes they did not commit have been exonerated by DNA evidence.[53] Yet, like the Public Integrity study, the Innocence Project found that prosecutors were rarely held accountable for their misconduct.[54]

46. HARMFUL ERROR, *supra* note 1, at i, 2; *id.* app. at 108–09.

47. *Id.*

48. *Id.*

49. *Id.* app. at 92–107. Of these cases, one wrongful conviction occurred in the 1960s; twelve wrongful convictions occurred in the 1970s; thirty-one wrongful convictions occurred in the 1980s; and ten wrongful convictions occurred in the 1990s. The data from the 1990s to date is very preliminary given the length of time involved in capital prosecutions, appeals, and habeas proceedings. For example, in California it typically takes a decade for the direct appeal of a capital conviction to be resolved. Bob Egelko, *State's Chief Justice Praises Long Appeals Process*, S.F. CHRON., Dec. 15, 2004, at A21. The subsequent state and federal habeas actions may last an additional five to ten years. *Id.* According to Professor Liebman, the average time for appellate and habeas review of a capital case is eleven years. Liebman, *supra* note 2, at 2056.

50. HARMFUL ERROR, *supra* note 1, app. at 78–90.

51. SCHECK ET AL., *supra* note 1, at xiv.

52. *Id.* app. 2, at 263.

53. Innocence Project, *supra* note 1.

54. *Id.*; SCHECK ET AL., *supra* note 1, at 175, 180–181.

Two other national studies reached similar conclusions. A study published in 2000 by Professor James S. Liebman and his Columbia Law School colleagues examined 4578 state capital cases that were directly reviewed on appeal in state appellate courts and 599 capital cases that were reviewed in federal habeas corpus proceedings from 1973–95.[55] They concluded that sixty-eight percent of the cases contained serious error warranting reversal[56] and catalogued numerous cases of prosecutorial misconduct.[57] They too noted the lack of prosecutorial accountability.[58]

Similarly, a 1999 national study by the *Chicago Tribune* found that since 1963, 381 homicide convictions have been reversed for serious prosecutorial misconduct, including using false evidence or suppressing exculpatory evidence.[59] Of the 381 defendants, sixty-seven had been sentenced to death.[60] In describing the prosecutorial misconduct, the reporters wrote: "They have prosecuted black men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs."[61] But, again, the study found prosecutors were neither prosecuted nor disciplined for their misconduct.[62]

State and local studies mirror the conclusions on a smaller scale. A report on Illinois death penalty cases found that prosecutorial misconduct accounted for twenty-one percent of all reversals.[63] An Ohio study found that in fourteen of the forty-eight cases in which the death penalty was imposed some ethical issue involving the prosecutor had arisen.[64] In California, the Los Angeles County Grand Jury reported that from 1979–90, "The Los Angeles County District Attorney's Office failed to fulfill the ethical responsibilities required of a public prosecutor by its

55. Liebman et al., *supra* note 42, at 1844.

56. Liebman, *supra* note 2, at 2052–54; Liebman et al., *supra* note 42, at 1850.

57. Liebman, *supra* note 2, at 2094–96 n.160; Liebman et al., *supra* note 42, at 1850.

58. Liebman, *supra* note 2, at 2121–22.

59. Armstrong & Possley, *supra* note 1, Jan. 10, 1999.

60. *Id.*

61. *Id.*

62. *Id.*

63. Hartman & Richards, *supra* note 1, at 423.

64. Edward C. Brewer, III, *Let's Play Jeopardy: Where the Question Comes After the Answer for Stopping Prosecutorial Misconduct in Death-Penalty Cases*, 28 N. KY. L. REV. 34, 36 (2001).

deliberate and informed declination to take the action necessary to curtail the misuse of jail house informant testimony."[65]

Unfortunately, these studies are but the latest of many reaching the same conclusion.[66] For example, in 1932, Professor Edwin Borchard of Yale Law School published a book cataloguing sixty-five case studies of wrongful convictions, including eight cases in which defendants were convicted of murder but the alleged victim later turned out to be alive.[67] A 1987 Stanford study found that since 1900, 350 innocent people were convicted of potentially capital offenses.[68] According to their analyses, fifty of those wrongful convictions resulted at least in part from prosecutorial misconduct, including suppression of exculpatory evidence (thirty-five cases) and overzealous prosecution (fifteen cases).[69]

As consistent and convincing as these studies are, numbers alone cannot convey the significance of the problem in human terms. For example, in recent years in North Carolina, five death sentences were reversed after prosecutorial misconduct was uncovered through the state's open-files process, which applies to habeas corpus actions for prisoners on death row.[70] In one case, the attorney general produced files that contained statements from seventeen witnesses who had seen the victim alive after the defendant was supposed to have killed him.[71] In

65. REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 6. The report catalogues inducements provided to informants in exchange for testimony. *Id.* at 76–90. It explains that informants were encouraged to fabricate information and evidence because they were never prosecuted for falsifying evidence, even though the fabrication was discovered. *Id.* at 90. For example, informants were not prosecuted even after they testified to "diametrically opposite facts in the same trial" and provided testimony that was "completely contrary to earlier taped statements." *Id*. In other cases, informants were promised that their cooperation would be favorably reported if they provided "truthful" testimony. *Id.* at 95. As the Report observes, "[I]t is only reasonable that 'truthful' to the informant means consistent with the prosecution's theory of the case. Otherwise, of course, there is no point in calling the informant as a witness." *Id.* The Report explains that the District Attorney's Office failed to take corrective measures although evidence of the abuses were known by the staff before it became publicly disclosed in a series of periodical articles in 1987. *Id.* at 97–111. And even after the public disclosure, the Report concludes that the management of the office failed to act in response to the abuses for more than a year. *Id.* at 111–22.

66. HARMFUL ERROR, *supra* note 1, at 46–47.

67. *Id.* at 46 (summarizing EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE).

68. *Id*. at 45–47; Hugo Adam Bedau & Michael L. Redelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23–24, apps. A–B (1987).

69. Bedau & Redelet, *supra* note 68, at 57.

70. Leonard Post, *Open Files Key in Reversals: A Unique Discovery Statute Helps Death Row Inmates Win New Trial*, NAT'L L.J., Nov. 10, 2003, at 4.

71. *Id.*

violation of the constitutional requirement established in *Brady v. Maryland*,[72] the prosecutors had withheld the statements from the defendant's trial and appellate counsel.[73]

Unfortunately, these are not isolated examples. An innocent Texas man served thirteen years on death row as a result of what a federal judge described as "outrageous" misconduct by the prosecutor, who failed to disclose evidence that overwhelmingly pointed to another man as the killer.[74] In Louisiana, after fourteen years in prison, two innocent men convicted of the same crime walked off death row after their lawyers established serious prosecutorial misconduct.[75] In California, two men were wrongfully convicted of murder and sentenced to life in prison because prosecutors withheld exculpatory evidence, including a confession by another man, an eyewitness's corroboration, and an admission by a trial witness that she was lying about having seen the murder.[76] In 2004 they were found factually innocent after serving more than thirteen years in prison.[77] Another California man was convicted of murder and served twenty-four years before being released when a federal court determined that he had been wrongly convicted based on the testimony of a jailhouse informant, a heroin user with a lengthy criminal record.[78] The prosecutors had struck a deal with the informant to obtain his testimony but failed to inform defense counsel of the deal.[79] In 1999, in Tulia, Texas, thirty-nine people—ten percent of the town's black population—were arrested on drug charges.[80] Thirty-five of them were convicted based on the false testimony of a former deputy sheriff

72. 373 U.S. 83, 86–88 (1963) (holding that a prosecutor must divulge potentially exculpatory evidence to the defendant).

73. Post, *supra* note 70, at 4.

74. Michael Yablonski, *Section Volunteer Proves "Outrageous" Prosecutorial Misconduct in Murder Trial*, LITIG. NEWS, June–July 1995, at 1, 8.

75. Sara Rimer, *Two Death-Row Inmates Exonerated in Louisiana*, N.Y. TIMES, Jan. 6, 2001, at A8. One of the men, Mr. Burrell, "who is retarded and cannot read or write, came within 17 days of execution in 1996." *Id.*

76. Bob Egelko, *In Prison 13 Years for Murder, Freed Man Sues the City*, S.F. CHRON., Feb. 14, 2004, at A21; Bob Egelko, *Wrongfully Convicted of Murder, Man Sues*, S.F. CHRON., Apr. 28, 2004, at B4; Joan Ryan, *Innocent Man Freed with Luck, Good Lawyers*, S.F. CHRON., May 5, 2004, at B1.

77. Egelko, *supra* note 76.

78. *Judge Dismisses Murder Case, Frees Man After 24 Years*, S.F. CHRON., Apr. 3, 2004, at B2.

79. *Id.*

80. Leonard Post, *Trouble in Tulia Still Resounds*, NAT'L L.J., Apr. 5, 2004, at 1.

and the suppression of exculpatory evidence by the prosecutor.[81] Their sentences ranged from eighteen to ninety years in prison,[82] a combined total of 750 years.[83]

The human consequences of wrongful convictions are tragic. Imagine spending even one night on death row as an innocent person. Imagine spending ten years in prison. Even after the wrongly convicted are exonerated, the damage continues. The stigma of a prosecution and conviction is lasting.[84] Employment prospects are greatly diminished.[85] As former Labor Secretary Ray Donovan asked his prosecutor after his acquittal on criminal charges, "What office do I go to to get my reputation back?"[86] Of course, the wrongly accused defendant is not the only one who suffers as a result of prosecutorial misconduct. Wrongful prosecutions, convictions, and incarcerations ruin lives and destroy families.[87] The victim of the underlying crime and the victim's family are denied closure and justice.[88] When the real perpetrators remain free, other victims are exposed to future crimes and even death.[89] In more than one instance when an innocent defendant was wrongly convicted and incarcerated for murder, the real murderer went on to commit other murders.[90]

While prosecutorial misconduct occurs with alarming frequency, safeguards and corrective measures have proven ineffective. Although numerous procedural protections (including jury trials, appellate review, and habeas corpus proceedings) are designed to protect the criminal defendant's rights, they neither prevent nor correct prosecutorial misconduct. Moreover, other corrective measures including professional discipline and criminal prosecution of misbehaving prosecutors are almost never pursued. The following discussion will explain why each of

81. *Id.*

82. *Id.*

83. *Targeted in Tulia, Texas?*, *at* http://www.cbsnews.com/stories/2003/09/26/60minutes/main575291.shtml (last visited Feb. 7, 2005).

84. *See* Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1305–07 (2000).

85. *See id.* at 1308–09.

86. *Id.* at 1307 (quoting George Lardner, Jr., *Bronx Jury Acquits Donovan; Ex-Labor Secretary, Codefendants Cleared of Larceny Charges*, WASH. POST, May 25, 1987, at A1).

87. *See id*. at 1308.

88. Liebman et al., *supra* note 42, at 1864.

89. *Id.*

90. *Id.* at 1864 n.81.

these safeguards fails to adequately protect innocent defendants from prosecutorial misconduct.

First, the trial process fails to protect the defendant against prosecutorial misconduct. Indeed, the same studies that catalogue prosecutorial misconduct also document the ineffectiveness of defense counsel in protecting the defendant's rights.[91] For example, a study of Illinois death penalty cases concluded that prosecutorial misconduct was responsible for twenty-one percent of reversals, while defense counsel error accounted for nineteen percent of reversals.[92] The ineffectiveness of defense lawyers has been well documented, especially in death penalty cases.[93] Defense lawyers in capital cases are not adequately paid[94] and are not provided sufficient funds for investigations and experts.[95] Moreover, they have a disproportionately high record of discipline and disbarment.[96] The few attorneys willing to take on capital cases are often "thoroughly incapable of mounting an effective defense during either the guilt or punishment phases of the capital trial."[97]

Trial judges also provide an insufficient check on prosecutorial misconduct. As the thousands of appellate findings of prosecutorial misconduct show, trial judges fail to protect the defendant from misconduct.[98] Even when the trial court catches the misconduct and has the power to remedy the situation, the offending prosecutor is rarely

91. Liebman et al., *supra* note 42, at 1850 (stating that the two most common categories of serious error were incompetent defense counsel (thirty-seven percent of reversals) and prosecutorial misconduct (sixteen percent of reversals)); *see also* HARMFUL ERROR, *supra* note 1; SCHECK ET AL., *supra* note 1.

92. Hartman & Richards, *supra* note 1, at 423.

93. *See, e.g.*, Liebman, *supra* note 2, at 2102–10; Kenneth Williams, *Mid-Atlantic People of Color Legal Scholarship Conference: The Death Penalty: Can It Be Fixed?*, 51 CATH. U. L. REV. 1177, 1189–92 (2002).

94. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1853–55 (1994); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995). In Massachusetts, private counsel appointed to represent indigents in criminal cases receive thirty-five dollars an hour, which is raised to fifty-four dollars an hour for handling a murder case. Leonard Post, *Indigent Defense Services Blasted*, NAT'L L.J., July 12, 2004, at 21.

95. THE CONSTITUTION PROJECT, MANDATORY JUSTICE 1–2 (2001); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 398–99 (1995).

96. *See* Liebman, *supra* note 2, at 2102–10.

97. Steiker & Steiker, *supra* note 95, at 399.

98. *See* HARMFUL ERROR, *supra* note 1, app. at 108–09.

identified publicly.[99] This problem is exacerbated in states where judges stand for election.[100] As Professor Liebman explains, state judges and the governors who appoint them run for office on high numbers of death sentences and may lose reelection if capital trials result in acquittals or life sentences.[101]

Second, appellate review is an inadequate check on prosecutorial misconduct for several reasons. To begin with, prosecutorial misconduct is rarely grounds for reversal of a conviction. Indeed, reversal is the exception, not the rule.[102] Under the harmless error standard, a defendant must show not only that the prosecutor engaged in misconduct, but also that the misconduct had a substantial, prejudicial effect.[103] For example, when a defendant proves that a prosecutor failed to disclose exculpatory evidence, the defendant is not entitled to a reversal of the conviction unless he also shows "that there is a reasonable *probability* that the

99. *See* United States v. Horn, 811 F. Supp. 739, 741 n.1 (D.N.H. 1992) (finding serious prosecutorial misconduct but declining to name the offender because the court had been advised to eliminate the name); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 831 & n.448 (1999).

100. Liebman, *supra* note 2, at 2111–14.

101. *Id*. at 2112. Professor Liebman provides examples of statements by governors about appointing death penalty proponents to the bench and of political attacks on judges who made unpopular decisions in death penalty cases. For example, Tennessee Governor Don Sundquist "proclaimed before a 1996 judicial election that he would appoint only death-penalty supporters to be criminal-court judges." *Id.* at 2112 n.197 (quoting Alan Berlow, *Wrong Man*, ATL. MONTHLY, Nov. 1999, at 66, 80). California Governor Gray Davis reportedly told reporters "that voters elected him based on public positions in favor of capital punishment and abortion rights . . . [and] expect his [judicial] appointments to follow his political views: 'My appointees . . . are not there to be independent agents. They are there to reflect the sentiments that I expressed during the campaign.'" *Id*. at 2113 n.197 (alterations in original) (internal quotation marks omitted) (quoting Bart Jansen, *Davis: Judicial Picks Should Follow My Lead*, ORANGE COUNTY REG., Mar. 1, 2000, at A4 (quoting Gray Davis)). Professor Liebman also includes the example of the Tennessee Supreme Court justice voted off the court principally due to a silent concurrence in a death penalty reversal. Liebman, *supra* note 2, at 2113 (citing Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts To Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 308–12 (1997), and Stephen B. Bright et al., *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases*, 31 COLUM. HUM. RTS. L. REV. 123 *passim* (1999)). Professor Liebman also refers to his own earlier work, Liebman et al., *supra* note 1 (discussing whether political pressure on judges may lead to high death sentencing rates), and also to the work of Bright and Keenan, Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760–61, 765 (1995) (providing numerous examples of judges being removed from the bench because of their record in death penalty cases and of their replacements' notable inclination to impose and uphold capital convictions). Liebman, *supra* note 2, at 2113.

102. *See* HARMFUL ERROR, *supra* note 1, app. at 108–09.

103. Kotteakos v. United States, 328 U.S. 750, 765, 776 (1946).

outcome of the trial would have been different had the evidence been disclosed."[104] In other words, even when the defendant establishes prosecutorial misconduct that *may* have influenced the conviction or sentence, the conviction is affirmed under the harmless error standard.[105] Thus, even when courts find prosecutorial misconduct, they generally affirm the conviction or sentence. Recent empirical studies illustrate this point. Specifically, the Center for Public Integrity studied 11,452 cases in which prosecutorial misconduct was alleged.[106] The appellate courts granted relief in 2012 cases but found that the prosecutorial misconduct amounted to harmless error in 8709 cases.[107] Similarly, between 1993 and 1997, the Illinois Supreme Court and Illinois Appellate Courts found 167 instances of prosecutorial misconduct but affirmed 122 of the convictions on the grounds that the misconduct was harmless.[108]

Even when the appellate court reverses a conviction on grounds of prosecutorial misconduct, the prosecutor who engaged in the misconduct generally escapes any repercussions. The consequence of a reversal is that the defendant will be retried or have a new sentencing hearing. The offending prosecutor is rarely identified by name.[109] Moreover, the loss on appeal is charged not to the original local prosecutor who committed the misconduct, but to the unfortunate lawyer in the state attorney general's office who inherited the case for purposes of the appeal.[110] Thus, the trial attorney who engaged in the misconduct often escapes

104. Gantt v. Roe, 389 F.3d 908, 913 (9th Cir. 2004) (emphasis added) (citing Strickler v. Greene, 527 U.S. 263, 281–82 (1999)).

105. *See, e.g.*, *Strickler*, 527 U.S. at 289–96 (finding harmless error where prosecutor failed to disclose exculpatory evidence); United States v. Williams, 504 U.S. 36, 45–55 (1992) (holding harmless error where prosecutor engaged in misconduct before the grand jury); Darden v. Wainwright, 477 U.S. 168, 178–82 (1986) (holding harmless error where prosecutor delivered improper closing argument).

106. HARMFUL ERROR, *supra* note 1, app. at 108–09.

107. *Id.*

108. Liebman, *supra* note 2, at 2128 n.239 (citing Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at N1); *see also* United States v. Lane, 474 U.S. 438, 475 n.13 (1986) (Stevens, J., concurring in part and dissenting in part) (collecting authorities arguing that the harmless error standard encourages prosecutorial misconduct and undermines the integrity of the criminal justice process).

109. Liebman, *supra* note 2, at 2126; *see also* Henning, *supra* note 99, at 830–31 (describing *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993), in which the Ninth Circuit found that the Assistant United States Attorney engaged in extensive and persistent misconduct including lying to the trial court; in the slip opinion remanding the case to determine whether it should be dismissed due to the misconduct, the offending attorney was named, but the final opinion deleted the name). *But see* Ruiz v. State, 743 So. 2d 1, 5 (Fla. 1999) (naming the prosecutor).

110. Liebman, *supra* note 2, at 2121.

responsibility.[111] Without meaningful trial or appellate court consequences for misconduct, prosecutors may be sorely tempted to bend the ethical and constitutional rules to obtain convictions since trial success is essential to political success for elected prosecutors, and since convictions are essential to favorable evaluations and promotions for subordinate prosecutors.[112]

Even when a court is willing to publicly name the prosecutor, the admonition seems to have no effect. For example, in 1999, the Florida Supreme Court expressed its exasperation with the persistent prosecutorial misconduct in death penalty cases that resulted in reversals:[113]

> In spite of our admonishment in [a prior case reversing a death penalty conviction] and despite subsequent warnings that prosecutorial misconduct will be subject to disciplinary proceedings of The Florida Bar, we nevertheless continue to encounter this problem with unacceptable frequency. The present case follows on the heels of another misconduct case and is one of the worst examples we have encountered.[114]

In addition to finding that the conduct at issue "crossed the line of zealous advocacy by a wide margin and compromised the integrity of the proceeding,"[115] the court also cited six prior death penalty cases that it had been compelled to reverse because of prosecutorial misconduct.[116]

Third, while it is difficult to correct prosecutorial misconduct in the direct appeal, it is even more difficult on collateral review in a federal habeas corpus proceeding. The 1996 Antiterrorism and Effective Death

111. *Id.* at 2122–25. Indeed, Professor Liebman provides examples from the Chicago Tribune report in which prosecutors were actually promoted despite scathing rebukes from the Illinois Appellate Court for their misconduct. *Id.* at 2125 n.232 (citing Armstrong & Possley, *supra* note 108, at N1).

112. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice*?, 44 VAND. L. REV. 45, 58 n.63 (1991).

113. *Ruiz*, 743 So. 2d at 9–10.

114. *Id.* at 9 (footnotes omitted).

115. *Ruiz*, 743 So. 2d at 8–10.

116. *Id.* (citing Urbin v. State, 714 So. 2d 411 (Fla. 1998); Campbell v. State, 679 So. 2d 720 (Fla. 1996); King v. State, 623 So. 2d 486 (Fla. 1993); Garcia v. State, 622 So. 2d 1325, 1332 (Fla. 1993); Nowitzke v. State, 572 So. 2d 1346, 1356 (Fla. 1990); Garron v. State, 528 So. 2d 353, 359 (Fla. 1988)); *see also* Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (finding that the prosecutor's misconduct was not "so outrageous as to taint the validity of the jury's recommendation" of death, but holding that the prosecutorial misconduct, despite prior admonitions, warranted disciplinary proceedings).

Penalty Act (AEDPA) set strict time limits in habeas proceedings.[117] Under AEDPA, federal courts must be deferential to state court convictions.[118] Thus, federal judges have found that they are powerless to grant relief even when they find credible evidence of actual innocence.[119] In one case, the defendant was convicted based on the testimony of two eyewitnesses.[120] One recanted and admitted perjury, and the other's testimony was challenged by an associate who said it was physically impossible for the witness to have seen the crime.[121] As the court explained its inability to grant relief:

> One cannot read the record in this case without developing a nagging suspicion that the wrong man may have been convicted of capital murder and armed criminal action in a Missouri courtroom. . . . A layperson would have little trouble concluding Burton should be permitted to present his evidence of innocence in *some* forum. Unfortunately, Burton's claims and evidence run headlong into the thicket of impediments erected by courts and by Congress. Burton's legal claims permit him no relief, even as the facts suggest he may well be innocent.[122]

In other words, since AEDPA review is so restricted, it is not an effective procedure for correcting prosecutorial misconduct.

Fourth, just as the adversary process fails to prevent or correct prosecutorial misconduct, disciplinary proceedings are also inadequate to address the problem because they are rarely instituted against prosecutors.[123] Specifically, the report by the Center for Public Integrity

117. HARMFUL ERROR, *supra* note 1, at 39. 28 U.S.C. § 2244(d)(1) provides that prisoners in state custody must file habeas petitions within one year of certain triggering events, in most cases the date the state conviction became final. 28 U.S.C. § 2255 provides parallel deadlines for prisoners in federal custody.

118. HARMFUL ERROR, *supra* note 1, at 39. Under 28 U.S.C. § 2254(e)(1), a federal court must assume that a state court finding of fact is correct and can only reject the finding based on clear and convincing evidence of error.

119. HARMFUL ERROR, *supra* note 1, at 40–41.

120. *Id.* at 40.

121. *Id.*

122. *Id.*

123. Liebman, *supra* note 2, at 2121 n.227 (citing Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, at N1); Douglas J. McNamara, Buckley, Imbler *and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 ALB. L. REV. 1135, 1184–89 (1996); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 898–900 (1995); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 718–31 (1987); Walter W. Steele, Jr., *Unethical*

found that since 1970 there were more than 2000 cases of prosecutorial misconduct requiring appellate correction for harmful error.[124] But there were only forty-four instances in which disciplinary action was taken and only two disbarments. Another study apparently found that from 1886 to 2000 there were only 100 cases of disciplinary proceedings against prosecutors, less than one per year across the entire country.[125] And although the *Chicago Tribune* study found 381 reversed convictions resulting from prosecutorial misconduct in suppressing exculpatory evidence and introducing false evidence, it found not a single instance in which the prosecutor received a public sanction.[126]

And finally, while in theory prosecutors could be criminally prosecuted for their misconduct, in fact they almost never are.[127] Specifically, 18 U.S.C. § 242 provides criminal liability for government officials who violate constitutional protections.[128] But since § 242 was adopted in 1866,[129] research discloses only one conviction of a prosecutor under this statute.[130] Indeed, although the Supreme Court cited § 242 as a basis for criminally prosecuting prosecutors who engage

Prosecutors and Inadequate Discipline, 38 SW. L.J. 965, 966–67 (1984); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors To Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 881–96 (1997); Williams, *supra* note 3, at 3441; *see also* SCHECK ET AL., *supra* note 1, at 181.

124. HARMFUL ERROR, *supra* note 1, at i.

125. Monroe H. Freedman, *Professional Discipline of Prosecutors: A Response to Professor Zacharias*, 30 HOFSTRA L. REV. 121, 124 (2001) (discussing Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001)).

126. Armstrong & Possley, *supra* note 1.

127. Liebman, *supra* note 2, at 2122.

128. Section 242 provides in pertinent part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year, or both . . . .

18 U.S.C. § 242 (1996).

129. Section 242 was originally adopted as part of the Civil Rights Act of 1866. It was readopted after the passage of the Fourteenth Amendment as part of the 1871 Ku Klux Klan Act. *See* Monroe v. Pape, 365 U.S. 167, 180–85 (1961); *see also* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 5, 7 (1985).

130. Brophy v. Comm. on Prof'l Standards, 442 N.Y.S.2d 818 (N.Y. App. Div. 1981); Rosen, *supra* note 123, at 703 n.56, 726; Weeks, *supra* note 123, at 878–79 n.259. Somewhat ironically, the criminal conviction was treated as a mitigating factor in the state disciplinary proceeding. *Brophy*, 442 N.Y.S.2d at 819. One other case involved an attorney who wrongfully invoked the criminal process to extract money from the defendant, but it is not clear whether the attorney was a public official. *See In re* Anderson, 177 S.E.2d 130 (S.C. 1970).

in misconduct, the Court cited no case in which this has actually happened.[131]

In short, prosecutorial misconduct is alarmingly common, and there is no corrective mechanism, no accountability, no effective deterrent, and—because of prosecutorial immunities—often no civil remedy. As one commentator observed, the arguments supporting absolute prosecutorial immunity "offer a wry blend of fairy tale and horror story."[132]

III. HISTORICAL BACKGROUND TO § 1983 LIABILITY AND COMMON-LAW IMMUNITIES

As this section will show, the Court has developed a functional approach to the application of common-law immunities in § 1983 actions.[133] Depending on the function being performed, a government officer is either entitled to absolute or qualified immunity.[134] Absolute immunity shields the officer from liability even though she acted in bad faith and with malice.[135] Qualified immunity, on the other hand, protects the officer unless she violated clearly established law of which a reasonable officer would have known.[136] The following section explains this development. It first outlines the significance of § 1983 liability in civil rights enforcement and then traces the Court's early analysis of the application of common-law immunities in § 1983 litigation.

A. Section 1983

Until the Civil War, the constitutional protections of the Bill of Rights applied only to the federal government, not to the states.[137] At the close of the Civil War, Congress adopted the Thirteenth Amendment, which outlawed slavery and essentially transformed the Emancipation Proclamation into a constitutional right.[138] But the Thirteenth

131. Imbler v. Pachtman, 424 U.S. 409, 429 (1976).

132. R.J. Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 339 (1959).

133. Forrester v. White, 484 U.S. 219, 224 (1988); *see also* 2 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 7:2 (2003); 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 15:2 (2002).

134. *Forrester*, 484 U.S. at 224; Harlow v. Fitzgerald, 457 U.S. 800, 807–08 (1982); 1 STEINGLASS, *supra* note 133, § 15:3.

135. Kalina v. Fletcher, 522 U.S. 118, 124 (1997); *Imbler*, 424 U.S. at 427.

136. *Harlow*, 457 U.S. at 818; 1 STEINGLASS, *supra* note 133, § 15:7.

137. Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243 (1833).

138. U.S. CONST. amend. XIII.

Amendment failed to adequately protect the rights and safety of the newly freed slaves, and a reign of violence took hold in the South.[139] In response, Congress adopted the first Reconstruction civil rights statute, the Civil Rights Act of 1866.[140] In part because it doubted the constitutional authority for this statute,[141] in 1868 Congress adopted the Fourteenth Amendment, which requires states to provide citizens due process and equal protection of the law.[142] In 1871, buttressed by the constitutional authority of the Fourteenth Amendment, Congress essentially readopted the Civil Rights Act of 1866, which is codified today as 42 U.S.C. § 1983.[143] As Justice Blackmun has explained, "Taken collectively, the Reconstruction Amendments, the Civil Rights Acts, and these new jurisdictional statutes, all emerging from the caldron of the War Between the States, marked a revolutionary shift in the relationship among individuals, the States, and the Federal Government."[144]

Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[145]

For nearly 100 years, § 1983 remained essentially dormant.[146] But in 1961, the Court held in *Monroe v. Pape*[147] that § 1983 applied when

139. *See* Monroe v. Pape, 365 U.S. 167, 174–79 (1961).

140. Blackmun, *supra* note 129, at 4–5; Jacques L. Schillaci, *Unexamined Premises: Toward Doctrinal Purity in Section 1983 Malicious Prosecution Doctrine*, 97 NW. U. L. REV. 439, 447 (2002).

141. Blackmun, *supra* note 129, at 6–8.

142. U.S. CONST. amend. XIV; *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 1:3 (2004); Blackmun, *supra* note 129, at 4–5; Schillaci, *supra* note 140, at 447.

143. 42 U.S.C. § 1983 was originally enacted as section 1 of the Ku Klux Klan Act of 1871, 17 Stat. 13, which was essentially a reenactment of the Civil Rights Act of 1866. *See Monroe*, 365 U.S. at 167, 171, 185; *see also* 1 NAHMOD, *supra* note 133, § 1:3 (explaining that § 1983 was patterned after the Civil Rights Act of 1866).

144. Blackmun, *supra* note 129, at 6.

145. 42 U.S.C. § 1983 (2004).

146. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437 (1968); *see also* HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, CIVIL RIGHTS LAW AND PRACTICE 2 (2001); Blackmun, *supra* note 129, at 19–20.

police officers violated a person's civil rights by an abuse of their official office, despite the availability of a state remedy. Since *Monroe*, § 1983 has been the major remedy for civil rights violations by state and local officials.[148] It provides the primary enforcement mechanism for many statutory provisions as well as constitutional guarantees.[149] In addition, despite the absence of statutory authority, the Court adopted a companion remedy for redressing violations by federal officials in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics.*[150] The frequent use of these two civil rights remedies has not been without controversy.[151] But given their lengthy and well-established jurisprudence, it seems highly unlikely that the Court will return to an interpretation of § 1983 and *Bivens* that significantly diminishes their role in civil rights enforcement.

B. Common-Law Immunities in § 1983 Actions

As § 1983 and *Bivens* actions came into frequent use, the Court faced the question of whether immunity defenses would be available to officials sued for civil rights violations.[152] Nothing in the language of § 1983 suggests that Congress intended to extend official immunity defenses to defendants in civil rights actions, and the legislative history

147. 365 U.S. 167, 185–91 (1961).

148. *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 497 (1992).

149. KAREN M. BLUM & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 43 (1998).

150. 403 U.S. 388, 397 (1971). For purposes of the immunity defenses, the Court treats § 1983 and *Bivens* actions the same. *See* Malley v. Briggs, 475 U.S. 335, 340 n.2 (1986) ("[I]t is untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." (internal quotation marks omitted)); Butz v. Economou, 438 U.S. 478, 504 (1978).

151. *Compare* Blackmun, *supra* note 129, at 1 (arguing that § 1983 was an important vehicle for maintaining a federal forum for the protection of federal rights), *and* James K. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393 (2003) (arguing that monetary remedies for constitutional torts serve not only the goals of compensation and deterrence, but also provide individual remedies that help spur the development of constitutional rights, norms that regulate government action, and structural solutions to systemic problems), *with* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (arguing that courts interpret constitutional rights narrowly in order to reduce government exposure to money damages), *and* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (arguing that constitutional torts have a limited deterrent effect and are not economically justified).

152. *See* Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutorial immunity); Scheuer v. Rhodes, 416 U.S. 232 (1974) (executive immunity); Pierson v. Ray, 386 U.S. 547 (1967) (judicial immunity).

does not demonstrate that Congress intended to preserve immunities.[153] Indeed, since the whole goal of the statute was to impose liability on state officials who violated constitutional rights, it seems doubtful that Congress intended to insulate officials who were violating civil rights by granting them immunity.[154]

According to the Court, however, the 1871 Congress presumably acted against the backdrop of the established common-law immunities of the time.[155] In the Court's view, if Congress had intended to effect such a momentous change in the law as to eliminate common-law immunities, that would be clear from the legislative history.[156] Since the legislative record does not affirmatively support this intent, the Court inferred from the congressional silence that Congress intended to retain the common-law immunities.[157] For this reason, the starting point for analyzing immunity defenses under § 1983 is the relevant common law as it existed in 1871 when § 1983 was adopted.

The Court first held that common-law immunities applied in § 1983 actions in *Tenney v. Brandhove*.[158] In *Tenney*, members of the Un-American Activities Committee of the California Senate were sued for violating the plaintiff's First Amendment rights.[159] The Court held that the legislators were protected by legislative immunity, which was reflected in English common law and the Speech or Debate Clause of the federal and state constitutions.[160] As Justice Frankfurter explained, quoting a member of the constitutional Committee of Detail,

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however

153. *See Pierson*, 386 U.S. at 559–60 (Douglas, J., dissenting); Tenney v. Brandhove, 341 U.S. 367, 382–83 (1951) (Douglas, J., dissenting); Achtenberg, *supra* note 148, at 502–11; Note, *Liability of Judicial Officers Under § 1983*, 79 YALE L.J. 322, 325–28 (1969).

154. *Pierson*, 386 U.S. at 559–60 (Douglas, J., dissenting); *Tenney*, 341 U.S. at 382–83 (Douglas, J., dissenting); Achtenberg, *supra* note 148, at 502–11; Note, *supra* note 153, at 325–28.

155. *Buckley*, 509 U.S. at 268–69; *Burns*, 500 U.S. at 484–85; Stump v. Sparkman, 435 U.S. 349, 356 (1978); *Tenney*, 341 U.S. at 376.

156. *Buckley*, 509 U.S. at 268–69; *Burns*, 500 U.S. at 484–85; *Stump*, 435 U.S. at 356; *Tenney*, 341 U.S. at 376.

157. *Buckley*, 509 U.S. at 268–69; *Burns*, 500 U.S. at 484–85; *Stump*, 435 U.S. at 356; *Tenney*, 341 U.S. at 376.

158. 341 U.S. 367.

159. *Id.* at 370–71.

160. *Id.* at 372–73.

> powerful, to whom the exercise of that liberty may occasion offence.[161]

The Court concluded that this historical immunity survived the passage of § 1983, explaining, "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of § 1983]."[162]

While the Court held that legislative immunity applied in § 1983 actions, it limited its application to conduct within the legislative function that the immunity was designed to protect.[163] To protect the legislative function, the Court has applied legislative immunity to nonlegislators when they are performing legislative functions.[164] But for acts to be covered, they must be an integral part of the legislative process;[165] legislative immunity does not apply to activities outside the legislative function.[166]

After recognizing absolute legislative immunity, the Court next addressed the issue of judicial immunity in § 1983 actions.[167] In *Pierson v. Ray*,[168] the Court held that judges were also entitled to absolute immunity from liability under § 1983. In the Court's view, "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."[169] This well-established doctrine was not intended to be abolished by the adoption of § 1983.[170] Under this doctrine, judges of courts of general jurisdiction "are not liable to civil actions for their judicial acts, even where such acts are in excess of their

161. *Id.* at 373 (internal quotation marks omitted) (quoting 2 WORKS OF JAMES WILSON 38 (Andrews ed. 1896)).

162. *Id*. at 376.

163. Gravel v. United States, 408 U.S. 606, 625 (1972); BLUM & URBONYA, *supra* note 149, at 72–73; 2 NAHMOD, *supra* note 133, § 7:4.

164. Sup. Ct. of Va. v. Consumers Union, 446 U.S. 719, 733–34 (1980) (holding that state supreme court justices receive legislative immunity when adopting the state bar code because this is a legislative function).

165. *Gravel*, 408 U.S. at 625; 2 NAHMOD, *supra* note 133, at § 7:4.

166. For example, legislative immunity does not protect a legislator engaged in private publishing through a commercial publisher nor for personnel decisions regarding his staff. *See Gravel*, 408 U.S. at 625; Davis v. Passman, 442 U.S. 228 (1979), *explained in* Forrester v. White, 484 U.S. 219, 224 (1988); 2 NAHMOD, *supra* note 133, at § 7:4.

167. Pierson v. Ray, 386 U.S. 547 (1967*)*; *see also* Stump v. Sparkman, 435 U.S. 349 (1978).

168. 386 U.S. at 553–54.

169. *Id.*

170. *Id.* at 554–555; *Forrester*, 484 U.S. at 225.

jurisdiction, and are alleged to have been done maliciously or corruptly."[171] As the Court has explained, the policy underlying the immunity was "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."[172] As with absolute legislative immunity, absolute judicial immunity is confined to the function it is intended to protect.[173]

In contrast to the absolute immunity afforded legislators and judges, executive officers—from police officers to governors—receive only qualified immunity.[174] As the Court explained in rejecting a claim for absolute executive immunity, the common law never granted police officers absolute immunity but rather afforded them qualified immunity so long as they acted reasonably and in good faith.[175] This same qualified immunity, according to the Court, applied as well to high-level executive officers.[176] In refusing to extend absolute immunity to police officers, the Court emphasized that its "role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice . . . . Since the statute on its face does not provide for *any* immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871."[177]

Moreover, qualified immunity is presumed to provide the appropriate balance between protecting government functions and compensating victims of misconduct.[178] In the Court's view, qualified immunity attempts to "balance between the evils inevitable in any available alternative."[179] It offers victims a remedy for egregious abuses of office while protecting honest officials from excessive exposure to liability and tempering the attendant social costs of litigation, diversion of official energy, and deterrence of citizens from accepting public office.[180] The

171. *Pierson*, 386 U.S. at 554; *Stump*, 435 U.S. at 355–56.

172. *Forrester*, 484 U.S. at 226–27.

173. For example, a judge is not entitled to absolute immunity for the unconstitutional discharge of a court employee since that act is administrative in nature and therefore outside the scope of absolute judicial immunity. *See id.* at 224, 227–29; 2 NAHMOD, *supra* note 133, § 7:15.

174. *Pierson*, 386 U.S. at 555; Scheuer v. Rhodes, 416 U.S. 232, 245 (1974).

175. *Scheuer*, 416 U.S. at 245.

176. *Id*. at 246–49.

178. Malley v. Briggs, 475 U.S. 335, 342 (1986); *see also* Burns v. Reed, 500 U.S. 478, 492–94 (1990); Tower v. Glover, 467 U.S. 914, 920–21 (1984).

178. Harlow v. Fitzgerald, 457 U.S. 800 (1982); *see also Burns*, 500 U.S. at 486–87.

179. *Harlow*, 457 U.S. at 813–14.

180. *Id.* at 814.

Court has repeatedly held that the official seeking absolute immunity has the burden of showing that it is justified, and that qualified rather than absolute immunity is presumed to provide sufficient protection to government officials.[181]

Over time, however, the Court became dissatisfied with the good-faith test for qualified immunity and developed a new, purely objective test. As the Court explained, "substantial costs attend the litigation of the subjective good faith of government officials."[182] Specifically, the Court found that subjective inquiries entail a consideration of the actor's experiences, values, and emotions and thus can rarely be decided by summary judgment.[183] The subjective test leads to broad-ranging discovery, which "can be peculiarly disruptive of effective government."[184] The immunity defenses are intended to shield officials not only from the burden of liability, but also from the burden of litigation.[185] So, to better achieve the proper balance, the court adopted an objective standard whereby "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[186]

As this summary shows, the Court has developed a functional approach to immunity defenses available in § 1983 actions. For essential government functions needing special protection, the Court applies

181. *Burns*, 500 U.S. at 486–87 (citing Forrester v. White, 484 U.S. 219, 224 (1988)); *Malley*, 475 U.S. at 340; *Harlow*, 457 U.S. at 812; Butz v. Economou, 438 U.S. 478, 506 (1978).

182. *Harlow*, 457 U.S. at 816.

183. *Id.*

184. *Id.* at 817.

185. *Id.* at 815–18.

186. *Id.* at 818. The Court has refined this objective standard. As the Court explained in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), the right must be established not in a vague and abstract sense, but

> in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Id. The most recent case addressing the qualified immunity test, *Hope v. Peltzer*, 536 U.S. 730 (2002), held that novel facts did not preclude finding that the officer had violated clearly established law of which a reasonable officer would have known. In *Hope*, the officer had handcuffed the plaintiff to a hitching post for several hours in the hot sun without water or bathroom breaks. *Id.* at 733–35. The Court held that although there were no prior reported cases with similar facts, the wanton infliction of pain violated clearly established law. *Id.* at 741–46.

absolute immunity.[187] Absolute immunity is rarely granted and is reserved for critical government functions where the defendant establishes both a common-law basis for the immunity and a public policy need for it.[188] Qualified immunity, on the other hand, is presumed to be the applicable immunity and to afford sufficient protection to government functions.[189] This immunity attempts to balance the need to protect the official function from undue liability against the need to protect civil rights, compensate victims, and deter official misconduct.[190] The following sections discuss the application of these immunity defenses in § 1983 actions for prosecutorial misconduct.

IV. THE CURRENT LAW

A. The Supreme Court's Functional Approach to Prosecutorial Immunity

As the Court developed its functional immunity doctrine, it decided a series of cases determining the appropriate level of immunity for prosecutors in § 1983 actions.[191] Specifically, the Court has held that prosecutors who act as advocates are protected by absolute immunity while prosecutors who act as administrators or investigators are protected by qualified immunity.[192] This Section will summarize the Court's

187. Buckley v. Fitzsimmons, 509 U.S. 259, 268–69 (1993); Burns v. Reed, 500 U.S. 478, 486–87 (1990).

188. *Buckley*, 509 U.S. at 268–69; *Burns*, 500 U.S. at 484–87.

189. *Burns*, 500 U.S. at 486–87; *Harlow*, 457 U.S. at 813–14.

190. *Burns*, 500 U.S. at 486–87; *Harlow*, 457 U.S. at 807, 813–14.

191. *See* Anne H. Burkett, Kalina v. Fletcher*: Another Qualification of* Imbler*'s Prosecutorial Immunity Doctrine*, 89 J. CRIM. L. & CRIMINOLOGY 867 (1999); Erwin Chemerinsky, *Prosecutorial Immunity—The Interpretation Continues*, TRIAL, Mar. 1998, at 80; McNamara, *supra* note 123; Brian P. Barrow, Note, *Buckley v. Fitzsimmons: Tradition Pays a Price for the Reduction of Prosecutorial Misconduct*, 16 WHITTIER L. REV. 301 (1995); Jeffrey J. McKenna, Note, *Prosecutorial Immunity:* Imbler, Burns, *and Now* Buckley v. Fitzsimmons*—The Supreme Court's Attempt To Provide Guidance in a Difficult Area*, 1994 BYU L. REV. 663; Deborah S. Platz, Note, Buckley v. Fitzsimmons*: The Beginning of the End for Absolute Prosecutorial Immunity*, 18 NOVA L. REV. 1919 (1994); Megan M. Rose, Note, *The Endurance of Prosecutorial Immunity—How the Federal Courts Vitiated* Buckley v. Fitzsimmons, 37 B.C. L. REV. 1019 (1996).

192. Kalina v. Fletcher, 522 U.S. 118 (1997); *Buckley*, 509 U.S. at 269–70; *Burns*, 500 U.S. at 487–96. Under the functional approach, prosecutorial immunities apply not only to prosecutors, but also to other officials performing prosecutorial functions. Erwin Chemerinsky, *Prosecutorial Immunity*, 15 TOURO L. REV. 1643, 1644 (1999). Thus, social workers who are functioning as prosecutors have been protected by absolute prosecutorial immunity. *Id.* at 1645 (citing Ernst v. Children & Family Servs., 108 F.3d 486 (3d Cir. 1997); Thompson v. SCAN Volunteer Servs., Inc., 85 F.3d 1365 (8th Cir. 1996)). As Professor Chemerinsky points out, other cases have afforded

development of these prosecutorial immunities in four cases: *Imbler v. Pachtman*,[193] *Burns v. Reed*,[194] *Buckley v. Fitzsimmons*,[195] and *Kalina v. Fletcher*.[196] As this line of cases shows, the Court has attempted to provide some guidance for determining whether a prosecutor was acting as an advocate entitled to absolute immunity or an administrator or investigator entitled to qualified immunity. The margins, however, are blurry and indistinct.

1. Imbler v. Pachtman

In the landmark case of *Imbler v. Pachtman*, the Court held that prosecutors are entitled to absolute immunity under § 1983.[197] Imbler was convicted of felony murder and sentenced to death following a trial in which the prosecutor knowingly used false evidence and suppressed exculpatory evidence.[198] Freed by a writ of habeas corpus after serving nine years in prison,[199] Imbler sued the prosecutor for money damages under § 1983.[200] The action was dismissed based on absolute immunity,[201] and the Supreme Court granted certiorari to consider the question of prosecutorial immunity.[202]

As the Court had previously concluded in cases involving legislators and judges, § 1983 should "be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."[203] Presented with its first opportunity to address the immunity of a state prosecutor in a § 1983 action, the Court began by exploring "the immunity historically accorded the relevant official at common law and the interests behind it."[204] The Court found that the historical immunity

social workers only qualified immunity. *Id.* at 1645 (citing White v. Chambliss, 112 F.3d 731 (4th Cir. 1997); Defore v. Premore, 86 F.3d 48 (2d Cir. 1996)).

193. 424 U.S. 409 (1976).

194. 500 U.S. 478 (1990).

195. 509 U.S. 259 (1993).

196. 522 U.S. 118 (1997).

197. 424 U.S. at 427.

198. *Id.* at 412–13. After the trial, when Pachtman discovered additional evidence corroborating Imbler's alibi defense, he wrote to the Governor of California to advise him of the new evidence. *Id.* at 412.

199. *Id.* at 414–15.

200. *Id.* at 415–16.

201. *Id.* at 416.

202. *Id.* at 417.

203. *Id.* at 418.

204. *Id.* at 421.

of prosecutors was grounded on the same policies as the immunities of judges and grand jurors.[205] "These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust."[206]

Finding the common-law rule of absolute prosecutorial immunity to be "well settled,"[207] the Court concluded that public policy supported the continuance of the doctrine under § 1983 because the threat of civil liability would undermine prosecutorial performance and constrain independent decisionmaking.[208] The Court anticipated that actions against prosecutors "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate."[209] In the Court's view, the potential flood of civil litigation would divert energy, attention, and resources from the performance of prosecutorial functions.[210] Moreover, as the Court explained, even honest prosecutors make mistakes under the constraints of limited time and information.[211] Immunity permits prosecutors to exercise their discretion without fear that they will be held civilly liable, a fear that could lead them to withhold relevant and credible evidence lest it might turn out to be false.[212] Thus, to the Court, absolute immunity was necessary because exposure to civil liability would undermine the prosecutorial function and in turn the criminal justice system.[213]

In the Court's analysis, the burden and distraction of imposing civil liability was unwarranted because other corrective mechanisms would safeguard the accused's rights. The Court listed "the remedial powers of the trial judge, appellate review, and state and federal post-conviction

205. *Id.* at 422–23.

206. *Id*. at 423.

207. *Id.* at 424; *see also id.* at 424 n.21 (citing authorities to support this "well settled" rule, the earliest of which was *Anderson v. Rohrer*, 3 F. Supp. 367 (S.D. Fla. 1933)). *But see infra* Part V.A (discussing the absence of historical support for the doctrine of absolute prosecutorial immunity).

208. *Imbler*, 424 U.S. at 427–28.

209. *Id*. at 425.

210. *Id.*

211. *Id.*

212. *Id.* at 425–26.

213. *Id.* at 426.

collateral remedies."[214] The Court also suggested that prosecutors could be subject to criminal liability under 18 U.S.C. § 242, the criminal analogue to § 1983, as well as professional discipline.[215] The Court acknowledged that its ruling left the "genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty."[216] But it concluded that in this instance it is "'better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'"[217]

2. Burns v. Reed

Fifteen years later, the Court refined the scope of absolute prosecutorial immunity in *Burns v. Reed*.[218] In *Burns*, a mother reported that her two sons had been shot by an unknown assailant.[219] When the police concluded that she was the chief suspect, the prosecutor wrongly advised them that they could seek a confession from the mother while she was hypnotized.[220] The prosecutor then used that confession to establish probable cause for her arrest.[221] When these facts were revealed, the trial judge ordered the "confession" suppressed and the prosecutor dropped all charges.[222] Burns brought a § 1983 action for damages against the prosecutor.[223] The action was dismissed on the ground of absolute immunity.[224] The Court granted certiorari to clarify the scope of absolute prosecutorial immunity.[225]

The Court noted that in *Imbler* it had held that absolute immunity covered the initiation and presentation of the State's case insofar as that conduct was "intimately associated with the judicial phase of the criminal process" but had declined to consider whether that immunity would extend to a prosecutor's conduct as an administrator or

214. *Id.* at 427.
215. *Id.* at 428–429.
216. *Id.* at 427.
217. *Id.* at 428 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).
218. 500 U.S. 478 (1990).
219. *Id.* at 481.
220. *Id.* at 482.
221. *Id.* at 482.
222. *Id.* at 483.
223. *Id.*
224. *Id.*
225. *Id.*

investigator as opposed to conduct as an advocate.[226] As the Court observed, under the functional approach, "the official seeking absolute immunity bears the burden of showing that [it] is justified" and must overcome the presumption that qualified rather than absolute immunity is sufficient to protect government functions.[227]

The Court then turned to the question of whether absolute immunity should be extended to Reed's participation in the probable cause hearing and provision of legal advice to the police. The Court concluded that Reed was entitled to absolute immunity from liability for participating in the probable cause hearing[228] but only entitled to qualified immunity for providing legal advice to the police.[229]

In addressing the argument that Reed was liable for eliciting misleading testimony in the probable cause hearing, the Court first examined the common-law immunity for testimony in judicial proceedings. It found that witnesses, prosecutors, and other lawyers were absolutely immune from liability at common law for making false or defamatory statements and also for eliciting false and defamatory testimony.[230] Justice White observed that in appearing before a judge and presenting evidence, the prosecutor was clearly acting in his role as an advocate, not as an investigator or administrator,[231] and that this conduct was "intimately associated with the judicial phase of the criminal process."[232] As before, the Court expressed confidence that "[t]he safeguards built into the judicial system tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct."[233]

Turning to the prosecutor's conduct in providing legal advice to the police, the Court found no common-law support for extending absolute immunity to this activity[234] and no policy reason to justify it.[235] The

226. *Id*. at 486 (internal quotation marks omitted) (quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976)).

227. *Id*.

228. *Id.* at 487.

229. *Id*. at 495–96.

230. *Id.* at 489–90.

231. *Id.* at 491.

232. *Id.* at 492 (internal quotation marks omitted) (quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976)).

233. *Id*. (internal quotation marks omitted) (quoting Butz v. Economou, 438 U.S. 478, 512 (1978)).

234. *Id*. at 492–94.

235. *Id* at 494–96.

Court emphasized that since § 1983 does not provide for any immunities, the Court would exceed its proper role in affording absolute immunity to conduct that was only accorded qualified immunity in 1871 when the statute was adopted.[236] The Court noted that absolute immunity for legal advice was not necessary to protect prosecutors from vexatious litigation since suspects will rarely know advice was given.[237]

Moreover, the Court stated that this conduct is not intimately connected to the judicial process, which is the function prosecutorial immunity is designed to protect.[238] As Justice White explained, "Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct."[239] The Court stressed that the current qualified immunity defense is more protective than when *Imbler* was decided and now "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[240] Finally, the Court concluded that the other checks on unconstitutional misconduct, most importantly the protections afforded through the judicial process, will not effectively restrain out-of-court prosecutorial misconduct. [241]

3. Buckley v. Fitzsimmons

The Court returned to the scope of absolute prosecutorial immunity in *Buckley v. Fitzsimmons.*[242] In *Buckley*, the question was whether absolute immunity protected prosecutors who conspired with police to fabricate evidence during the preliminary investigation of a highly publicized rape and murder.[243] Specifically, the prosecutors retained an expert witness known for her willingness to fabricate evidence and who provided the entire basis for the prosecution by falsely connecting the

236. *Id*. at 494.

237. *Id.*

238. *Id.*

239. *Id.* (citation omitted).

240. *Id.* at 494–95 (internal quotation marks omitted) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). Since the *Imbler* decision, the Court had rejected the common-law good-faith standard for qualified immunity and adopted an objective standard in *Harlow v. Fitzgerald*, 457 U.S. 800, 815–18 (1982). *See supra* notes 182–86 and accompanying text.

241. *Burns*, 500 U.S. at 496.

242. 509 U.S. 259 (1993).

243. *Id*. at 261–64.

defendant's boots to the crime scene.[244] The lower courts found that absolute immunity applied,[245] and the Supreme Court granted certiorari to refine the scope of prosecutorial immunity.[246]

The Court explained that, under the functional approach, absolute immunity shields adversary functions such as initiating judicial proceedings, evaluating evidence, and preparing presentations before a grand jury or trial.[247] But "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor."[248] Rather, the issue turns on the function the prosecutor was performing.[249] The Court distinguished between the tasks performed by an advocate in preparing for trial and those of a detective investigating a crime to establish probable cause to arrest a suspect.[250] As the Court concluded, "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'"[251]

The Court then considered whether the prosecutors had met the burden of establishing that they were functioning as advocates when fabricating evidence that the boot print on the victim's door had been made by Buckley's boot.[252] This conduct had occurred before the prosecutors had probable cause to arrest Buckley and before the grand jury investigation.[253] As the Court concluded, "[The defendants'] mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has

244. *Id*. at 262–63. The plaintiff also alleged that false statements at a press conference violated her civil rights. *Id*. at 261, 276. The Court held that qualified immunity applied to press conference statements for three reasons. First, there was no historical basis for applying absolute immunity since out-of-court statements by attorneys were not protected by the common law in 1871 when § 1983 was adopted because such statements were not functionally connected to the judicial process. *Id*. at 277. Second, the Court has no license to extend absolute immunity beyond its 1871 scope. *Id*. at 278. And third, qualified immunity is presumed to provide sufficient protection to government functions. *Id*.

245. *Id*. at 265.

246. *Id*. at 267.

247. *Id*. at 272–73.

248. *Id*. at 273.

249. *Id*.

250. *Id*.

251. *Id*. (quoting Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973)).

252. *Id*. at 274.

253. *Id*.

probable cause to have anyone arrested."[254] The Court emphatically rejected the contention that a prosecutor may shield his investigative misconduct by presenting fabricated evidence to a grand jury or introducing it at trial because "every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial."[255] The Court acknowledged that after probable cause is met, the prosecutor is not necessarily entitled to absolute immunity. As the Court explained, "Even after that determination . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity."[256]

In his concurring and dissenting opinion, Justice Kennedy pointed out the difficulties that the majority's approach would create for the lower courts.[257] In his view, drawing a line between advocatory and investigatory functions requires "difficult and subtle distinctions" that are not clarified by the adoption of a probable cause requirement.[258] To Justice Kennedy, the Court's attempt to establish a "bright-line standard"[259] "has created more problems than it has solved."[260] As will be discussed in Part IV.B, the application of the probable cause rule and the characterization of post-probable cause conduct have indeed proven troublesome to the lower courts.

4. Kalina v. Fletcher

The Court's most recent decision on the scope of absolute prosecutorial immunity is *Kalina v. Fletcher.*[261] In *Kalina*, the question posed was whether absolute immunity applied when a prosecutor made false statements of fact in an affidavit supporting an application for an arrest warrant.[262] The prosecutor had initiated criminal proceedings by filing three documents: (1) an unsworn information charging the defendant with burglary; (2) an unsworn motion for the warrant; and (3) a certification summarizing the evidence supporting the charges, which

254. *Id*.
255. *Id*. at 276.
256. *Id*. at 274 n.5.
257. *Id*. at 286–91 (Kennedy, J., concurring in part and dissenting in part).
258. *Id*. at 290 (Kennedy, J., concurring in part and dissenting in part).
259. *Id*. at 286 (Kennedy, J., concurring in part and dissenting in part).
260. *Id*. at 290 (Kennedy, J., concurring in part and dissenting in part).
261. 522 U.S. 118 (1997).
262. *Id*. at 120.

was executed by the prosecutor under penalty of perjury.[263] The third document, the certification (which implicated the suspect in the crime), was factually inaccurate in several respects.[264] Based on these documents, the trial court found probable cause and issued the arrest warrant.[265] After the charges were dismissed on the prosecutor's motion,[266] the plaintiff sued the prosecutor for damages under § 1983.[267] The District Court denied the prosecutor's motion for summary judgment on the basis of absolute immunity[268] and the Ninth Circuit affirmed.[269] In light of a conflict in the circuit courts on this question, the Supreme Court granted certiorari.[270]

Applying its functional immunity doctrine, the Court held that the prosecutor's conduct in preparing the three documents was protected by absolute immunity because they were prepared as part of an advocate's function.[271] But the critical question was "whether she was acting as a complaining witness rather than a lawyer when she executed the certification '[u]nder penalty of perjury.'"[272] As the Court had previously held, complaining witnesses are not entitled to immunity.[273] The Court concluded that the prosecutor was acting as a complaining witness, not an advocate, and therefore was not entitled to absolute

263. *Id*. at 120–21.

264. *Id*. at 121.

265. *Id*.

266. *Id*. at 122.

267. *Id*.

268. *Id*.

269. Fletcher v. Kalina, 93 F.3d 653 (9th Cir.1996).

270. *Kalina*, 522 U.S. at 123. The Ninth Circuit reasoned that since a police officer would receive qualified immunity for false statements in an application for an arrest warrant under *Malley v. Briggs*, 475 U.S. 335 (1986), a prosecutor should receive the same immunity for the same conduct. *Fletcher*, 93 F.3d at 655–56. But the Ninth Circuit recognized that the Sixth Circuit had reached a different conclusion in *Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir. 1986). As the Supreme Court explained, "Because we have never squarely addressed the question whether a prosecutor may be held liable for conduct in obtaining an arrest warrant, we granted certiorari to resolve the conflict." *Kalina*, 522 U.S. at 123.

271. *Kalina*, 522 U.S. at 129.

272. *Id*.

273. *Malley*, 475 U.S. at 335 (holding that a police officer only received qualified immunity for signing an affidavit in connection with an arrest warrant secured without probable cause). As the Court explained, complaining witnesses did not receive absolute immunity at common law. *Id*. at 340–41. This function is distinguished from that of a witness during the judicial phase of the proceeding. *Id*. at 341–43; *see also infra* Part V.A (discussing absolute witness immunity at common law).

immunity for signing the false certification under penalty of perjury.[274] As the Court explained, the ethics of the legal profession counsel that advocates should not put their own credibility in issue.[275] And while the prosecutor acting as an advocate could properly claim absolute immunity for evaluating the strength of the evidence to support the warrant and for determining which facts to include in the certification, "[t]estifying about facts is the function of the witness, not of the lawyer."[276]

In summary, the Court has relied on the common law of 1871 and various policy considerations in developing its prosecutorial immunity doctrine.[277] It has afforded prosecutors either qualified or absolute immunity depending on the function they were performing at the time of the misconduct.[278] Under the Court's functional approach, when prosecutors act as administrators, investigators, or witnesses, qualified immunity applies.[279] But when they act as advocates performing functions intimately connected with the judicial phase of the criminal proceeding, absolute immunity applies.[280] In determining whether a prosecutor is acting as an investigator or advocate, the Court has held that before probable cause is established, a prosecutor functions as an investigator.[281] After probable cause is established, a prosecutor may be acting as either an investigator or an advocate, depending on the function being performed.[282] But, as the following discussion shows, the Court's functional approach and probable cause requirement have produced conflicts and confusion in the lower courts and have generated subjective state-of-mind inquiries which preclude the early resolution of the litigation.

B. Conflicts in the Lower Courts

The Court's functional approach to prosecutorial immunity has created conflicts and confusion as the lower courts attempt to grapple with the difficulty of characterizing prosecutorial misconduct and

274. *Kalina*, 522 U.S. at 130–31.

275. *Id*. at 130.

276. *Id*.

277. *Id*. at 123–27; *Buckley*, 509 U.S. at 268–69; *Burns*, 500 U.S. at 484–85, 489–90; *Imbler*, 424 U.S. at 422–24.

278. *Kalina*, 522 U.S. at 125–27; *Buckley*, 509 U.S. at 268–69; *Burns*, 500 U.S. at 485–86.

279. *Kalina*, 522 U.S. at 125–26; *Buckley*, 509 U.S. at 269–70.

280. *Kalina*, 522 U.S. at 129–31; *Buckley*, 509 U.S. at 270–71; *Burns*, 500 U.S. at 486.

281. *Buckley*, 509 U.S. at 274.

282. *Id*. at 274 n.5.

determining which immunity applies. Specifically, the circuit court decisions conflict: (1) on whether the criminal defendant's due process rights are violated when a prosecutor coerces a witness to testify falsely; (2) on whether a prosecutor is entitled to absolute immunity when she fabricates evidence or coerces a witness to testify falsely and then uses that tainted evidence in a judicial proceeding; (3) on the application of the *Buckley* probable cause requirement; and (4) on how to determine whether a prosecutor is acting as an investigator or advocate when she engages in misconduct after probable cause has been met.

While the lower courts have been vexed with confusion about absolute prosecutorial immunity for many years, since 2003 this uncertainty has become increasingly problematic. Specifically, circuit courts have recently adopted subjective standards to determine whether the *Buckley* probable cause requirement has been met[283] and whether the prosecutor was functioning as an advocate or an investigator after probable cause was met.[284] The introduction of these subjective inquiries undermines the goal of providing a defense that can be resolved at the earliest stages of the litigation.[285] As the following discussion will show, the confusion that the absolute immunity doctrine has generated supports the argument that the doctrine itself should be reconsidered.

1. Due process rights and prosecutorial coercion of witnesses

In *Buckley v. Fitzsimmons*,[286] the plaintiff alleged that prosecutors violated his rights under the Due Process Clause by extracting incriminating statements from witnesses by coercing these witnesses and paying them money. The Court declined to rule on the due process claim because "the contours of [these] claims [were] unclear, and they were not addressed below."[287] In the decade since the *Buckley* decision, the circuit courts have split on the question of whether prosecutorial coercion of a witness violates the defendant's rights. The Third and Seventh Circuits have held that prosecutorial coercion violates only the witness's, not the

283. Broam v. Bogan, 320 F.3d 1023, 1028–32 (9th Cir. 2003).

284. KRL v. Moore, 384 F.3d 1105, 1111 (9th Cir. 2004); Genzler v. Longanbach, 384 F.3d 1092, 1099 (9th Cir. 2004); Cousin v. Small, 325 F.3d 627, 633–35 (5th Cir. 2003); *Broam*, 320 F.3d at 1033.

285. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982).

286. 509 U.S. 259 (1993).

287. *Id.*

defendant's, rights.[288] The Second Circuit held that prosecutorial misconduct in gathering evidence violates the criminal defendant's due process rights.[289] The Court has declined to grant certiorari to resolve this conflict,[290] leaving victims without a remedy for a particularly egregious form of prosecutorial misconduct.[291]

In *Buckley*, on remand from the Supreme Court, the Seventh Circuit considered the due process claim and found that it was not cognizable under § 1983.[292] The court held that coercing witnesses and paying them for false testimony was not a constitutional wrong as to the criminally accused, but only to the person being interrogated.[293] Thus, the plaintiff failed to state a valid due process claim.[294]

The Third Circuit followed the *Buckley* approach in *Michaels v. New Jersey*,[295] in which a day-care worker was indicted, tried, and convicted of multiple counts of child abuse.[296] The conviction was reversed on appeal because prosecutors and police officers had used coercive interview techniques with child witnesses during the investigation.[297] The day-care worker brought an action against the prosecutor under § 1983.[298] In concluding that the plaintiff had no remedy, the Third Circuit held that the criminal defendant could not sue for violations of the witnesses' rights.[299] While the court recognized that this approach left the plaintiff without a remedy, it concluded that the policies served by granting absolute immunity outweighed the harshness to the plaintiff and that the "'[h]arm to a falsely-charged defendant is remedied by safeguards built into the judicial system—probable cause hearings, dismissal of the charges—and into the state codes of professional responsibility.'"[300]

288. Michaels v. New Jersey, 222 F.3d 118, 121 (3d Cir. 2000); Buckley v. Fitzsimmons, 20 F.3d 789, 794 (7th Cir. 1994).

289. Zahrey v. Coffey, 221 F.3d 342, 349 (2d Cir. 2000).

290. Michaels v. McGrath, 531 U.S. 1118 (2001), *denying cert. to* 222 F.3d 118 (3d Cir. 2000).

291. *Id*. at 1118–19 (Thomas, J., dissenting).

292. *Buckley*, 20 F.3d at 794–96.

293. *Id*.

294. *Id*.

295. 222 F.3d 118 (3d Cir. 2000).

296. *Id*. at 120.

297. *Id*.

298. *Id*. at 121.

299. *Id*. at 122.

300. *Id*. (quoting Kulwicki v. Dawson, 969 F.2d 1454, 1464 (3d Cir. 1992)).

In contrast to the *Buckley* and *Michaels* decisions, the Second Circuit has found that prosecutorial misconduct in evidence gathering violates the accused's due process rights.[301] In *Zahrey v. Coffey*, prosecutors coerced and bribed witnesses to concoct false statements against the accused.[302] Following his acquittal,[303] Zahrey filed a § 1983 and a *Bivens* action for wrongful prosecution.[304] The Second Circuit held that the plaintiff had stated a cause of action because he had a due process right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigatory capacity.[305] The court acknowledged that mere fabrication—without more—would not violate due process.[306] But when that fabricated evidence causes the deprivation of liberty, due process is violated.[307] As the court explained, "The liberty deprivation is the eight months he was confined, from his bail revocation (after his arrest) to his acquittal, and the due process violation is the manufacture of false evidence."[308] Additionally, the court held that the subsequent use of the fabricated evidence by the same official who fabricated it did not break the chain of causation.[309]

The seeds for this intercircuit conflict may have been planted by Justice Scalia in his *Buckley* concurrence.[310] In his view, claims based on the fabrication of evidence "are unlikely to be cognizable under § 1983, since petitioner cites, and I am aware of, no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution."[311] This language has been construed to mean that a prosecutor's fabrication of evidence cannot be used to establish a constitutional violation.[312]

301. Zahrey v. Coffey, 221 F.3d 342, 348–49 (2d Cir. 2000).

302. *Id.* at 345.

303. *Id.* at 346.

304. *Id.* at 344.

305. *Id.* at 348–49.

306. *Id.* at 348.

307. *Id.* at 348–49.

308. *Id.* at 348.

309. *Id.* at 353–54; *see also* Clanton v. Cooper, 129 F.3d 1147, 1157–58 (10th Cir. 1997) (holding that a defendant in a criminal proceeding can challenge coerced statements by witnesses in affidavits to obtain an arrest warrant on due process grounds); *infra* Part IV.B.2 (discussing the prosecutor's in-court use of previously fabricated evidence).

310. *Buckley*, 509 U.S. at 279–82 (Scalia, J., concurring).

311. *Id.* at 281–82 (Scalia, J., concurring).

312. *See* McKenna, *supra* note 191, at 692–93.

Justice Thomas expresses a different view. When this circuit conflict was presented to the United States Supreme Court in a petition for certiorari in *Michaels v. McGrath*, Justice Thomas dissented from the Court's denial of the petition.[313] As he explained, "the decision below leaves victims of egregious prosecutorial misconduct without a remedy. In any event, even if I did not have serious doubt as to the correctness of the decision below, I would grant certiorari to resolve the conflict among the Courts of Appeals on this important issue."[314]

Thus, the Court has left open the question of whether due process is violated when a prosecutor coerces a witness to testify falsely against a defendant, and the circuit courts are left in conflict.[315] Given the current composition of the Supreme Court bench, one might expect that a majority of the current Court would find a cognizable claim.[316] But even if the Court finds a cognizable due process claim, the victim will still be denied a remedy if absolute immunity applies. On the other hand, the victim would be entitled to recover if qualified immunity applies since coercing and bribing witnesses violates clearly established law. In other words, the answer to whether a person can recover in a civil rights action in which a prosecutor coerces a witness to testify falsely requires a resolution of both the due process question and the immunity question.

2. Prosecutorial absolute immunity and the use of fabricated evidence

The second conflict in the courts of appeals is whether absolute immunity applies when a prosecutor introduces tainted evidence that she had previously procured during the investigatory phase of the prosecution. The Third Circuit has held that absolute immunity applies,[317] while the Second and Ninth Circuits have held that qualified immunity applies.[318]

313. 531 U.S. 1118, 1118–19 (Thomas, J., dissenting), *denying cert. to* 222 F.3d 118 (3d Cir. 2000).

314. *Id*. at 1119.

315. *Id*.; Zahrey v. Coffey, 221 F.3d 342, 349 (2d Cir. 2000).

316. McKenna, *supra* note 191, at 692–93. Justices Stevens, O'Connor, and Thomas were in the majority in *Buckley* in finding that the prosecutor who fabricated evidence before probable cause existed was not entitled to absolute immunity. Justice Scalia concurred in the result. This would have been a meaningless ruling if they were then to have held that there was no cognizable claim. Moreover, since Justices Souter, Ginsberg, and Breyer joined the Court after the *Buckley* decision, it seems more likely that the Court would recognize a cause of action.

317. *Michaels*, 222 F.3d at 123.

318. Milstein v. Cooley, 257 F.3d 1004, 1011 (9th Cir. 2001); *Zahrey*, 221 F. 3d at 342.

In *Michaels v. New Jersey*,[319] the Third Circuit held that a prosecutor is entitled to absolute immunity for introducing false evidence in a judicial proceeding that she had improperly procured. As explained above, *Michaels* held that coercing witnesses to testify falsely was not a violation of the accused's due process rights.[320] While the court recognized that the subsequent *use* of that coerced testimony in trial violated the accused's right to due process, it explained that this constitutional wrong could not be redressed in a § 1983 action: the prosecutor was entitled to absolute immunity for this conduct because it occurred during the advocacy phase of the process.[321]

In contrast to the Third Circuit's view, the Second Circuit held that a prosecutor who uses previously falsified evidence is only entitled to qualified immunity.[322] In *Zahrey*, as discussed above, the prosecutor improperly induced witnesses to make false statements.[323] The prosecutor conceded that his misconduct in the investigative phase "entitled him, at most, to only qualified immunity,"[324] but argued that his subsequent use of the evidence in the judicial phase entitled him to absolute immunity.[325]

The court rejected this argument and held that coercing witnesses into changing their testimony was not advocacy, but a misuse of investigative techniques.[326] The court further held that the subsequent use of that tainted evidence did not relate back so as to immunize the prior misconduct or break the causal chain.[327] While the court acknowledged that sometimes subsequent intervening circumstances may break the chain of proximate causation, this is generally not true when the wrongdoer can foresee that his deliberate misconduct will contribute to a deprivation of liberty.[328] Thus, when the same person commits both the initial act of misconduct and the subsequent intervening act directly causing the deprivation of liberty, the intervening act is not independent and does not break the causal chain.[329] As the court explained:

319. 222 F.3d at 122.
320. *Id*. at 122–23.
321. *Id*. at 121–22.
322. *Zahrey*, 221 F.3d at 354.
323. *Id*. at 344–46.
324. *Id*. at 347.
325. *Id*. at 352–53.
326. *Id*. at 349, 356.
327. *Id*. at 352–54.
328. *Id*. at 352.
329. *Id*. at 353.

> Coffey acknowledged at oral argument that if he had fabricated evidence and handed it to another prosecutor who unwittingly used it to precipitate Zahrey's loss of liberty, Coffey would be liable for the initial act of fabrication. It would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty. If, as alleged, Coffey fabricated evidence in his investigative role, it was at least reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that Zahrey would be indicted and arrested.[330]

The court also pointed out that allowing the prosecutor's subsequent use of the evidence to break the chain of causation would expand the scope of absolute immunity to the investigatory phase.[331]

Like the Second Circuit, the Ninth Circuit held that subsequent use of tainted evidence in a judicial proceeding does not entitle the prosecutor to immunity for the prior misconduct.[332] In *Milstein v. Cooley*, the plaintiff alleged that prosecutors obtained false statements from a witness for the purpose of prosecuting him.[333] The court reasoned that the allegation was analogous to the claim in *Buckley* that the prosecutor had procured false expert testimony.[334] Following *Buckley*, the Ninth Circuit held that a prosecutor who fabricates evidence is only entitled to qualified immunity for that misconduct.[335] While the court held that the prosecutor's *use* of that fabricated evidence in securing an indictment was entitled to absolute immunity,[336] it found that the later misconduct did not immunize the prior fabrication claim.[337]

This conflict in the courts of appeals was presented to the United States Supreme Court in a petition for certiorari in *Michaels v. McGrath*.[338] The Court denied the petition with Justice Thomas dissenting, leaving unresolved the question of whether absolute immunity attaches when a prosecutor has fabricated evidence and then used that evidence in a judicial proceeding.

330. *Id*. at 353–54 (footnote omitted).

331. *Id*. at 353–54 n.10.

332. Milstein v. Cooley, 257 F.3d 1004, 1011 (9th Cir. 2001).

333. *Id*. at 1006.

334. *Id*. at 1011.

335. *Id*.

336. *Id*. at 1012.

337. *Id*. at 1011.

338. 531 U.S. 1118, *denying cert. to* Michaels v. New Jersey, 222 F.3d 118 (3d Cir. 2000).

3. Application of the Buckley *probable cause requirement*

In *Buckley v. Fitzsimmons*, the Court seemingly limited the application of absolute immunity to conduct occurring *after* probable cause exists.[339] It held that prosecutorial misconduct that occurs before there is probable cause to arrest a defendant is necessarily investigative.[340] As the Court explained, "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."[341] As this discussion will show, the application of the *Buckley* probable cause requirement has created confusion in the lower courts in two respects. First, the courts disagree as to whether probable cause is always required for the application of absolute immunity. Some courts disregard the probable cause requirement and apply absolute immunity whenever a prosecutor's conduct involves initiating criminal proceedings.[342] Second, the circuits are in conflict as to when the requirement is met.[343] The Ninth Circuit has recently adopted a subjective standard,[344] which undermines the entire purpose of the immunity defense by precluding its resolution in the early stages of the litigation.[345]

a. Is probable cause always required for absolute immunity to attach? The first question—whether probable cause is always required for absolute immunity to attach—arises out of the tension between *Imbler v. Patchman*[346] and *Buckley v. Fitzsimmons.*[347] In *Imbler*, the Court held that absolute immunity applied to the initiation of criminal proceedings by the prosecutor because that conduct is intimately connected to the judicial phase of the criminal proceeding.[348] But in

339. *Buckley*, 509 U.S. at 274; *see also supra* notes 252–55 and accompanying text.

340. *Buckley*, 509 U.S. at 274.

341. *Id*.; *see also supra* notes 252–55 and accompanying text.

342. Spurlock v. Thompson, 330 F.3d 791 (6th Cir. 2003); Higgason v. Stephens, 288 F.3d 868, 877–78 (6th Cir. 2002); Donahue v. Gavin, 280 F.3d 371 (3d Cir. 2002); Moore v. Valder, 65 F.3d 189 (D.C. Cir. 1995); Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993).

343. *Compare* Hill v. City of New York, 45 F.3d 653 (2d Cir. 1995), *with* Broam v. Bogan, 320 F.3d 1023 (9th Cir. 2003).

344. *Broam*, 320 F.3d at 1029.

345. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982).

346. 424 U.S. 409 (1976).

347. 509 U.S. 259 (1993).

348. *Imbler*, 424 U.S. at 431.

Buckley, the Court held that absolute immunity did not attach until *after* probable cause existed.[349]

The Court has not explained how to harmonize these two rules. They complement each other when the prosecutor initiates criminal proceedings after probable cause exists. In such a case, under both *Imbler* and *Buckley*, the prosecutor would be functioning as an advocate and would be entitled to absolute immunity. But which rule applies when the prosecutor initiates criminal proceedings without probable cause or when probable cause is based on tainted evidence? Does *Imbler* mean that initiating a criminal proceeding is always an advocacy function and therefore always protected by absolute immunity, regardless of probable cause? Or does *Buckley* qualify *Imbler* so that initiation of criminal proceedings is only an advocacy function *after* probable cause exists?[350] In other words, does *Imbler* mean that absolute immunity always applies to the initiation of criminal proceedings despite the absence of probable cause? Or does *Buckley* mean that absolute immunity can *never* apply until *after* probable cause exists?

Several circuits, relying on *Imbler* and *Burns*, have held that absolute immunity applies when a prosecutor initiates criminal proceedings despite the lack of probable cause.[351] These decisions seem to be at odds with the *Buckley* rule that, prior to the existence of probable cause, a prosecutor acts as an investigator, not as an advocate. For example, the Sixth Circuit recently applied absolute immunity despite the absence of probable cause.[352] In *Spurlock v. Thompson*, two defendants were falsely charged with and convicted of murder based entirely on coerced false statements, which created probable cause.[353] Ultimately an investigation revealed that others had confessed to the murder and the convictions were vacated.[354] In the subsequent civil rights action, the Sixth Circuit

349. *Buckley*, 509 U.S. at 274.

350. McNamara, *supra* note 123, at 1159.

351. *See, e.g.*, Spurlock v. Thompson, 330 F.3d 791 (6th Cir. 2003) (holding that a prosecutor was entitled to absolute immunity although the defendant was falsely charged based on coerced false statements); Higgason v. Stephens, 288 F.3d 868, 877–78 (6th Cir. 2002) (holding that a prosecutor was entitled to absolute immunity even though no evidence supported the charges against the defendant); Moore v. Valder, 65 F.3d 189 (D.C. Cir. 1995) (holding that a prosecutor was entitled to absolute immunity for initiating a prosecution even though he knew the defendant was innocent, he concealed exculpatory evidence, and he manipulated grand jury testimony); Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993) (holding that a prosecutor who twice filed charges without probable cause was entitled to absolute immunity); *see also* Rose, *supra* note 191, at 1046–59.

352. *Spurlock*, 330 F.3d at 791.

353. *Id.* at 794.

354. *Id.*

concluded that presenting false evidence at trial is an advocacy function intimately connected with the judicial phase of the criminal trial and therefore is protected by absolute immunity.[355] But the court did not address the role of probable cause in determining whether absolute immunity applied, despite its acknowledgement that probable cause was entirely based on false testimony.[356] If, under *Buckley*, probable cause is required before a prosecutor is entitled to absolute immunity, the prosecutor should have received qualified, not absolute, immunity because probable cause never really existed.

While these circuits essentially disregard the *Buckley* probable cause requirement when the prosecutor's conduct consists of initiating criminal proceedings, the Ninth Circuit has tried to harmonize *Imbler* and *Buckley*. For example, in *Milstein v. Cooley*,[357] the plaintiff alleged that the prosecutor acquired false statements and fabricated evidence, which she then used to secure a grand jury indictment. Citing *Buckley*, the Ninth Circuit held that the prosecutor was not entitled to absolute immunity for fabricating this evidence because the conduct occurred before the existence of probable cause, which in fact was never met.[358] But then, citing *Imbler*, the court held that absolute immunity applied to the presentation of this evidence to the grand jury because that activity initiated the criminal prosecution and thus was an advocacy function.[359] Perhaps this is the proper accommodation of the two rules. But since probable cause never existed,[360] granting the prosecutor absolute immunity seems contrary to the *Buckley* admonition that a prosecutor is not entitled to be treated as an advocate before probable cause exists.

In short, while *Buckley* appeared to establish probable cause as the threshold for absolute immunity,[361] the lower courts have not consistently applied this standard when the conduct at issue consists of initiating criminal proceedings or engaging in conduct intimately connected with the judicial phase of the proceedings.[362]

355. *Id*. at 798.

356. *Id*. at 799.

357. 257 F.3d 1004, 1006 (9th Cir. 2001).

358. *Id*. at 1011.

359. *Id*. at 1011–12.

360. *Id*. at 1011.

361. *Buckley*, 509 U.S. at 274.

362. *See, e.g.*, Spurlock v. Thompson, 330 F.3d 791 (6th Cir. 2003); Higgason v. Stephens, 288 F.3d 868, 877–78 (6th Cir. 2002); Donahue v. Gavin, 280 F.3d 371 (3d Cir. 2002); Moore v. Valder, 65 F.3d 189 (D.C. Cir. 1995); Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993).

b. When is the probable cause requirement satisfied? Apart from the tension between the *Imbler* and *Buckley* approaches with respect to whether probable cause is always required for absolute immunity, courts are confused on the second issue, which is how to determine whether the probable cause requirement has been met. *Buckley* does not provide any guidance to the lower courts on how to determine whether probable cause has been met or who is to determine its existence.[363] Justice Kennedy raised this potential problem in his concurring and dissenting opinion.[364] As he observed, it was not clear from the majority opinion whether the probable cause line is crossed when the prosecutor believes it is met or whether a determination by a neutral third party is required.[365] Does a formal finding of probable cause in the criminal proceeding operate to collaterally estop litigation of the issue in a subsequent civil rights action? What if the formal finding is obtained through the use of false testimony or fabricated evidence? If the finding of probable cause in the criminal proceeding is tainted by prosecutorial misconduct, is probable cause to be determined by an objective, after-the-fact analysis in the civil rights action? As the following discussion will show, the cases considering these issues are in a state of confusion.

Some courts have held that probable cause is met when it is officially found to exist in the initial criminal proceedings. For example, the Ninth Circuit has found that, in some instances, a finding of probable cause in the criminal action will collaterally estop the defendant from challenging probable cause in a subsequent civil rights action.[366] But the Ninth Circuit has found exceptions to this rule,[367] and this approach is not followed when the official probable cause determination is gained by presenting false evidence or withholding exculpatory evidence.[368]

The difficulty of determining the point at which probable cause exists for purposes of granting the prosecutor absolute immunity is well-illustrated by a recent Ninth Circuit case, *Broam v. Bogan*.[369] The plaintiff was wrongly convicted of sexual abuse of his son and spent eight years in prison as the result of misconduct by the prosecutor and

363. *See* Rose, *supra* note 191, at 1044–46.

364. *Buckley*, 509 U.S. at 287 (Kennedy, J., concurring in part and dissenting in part).

365. *Id*.

366. Haupt v. Dillard, 17 F.3d 285, 288–91 (9th Cir. 1994).

367. *Id*.; *see also* Morley v. Walker, 175 F.3d 756, 760–61 (9th Cir. 1999).

368. *See Morley*, 175 F.3d at 760–61.

369. 320 F.3d 1023 (9th Cir. 2003).

investigator.[370] In the subsequent civil rights action, he alleged that the prosecutor and investigator secretly taped exculpatory conversations that they suppressed, interfered with psychological evaluations of the plaintiff's son, failed to interview witnesses, and prevented the son's recantation of allegations that had been elicited in "fantasy therapy."[371] The defendants asserted absolute and qualified immunity defenses, and the district court dismissed the action.[372]

The Ninth Circuit reversed, finding the plaintiff should have been granted leave to amend the complaint.[373] After reviewing the current absolute immunity doctrine, the court concluded that, to resolve this issue, it was necessary to determine whether the misconduct occurred before or after probable cause existed.[374] But because this determination required precise details about the chronology of events and the defendant's subjective state of mind, the court remanded the case.[375] Specifically, the court indicated that the question of probable cause depends on the exact point in time that the defendant *believed* probable cause was met. As the court stated,

> [W]e cannot determine whether the alleged constitutional violations were committed *before or after Ingram concluded that probable cause existed* to arrest Broam and Manning. If these events occurred *after* probable cause existed to arrest Appellants, and Ingram and Bogan's activities were quasi-judicial in nature, they would be protected by absolute immunity.[376]

Thus, the court concluded that the determination of probable cause depended on the exact chronology of events and the defendant's subjective assessment of the evidence.

The *Broam* case demonstrates the unworkability of the current absolute immunity doctrine. Determining the point at which probable cause existed in long-past criminal cases creates monumental proof problems. Discovery into and resolution of these fact questions will be protracted and expensive. And resolving the subjective state-of-mind question is even more problematic. The Court has rejected subjective

370. *Id*. at 1026–27.
371. *Id*.
372. *Id*. at 1025.
373. *Id*.
374. *Id*. at 1032–33.
375. *Id*.
376. *Id*. at 1033 (first emphasis added).

standards in its line of cases transforming qualified immunity from a good-faith standard to an objective standard.[377] The whole point of the shift to an objective standard was to avoid a protracted inquiry that required extensive discovery into factual disputes that, in turn, prevented the resolution of the immunity question in the initial stages of the litigation.[378]

Perhaps seeking to avoid this subjective, state-of-mind issue, some courts have held that the determination of when probable cause exists is determined by an objective, after-the-fact analysis in the civil rights action. The Second Circuit has adopted an objective standard based on a reconstruction of the chronology of the criminal prosecution.[379] In *Hill v. City of New York*,[380] the plaintiff alleged that the prosecutor manufactured videotape evidence in a child abuse prosecution. The prosecutor contended that the videotapes at issue were made for submission to the grand jury and thus he was entitled to absolute immunity.[381] The Second Circuit concluded that the issue did not turn on the prosecutor's subjective state of mind.[382] Rather, the court held that if the video was created before probable cause actually existed, then qualified immunity would apply, regardless of the prosecutor's subjective state of mind.[383] The court remanded the case for a determination of the factual issues with respect to the probable cause determination.[384]

Unfortunately, this approach presents nearly the same practical problems as the Ninth Circuit approach. How is the lower court to determine when probable cause objectively existed? Apparently, the precise chronology of the criminal prosecution must be reconstructed. This detailed reconstruction presents a daunting proof problem, especially given the passage of time in myriad cases in which people have been wrongly imprisoned for many years. Even if the record could be accurately reconstructed, the reconstruction will necessitate extensive discovery of the details of the investigation and will create inevitable

377. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982).

378. *See Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 815–18.

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

380. *Id*. at 656.

381. *Id*.

382. *Id*. at 662–63.

383. *Id*.

384. *Id*. at 663.

questions of fact as memories fade and evidence conflicts. Like the state-of-mind issue, this approach generates factual disputes that preclude resolution of the immunity defense at the initial stage of the litigation and prevents the immunity defense from protecting the prosecutors, not just from liability, but also from the burden of litigation.[385]

Even assuming that this practical problem could be overcome, the approach seems inconsistent with the purpose of the absolute immunity doctrine. The purpose of absolute immunity is to ensure that the prosecutor acts with zeal and independence, freed from the threat of civil liability.[386] But if the scope of the protection is not determined until years later by an after-the-fact, objective analysis of the complete criminal record, then how can this doctrine provide the prosecutor the peace of mind that is intended?[387]

In short, the *Buckley* probable cause approach offered the hope of a brightline test for determining whether a prosecutor was functioning as an investigator, administrator, or advocate. In practice, however, the *Buckley* probable cause requirement has generated confusion and conflict in the lower courts both as to when it applies and how it is to be established. Indeed, rather than providing an efficient test for determining whether absolute immunity applies, the *Buckley* probable cause requirement generates factual disputes that preclude the pretrial resolution of the immunity defense.

4. Determining whether a prosecutor is acting as an investigator or advocate after probable cause has been met

Assuming the courts can develop a satisfactory approach to the determination of when probable cause is required and when it is satisfied for purposes of the immunity defenses, they face another set of questions about the application of the immunity defenses after probable cause has been met.[388] In *Buckley*, the Court held that pre-probable cause conduct

385. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982) (explaining that immunity defenses should be resolved at the earliest stages of the litigation to protect the defendant not just from liability but from the burden of litigation); *see also infra* notes 604–19 and accompanying text.

386. *See* Imbler v. Pachtman, 424 U.S. 409, 423–25 (1976).

387. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 643 (1987) ("An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide.").

388. McNamara, *supra* note 123, at 1160–61.

is only protected by qualified immunity.[389] But it recognized that post-probable cause conduct might give rise to either qualified or absolute immunity, depending on the function being performed.[390] Unfortunately, it gave no guidance to lower courts on how to determine whether a prosecutor is acting as an advocate or as an investigator after probable cause has been met.[391]

Not surprisingly, lower courts have reached conflicting decisions on post-probable cause immunity. The D.C. Circuit took a categorical approach in holding that coercing witnesses to testify falsely is an investigative function that receives only qualified immunity.[392] On the other hand, the Fifth and Ninth Circuits have recently held that the question is to be resolved by evaluating the subjective intent of the prosecutor at the time of the misconduct—whether she intended to act as an investigator or an advocate.[393]

Moore v. Valder[394] illustrates the first approach. After the plaintiff was acquitted on fraud charges,[395] he filed a *Bivens* action alleging that the prosecutor had intimidated and coerced witnesses to testify falsely.[396] Applying the categorical approach to the immunity question, the D.C. Circuit held that intimidating and coercing witnesses was an investigatory function, not advocatory.[397] The court explained that the prosecutor's actions were "a misuse of *investigative* techniques legitimately directed at exploring whether witness testimony is truthful and complete and whether the government has acquired all incriminating evidence. It therefore relates to a typical police function, the collection of information to be used in a prosecution."[398]

In contrast to the *Moore* court's position that witness coercion is categorically an investigative technique, the Fifth Circuit considers the subjective state of mind of the prosecutor at the time of the misconduct

389. *Buckley*, 509 U.S. at 274.

390. *Id.* at 274 n.5.

391. *See* McKenna, *supra* note 191, at 691; *see also* Rose, *supra* note 191, at 1044–46.

392. *See* Moore v. Valder, 65 F.3d 189, 194 (D.C. Cir. 1995).

393. *See* KRL v. Moore, 384 F.3d 1105, 1111 (9th Cir. 2004); Genzler v. Longanbach, 384 F.3d 1092, 1099 (9th Cir. 2004); Cousin v. Small, 325 F.3d 627, 633–35 (5th Cir. 2003); Broam v. Bogan, 320 F.3d 1023, 1033 (9th Cir. 2003).

394. 65 F.3d 189.

395. *Id.* at 191.

396. *Id.*

397. *Id.* at 194.

398. *Id.*

to determine the function she was performing.[399] In *Cousin v. Small*, the plaintiff alleged that prosecutors had coerced a witness to testify falsely, leading to his wrongful murder conviction.[400] The Fifth Circuit considered the chronology of events and found that at the time of the misconduct the prosecutor was acting as an advocate, not as an investigator.[401] The court reached this conclusion because "the interview was *intended* to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect, not to identify a suspect or establish probable cause."[402] In other words, the immunity that applies depends on the prosecutor's subjective state of mind at the time of the misconduct.

Similarly, the Ninth Circuit has adopted a subjective state-of-mind test in three recent cases.[403] For example, in *Broam v. Bogan*,[404] the plaintiff alleged that the prosecutor and investigator improperly avoided interviewing exculpatory witnesses and withheld exculpatory evidence, including tape recordings. The Ninth Circuit remanded the case for development of the factual chronology of events and for a determination of whether the prosecutor was acting as an investigator or as an advocate.[405] As the court explained, the prosecutor is absolutely immune if he was gathering evidence to present to the trier of fact, but only protected by qualified immunity if he was conducting an investigation to determine whether probable cause existed.[406] In other words, the prosecutor's subjective intention determines which immunity applies.[407]

399. Cousin v. Small, 325 F.3d 627, 633–35 (5th Cir. 2003).

400. *Id*. at 629–31.

401. *Id*. at 635.

402. *Id*. (emphasis added).

403. *See* KRL v. Moore, 384 F.3d 1105, 1111 (9th Cir. 2004); Genzler v. Longanbach, 384 F.3d 1092, 1099 (9th Cir. 2004); Broam v. Bogan, 320 F.3d 1023, 1033 (9th Cir. 2003).

404. 320 F.3d at 1027–28.

405. *Id.* at 1034.

406. *Id*. at 1033.

407. *See KRL*, 384 F.3d 1105. In *KRL*, the court held that a question of fact was presented on the defendants' purpose in securing a search warrant after probable cause had been met when the warrant went beyond legitimate preparation for trial on an existing indictment and sought to collect evidence of additional criminal activity. *Id*. at 1112. As the court explained, "A genuine issue of fact certainly exists as to the extent that the search warrant sought to gather evidence to prosecute [plaintiff] rather than to further the collateral investigation." *Id*. Obviously, what the warrant "sought to gather" depends on the drafter's intent in drafting the warrant, in other words, the subjective state of mind of the defendant. Moreover, in the mixed motive case in which the purpose is partly investigatory and partly advocatory, the Ninth Circuit concluded that to the extent the warrant served an investigative goal, qualified immunity applies, but to the extent it served an advocacy goal, absolute immunity applies. *Id*. The reconstruction of the events through notes and testimony and the

As explained above, injecting a subjective state-of-mind component into the immunity defenses is problematic.[408] The *Buckley* Court cautioned against allowing prosecutors to obtain absolute immunity by claiming that investigative functions were for advocacy purposes,[409] which is exactly what this approach seems to invite. Moreover, this approach has been rejected by the Supreme Court in the line of cases that transformed qualified immunity from a good-faith standard to an objective standard.[410] Subjective inquiries frustrate the goal of the immunity defense, which is to ensure the early disposition of the litigation.[411] These inquiries lead to wide-ranging discovery that "can be peculiarly disruptive of effective government."[412]

As the above discussion shows, the circuit courts are in conflict on a number of issues arising out of the current prosecutorial immunity doctrine. The Court could resolve these conflicts in either of two ways. First, the Court could take up a series of cases to answer these questions and resolve these conflicts. Alternatively, the Court could simplify the entire area of the law by eliminating absolute prosecutorial immunity and applying qualified immunity in all cases. The question is whether the benefits of the absolute immunity doctrine justify the complexity and confusion it introduces into the law. The following section addresses this

assessment of prosecutorial intent based on this reconstruction required extensive factual discovery and presented complicated questions of fact. *Id.*; *see also Genzler*, 384 F.3d 1092.

In another case, *Genzler v. Longanbach*, 384 F.3d 1092, the court held that witness interviews conducted after probable cause existed may serve either an investigative function or an advocatory function. *Id*. at 1099–1100. While the timing of evidence gathering is a relevant factor in determining function, it is not determinative. *Id*. at 1100. The court also focused on the nature of the meetings with witnesses. *Id*. at 1100–03. It looked at the defendants' notes about the meetings to determine the defendants' purpose in conducting the interviews and concluded that they

> were in the process of gathering information from [the witness] during the meeting and possibly encouraged her to lie as part of [the] process. There is little or nothing in the notes to indicate that the meeting focused on coaching [the witness] about how to present this information in a court proceeding.

Id. at 1103. For this reason, the court concluded that the defendants were acting in an investigatory, not advocatory, capacity. *Id*. The court's evaluation of the evidence reveals that it was trying to reconstruct the defendants' states of mind at the time of the misconduct to determine whether the prosecutors were functioning as investigators or advocates for the purpose of determining which immunity applied.

408. *See supra* notes 182–86 and 369–85 and accompanying text.

409. *Buckley*, 509 U.S. at 276.

410. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982).

411. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); *Harlow*, 457 U.S. at 815–18.

412. *Harlow*, 457 U.S. at 817.

question and concludes that, ultimately, the benefits do not justify absolute immunity.

V. QUALIFIED IMMUNITY SHOULD APPLY TO ALL CASES

Since first adopting the prosecutorial immunity defense in civil rights actions, the Court has supported absolute prosecutorial immunity on historical and public policy grounds. But, as this discussion will show, the application of absolute immunity in prosecutorial misconduct cases misreads history and violates public policy. Qualified immunity should be uniformly applied in cases of prosecutorial misconduct. Qualified immunity is supported by both history and public policy. It provides protection for the honest prosecutor from the burden and intimidation of retaliatory litigation, while affording the victims a remedy where the prosecutor has intentionally violated clearly established constitutional guarantees. In addition, the uniform application of qualified immunity will eliminate the unnecessary confusion and complexity injected into civil rights litigation by the doctrine of absolute prosecutorial immunity. Finally, although the doctrine of stare decisis properly curtails the casual overruling of precedent, when governing decisions prove to be both wrong and unworkable, the Court should and does correct its prior missteps.[413]

A. Absolute Prosecutorial Immunity Is Historically Unjustified

As the Court has repeatedly explained, immunities apply in § 1983 actions because the Court has concluded that Congress did not intend to erase established common-law immunities when it adopted § 1983.[414] For this reason, the Court's starting point for analyzing an immunity question under § 1983 is the state of the law of immunities in 1871 when § 1983 was adopted.[415] Thus, in the Court's view, since legislators and judges had absolute immunity in 1871, these immunities were retained.[416]

413. Lawrence v. Texas, 539 U.S. 558, 576–77 (2003); Payne v. Tennessee, 501 U.S. 808, 827–28 (1991).

414. Kalina v. Fletcher, 522 U.S. 118, 123 (1997); *Buckley*, 509 U.S. at 268; Burns v. Reed, 500 U.S. 478, 484 (1991); Imbler v. Pachtman, 424 U.S. 409, 417–18 (1976).

415. *Kalina*, 522 U.S. at 123; *Buckley*, 509 U.S. at 268; *Burns*, 500 U.S. at 484; *Imbler*, 424 U.S. at 417–18.

416. Pierson v. Ray, 386 U.S. 547, 553–55 (1967) (finding that absolute immunity applied to judges in 1871); Tenney v. Brandhove, 341 U.S. 367, 372–76 (1951) (finding that absolute immunity applied to legislators in 1871). *But see* J. Randolph Block, Stump v. Sparkman *and the*

But the 1871 common law with respect to prosecutorial immunity is more difficult to establish than legislative or judicial immunity for two reasons. First, in 1871, the office of public prosecutor as we know it today did not exist in most states.[417] Second, the first United States case recognizing any form of immunity for a public prosecutor was decided twenty-five years after § 1983 was adopted.[418] This section will review the common-law landscape of 1871 and explain why absolute prosecutorial immunity cannot be justified by reference to history.

In 1871, the United States' criminal justice system bore little resemblance to the system we know today. In the English common-law system, criminal prosecutions were primarily brought by the victim's family and friends,[419] and the American system developed in part out of

History of Judicial Immunity, 1980 DUKE L.J. 879, 899; John C. Filosa, Note, *Prosecutorial Immunity: No Place for Absolutes*, 1983 U. ILL. L. REV. 977, 980–81 (noting that of the thirty-seven states in the Union as of 1871, only a minority of them had absolute judicial immunity at the time; the *Sparkman* Court cited to those thirteen states that had absolute immunity and ignored the twenty-four others that did not have absolute immunity.); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 323–28 (1969) (stating that the assumption of common-law immunity is wrong because the common law in the United States in 1871 did not clearly require absolute judicial immunity: "[A] diligent congressman, looking to the federal rule in 1871, would have had no reason not to surmise that an incorrect ruling of law, maliciously made, which deprived an individual of his constitutional rights, would probably subject the offending judge to liability.").

417. *Kalina*, 522 U.S. at 124 n.11 (citing Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 100–02 (1976); John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 316 (1973)).

418. Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896) (holding that a prosecutor was entitled to absolute immunity); *see also Burns*, 500 U.S. at 499 (Scalia, J., concurring in part and dissenting in part); McKenna, *supra* note 191, at 668 n.36.

419. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515–16 (1994); Andrew Sidman, Comment, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 756 (1976). As one American court explained, "In an early day in England private parties prosecuted criminal wrongs which they suffered. They obtained an indictment from a grand jury, and it became the duty and the privilege of the person injured to provide a prosecutor at his own expense to prosecute the indicted person." State v. Peterson, 218 N.W. 367, 369 (Wis. 1928), *quoted in* Bessler, *supra*, at 520 n.34. While law officers of the crown could and did regularly prosecute, these were extraordinary cases, and not the normal process except in matters touching the interest of political authorities. Langbein, *supra* note 417, at 315–16. Indeed, historically, prosecutors in most felony cases were not lawyers, but victims. *Id*. at 316–18. And later, when private prosecutors retained solicitors, the private prosecutor retained control to manage the prosecution just as a private litigant would manage a civil case. Thomas J. Robinson, Jr., *Private Prosecution in Criminal Cases*, 4 WAKE FOREST L. REV. 300, 302 (1968). Since the private prosecutor often had a stake in the litigation, revenge was often a primary motivating factor for the prosecution. Bessler, *supra*, at 515 n.13. But since the private prosecutor did not need to have any interest in the litigation, the motivation may well have been not justice, but financial gain from rewards offered by victims or their families or from fines that were shared between the crown and the prosecutor. Robinson, *supra*, at 302–03. Indeed, Blackstone observed that prosecutions were motivated for financial reasons, not to achieve social justice since defendants were often allowed to

this tradition.[420] But even before the Revolutionary War, the colonies had begun replacing private prosecutions with public prosecutions.[421] Yet well into the nineteenth century, and despite the official establishment of public prosecutors' offices, the private prosecution of crimes remained a significant feature of the American criminal justice system.[422] For example, in Pennsylvania, private prosecutions were common.[423] Thus, "[p]arents of young women prosecuted men for seduction; husbands prosecuted their wives' paramours for adultery; wives prosecuted their husbands for desertion."[424] In this system, the victims and their families often retained private lawyers to prosecute the perpetrators of crimes against them.[425] Obviously, in this tradition prosecutors had a personal stake in the outcome and were far from detached and unbiased participants in the process. As one commenter observed, "At common law criminal prosecution adhered to the pure

pay complainants before judgment was entered. 2 William BLACKSTONE, COMMENTARIES *364, *cited in* Sidman, *supra*, at 760 n.43. But even in the case of public prosecutors, a financial incentive often was provided for convictions. *See* Meares, *supra* note 123, at 880–81. For example, in California in 1887, prosecutors received $15 for each conviction. *Id.* at 881 n.109. To put this in perspective, $15 in 1887 would have been worth $293 in 2003. The Inflation Calculator, *at* http://www.westegg.com/
inflation/infl.cgi (last visited Jan. 21, 2005). Similarly, in 1866 in Tennessee, the district attorney general received $10 for each felony conviction and $20 for each death penalty conviction. Meares, *supra* note 123, at 881 n.109. Adjusted for inflation, $10 in 1886 would have been worth $114 in 2003, and $20 in 1886 would have been worth $228 in 2003. The Inflation Calculator, *at* http://www.westegg.com/inflation/infl.cgi (last visited Jan. 21, 2005).

420. Bessler, *supra* note 419, at 515; Sidman, *supra* note 419, at 756.

421. Bessler, *supra* note 419, at 516; Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43 (1995); Sidman, *supra* note 419, at 762. The origins of the American public prosecutor are traced to several European traditions—English, French, and Dutch—but its exact heritage is an "historical enigma." Bessler, *supra* note 419, at 517; *see also* Robinson, *supra* note 419, at 308–311 (explaining the Dutch, Scottish, and French influence on the adoption of the public prosecutor's office in the colonies); W. Scott Van Alstyne, Jr., *The District Attorney—A Historical Puzzle*, 1952 WIS. L. REV. 125, 128–37 (exploring the Dutch influence on the development of the public prosecutor in America).

422. Bessler, *supra* note 419, at 518; Ireland, *supra* note 421, at 43.

423. Bessler, *supra* note 419, at 518. "Private prosecution—one citizen taking another to court without the intervention of the police—was the basis of law enforcement in Philadelphia and an anchor of its legal culture, and this had been so since colonial times." *Id*. at 518 n.26 (internal quotation marks omitted) (quoting ALLEN STEINBERG, THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880, at 25 (1989)).

424. *Id*. at 518 (internal quotation marks omitted) (quoting STEINBERG, *supra* note 423, at 48). As Bessler notes, "Some private prosecutions in Philadelphia bordered on the bizarre. For example, 'Henry Blake's wife prosecuted him for refusing to come to bed when called and making too much noise, preventing her from sleeping. He was bound over to come to bed when called.'" *Id*., at 518 n.28 (quoting STEINBERG, *supra* note 423, at 57).

425. Ireland, *supra* note 421, at 45–46.

form of the adversary system; each aggrieved party retained his own counsel to prosecute his private interest."[426]

The persistence of the private prosecutor in the United States in the nineteenth century after the establishment of public prosecutors' offices has been explained by two main factors. First, because of inadequate funding of the office, public prosecutors were often incompetent.[427] According to one delegate at the Illinois Constitutional Convention in 1847, "The [public prosecutor's] office was generally taken by young men who desired to become acquainted with people, and get into practice; as soon as this was accomplished they gave way to others."[428] This view was expressed in many other jurisdictions as well.[429] Second, public prosecutors were responsible for covering vast territories, often without any assistants, which compounded their incompetence.[430] Traveling from county to county, the public prosecutor was often unprepared for the litigation, unfamiliar with the jury pool, and outmatched by defense counsel.[431] As one delegate to the 1890–91 Kentucky Constitutional Convention explained, the public prosecutor was "a rat in a strange garret."[432] Under these circumstances, victims and their families hired private lawyers to handle criminal prosecutions in the hope of securing convictions.[433] Throughout the nineteenth century, private prosecution flourished in most states.[434]

426. John A. J. Ward, Note, *Private Prosecution—The Entrenched Anomaly*, 50 N.C. L. REV. 1171, 1171 (1972).

427. Ireland, *supra* note 421, at 43–44.

428. *Id*.

429. *Id*. at 44. The same criticism was expressed in Kentucky, Maryland, Kansas, Nebraska, and Florida. *Id.*

430. *Id.* at 44–45.

431. *Id.*

432. *Id.* at 45.

433. *Id.* 45–46.

434. *Id.* 48–49. Specifically, private prosecution had been officially approved in Alabama, Florida, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nebraska, New Jersey, North Dakota, Texas, Utah, Vermont, and Virginia. *Id*. at 49. North Carolina has also acknowledged that private prosecution "is deeply rooted in North Carolina practice." State v. Best, 186 S.E.2d 1, 3 (N.C. 1974); *see also* Ward, *supra* note 426, at 1171. To be sure, the system had its critics who feared that the criminal defendant's rights were prejudiced and who believed a public prosecutor was necessary to ensure the integrity of the process. Ireland, *supra* note 421, at 47–48; Ward, *supra* note 426, at 1172–73. A few state courts—specifically, Massachusetts, Michigan, and Wisconsin—condemned the practice. Bessler, *supra* note 419, at 519–20. But the practice persisted well into the twentieth century. In 1987, exercising its supervisory authority over federal courts, the United States Supreme Court criticized the practice. Young v. United States, 481 U.S. 787, 806–08 (1987). But, as

While the office of public prosecutor was not well established in the late nineteenth century, the tort of malicious prosecution was clearly recognized in both the English and American common law.[435] The elements of the action were: (1) that the prosecution terminated in favor of the plaintiff; (2) that there was no probable cause; and (3) that the defendant acted with malice.[436] Although there was no prosecutorial immunity defense at the time, the elements of a cause of action for malicious prosecution essentially allowed for the same result as qualified immunity, since the plaintiff was required to prove malice and lack of probable cause.[437] As explained in Blackstone's *Commentaries*, these requirements were necessary, "[f]or it would be a very great discouragement to the public justice of the kingdom if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried."[438]

And throughout the century, while malicious prosecution actions were frequently brought against the parties who pressed criminal charges arising out of a personal dispute,[439] the lawyers privately retained to

of 1991, the high courts or legislatures of thirty states still approved some form of involvement of private prosecutors in criminal prosecutions. Ireland, *supra* note 421, at 55.

435. MELVILLE M. BIGELOW, LAW OF TORTS 195 (1875) (explaining that the leading English case of this period, *Savile v. Roberts*, 91 Eng. Rep. 1147 (K.B. 1698), required plaintiff to prove malice and lack of probable cause); Schillaci, *supra* note 140, at 443–45.

436. Vanderbilt v. Mathis, 5 Duer 304 (N.Y. 1856); Steward v. Gromett, 7 Common Bench Reports, New Series, 191 (Common Pleas 1859), *reported in* JAMES B. AMES & JEREMIAH SMITH, 1 THE LAW OF TORTS 573 (3d ed. 1910); FRANCIS M. BURDICK, THE LAW OF TORTS 249 (2d ed. 1908); THOMAS M. COOLEY, ELEMENTS OF TORTS 53–54 (1895).

437. *See* BURDICK, *supra* note 436, at 132–33. As Justice Scalia observed, "There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was adopted." *Id.* at 132; *see also* BURDICK, *supra* note 436, at 249–62; Eugene Scalia, *Police Witness Immunity Under §1983*, 56 U. CHI. L. REV. 1433, 1441–42 (1989); Schillaci, *supra* note 140, at 445.

438. BLACKSTONE, *supra* note 419, at *126.

439. *See* Field v. Ireland, 21 Ala. 240 (1852) (approving a malicious prosecution action against defendant for prosecuting plaintiff for theft of goods); Long v. Rodgers, 19 Ala. 321 (1851) (recognizing a malicious prosecution action against father for charging plaintiff with unlawfully taking his daughter); Collins v. Fowler, 10 Ala. 858 (1846) (affirming a malicious prosecution action against defendant for charging plaintiff with stealing two bales of cotton); Stone v. Stevens, 12 Conn. 219 (1837) (affirming a malicious prosecution action against former employer who charged plaintiff with stealing cloth); Bourne v. Stout, 62 Ill. 261 (1871) (upholding a jury verdict in a malicious prosecution action against defendant for charging plaintiff with stealing a horse); Chapman v. Cawrey, 50 Ill. 512 (1869) (affirming a malicious prosecution action after a landlord-tenant dispute led to charges that the tenant had made death threats); Ross v. Innis, 35 Ill. 487 (1864) (affirming a malicious prosecution action against former employer for charging employee with embezzlement); Jacks v. Stimpson, 13 Ill. 702 (1852) (reversing a malicious prosecution action against defendant for charging plaintiff with cattle theft because the instructions indicated that defendant's belief in the plaintiff's guilt satisfied probable cause); Shaul v. Brown, 28 Iowa 37

prosecute crimes could also be held liable.[440] For example, an 1845 Kentucky case held that an attorney could be held liable for malicious prosecution for leading a lay justice of the peace into issuing a wrongful order for the sheriff to seize the plaintiff's dwelling.[441] As the court

(1869) (affirming a malicious prosecution action against defendant for charges that plaintiff stole a puppy); Faris v. Starke, 42 Ky. 4 (1842) (reversing a malicious prosecution action against defendant for charging plaintiff with breaking into his store and stealing property because the evidence required a new trial); Kimball v. Bates, 50 Me. 308 (1862) (reversing a malicious prosecution action against defendant who instituted criminal proceedings to coerce plaintiff to surrender promissory notes based on the evidence); Varrell v. Holmes, 4 Me. 168 (1826) (affirming a nonsuit in a malicious prosecution action against defendant who instituted criminal charges arising out of land dispute because the plaintiff failed to show want of probable cause); Boyd v. Cross, 35 Md. 194 (1872) (affirning a judgment for defendant in a malicious prosecution action against a bank cashier for charging plaintiff with trying to pass a forged check because the evidence failed to establish malice); Laird v. Taylor, 66 Barb. 139 (N.Y. Gen. Term 1868) (affirming a malicious prosecution verdict against defendant for charging plaintiff with theft of horse reins); Grinnel v. Stewart, 32 Barb. 544 (N.Y. Gen. Term 1860) (setting aside the dismissal of a malicious prosecution action against defendant for charging that plaintiff obtained property by false pretenses); Schonfield v. Ferrer, 47 Pa. 194 (1864) (revising a malicious prosecution judgment because the judge failed to instruct the jury on the malice requirement in an action against defendant for charging plaintiff with horse theft in order to coerce the return of the horse); Prough v. Entriken, 11 Pa. 81 (1849) (reversing a malicious prosecution judgment for instructional error in an action against defendant who had plaintiff arrested on fraud charges and then extorted money from him while he was in prison); French v. Smith, 4 Vt. 363 (1827) (reversing a malicious prosecution case because of juror prejudice in an action against defendant for charging plaintiff with the theft of a scale).

440. Warfield v. Campbell, 35 Ala. 349 (1859) (holding that an attorney who caused plaintiff to be arrested and imprisoned with malice and without probable cause could be held liable for malicious prosecution); Burnap v. Marsh, 13 Ill. 536, 538–40 (1852) (holding that an attorney who caused the wrongful imprisonment of plaintiff in civil action could be held liable for malicious prosecution); Wood v. Weir, 44 Ky. 544 (1845) (holding that an attorney could be held liable for malicious prosecution for maliciously inducing a justice of the peace to issue a wrongful order for the seizure of plaintiff's house); Staley v. Turner 21 Mo. App. 244, 251–52 (1886) (holding that an attorney who joined with his client in bringing a criminal action with malice and without probable cause is liable for malicious prosecution). According to the court in *Staley*, in such cases, the client and the attorney are legally in the same position but

> from the standpoint of sound morals, it is infinitely worse, for he prostitutes the privileges which the state has conferred upon him of appearing in its courts as an officer of those courts and a minister of justice. The client may, indeed, in many cases, excuse his motives by proving that he acted under the advice of his counsel, but no such refuge is left open to the attorney. He is learned in the law and knows the ground whereon he stands.

Id. at 251; *see* McKenna, *supra* note 191, at 668–69 n.36 (citing a nineteenth-century treatise, MARTIN L. NEWELL, MALICIOUS PROSECUTION, FALSE IMPRISONMENT AND THE ABUSE OF LEGAL PROCESS (1892), which "provided that prosecutors were liable if there were malice and absence of probable cause, with no distinction made between public and private prosecutors").

441. *Wood*, 44 Ky. at 544.

explained, justices of the peace rely on counsel to prepare proper orders:[442]

> It would be strange, therefore, if the attorney, by art and contrivance, the abuse of the confidence reposed, and prostitution of his profession, should *procure* from the Justices, from *malicious motives* to the defendant, an illegal and oppressive order by which injury accrues to the defendant, if the attorney could not be made liable for the wrong. It is contended, that *this rule* will expose attorneys to perplexing litigation, to the manifest injury of the profession. If it should, the law knows no distinction of persons; a different rule cannot, as to them, be recognized by this Court, from that which is applicable to others. Besides, this is a numerous class, powerful for good or evil, and holding them to a strict accountability, will have the effect to exalt and dignify the profession, by purging it of ignorant, meretricious and reckless members.[443]

While the actual decisions are few, case law predating 1871 suggests that *public* prosecutors were equally liable for prosecutorial misconduct. Specifically, an 1854 Massachusetts decision, *Parker v. Huntington*,[444] held that public prosecutors could be liable for malicious prosecution. In *Parker*, the plaintiff alleged that the district attorney maliciously contrived with another to elicit testimony from the plaintiff during a grand jury proceeding that could later be used to indict him for perjury.[445] He further alleged that the prosecutor used false testimony to indict and convict him of perjury.[446] The defendants demurred on the grounds that the action failed to establish a conspiracy.[447] The court overruled the demurrer, holding that, although an action for malicious prosecution had historically required conspiracy allegations, that element was no longer required.[448] As the court explained, "The plaintiff can maintain his case by proof of a malicious prosecution by both or either of the defendants."[449] In other words, the plaintiff stated a malicious prosecution cause of action against the *public prosecutor* simply by

442. *Id.* at 546–47.

443. *Id.* at 547.

444. 68 Mass. (2 Gray) 124 (1854); *see also* McKenna, *supra* note 191, at 668–69 n.36.

445. *Id.* at 125.

446. *Id.*

447. *Id.* at 126.

448. *Id.* at 126–28.

449. *Id.*

alleging that he elicited and used false testimony in a criminal prosecution.[450]

Thus, a hypothetical legislator in 1871 conscientiously researching the common law on the eve of the passage of § 1983 would have found the well-established tort of malicious prosecution,[451] which had been upheld in an action against a public prosecutor for eliciting and using false testimony.[452] Additionally, he would have found no immunity defense to insulate the prosecutor from liability if the elements of the cause of action were proven, for there was *not a single decision* affording prosecutors any kind of immunity defense from liability for malicious prosecution.[453] Nothing in the existing common law would have suggested to our legislator that after the adoption of § 1983 prosecutors would escape liability for malicious prosecution under the shield of a totally novel doctrine of absolute prosecutorial immunity that had never been recognized in the common law.

Indeed, far from being a "well-settled" doctrine in 1871,[454] there is not one single case adopting any form of prosecutorial immunity until many years later. Instead the defense of prosecutorial immunity developed two to three decades after the adoption of § 1983 as the office of the public prosecutor developed,[455] but the courts split on whether absolute or qualified immunity applied.[456] The first case, *Griffith v. Slinkard*,[457] was decided in 1896, twenty-five years after § 1983 was enacted.[458] In *Griffith*, the Indiana Supreme Court shielded the district attorney with absolute immunity no matter how malicious his motives.[459]

450. The court did suggest that the action was deficient for other reasons, citing two previous cases. *Parker*, 68 Mass. (2 Gray) at 128 (citing *Parker v. Farley*, 64 Mass. (10 Cush.) 279 (1852); *Bacon v. Towne*, 58 Mass. (4 Cush.) 217 (1849)). But the defect in both these cases was the failure to sufficiently allege the criminal prosecution had terminated in the plaintiff's favor and was unrelated to the question of liability of a public prosecutor. *Parker*, 64 Mass. (2 Gray) at 280–81; *Bacon*, 58 Mass. (4 Cush.) at 235.

451. *See* Kalina v. Fletcher, 522 U.S. 118, 132–33 (Scalia, J., concurring).

452. *Parker*, 68 Mass. (2 Gray) at 124.

453. *Kalina*, 522 U.S. at 132 (Scalia, J., concurring).

454. Imbler v. Pachtman, 424 U.S. 409, 423 (1976).

455. *See Kalina*, 522 U.S. at 124 n.11.

456. Note, *The Civil Liability of a District Attorney for Quasi-Judicial Acts*, 73 U. PA. L. REV. 300, 304–07 (1925).

457. 44 N.E. 1001 (Ind. 1896).

458. *Imbler*, 424 U.S. at 421.

459. *Griffith*, 44 N.E. 1001. In *Griffith*, the plaintiff alleged that the elected prosecuting attorney had maliciously and wrongfully sought an indictment against him before the grand jury and had wrongfully inserted his name into the indictment, even though the grand jury had decided not to

But the very next year, a Kentucky case indicated that prosecutors could be held liable for malicious prosecution if they acted with malice or corrupt motives.[460] This split remained for roughly the next twenty-five years.[461]

For example, in 1908 the Supreme Court of California held that a complaint stated a cause of action for malicious prosecution against the district attorney by alleging that he had conspired with the deputy district attorney and sheriff to falsely charge the plaintiff with a crime and that he had convicted the plaintiff by procuring false evidence and intimidating the jury.[462] The defendants contended no action would lie because the plaintiff had been convicted, and thus probable cause had been met.[463] The court rejected this argument stating:

> Certainly, if a man has procured an unjust judgment by the knowing use of false and perjured testimony, he has perpetrated a great private wrong against his adversary. If that judgment is in the form of a judgment of criminal conviction, it would be obnoxious to every one's sense of right and justice to say that, because the infamy had been successful to the result of a conviction, the probable cause for the prosecution was thus conclusively established against a man who had thus been doubly wronged.[464]

return an indictment against him. *Id.* at 1001. The defendant thereafter caused him to be arrested through a warrant issued based on the indictment. *Id.* The Indiana Supreme Court affirmed the trial court's grant of a demurrer on the ground that the prosecuting attorney was acting as a judicial officer and was therefore entitled to immunity, even though he acted maliciously. *Id.* at 1002. The court also sustained the demurrer to a defamation action against the prosecutor arising from the reading of the indictment. *Id.*

460. Arnold v. Hubble, 38 S.W. 1041 (Ky. Ct. App. 1897).

461. Note, *supra* note 456, at 304–07. *Compare* Carpenter v. Sibley, 94 P. 879 (Cal. 1908) (upholding action against sheriff and district attorney for malicious prosecution), Leong Yau v. Carden, 23 Haw. 362 (1916) (holding that prosecutor was entitled to qualified immunity when acting within the scope of his authority), Schneider v. Shephard 158 N.W. 182 (Mich. 1916) (holding prosecutor was not entitled to immunity), State v. Brinkman, 175 N.W. 1005 (Minn. 1920) (holding that malicious prosecution action would lie when prosecutor acted with malice and without probable cause), *and* Skeffington v. Eylward, 105 N.W. 638 (Minn. 1906) (upholding verdict against prosecutor for malicious prosecution), *with* Smith v. Parman, 165 P. 663 (Kan. 1917) (holding that prosecutor enjoys absolute immunity), Kittler v. Kelsch, 216 N.W. 898 (N.D. 1927) (holding the state prosecutor was absolutely immune for his decision as to the sufficiency of the evidence for a criminal prosecution), Price v. Cook, 250 P. 519 (Okla. 1926) (holding that public prosecutor enjoys absolute immunity), *and* Watts v. Gerking, 222 P. 318 (Or. 1924) (holding prosecutor immune from malicious prosecution action when performing his official duty).

462. *Carpenter*, 94 P. at 879–80.

463. *Id.*

464. *Id.* at 880.

For this reason, the court upheld the plaintiff's right to proceed in the tort action against the prosecutor who had procured the false testimony.[465]

Similarly, in 1924 the Supreme Court of Oregon refused to grant a prosecutor absolute immunity.[466] While the court recognized the need to give prosecutors sufficient breathing room to exercise their discretion,[467] it stated:

> But from this it does not follow that a district attorney is not to be held accountable in a civil action for damages at the suit of an injured party for maliciously causing the arrest of such party for a pretended offense, which, at the time of the arrest, he knew had not been committed at all; for in such case the district attorney is not acting in the line of his duty or within the scope of his authority.[468]

While the state decisions on the immunity or liability of a public prosecutor were in conflict from 1896 to 1927, federal law also offered no resolution of the question during this period. The Supreme Court did not address the question of whether a public prosecutor would enjoy absolute or qualified immunity until 1927—fifty-six years after § 1983 was adopted.[469] In that decision, the Court held that absolute immunity applied.[470] But obviously this decision does not support the conclusion that absolute prosecutorial immunity was established in the common law fifty years earlier when the 1871 Congress enacted § 1983.

In short, since prosecutors did not enjoy absolute immunity in 1871, the Court's historical justification for adopting it in §1983 actions is unfounded. Indeed, in the opinion of some justices, the absence of a common-law tradition of absolute immunity precludes its recognition today.[471] Specifically, in Justice Scalia's view, although a common-law tradition of absolute immunity is not a *sufficient* condition for adopting the doctrine, it is a *necessary* one.[472] As he explains, the Court's "role is to interpret the intent of [the 1871] Congress in enacting § 1983, not to

465. *Id.*

466. *Watts*, 222 P. at 322.

467. *Id.*

468. *Id.* at 322–23.

469. Yaselli v. Goff, 275 U.S. 503 (1927).

470. *Id.*

471. *See, e.g.*, Burns v. Reed, 500 U.S. 478, 493–94 (1991).

472. *Burns*, 500 U.S. at 497–98 (Scalia, J., concurring in part and dissenting in part); *see also* Buckley v. Fitzsimmons, 509 U.S. 259, 279–80 (1993) (Scalia, J., concurring).

make a freewheeling policy choice."[473] Moreover, qualified immunity is presumed to apply, and "the defendant bears the burden of showing that the conduct for which he seeks immunity would have been privileged at common law in 1871."[474] Thus if the common law is unclear, the defendant is entitled to qualified immunity—not absolute immunity.[475] Under this approach, since the common-law doctrine of absolute prosecutorial immunity is at best unclear and, in fact, lacking any support in case law, it should not have been recognized in § 1983 actions.

Instead of denying absolute prosecutorial immunity based on the common law of 1871, the *Imbler* Court misread the 1871 common law and erroneously concluded that prosecutors enjoyed absolute immunity.[476] As discussed above,[477] the *Imbler* Court found that at common law, prosecutors enjoyed absolute immunity for the same policy reasons that judges and legislators were shielded by immunity.[478] Indeed, the Court concluded that this immunity was "well settled."[479] But the Court cited no precedent recognizing prosecutorial immunity before 1871. And as the following discussion will show, the Court's initial conclusions about the 1871 common law were unfounded since none of the 1871 common-law immunities afforded prosecutors absolute immunity.[480]

For purposes of this Article, there were three relevant immunities in 1871: judicial, quasi-judicial, and defamation. First, judicial immunity extended both to public officials and to private citizens who were

473. *Burns*, 500 U.S. at 498 (Scalia, J., concurring in part and dissenting in part) (internal quotation marks omitted) (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)); *see also Buckley*, 509 U.S. at 268.

474. *Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

475. *Id.*

476. Imbler v. Pachtman, 424 U.S. 409, 421–24 (1976).

477. *See supra* Part IV.A.

478. *Imbler*, 424 U.S. at 422–24.

479. *Id.* at 424.

480. See *Kalina v. Fletcher*, 522 U.S. 118, 123–27 (1997), in which the Supreme Court recognized that its prior decisions had "granted a broader immunity to public prosecutors than had been available in malicious prosecution actions against private persons who brought prosecutions at early common law." *Id.* at 124 n.11. The Court explained that "these early cases were decided before the office of public prosecutor in its modern form was common," and since the office of public prosecutor was established, "the availability of malicious prosecution actions has been curtailed." *Id.* (internal quotation marks omitted) (quoting White v. Frank, 855 F.2d 956, 962 (2d Cir. 1988)). For these reasons, the Court observed: "[T]he Court in *Imbler* drew guidance both from the first American cases addressing the availability of malicious prosecution actions against public prosecutors, and perhaps more importantly, from the policy considerations underlying the firmly established common-law rules providing absolute immunity for judges and jurors." *Id.*

involved in resolving disputes, including "judges, jurors and grand jurors, members of courts martial, private arbitrators, and various assessors and commissioners."[481] As Justice Scalia has explained, "[T]he touchstone for its applicability was performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights."[482] It precluded civil liability even where the defendant acted in bad faith and with malice.[483] It was adopted to ensure that those resolving disputes would act independently and without fear of consequences.[484] The Court explained in adopting the absolute judicial immunity doctrine in 1872:

> [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.[485]

But absolute judicial immunity was not extended to prosecutors, who were liable for malicious prosecution if they acted unreasonably and in bad faith.[486]

Using a functional approach, judicial immunity would not apply to today's public prosecutors since they function as advocates, not independent adjudicators responsible for resolving disputes.[487] Indeed, the current law of absolute prosecutorial immunity is limited to the

481. *Kalina*, 522 U.S. at 132 (Scalia, J., concurring); Burns v. Reed, 500 U.S. 478, 499–500 (1991) (Scalia, J., concurring in part and dissenting in part); McKenna, *supra* note 191, at 666 n.22; *see also* JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW 361–62 (1889); BURDICK, *supra* note 436, at 30–31.

482. *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part).

483. *Kalina*, 522 U.S. at 132 (Scalia, J., concurring in part and dissenting in part); Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547, 554 (1966); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872).

484. *Kalina*, 522 U.S. at 132 (Scalia, J., concurring in part and dissenting in part); *Stump*, 435 U.S. at 349; *Pierson*, 386 U.S. at 554.

485. *Bradley*, 80 U.S. (13 Wall.) at 347; s*ee also Pierson*, 386 U.S. at 554.

486. *Kalina*, 522 U.S. at 132 (Scalia, J., concurring); *see supra* notes 435–50 and cases cited therein.

487. *Kalina*, 522 U.S. at 132.

advocacy functions of the prosecutor.[488] This advocacy role is not at all analogous to the impartial dispute-resolution function protected by judicial immunity as it existed in 1871, but is closely analogous to the role of the private prosecutor who could be sued for malicious prosecution.[489]

Second, quasi-judicial immunity applied to public officials engaged in official acts involving policy decisions.[490] It applied where the law "commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial."[491] For example, quasi-judicial immunity protected a tax assessor determining liability,[492] a school board expelling a student,[493] a town board of equalization determining land value,[494] a court clerk,[495] and a surveyor-general.[496] This immunity would seem applicable to the function of the modern public prosecutor who performs government functions requiring the exercise of discretion.[497] But quasi-judicial immunity was a qualified immunity requiring good faith and thus provides no historical support for granting prosecutors absolute immunity.[498]

Finally, absolute defamation immunity applied to all statements made in court proceedings.[499] It shielded judges, jurors, witnesses, and

488. *Id.* at 125; Buckley v. Fitzsimmons, 509 U.S. 259, 273–74 (1993).

489. *Kalina*, 522 U.S. at 132 (Scalia, J., concurring). As Justice Scalia points out, at common law prosecutors enjoyed no immunity, but the elements of malicious prosecution essentially gave the prosecutor the same protection that qualified immunity would have provided since good faith would defeat the required malice element. *Id.*

490. *Kalina*, 522 U.S. at 132 (Scalia, J., concurring); *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part); *see* BISHOP, *supra* note 481, at 365–66; BURDICK, *supra* note 436, at 35–36.

491. BISHOP, *supra* note 481, at 365; *see also* H. GERALD CHAPIN, HANDBOOK OF THE LAW OF TORTS 150 (1917); COOLEY, *supra* note 436, at 161.

492. BISHOP, *supra* note 481, at 366 (citing Dillingham v. Snow, 5 Mass. 547, 559 (1809); Weaver v. Devendorf, 3 Denio 117 (N.Y. Sup. Ct. 1846)).

493. *Id.* (citing Stewart v. Southard, 17 Ohio 402 (1848)).

494. *Id.* (citing Steele v. Dunham, 26 Wis. 393 (1870)).

495. Billings v. Lafferty, 31 Ill. 318, 322 (1863).

496. Reed v. Conway, 20 Mo. 22, 44–52 (1854).

497. Kalina v. Fletcher, 522 U.S. 118, 132 (1997) (Scalia, J., concurring); Burns v. Reed, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in part and dissenting in part).

498. *Burns*, 500 U.S. at 500–01 (Scalia, J., concurring in part and dissenting in part); *see* BISHOP, *supra* note 481, at 366; BURDICK, *supra* note 436, at 36.

499. *Kalina*, 522 U.S. at 133; *see also* BISHOP, *supra* note 481, at 123–25.

lawyers.[500] Like judicial immunity, defamation immunity protected defendants from liability even where they acted with bad faith.[501] The purpose of defamation immunity was to protect the public interest in the judicial function by ensuring that the participants would not fear being sued for their involvement.[502] But this immunity applied only to defamation actions and did not extend to malicious prosecution suits.[503] Thus, applying this immunity today would insulate prosecutors in defamation actions brought based on testimony elicited in court,[504] but it would not bar actions for due process violations, including fabricating evidence, suppressing exculpatory evidence, coercing witnesses, or other nontestimonial misconduct resulting in wrongful convictions.

In short, the common law of immunities in 1871 simply does not support the *Imbler* Court's conclusion that the advocacy function performed by today's public prosecutor would have enjoyed absolute common-law immunity. Rather, if 1871 immunity law were applied to today's prosecutor, she would enjoy absolute defamation immunity for testimony elicited in court, but only qualified immunity for other advocacy functions.

Moreover, even assuming that the 1871 Congress intended to retain the common law in adopting § 1983 and assuming that prosecutors enjoyed absolute immunity under that common law, this does not necessarily justify retaining absolute prosecutorial immunity today. The 1871 Congress presumably understood the common law system. This is the assumption the Court made in concluding Congress intended to retain common law immunities.[505] So presumably, Congress also knew that the common law evolved. As Justice Oliver Wendell Holmes, Jr., explained:

500. *Burns*, 500 U.S. at 501 (Scalia, J., concurring in part and dissenting in part); *see also* Imbler v. Pachtman, 424 U.S. 409, 426 n.23 (1976); BISHOP, *supra* note 481, at 123–25 (noting that for remarks of counsel to be privileged they must be pertinent to the issue); James P. Kenner, Note, *Prosecutorial Immunity: Removal of the Shield Destroys the Effectiveness of the Sword*, 33 WASHBURN L.J. 402, 405–06 (1994).

501. *Kalina*, 522 U.S. at 133; *see also* BISHOP, *supra* note 481, at 124–25.

502. *See* BISHOP, *supra* note 481, at 124–25.

503. *Kalina*, 522 U.S. at 133 (Scalia, J., concurring); *Burns*, 500 U.S. at 501 (Scalia, J., concurring in part and dissenting in part); *see also* Kenner, *supra* note 500, at 406.

504. *Kalina*, 522 U.S. at 133 (Scalia, J., concurring).

505. *See Kalina*, 522 U.S. at 123; Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993); *Burns*, 500 U.S. at 484; *Imbler*, 424 U.S. at 417–18. As the Court explained, "the presumed legislative intent not to eliminate the traditional immunities is our only justification for limiting the categorical language of the statute." *Burns*, 500 U.S. at 498.

> The life of the [common] law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. . . . The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, consideration of what is expedient for the community concerned.[506]

Given this adaptive system and the Court's conclusion that the 1871 Congress acted "in harmony with general principles of tort immunities and defenses,"[507] nothing in the text of § 1983 or its legislative history supports the view that Congress intended the existing immunity doctrines to be frozen for eternity as they existed in 1871. Assuming Congress intended to preserve the common law, it intended to preserve an evolving system of judicial decisionmaking, responsive to historic, economic, social, and institutional developments, not rigid rules set for all time in 1871 concrete.

This common law evolution is exactly what has happened to the common-law doctrine of qualified immunity.[508] The Court has candidly recognized that the common-law doctrine that existed in 1871 has proven unsatisfactory in contemporary times.[509] For this reason, the Court has transformed the common-law quasi-judicial immunity doctrine from a subjective good-faith standard to an objective standard based on clearly established law.[510] In doing so, the Court frankly rejected the 1871 doctrine and overruled prior precedents applying a subjective standard.[511] The Court is similarly obligated to revise the absolute immunity doctrine if it proves unsuited to contemporary needs and policies.[512]

In other words, even assuming that the Court was right about Congress's intent to preserve the common law and about the existence of

506. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1, 35 (1881).

507. *Imbler*, 424 U.S. at 418.

508. *See infra* notes 601–16 and accompanying text.

509. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982).

510. *Id.*

511. *See id.*

512. Justice Scalia has distinguished the Court's role in expanding and redefining qualified immunity from its authority to expand absolute immunity. Burns v. Reed, 500 U.S. 478, 498 n.1 (1991) (Scalia, J., concurring in part and dissenting in part). In my view, the distinction is valid but inapplicable when the argument is that absolute immunity should be restricted rather than expanded.

absolute prosecutorial immunity in 1871, that still would not justify adherence to that doctrine if it were ill-suited to contemporary needs. History alone—even accurate history—is a poor justification for retaining an unjust and unworkable common-law rule. As Justice Holmes observed:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[513]

In determining immunities under § 1983, the Court has repeatedly explained that the common law of 1871 is the starting point for analysis. But as this section has shown, absolute prosecutorial immunity did not exist in 1871. The *Imbler* Court was mistaken in its analysis of the analogous 1871 common-law immunities with respect to prosecutorial functions. And if the 1871 Congress intended to retain the common law, that does not mean it intended to adopt an immutable rule of immunity in place of the case-by-case evolution of the common law. The historical argument for absolute prosecutorial immunity is simply unsupportable.

B. Absolute Prosecutorial Immunity Violates Public Policy

In developing the immunity defenses available in § 1983 actions, the Court considers both historic foundations and contemporary public policy.[514] This section focuses on how absolute prosecutorial immunity violates public policy in several important ways. First, absolute prosecutorial immunity undermines the integrity of the criminal justice system. Second, it denies any remedy to the victims of the egregious abuse of government power. Third, it eliminates the needed deterrent effect that a civil remedy would provide, especially since other checks on prosecutorial misconduct are ineffective. Fourth, it hinders the development of constitutional law and the implementation of structural remedies to systemic problems. Fifth, absolute immunity is not necessary to protect honest prosecutors from vexatious litigation since the requirements for proving a cause of action and the defense of qualified immunity are sufficient to eliminate unmeritorious cases. And finally, absolute prosecutorial immunity introduces unnecessary complexity, confusion, and conflict into the law.

513. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

514. Imbler v. Pachtman, 424 U.S. 409, 424–29 (1976).

1. Absolute immunity undermines the integrity of the criminal justice system

The public prosecutor has a unique role in our criminal justice system. One former attorney general observed that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America."[515] Because of this vast power, the prosecutor has special responsibilities:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, . . . is not that [he] shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.[516]

As one court explained, this "overriding obligation of fairness [is] so important that the Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer."[517]

Absolute prosecutorial immunity undermines this compelling obligation to protect the innocent and to see that justice shall be done. We are not concerned here with minor breaches of professional etiquette. Prosecutors who engage in misconduct strike not just hard blows, but criminal blows. Specifically, when a prosecutor violates a person's due process rights, the violation is a crime.[518] Subornation of perjury is a crime.[519] Tampering with and coercing witnesses is a crime.[520] Using false evidence before a grand jury or court is a crime.[521] Yet the prosecutors who engage in this criminal conduct are not prosecuted, are not disciplined, and are not held liable for their crimes.[522]

Given this reality, how can we have faith in our criminal justice system? How can we ask or expect those most vulnerable to the misuse of the criminal process—the poor, racial and ethnic minorities—to trust the integrity of the criminal justice process? The ABA's Kennedy

515. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940).

516. Berger v. United States, 295 U.S. 78, 88 (1935).

517. Handford v. United States, 249 F.2d 295, 296 (5th Cir. 1957).

518. 18 U.S.C. § 242 (2004).

519. *Id.* § 1622.

520. *Id.* § 1512.

521. *Id.* § 1623.

522. *See supra* notes 123–31 and accompanying text.

Commission has just released a report flagging the existence of widespread racial and ethnic discrimination in the criminal justice system.[523] One recent commentator explored the nexus between poverty, race, and wrongful convictions.[524] In addition to the accidental events that lead to the wrongful convictions of minorities, including faulty eyewitness testimony in cross-racial identification,[525] poverty itself is a factor contributing to wrongful convictions.[526] When prosecutorial misconduct is added to this mix, the risk of wrongful conviction escalates.[527] According to one study, fifty-seven percent of the wrongfully convicted who have been exonerated were African-American.[528]

The justification for absolute immunity is that civil rights litigation will chill the prosecutorial function and unduly burden the government. But the evidence of prosecutorial misconduct resulting in wrongful convictions[529] suggests that we have sacrificed the integrity of our criminal justice system for the sake of efficiency. This corruption of our criminal justice system violates public policy. On the other hand, the elimination of absolute immunity would serve public policy. As Justice White wrote, "one would expect that the judicial process would be protected and indeed its integrity enhanced by denial of immunity to prosecutors who engage in unconstitutional conduct."[530] Prosecutors must obey their solemn obligation to see that justice is done. To insure the integrity of our system of justice, those who violate their duty by trampling on clearly established constitutional rights must be held accountable.

523. *ABA Urges Reform of Criminal Punishment in Response to Justice Kennedy's Invitation*, U.S. L. WK., Aug. 17, 2004, at 2092, 2093.

524. *See* Arthur L. Rizer, III, *Justice in a Changed World: The Race Effect on Wrongful Convictions*, 29 WM. MITCHELL L. REV. 845 (2003).

525. *Id.* at 853–55; *see also* SCHECK ET AL., *supra* note 1, app. 2 at 264.

526. Rizer, *supra* note 524, at 856–60.

527. *Id.* at 861–64.

528. SCHECK ET AL., *supra* note 1, app. 2 at 267.

529. *Id*. app. 2 at 263 (finding prosecutorial misconduct a factor in the wrongful conviction of innocent people in twenty-six percent of the cases in which they were later exonerated by DNA evidence); HARMFUL ERROR, *supra* note 1, at i (finding prosecutorial misconduct led to the conviction of thirty-two innocent defendants and the reversal on appeal of more that 2000 cases tainted by prosecutorial misconduct over a thirty year period); Armstrong & Possley, *supra* note 1, Jan. 10, 1999 (finding that since 1963, 381 homicide convictions had been reversed nationwide due to prosecutorial misconduct).

530. Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (White, J., concurring).

2. Absolute immunity denies victims a remedy

The purpose of § 1983 is to provide victims of government misconduct a remedy.[531] The Supreme Court has explained that the central purpose of the statute is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."[532] Absolute immunity defeats that purpose. As Justice White explained, extending "absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create."[533] The Court has recognized that absolute immunity leaves victims uncompensated and justice unfulfilled. As the *Imbler* Court stated, "[T]his immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty."[534]

The enormity of the constitutional injury cries out for a remedy. Innocent people have had their lives ruined by deliberate and egregious prosecutorial misconduct. Consider the innocent people who have spent years in prisons, many on death row, for crimes they did not commit. Consider Thomas Lee Goldstein, who spent twenty-four years in prison;[535] John Tennison, who spent thirteen years in prison;[536] Ellen

531. Scholars have proposed a number of other possible remedial schemes for compensating the wrongfully convicted. *See* Shawn Armbrust, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157 (2004) (proposing a remedial scheme that would address not only financial difficulties, but also health problems, lack of education, and job training); Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts To Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703 (2004) (proposing that state legislatures should adopt responsible compensation statutes and that courts should entertain civil rights suits); Alberto V. Lopez, *$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665 (2002) (proposing a model state statute to award the wrongfully convicted money damages for economic and noneconomic injuries).

532. Monroe v. Pape, 365 U.S. 167, 172 (1961). (Note that the Court used the parallel citation, R.S § 1979; today the conventional reference to the statute is 42 U.S.C. § 1983.) The compensation justification for constitutional tort actions has been criticized on the ground that it leads courts to narrowly interpret constitutional rights in order to prevent financial burdens on the government. Jeffries, *supra* note 151, at 89–90. But Dean Jeffries recognizes that when qualified immunity applies—which is what this Article proposes for prosecutorial immunity—this risk is minimized. Indeed, in his view, qualified immunity promotes the development of constitutional law. *Id*. at 108–09.

533. *Imbler*, 424 U.S. at 434 (White, J., concurring).

534. *Id.* at 427.

535. *Judge Dismisses Murder Case, Frees Man After 24 Years*, S.F. CHRON., Apr. 3, 2004, at B2.

536. Bob Egelko, *Wrongfully Convicted of Murder, Man Sues*, S.F. CHRON., Apr. 28, 2004, at B4.

Reasonover, who spent sixteen years in prison;[537] or any of the hundreds of other innocent people who have been wrongfully convicted because of prosecutorial misconduct.

In our legal system, intentional wrongdoers are held civilly liable to those they injure. As one judge explained, "Privileges and immunities against responsibility are an anathema for a democratic society and most appropriately correctable by civil damage responsibility."[538]

3. Absolute immunity allows misconduct that is unchecked by other mechanisms

In addition to compensating victims, § 1983 liability serves as a deterrent to government misconduct. According to Justice White, "It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which § 1983 was enacted."[539] Absolute immunity frustrates this deterrent effect.

The Court concluded that the deterrence provided by § 1983 is not necessary in the case of prosecutorial misconduct because of the other numerous checks on abusive misconduct.[540] The Court relied on the trial judge, appellate review, collateral proceedings, potential criminal liability of prosecutors, and potential disciplinary proceedings against prosecutors in order to conclude that prosecutorial misconduct would be deterred by other means.[541] In theory perhaps that is true, but in fact it is not. As explained in Part II of this Article, extensive research establishes

537. HARMFUL ERROR, *supra* note 1, at 13.

538. Cooney v. Park County, 792 P.2d 1287, 1302 (Wyo. 1990) (Urbigkit, J., dissenting), *vacated by* 501 U.S. 1201 (1991).

539. *Imbler*, 424 U.S. at 442 (White, J., concurring); *see, e.g.*, Owen v. City of Independence, 445 U.S. 622, 656 (1980). The deterrent effect of monetary awards has been challenged by Professor Daryl J. Levinson. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). In his view, the deterrent effect of money damages actions is limited because governments do not respond to monetary liability in the same way that private actors do. *Id.* at 355–57. While private actors seek to maximize financial gain and will therefore adjust their behavior in response to financial costs, government institutions respond to political costs and benefits. *Id.* at 359. Since the political effects of constitutional tort actions are unpredictable, their deterrent effects are uncertain. *Id.* at 379–80. *But see* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) (arguing that constitutional tort actions are an effective deterrent to government misconduct).

540. *Imbler*, 424 U.S. at 427–29.

541. *Id.*

that these mechanisms are grossly inadequate, and that misconduct occurs frequently, undeterred, and unpunished.

Scholars have proposed a number of potential solutions to the problem.[542] But Congress has already adopted one—§ 1983, the predominant civil rights remedy. The absolute immunity doctrine frustrates the deterrent purpose of the statute.

4. Absolute immunity hinders the development of constitutional law and the implementation of structural remedies to systemic problems

Civil rights litigation under § 1983 serves several important purposes in addition to providing a remedy and deterring misconduct.[543] Civil rights litigation gives concrete meaning to abstract constitutional language.[544] Moreover, as many scholars have explained, remedies influence rights.[545] Since *Monroe v. Pape* was announced in 1961, § 1983 has been a primary vehicle for the evolution of constitutional rights.[546] Through this litigation, courts have defined the rights that protect people from government misconduct and regulate the discretion of officials to inflict injury.[547] Dean John C. Jeffries explains that "the capacity of constitutional doctrine to adapt to evolving economic, political, and social conditions is a great strength."[548]

This evolution of constitutional doctrine is fostered under a qualified immunity regime. The first step in the qualified immunity analysis is to determine whether the alleged wrongdoing, in fact, violated the

542. *See, e.g.*, Meares, *supra* note 123, at 899; Steele, Jr., *supra* note 123, at 982–88; Rick A. Bierschbach, Note, *One Bite at the Apple: Reversals of Convictions Tainted by Prosecutorial Misconduct and the Ban on Double Jeopardy*, 94 MICH. L. REV. 1346 (1996); Douglas P. Currier, Note, *The Exercise of Supervisory Powers To Dismiss a Grand Jury Indictment—A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L.J. 1077 (1984); Carrissa Hessich, Note, *Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution We Have Been Looking For?*, 47 S.D. L. REV. 2545 (2002); Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline*?, 7 GEO. J. LEGAL ETHICS 1083 (1994).

543. Park, *supra* note 151, at 395–96.

544. *See id.* at 420.

545. *Id.* at 420–22; *see also* Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 1 (1979); John C. Jeffries, *Disaggregating Constitutional Torts*, 110 YALE L.J. 259 (2000); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

546. 365 U.S. 167 (1961); *see supra* text accompanying notes 146–49.

547. Park, *supra* note 151, at 422–24.

548. Jeffries, *supra* note 151, at 97.

Constitution.[549] This requirement ensures the development of constitutional doctrine and the evolution of appropriate standards and constitutional norms for official conduct.[550] Chief Justice Rehnquist explained: "Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in legal standards for official conduct, to the benefit of both the officers and the general public."[551]

While qualified immunity permits the development of law, it does not expose the government to excessive liability because it protects the defendant from liability unless the law was clearly established and a reasonable officer would have known of that law.[552] In other words, if courts announce a new constitutional rule, they will only impose liability for future violations,[553] which officers can avoid by complying with the newly established law. This approach, according to Dean Jeffries, allows courts to announce innovations in the evolution of constitutional law without "fear of subjecting the government to excessive costs."[554]

In addition to fostering the continuing evolution of constitutional doctrine, individual civil rights actions bring about structural reforms to systemic problems.[555] In some cases, these actions result in broad injunctive relief regulating government conduct. School desegregation and prison reform cases are notable examples.[556] For example, while the Court avoids undue involvement in prison administration, it has recognized that the Eighth Amendment provides fundamental constitutional protections including an obligation to provide medical care to sick and injured prisoners.[557] Where prisons fall below the constitutional minimum, injunctive relief is available to ensure humane treatment is provided.[558]

549. County of Sacramento v. Lewis, 523 U.S. 833, 842 n.5 (1998); *see also* Hope v. Pelzer, 536 U.S. 730, 736 (2002).

550. Wilson v. Layne, 526 U.S. 603, 609 (1998); *Lewis*, 523 U.S. at 842 n.5.

551. *Wilson*, 526 U.S. at 609.

552. *Hope*, 536 U.S. at 739; *Lewis*, 523 U.S. at 842 n.5.

553. *Wilson*, 526 U.S. at 614–18.

554. Jeffries, *supra* note 151, at 89–90.

555. Park, *supra* note 151, at 440–42.

556. *See id*. at 445–47.

557. Estelle v. Gamble, 429 U.S. 97 (1976); *see also* Park, *supra* note 152, at 428–29.

558. *See, e.g.*, Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980) (holding that systemic deficiencies in a prison medical program can be remedied by injunctive relief and deferring an order to close the facility on the condition that the state would present a plan for eradicating the constitutional deficiencies); Morales Feliciano v. Rossello Gonzalez, 13 F. Supp. 2d 151, 210 (D.P.R. 1998) (finding that the evidence established systemic deficiencies in staffing, facilities,

Even without injunctive relief, individual actions for money damages can set national standards. As Justice Blackmun explained in refuting the argument that individual prisoner cases unduly burden the federal courts, "I suspect that improvements in prison conditions of recent years are traceable in large part, and perhaps primarily, to actions under § 1983 challenging those conditions."[559] For example, a recent Supreme Court decision held that restraining a prisoner by handcuffing him to a hitching post for up to seven hours in the hot sun violated the Eighth Amendment.[560] While the plaintiff filed the case as an individual damage action, this decision sends a national message about the constitutional treatment of prisoners. Thus, individual damage actions serve to set constitutional standards and correct constitutional abuses at a national level. As one recent article concluded, "most of the rights regulating a government official's discretion to inflict injury upon individuals have been established in constitutional tort actions."[561]

Absolute immunity stymies the development of constitutional law since it requires courts to dismiss actions at the earliest stages without regard to the merits of the plaintiff's constitutional claim.[562] For this reason, it tends to freeze the law in a state of perpetual uncertainty. To the extent that the frequency of prosecutorial misconduct might be attributable to honest ignorance, qualified immunity should be adopted so that legal standards may be developed and enforced to protect constitutional rights. For example, in *Kalina v. Fletcher*, in which the Court refused to apply absolute prosecutorial immunity, the Court

procedures, and administration of medical care caused by the deliberate indifference of officials to basic human and health needs of prisoners; continuing in force prior orders to ensure constitutional minimum standards are implemented); Coleman v. Wilson, 912 F. Supp. 1282, 1314 (E.D. Cal. 1995) (finding that medical care for prisoners who suffer from serious mental disorders was so inadequate that their rights under the Eighth and Fourteenth Amendments were violated, and granting injunctive relief for the development and implementation of remedial plans).

559. Blackmun, *supra* note 129, at 21.

560. Hope v. Pelzer, 536 U.S. 730, 730 (2002).

561. Park, *supra* note 151, at 446.

562. *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978). The plaintiff had been sterilized pursuant to a court order sought by her mother. *Id.* at 351–53. She was told she was having her appendix removed. *Id.* at 353. After she married and was unable to become pregnant, she discovered the truth. *Id.* She sued the judge who had granted the order on the grounds that his issuance of the order violated her constitutional rights. *Id.* The Supreme Court affirmed the lower court's finding of absolute immunity without considering the merits of the plaintiff's constitutional claim. *Id.* at 355–64; *see also* Buckley v. Fitzsimmons, 509 U.S. 259, 279 (1993). In *Buckley*, the plaintiff alleged a violation of due process when the prosecutor had fabricated evidence in order to convict the plaintiff. *Buckley*, 259 U.S. at 262–63. The Court addressed the immunity defenses without resolving whether the misconduct violated the Due Process Clause. *Id.* at 267–79.

condemned the custom of having the prosecutor swear to the facts supporting the arrest warrant, thereby setting a national standard for prosecutors and curtailing a practice jeopardizing constitutional protections.[563] As Professor Erwin Chemerinsky observed, "From a practical perspective, *Kalina* will mean that prosecutors no longer will file declarations in support of arrest warrants under penalty of perjury."[564] Had absolute immunity been applied, the issue would not have been addressed and, undoubtedly, the practice would have continued.

In short, adopting a uniform rule of qualified immunity for prosecutors would promote the evolution of national standards for constitutional prosecutions, to the benefit of both prosecutors and the public. When qualified immunity applies, the courts first address the merits of the claim and determine whether the prosecutor's conduct violated the Constitution. When violations are found, prosecutors reform their practices to avoid future liability. In this way, prosecutors will be guided on how to conform their practice to constitutional standards, and citizens will be protected from unconstitutional misconduct.

5. Absolute immunity is unnecessary to protect honest prosecutors

The Court held that absolute immunity was necessary to ensure that prosecutors are not chilled in the vigorous enforcement of the criminal law by the fear of subsequent civil liability.[565] Those convicted of crimes should not be permitted to retaliate against their prosecutors and burden the court system with civil rights actions based on alleged prosecutorial misconduct.[566] And, as the Court has observed, even the most honest prosecutor sometimes makes mistakes.[567]

But this fear of a flood of frivolous civil rights actions for prosecutorial misconduct is exaggerated for three main reasons. First, the requirements for imposing liability are sufficiently rigorous to eliminate unfounded and harassing litigation. Second, qualified immunity has become a potent defense that minimizes litigation burdens and protects "all but the plainly incompetent or those who knowingly violate the

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

564. Chemerinsky, *supra* note 191, at 81.

565. *See* Imbler v. Pachtman, 424 U.S. 409, 423 (1976).

566. *See id.* at 423–24.

567. *Id.* at 425.

law."[568] Third, courts have efficient tools for minimizing or penalizing unmeritorious litigation.

a. The elements required to state a § 1983 action will eliminate frivolous and vexatious litigation. The Court has explained that prosecutors need protection from wasteful litigation. To this end, the Court has interpreted § 1983 to impose barriers on potential litigants, requiring them to meet two difficult standards. Specifically, the plaintiff must show: (1) the criminal proceeding terminated in his or her favor; and (2) the prosecutor violated the Constitution with a culpable state of mind. This section will explain these elements.

(1) The plaintiff must prove the criminal prosecution terminated in his or her favor. In 1976, when the Court first adopted absolute prosecutorial immunity, it was not clear whether a plaintiff suing a prosecutor for misconduct had to establish that the criminal prosecution terminated in favor of the defendant.[569] For this reason, the Court understandably feared that disgruntled convicts would retaliate by suing their prosecutors.[570] But beginning in 1994 with the case of *Heck v. Humphrey*,[571] the Court has required plaintiffs seeking to recover for wrongful convictions to establish that the criminal proceeding was resolved in their favor. This development greatly reduces the threat of unmeritorious, retaliatory litigation.

In *Heck*, the plaintiff (Heck) was convicted of manslaughter and sentenced to fifteen years in prison.[572] While he was serving this sentence and while his direct appeal was pending, Heck filed a § 1983 civil rights action naming county prosecutors and a state police investigator as defendants.[573] The complaint alleged that the defendants conducted an illegal investigation of him, destroyed exculpatory evidence, and used an unlawful voice identification procedure against him at trial.[574] He sought compensatory and punitive damages.[575] The Court ruled that the action was not cognizable under § 1983.[576]

568. Burns v. Reed, 500 U.S. 478, 494–95 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

569. *See Imbler*, 424 U.S. at 427.

570. *See id.* at 423–25.

571. 512 U.S. 477 (1994).

572. *Id.* at 478.

573. *Id.* at 478–79.

574. *Id.* at 479.

The Court explained that § 1983 created a species of tort liability and that the most analogous common-law action was malicious prosecution.[577] As an element of a malicious prosecution action, the plaintiff must allege and prove that the prior criminal proceeding terminated in favor of the accused.[578] The Court imposed this requirement in the civil rights action for two primary reasons. First, it avoids parallel criminal and civil litigation with possibly inconsistent results.[579] Second, it prevents a collateral attack on the conviction by means of a civil action.[580] The *Heck* Court ruled that this requirement applies in any action to recover damages for an allegedly unconstitutional conviction or imprisonment.[581] Thus, to bring a §1983 action, a plaintiff must prove that the challenged conviction or sentence has been reversed on appeal, expunged by executive order, declared invalid, or subject to a federal writ of habeas corpus.[582] The Court concluded that the "hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement."[583]

Thus, the *Heck* requirement that a plaintiff bringing a § 1983 action must prove the unlawfulness of his conviction or confinement largely eliminates the potential flood of frivolous litigation that concerned the *Imbler* Court.[584]

(2) The plaintiff must prove that the prosecutor violated the Constitution with a culpable state of mind. Currently, requirements for recovery under § 1983 for malicious prosecution are undefined.[585] As

575. *Id.*

576. *Id.* at 487.

577. *Id.* at 483–84.

578. *Id.* at 484.

579. *Id.*

580. *Id.*

581. *Id.* at 486–87.

582. *Id*.

583. *Id.* at 486.

584. McNamara, *supra* note 123, at 1178–79.

585. As discussed above, the absolute immunity doctrine stymies the development of civil rights law by resolving actions based on the immunity defense and avoiding an analysis of the merits of the constitutional claim. *See supra* notes 543–64 and accompanying text; *see also* Albright v. Oliver, 510 U.S. 266, 270 n.4 (1994). In *Albright*, a majority of the Court (in five separate opinions) held that malicious prosecution actions under § 1983 should be analyzed based on the explicit text of the Constitution, not based on common-law tort or substantive due process. *See id.* at 273–75; *id.* at

the Court has noted, "the extent to which a claim of malicious prosecution is actionable under § 1983 is one 'on which there is an embarrassing diversity of judicial opinion.'"[586] But two points are relatively clear: (1) the plaintiff must prove a violation of constitutional law; and (2) the plaintiff must prove the defendant acted with a culpable state of mind.

In developing the requirements for § 1983 liability, the Court has consistently looked to analogous common-law principles.[587] However, "[a]lthough the common law tort serves as an important guidepost for defining the constitutional cause of action, the ultimate question is always whether the plaintiff has alleged a constitutional violation."[588] Thus, to establish liability for malicious prosecution under § 1983, the plaintiff must show a violation of constitutional law, not simply a common-law tort cause of action.[589]

275–91 (opinions of Scalia, Ginsberg, Kennedy, and Souter, JJ., concurring). The *Albright* decision generated a fair amount of uncertainty, which remains unresolved, about the viability of an action under § 1983 for malicious prosecution. *See* BLUM & URBONYA, *supra* note 149, at 31–35; John T. Ryan, *Malicious Prosecution Claims Under Section 1983: Do Citizens Have Federal Recourse?*, 64 GEO. WASH. L. REV. 776 (1996); Schillaci, *supra* note 140, at 439; Mary E. Williams, *Constitutional Law—Constitutional Remedy? The Third Circuit's Approach to §1983 Malicious Prosecution Claims*, 44 VILL. L. REV. 919 (1999); Joseph G. Yannetti, *Who's on First, What's on Second, and I Don't Know About the Sixth Circuit: A § 1983 Malicious Prosecution Circuit Split That Would Confuse Even Abbott and Costello*, 36 SUFFOLK U. L. REV. 513 (2003); Esther M. Schonfeld, Note, *Malicious Prosecution as a Constitutional Tort: Continued Confusion and Uncertainty*, 15 TOURO L. REV. 1681 (1999).

586. *Albright*, 510 U.S. at 271 n.4; *see also* Ryan, *supra* note 585, at 776; Schillaci, *supra* note 140, at 439; Williams, *supra* note 585, at 919; Yannetti, *supra* note 585, at 517; Schonfeld, *supra* note 585, at 1681.

587. *See Heck*, 512 U.S. at 484–86 (looking to the common law tort of malicious prosecution); *see also* Pierce v. Gilchrist, 359 F.3d 1279, 1288–90 (10th Cir. 2004); Lambert v. Williams, 223 F.3d 257, 261–62 (4th Cir. 2000).

588. *Pierce*, 359 F.3d at 1289 (citing Taylor v. Meachum, 82 F.3d 1556, 1561 (10th Cir. 1996)).

589. *See Albright*, 510 U.S. at 271 n.4; *see also Pierce*, 359 F.3d at 1289; Penn v. Harris, 296 F.3d 573, 576 (7th Cir. 2002) (holding that liability for malicious prosecution under § 1983 requires a constitutional violation); Donahue v. Gavin, 280 F.3d 371, 379–83 (3d Cir. 2002) (stating that a malicious prosecution action should be analyzed under the relevant constitutional provision); Newsome v. McCabe, 256 F.3d 747, 751 (7th Cir. 2001) (observing that malicious prosecution claims under § 1983 should be analyzed under the language of the Constitution itself); Lambert v. Williams, 223 F.3d 257, 261–62 (4th Cir. 2000); Pace v. City of Des Moines, 201 F.3d 1050, 1055 (8th Cir. 2000) (concluding that liability for malicious prosecution under § 1983 requires a constitutional violation); Gordon v. Hansen, 168 F.3d 1109, 1112 (8th Cir. 1999); Torres v. McLaughlin, 163 F.3d 169, 172 (3d Cir. 1998); Taylor v. Meacham, 82 F.3d 1556, 1561 (10th Cir. 1996); Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (2d Cir. 1995); Torres v. Superintendent of Police, 893 F.2d 404, 409 (1st Cir. 1990); Coogan v. City of Wixom, 820 F.2d 170, 174–75 (6th Cir. 1987); Usher v. City of Los Angeles, 828 F.2d 556, 561–62 (9th Cir. 1987).

To establish the constitutional violation, the plaintiff must satisfy the state-of-mind requirement imposed by the Court. In developing the elements of constitutional claims, the Court has frequently used state-of-mind requirements to keep liability within appropriate bounds. For example, in prison discipline cases claiming a violation of the Eighth Amendment prohibition against cruel and unusual punishment, the plaintiff must prove that the defendant acted maliciously and sadistically.[590] On the other hand, in prison medical cases alleging an Eighth Amendment violation, the plaintiff must prove that the defendant acted with deliberate indifference to serious medical needs.[591] In substantive due process cases, the Court imposes the shocking-to-the-conscience requirement, which depends on the factual context.[592] In procedural due process cases, the Court requires a culpable state of mind beyond mere negligence.[593] By imposing these state-of-mind requirements, the Court strikes a balance between the competing interests of protecting the functioning of the government and the civil rights of individuals.[594]

While the Court has yet to establish the state-of-mind requirement for § 1983 actions against prosecutors, a related decision suggests that the Court will impose a significant subjective state-of-mind requirement. Specifically, in *Heck*, the plaintiff alleged that he had been wrongly convicted because a police investigator destroyed exculpatory evidence and introduced false evidence at trial.[595] To determine whether the complaint was cognizable, the Court turned to the most analogous common-law tort, malicious prosecution. The Court held that no action would lie unless the criminal proceeding had been terminated in favor of the accused since that was an element of malicious prosecution.[596] If the Court adopts this same analogy for the state-of-mind element for § 1983

590. Whitley v. Albers, 475 U.S. 312, 320–22 (1986) (adopting a malicious and sadistic standard to avoid undue intrusion on prison operations).

591. *See* Estelle v. Gamble, 429 U.S. 97, 103–06 (1976) (holding that the Eighth Amendment was violated when prison officials acted with deliberate indifference to serious medical needs).

592. *See* County of Sacramento v. Lewis, 523 U.S. 833, 845–55 (1998) (holding that in cases involving high-speed chases, the police are not liable unless their conduct was shocking to the conscience, which in the factual context required a showing of intent).

593. *See* Daniels v. Williams, 474 U.S. 327 (1986) (holding that to establish a due process violation, the plaintiff must show a culpable state of mind beyond mere negligence); *see also* Hudson v. Palmer, 468 U.S. 517 (1984).

594. *Lewis*, 523 U.S. at 845–55.

595. *Heck*, 512 U.S. at 479.

596. *Id.* at 484.

prosecutorial misconduct cases, plaintiffs will be required to prove that prosecutors acted with malice since that is an element of the common-law tort.[597]

In short, while the precise requirements for recovery for prosecutorial misconduct remain unresolved, it is clear that the plaintiff will be required to establish a constitutional violation, not simply a tort cause of action.[598] Moreover, the Court will undoubtedly impose a culpable state-of-mind standard sufficient to protect government functions and the discretion of the prosecutor. By analogizing to the common-law tort of malicious prosecution, the Court may well require the plaintiff to prove that the prosecutor acted with malice.[599] Or the Court may adopt the due process requirement that the conduct be shocking to the conscience.[600] But clearly the Court will follow its prior decisions in adopting a state-of-mind requirement sufficient to protect the government function. Because the constitutional cause of action imposes these substantial proof requirements, the risk of unfounded litigation is greatly reduced.

b. The defense of qualified immunity has evolved to insure that frivolous actions are eliminated at the earliest stages of litigation. In addition to the difficulty of establishing the elements of the cause of action, plaintiffs will also have to overcome the potent defense of qualified immunity. Initially, when absolute prosecutorial immunity was first adopted,[601] qualified immunity was based on the good faith and reasonableness of the defendant.[602] Today, the Court has revised this defense to impose a purely objective standard.[603] The current doctrine affords much greater protection to defendants and minimizes the risk that vexatious litigation will advance beyond its earliest stages.

597. Malice is an element of the common-law tort of malicious prosecution. *See* Schonfeld, *supra* note 585, at 1704; *see also* Pierce v. Gilchrist, 359 F.3d 1279, 1297 n.12 (10th Cir. 2004) (noting that neither party questioned the malice standard in a § 1983 malicious prosecution case but also noting that the applicable standard had yet to be determined); DAN B. DOBBS, THE LAW OF TORTS § 433, at 1223–25 (2000).

598. Albright v. Oliver, 510 U.S. 266, 271 (1994).

599. *Heck*, 512 U.S. at 484–86 (looking to the common-law tort of malicious prosecution).

600. County of Sacramento v. Lewis, 523 U.S. 833, 846–47 (1998).

601. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976).

602. *Id.*

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

The current qualified immunity doctrine is far more protective than when *Imbler* was decided.[604] In *Harlow v. Fitzgerald* the Court "completely reformulated qualified immunity," replacing the subjective standard with an objective standard based on clearly established law.[605] The Court candidly explained that the subjective standard was incompatible with the need to eliminate the burdens of discovery and litigation.[606] Under the *Harlow* standard, an officer is liable only when she violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[607] The change was designed to avoid disruption of the government and permit the resolution of weak claims on summary judgment.[608] The application of qualified immunity to most government officials reflects the Court's view that a balance should be struck between vindicating the rights of citizens and protecting government officials exercising their discretion.[609] The Court has found that, "[i]n most cases, qualified immunity is sufficient to 'protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'"[610] As Justice White explained, changing qualified immunity to an objective standard "satisfies one of the principal concerns underlying our recognition of absolute immunity."[611] In other words, one of the main justifications for adopting absolute immunity no longer exists.

In addition to transforming qualified immunity from a subjective to an objective standard, the Court has adopted a series of practical, procedural safeguards to insure that the qualified immunity defense can be resolved at the earliest stages of litigation. The Court has explained that qualified immunity is intended to protect officers not just from the burden of liability but also from the burden of litigation.[612] When the defendant raises the qualified immunity defense, discovery on other issues is stayed until the issue is resolved by motion to dismiss or motion

604. Burns v. Reed, 500 U.S. 478, 494–95 (1991).

605. Anderson v. Creighton, 483 U.S. 635, 645 (1987).

606. *Harlow*, 457 U.S. at 815–16.

607. *Id.* at 818.

608. *Burns*, 500 U.S. at 495 n.8; *see also* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

609. *Harlow*, 457 U.S. at 807.

610. Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

611. *Burns*, 500 U.S. at 495 n.8.

612. *Harlow*, 457 U.S. at 814–18; *see also Mitchell*, 472 U.S. at 526.

for summary judgment.[613] Additionally, a defendant is entitled to an immediate interlocutory appeal if the trial court rejects the immunity defense.[614] Thus, qualified immunity affords defendants an effective means of avoiding unnecessary litigation so that the extraordinary protection of absolute immunity is no longer necessary.[615] As Justice White observed, the current qualified immunity defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[616]

Since qualified immunity is now a potent defense, it is sufficient to protect the criminal justice system from undue disruption.[617] One court observed:

> Since *Imbler*, the Court has expanded the protection of qualified immunity . . . . Thus, § 1983 defendants who have qualified immunity are now less likely to be liable, and, if not liable, are less likely to have to go to trial since the objective qualified immunity standard lends itself to resolution on the pleadings. This decreases the disruption to state criminal law enforcement that would result from granting a prosecutor only qualified immunity.[618]

In short, just as the elements of the cause of action have evolved to eliminate the potential for wasteful litigation, the defense of qualified

613. *Harlow*, 457 U.S. at 818.

614. *Mitchell*, 472 U.S. at 524–30.

615. *See* McNamara, *supra* note 123, at 1175–78; Weeks, *supra* note 123, at 877.

616. *Burns*, 500 U.S. at 494–95 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

617. Qualified immunity is not without critics. For example, Professor Sheldon H. Nahmod devotes an entire section of his treatise to a critical analysis of qualified immunity. 2 NAHMOD, *supra* note 133, § 8:5. As he observes, there is no data to support the Court's conclusion that qualified immunity is needed to protect government officials from undue burdens, and the Court did not consider the benefits to society of imposing liability for constitutional misconduct. *Id.* In his view, the Court has "limited individual liability by converting qualified immunity into the functional equivalent of absolute immunity." *Id.*; *see also* Sheldon Nahmod, *From the Courtroom to the Street: Court Orders and Section 1983*, 29 HASTINGS CONST. L.Q. 613, 641 n.125 (2002) (arguing that under qualified immunity "much harm caused by wrongful unconstitutional conduct remains unredressed"). But in my view this criticism is not accurate in the context of prosecutorial immunity since the conduct at issue typically violates clearly established law. Specifically, withholding exculpatory evidence violates *Brady v. Maryland*, 373 U.S. 83 (1963). Fabricating evidence and witness tampering are crimes. 18 U.S.C. §§ 242, 1512, 1622, 1623. Thus, under a qualified immunity rule, the prosecutors who engage in this misconduct would be liable for violating clearly established law of which a reasonable officer would have known. *See Harlow*, 457 U.S. at 818.

618. Lerwill v. Joslin, 712 F.2d 435, 437 n.2 (10th Cir. 1983) (citation omitted), *quoted in* McKenna, *supra* note 191, at 677 n.89.

immunity has evolved to efficiently eliminate unmeritorious claims.[619] It affords ample protection to the honestly mistaken prosecutor.

c. Courts have effective tools to control and dispose of frivolous and vexatious litigation. In addition to the liability requirements and the protection of qualified immunity, courts have effective procedural tools to control burdensome litigation. The Court highlighted these traditional devices when it refused to grant immunity to the President (for his conduct before taking office) in *Clinton v. Jones*.[620] Though the President decried the potential for exposure to taxing litigation,[621] the Court recognized that most frivolous lawsuits are disposed of at the pleading or summary judgment stage with little or no involvement by the actual defendant.[622] Moreover, courts can sanction offending litigants.[623] These same tools—in addition to the other safeguards discussed above—are available to protect prosecutors from meritless litigation.

6. Absolute immunity introduces unnecessary complexity and confusion into the law

The current absolute prosecutorial immunity defense is complicated and difficult to apply. As Part IV.B explains, it has generated confusion and conflict in the lower courts. Today, circuit courts are split on at least four distinct issues related to prosecutorial immunity.[624] Moreover, as discussed above, recent decisions applying the immunity doctrine have introduced subjective state-of-mind questions that preclude rather than promote the early resolution of the litigation.[625]

The confusion and litigation generated by the absolute immunity doctrine might be acceptable if the doctrine were justified by substantive policy reasons. But it is not. As this discussion has shown, absolute prosecutorial immunity violates rather than serves public policy. Moreover, adopting qualified immunity in all cases against prosecutors would eliminate this unwarranted confusion by applying one uniform, objective standard. Qualified immunity properly balances the need to

619. McNamara, *supra* note 123, at 1177–78.

620. 520 U.S. 681 (1997).

621. *Id.* at 708–10.

622. *Id.* at 708.

623. *Id.* at 708–09.

624. *See supra* Part IV.B.

625. *See supra* notes 369–78, 399–412 and accompanying text.

protect government functions against the need to protect individual civil rights and provides an affirmative defense that can be efficiently used in the initial stages of the proceeding to eliminate not just the burden of liability but also the burden of litigation.[626]

C. Stare Decisis Does Not Justify the Continuance of Absolute Prosecutorial Immunity

The doctrine of stare decisis rightly constrains the Court's ability to overrule precedent and promotes the stability of and respect for the rule of law.[627] But when the Court has adopted an erroneous rule of law that produces unjust and inconsistent results and has not induced detrimental reliance by individuals or society, the Court should and does reverse course and correct the error.[628] In the case of absolute prosecutorial immunity, the Court should make this correction.[629]

While the Court has not been entirely consistent with respect to stare decisis,[630] the Court has identified factors suggesting that a prior erroneous precedent should be overruled when: (1) the soundness of the original principle is doubtful;[631] (2) the foundations of the principle have been eroded by subsequent decisions;[632] (3) the principle has been divorced from its apparent original purpose by factual and legal changes;[633] (4) the principle has generated a body of interpretative law that is so complex that the law has become difficult to apply;[634] (5) the principle has been subject to substantial and consistent criticism;[635] and

626. *See supra* notes 601–19 and accompanying text.

627. McNamara, *supra* note 123, at 1154.

628. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003); Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) (holding that a departure from the doctrine of stare decisis is justified where a prior precedent has become "a positive detriment to coherence and consistency in the law").

629. *See* McNamara, *supra* note 123, at 1159–92.

630. *See Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

631. Bd. of County Comm'rs v. Brown, 520 U.S. 397, 431, 435 (Breyer, J., dissenting) (1997) (citing Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47–49 (1977) (reexamining an interpretation of the Sherman Act)); Hubbard v. United States, 514 U.S. 695, 697–715 (1995) (reexamining an interpretation of 18 U.S.C. § 1001); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 664–90 (1978) (reexamining an interpretation of 42 U.S.C. § 1983).

632. *Lawrence*, 539 U.S. at 577.

633. *Brown*, 520 U.S. at 431, 435 (Breyer, J., dissenting) (citing *Hubbard*, 514 U.S. at 697–715; *Monell*, 436 U.S. at 664–90; *Continental T.V.*, 433 U.S. at 47–49).

634. *Brown*, 520 U.S. at 431, 435 (Breyer, J., dissenting) (citing *Hubbard*, 514 U.S. at 697–715; *Monell*, 436 U.S. at 664–90; *Continental T.V.*, 433 U.S. at 47–49).

635. *Lawrence*, 539 U.S. at 576–77.

(6) the principle has not induced individual and societal reliance that counsels against overruling.[636] In the case of absolute prosecutorial immunity, all of these factors suggest that the doctrine should be overruled.

First, as discussed above, the soundness of the doctrine of absolute prosecutorial immunity is doubtful.[637] The Court initially adopted the doctrine based on the misconception that it reflected the common law in 1871 and that it furthered public policy.[638] However, absolute prosecutorial immunity was not available under the common law in 1871.[639] Moreover, absolute prosecutorial immunity violates public policy by undermining the integrity of the criminal justice process, by denying victims of misconduct a remedy, by failing to deter misconduct, and by frustrating the development of constitutional standards.[640]

Second, the foundations of absolute prosecutorial immunity have been eroded by subsequent decisions. As the Court explained, qualified immunity is usually sufficient to protect government functions and absolute immunity is only granted when the proponent has made a strong showing of a special need for extra protection.[641] Since absolute prosecutorial immunity was first adopted in *Imbler v. Pachtman*,[642] each subsequent Supreme Court decision interpreting the doctrine has narrowed its scope to prevent its application to conduct which is outside the prosecutor's advocacy function. Specifically, in *Burns v. Reed*, the Court held that absolute immunity does not apply to the prosecutor's conduct in giving legal advice to the police.[643] In *Buckley v. Fitzsimmons*, the Court held that absolute immunity does not apply where the prosecutor conspires with police to fabricate evidence.[644] And,

636. *Id.*

637. *See supra* Part V.A–B.

638. *See Imbler*, 424 U.S. at 420–29.

639. *See supra* Part V.A; *see also Kalina*, 522 U.S. at 124 n.11.

640. *See supra* Part V.B.

641. Buckley v. Fitzsimmons, 509 U.S. 259, 268–69 (1993).

642. 424 U.S. 409 (1976).

643. Burns v. Reed, 500 U.S. 496 (1991); *see also* James Lappan, *The Prosecutor, The Investigator, The Administrator, 42 U.S.C. § 1983 and* Burns v. Reed*: The Hammer Has Dropped*, 62 MISS. L.J. 169, 190 (1992); A. Allise Burris, Note, *Qualifying Immunity in Section 1983 and* Bivens *Actions*, 71 TEX. L. REV. 123 (1992).

644. *Buckley*, 509 U.S. 259; *see also* Barrow, *supra* note 191; Thomas J. Foltz, *Prosecutorial Immunity No Longer Absolute*, CRIM. JUST., Winter 1994, at 21; Angelee J. Harris, Buckley v. Fitzsimmons*: The Supreme Court Limits Absolute Immunity Protection for Prosecutors*, 20 J. CONTEMP. L. 212 (1994); Kenner, *supra* note 500, at 425–27 (arguing that *Buckley* improperly limits

finally, in *Kalina v. Fletcher*, the Court held that absolute immunity does not shield a prosecutor who makes false statements of fact in an affidavit supporting an application for an arrest warrant.[645] Thus, while *Imbler* adopted a potentially expansive absolute immunity defense, in each of its subsequent decisions the Court has limited the doctrine.

Third, factual and legal changes have divorced the principle of absolute immunity from its original purpose. The original purpose of absolute prosecutorial immunity was to safeguard the integrity of the criminal justice system and to protect honest prosecutors from the burden and distraction of harassing civil litigation.[646] Rather than protecting the integrity of the criminal justice system, absolute prosecutorial immunity has undermined the integrity of the criminal justice system by preventing accountability and fostering unchecked prosecutorial misconduct, resulting in the wrongful convictions of hundreds of innocent people.[647] Subsequent developments have made absolute immunity unnecessary to protect the honest prosecutor from vexatious litigation. As explained above, *Heck* (requiring the plaintiff to prove the favorable termination of the criminal proceeding)[648] and *Harlow* (transforming qualified immunity into an objective standard)[649] have dramatically reduced, if not eliminated, the threat of a flood of frivolous litigation against the honest prosecutor.[650] Since the threats that the doctrine was designed to prevent have been addressed by these related legal developments, this justification for maintaining absolute immunity no longer exists.

Fourth, absolute prosecutorial immunity has generated a body of interpretative law so complex that it has become difficult to apply.[651] An unworkable doctrine that creates confusion in the lower courts can become "a positive detriment to coherence and consistency in the law."[652] A legal doctrine that requires a great many "distinctions to

absolute prosecutorial immunity); Deborah S. Platz, Buckley v. Fitzsimmons*: The Beginning of the End for Absolute Prosecutorial Immunity*, 18 NOVA L. REV. 1919 (1994).

645. 522 U.S. at 130–31; *see also* Anne H. Burkett, Kalina v. Fletcher*: Another Qualification of* Imbler*'s Prosecutorial Immunity Doctrine*, 89 J. CRIM. L. & CRIMINOLOGY 867 (1999).

646. *See Imbler*, 424 U.S. at 422–27.

647. *See supra* Parts II, V.B.

648. 512 U.S. at 486–87.

649. 457 U.S. at 818.

650. McNamara, *supra* note 123, at 1175–79.

651. *See* Bd. of County Comm'rs v. Brown, 520 U.S. 397, 431, 435 (1997) (Breyer, J., dissenting); Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).

652. *Patterson*, 491 U.S. at 173.

maintain its legal life may not deserve such longevity."[653] As explained above, absolute immunity has generated at least four circuit court splits on its application.[654] Furthermore, the doctrine requires the lower courts to distinguish between pre- and post-probable cause conduct[655] and then to further distinguish between investigatory and advocatory conduct.[656] Moreover, litigating these distinctions requires extensive discovery and generates intricate questions of fact that defeat the goal of immunity, which is to allow the early disposition of the litigation.[657] The confusion and complexity of the doctrine suggests that it should be reconsidered.

Fifth, members of the Court and the scholarly community have leveled substantial and consistent criticism at the doctrine of absolute prosecutorial immunity. Justice Scalia has repeatedly and persuasively demonstrated that the Court's conclusion that absolute prosecutorial immunity existed under the common law in 1871 is simply wrong.[658] Scholars have criticized the Court's prosecutorial immunity analysis and argued that qualified immunity for prosecutors is more in keeping with common-law immunities[659] and better supported by policy.[660] Professor Erwin Chemerinsky has repeatedly pointed out the lower courts' confusion about the doctrine.[661] As he explained: "The distinction between investigative and prosecutorial tasks is inherently arbitrary. It is not surprising that in the last six years, there have been three Supreme Court decisions addressing it. Many more are likely to follow until the Court reconsiders the desirability of its approach to prosecutorial immunity."[662] Thus, while the circuit conflicts discussed in this paper

653. *Brown*, 520 U.S. at 435 (Breyer, J., dissenting).

654. *See supra* Part IV.B.

655. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 273–74 (1993).

656. *Id.* at 274 n.5.

657. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982).

658. Kalina v. Fletcher, 522 U.S. 118, 132–33 (1997) (Scalia, J., concurring); *Buckley*, 509 U.S. at 279–80 (Scalia, J., concurring); Burns v. Reed, 500 U.S. 478, 497–98 (1991) (Scalia, J., concurring in part and dissenting in part).

659. *See, e.g.*, Jay M. Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.C. L. REV. 201, 256 (1980); Richard Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 748 (1987); Filosa, *supra* note 416, at 980–81.

660. Feinman & Cohen, *supra* note 659, at 261–64; Filosa, *supra* note 416, at 982–86.

661. Chemerinsky, *supra* note 192, at 1652–56.

662. Chemerinsky, *supra* note 191, at 82.

have not previously been analyzed, scholars have consistently attacked the *Imbler* absolute immunity doctrine.[663]

Sixth, overruling absolute prosecutorial immunity will not upset any justifiable individual or societal reliance on the doctrine. As the Supreme Court has explained, "the mainstay of *stare decisis*" is "the desirability that the law furnishes a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise."[664] People must have confidence that they can predict the legal consequences of their actions "to facilitate the planning of primary activity. . . . However, that confidence is threatened least by the announcement of a new remedial rule to effectuate well-established primary rules of behavior."[665] Under this principle, allowing a remedy for prosecutorial misconduct is not precluded by the doctrine of stare decisis. If qualified immunity were to apply rather than absolute immunity, prosecutors would still be immune unless their conduct violated clearly established law of which a reasonable officer would have known,[666] that is, "well-established primary rules of behavior."[667]

Moreover, as the cases discussed in this Article illustrate, the misconduct at issue does not involve grey areas of controversy over which reasonable minds might differ. The cases involve blatant and often criminal misconduct—manufacturing evidence, tampering with witnesses, suborning perjury. Certainly, prosecutors should not be allowed to claim that they violated clearly established law against such misconduct in reliance on the cloak of absolute immunity to shield them from liability. Qualified immunity provides sufficient protection to honest prosecutors exercising discretion in uncertain areas of the law; absolute immunity, on the other hand, protects those who deliberately violate the Constitution. Thus, overruling absolute immunity will not upset any legitimate expectations but will provide a needed remedy for willful violations of clearly established constitutional law.

In short, stare decisis does not require continued adherence to the doctrine of absolute prosecutorial immunity. Rather, the Court should

663. *See, e.g.*, McNamara, *supra* note 123; *see also* Filosa, *supra* note 416; Williams, *supra* note 3, at 3479–80.

664. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (recognizing a wrongful death cause of action for seaman killed aboard unseaworthy vessels); *see also* Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 699–700 (1978).

665. *Moragne*, 398 U.S. at 403.

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

667. *Moragne*, 398 U.S. at 403.

reconsider the absolute immunity doctrine in light of the overwhelming evidence of persistent prosecutorial misconduct, the difficult requirements for establishing a § 1983 cause of action, and the high degree of protection afforded to prosecutors by the current qualified immunity defense.[668]

VI. ABSOLUTE IMMUNITY SHOULD NOT BE APPLIED IN CASES WHERE THE PROSECUTOR HAS SUPPRESSED EXCULPATORY EVIDENCE OR HAS ENGAGED IN MISCONDUCT BEFORE ABSOLUTE IMMUNITY ATTACHED

If courts decide that absolute immunity must persist in the § 1983 framework, they should deny the doctrine's application in two kinds of cases: (1) cases in which the prosecutor has suppressed exculpatory evidence; and (2) cases in which the prosecutor has engaged in misconduct before absolute immunity attached. As the following discussion will show, absolute immunity should not apply when a prosecutor has suppressed evidence because immunity in such cases is not necessary to protect the judicial process and is inconsistent with the Court's functional approach to absolute immunity. Neither should absolute immunity apply to acts of misconduct during the investigative phase because such acts are only entitled to qualified immunity under the Court's functional immunity doctrine.

A. Absolute Immunity Should Not Apply when the Prosecutor Has Suppressed Exculpatory Evidence in Violation of Brady v. Maryland

In the landmark case of *Brady v. Maryland*,[669] the Supreme Court held that "the 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."[670] Unfortunately, *Brady* violations are one of the most common forms—if not *the* most common form—of prosecutorial misconduct, yet discipline is rarely imposed.[671] According to the

668. *See* McNamara, *supra* note 123, at 1137 (arguing that qualified immunity is sufficient protection); Williams, *supra* note 3, at 3479–80 (same).

669. 373 U.S. 83 (1963).

670. *Id.* at 87.

671. *See* Liebman, *supra* note 42, at 1850 (finding that sixteen percent of state post-conviction reversals in death penalty cases resulted from "prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty"); *see also* SCHECK ET AL., *supra* note 1, app. 2 at 265 (noting that prosecutorial misconduct occurs in several forms: suppression of exculpatory evidence (forty-three percent); knowing use of false testimony (twenty-two percent);

Innocence Project, suppression of exculpatory evidence accounts for thirty-four percent of prosecutorial misconduct.[672]

The question of whether absolute immunity should be extended to prosecutors who withhold exculpatory evidence in violation of *Brady* has been debated by the Court since it first considered prosecutorial immunity in *Imbler v. Pachtman.*[673] In fact, *Imbler* focused on the question of whether absolute or qualified immunity applied to a *Brady* violation. In *Imbler*, the majority stated that absolute immunity should apply.[674]

As the following discussion shows, the application of absolute immunity for *Brady* violations should be reconsidered for three reasons. First, it extends the doctrine beyond its proper scope since it is not necessary to protect the judicial system or the prosecutorial function. Second, it leaves unchecked prosecutorial misconduct that is unlikely to be addressed by the existing procedural safeguards. And, third, it is inconsistent with the Court's functional approach to immunity defenses.

As the Court has repeatedly stressed, absolute prosecutorial immunity should be confined to cases in which it is essential to the functioning of the judicial process or the prosecutorial function.[675] But imposing liability for the suppression of exculpatory evidence poses no threat to the judicial process or to the prosecutorial function. Unlike the borderline judgment call a prosecutor may have to make about which witnesses to call when the testimony is conflicting, there is no danger of

coerced witnesses (thirteen percent); improper closing argument (eight percent); false statements to the jury (eight percent); evidence fabrication (three percent); other misconduct (three percent)). Professor Richard Rosen wrote a detailed article cataloguing and classifying scores of instances in which prosecutors failed to turn over exculpatory evidence as required by due process under *Brady*. Rosen, *supra* note 123, 697–703. Yet, despite the large number of *Brady* violations, he found only nine cases in which discipline of the prosecutor was even considered. *See id.* at 720–30. Of those nine, three resulted in no disciplinary action, four in minor sanctions, two in censures, one in suspension, and one in expulsion, which was later reversed. *Id.* at 728–30. A follow-up study found that in the decade after the first report there were seven additional cases in which discipline was sought for *Brady* violations. Weeks, *supra* note 123, at 881–82. In three, no discipline was imposed; in the other four, minor discipline was imposed. *Id.*

672. Innocence Project, *supra* note 1.

673. 424 U.S. 409. Justice White, joined by Justices Brennan and Marshall, concurred in the decision because in their view the pleadings did not actually present the *Brady* question. *Id.* at 432–33, 441, 447 (White, J., concurring). They concluded that the absolute immunity recognized by the majority was broader than that recognized at common law and broader than necessary to protect the judicial process. *Id.* at 441–43 (White, J., concurring). In their view, absolute immunity should not attach to *Brady* violations. *Id.* at 441–53 (White, J., concurring).

674. *See supra* Part IV.A.

675. *Imbler*, 424 U.S. at 437 (White, J., concurring).

introducing excessive caution into the process by imposing liability for failing to disclose exculpatory evidence. Prosecutors should be cautious—very cautious—in deciding whether to disclose evidence. As the Supreme Court has explained, "'where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate.'"[676]

The prosecutor who fears liability on this ground can simply err on the side of caution and disclose more evidence than is actually required. Marginal evidence—viewed through the eyes of defense counsel—might be the key to unraveling the case and exonerating the accused. As Justice White explained, "A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required. But, this will hardly injure the judicial process. Indeed, it will help it."[677] In other words, in deciding whether to disclose potentially exculpatory evidence, prosecutors need not be chilled in the vigorous exercise of their discretion; they should simply be vigilant in complying with their *Brady* obligations. According to Justice White:

> It is virtually impossible to identify *any* injury to the judicial process resulting from a rule permitting suits for such unconstitutional conduct, and it is very easy to identify an injury to the process resulting from a rule which does not permit such suits. Where the reason for the rule extending absolute immunity to prosecutors disappears, it would truly be "monstrous to deny recovery."[678]

In sum, imposing liability for suppression of exculpatory evidence poses no threat to the judicial process and indeed would have an entirely salutary effect.[679]

Moreover, unlike prosecutorial misconduct in the courtroom, the safeguards intended to protect the innocent—the adversary process, the threat of criminal prosecution, and professional discipline—are not available to correct the suppression of evidence. Indeed, it is reasonable to assume that such violations rarely come to light. Since this conduct occurs outside of the judicial process, "the judicial process has no way to

676. Burns v. Reed, 500 U.S. 478, 495 (1991) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)).

677. *Imbler*, 424 U.S. at 443 (White, J., concurring).

678. *Id.* at 444–45 (White, J., concurring).

679. *Id.* (White, J., concurring).

prevent or correct the constitutional violation of suppressing evidence."[680] As Justice White explained:

> The judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface. It is all the more important, then, to deter such violations by permitting damage actions under 42 U.S.C. § 1983 to be maintained in instances where violations do surface.[681]

Finally, in terms of the Court's functional approach to prosecutorial immunity, the prosecutor is not acting as an advocate in responding to a request to disclose exculpatory evidence as required by *Brady*.[682] As Professor Joseph R. Weeks pointed out, the duty to disclose exculpatory evidence falls on the prosecutor because that office is the repository of the evidence gathered by the police:[683] "Responding to such requests has nothing whatsoever to do with the prosecutor's role as advocate of the state in determining such things as whether to prosecute, what charges to assert, what court to bring the case before, and what evidence is to be offered by the state at trial."[684] Thus, in the withholding of evidence, prosecutors are not performing an advocacy function and therefore should receive only qualified immunity.

In other words, extending absolute immunity for *Brady* violations is incongruous with the functional approach to immunity. While the Court has never considered a § 1983 case in which a police officer was sued for failing to disclose exculpatory evidence that led to the plaintiff's wrongful conviction, the lower courts have uniformly held such cases are actionable and subject only to qualified immunity.[685] One of the Court's "unquestioned goals of . . . § 1983 jurisprudence [is] ensuring parity in

680. *Id*. at 443 (White, J., concurring).

681. *Id.* at 443–44 (White, J., concurring).

682. Weeks, *supra* note 123, at 876.

683. *Id.*

684. *Id.*

685. *See* Pierce v. Gilchrist, 359 F.3d 1279, 1299–1300 (10th Cir. 2004) (holding that police chemist only entitled to qualified immunity for withholding exculpatory evidence); Newsome v. McCabe, 319 F.3d 301, 303–04 (7th Cir. 2003); Sanders v. English, 950 F.2d 1152, 1162 (5th Cir. 1992); Geter v. Fortenberry, 882 F.2d 167, 170–71 (5th Cir. 1989); Jones v. City of Chicago, 856 F.2d 985, 995 (7th Cir. 1988); Michael Avery, *Paying for Silence: The Liability of Police Officers Under Section 1983 for Suppressing Exculpatory Evidence*, 13 TEMP. POL. & CIV. RTS. L. REV. 1, 1–2, 47–49 (2003). According to Professor Avery, research discloses no cases in which the lower courts have not held that a police officer may be held liable under § 1983 where the suppression of evidence results in a wrongful conviction and incarceration. *Id.* at 29–30 nn.176–77.

treatment among state actors engaged in identical functions."[686] As the Court explained in *Buckley v. Fitzsimmons*, when prosecutors and police engage in the same act of misconduct, "it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'"[687] Where prosecutors and police engage in the same misconduct—suppression of exculpatory evidence—they should both receive qualified immunity.[688]

In short, absolute immunity for *Brady* violations should be reconsidered. Its application is unwarranted by the policies underlying the doctrine and fosters prosecutorial misconduct that is unlikely to be checked by existing procedural safeguards. Finally, it is inconsistent with the functional approach to immunity defenses for prosecutors to enjoy absolute immunity for suppressing evidence while police officers only enjoy qualified immunity for the same misconduct.

B. Absolute Immunity Should Not Apply To Shield a Prosecutor from Liability for Prior Acts of Misconduct That Occurred Before Absolute Immunity Attached

As discussed in Part IV.B above, confusion has arisen among lower courts about how the immunity doctrines apply when a prosecutor has fabricated evidence or tampered with witnesses and then introduced that corrupted evidence in a judicial proceeding.[689] This confusion is an understandable consequence of the uncertainties surrounding the immunity doctrines. But, in this instance, the Court has given some guidance in two decisions, *Buckley v. Fitzsimmons*[690] and *Kalina v. Fletcher*,[691] which suggest that prosecutors who fabricate evidence should receive qualified, not absolute, immunity.

686. Buckley v. Fitzsimmons, 509 U.S. 259, 288 (1993) (Kennedy, J., concurring in part and dissenting in part) (citing Forrester v. White, 484 U.S. 219, 229 (1987); Cleavinger v. Saxner, 474 U.S. 193, 201(1985)).

687. *Id*. at 273 (quoting Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973)).

688. *See id*.; Kalina v. Fletcher, 522 U.S. 118 (1997) (holding that when prosecutor performs same function as police officer in swearing to facts to support a warrant, qualified immunity applies).

689. *See supra* text accompanying notes 27–28, 317–38; Michaels v. New Jersey, 222 F.3d 118 (3d Cir. 2000) (holding that absolute immunity applies to introduction of tainted evidence); Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000) (holding that qualified immunity applies to fabrication of evidence).

690. 509 U.S. at 259.

691. 522 U.S. at 118.

In *Buckley*, the prosecutor conspired with police to fabricate false evidence by retaining an unreliable anthropology expert to connect a boot print to the accused's boot.[692] The defendant spent ten months in jail awaiting trial.[693] The expert testimony was the principal evidence used against him at trial.[694] When the jury was unable to convict, he spent another two years in jail awaiting a retrial.[695] The charges were ultimately dismissed after the expert died.[696]

The Court held that the fabrication of evidence during the investigative phase would not be protected by absolute immunity, even though the evidence was later used in the trial.[697] With respect to the fabrication of evidence, the Court found that "there is no common-law tradition of immunity for it, whether performed by a police officer or prosecutor."[698] And the Court emphatically rejected the contention that a prosecutor may shield his investigative misconduct by presenting fabricated evidence to a grand jury or introducing it at trial because "every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial."[699] Thus, *Buckley* supports the proposition that a prosecutor who manufactures evidence during the investigative phase cannot bootstrap the immunity defense from qualified to absolute by introducing that evidence in court.

Kalina supports the same conclusion.[700] There the prosecutor manufactured evidence by swearing to false statements of fact to support an application for an arrest warrant.[701] The Court rejected her claim for absolute immunity, holding she was not acting as an advocate in testifying as to the facts supporting the application because "[t]estifying about facts is the function of the witness, not of the lawyer."[702] Thus, under *Kalina*, a prosecutor who creates false evidence and then submits it to a court is not entitled to absolute immunity.

692. *Buckley*, 509 U.S. at 262–63; *see also supra* Part IV.A.3.
693. *Buckley*, 509 U.S. at 264.
694. *Id*.
695. *Id*.
696. *Id*.
697. *Id*. at 274–76.
698. *Id*. at 274 n.5.
699. *Id.* at 276.
700. *Kalina*, 522 U.S. at 118; *see supra* Part IV.A.4.
701. *Kalina*, 522 U.S. at 121.
702. *Id.* at 130.

The reason that these two cases fail to neatly resolve the issue is that the Court focused on different factors in reaching its conclusions in *Buckley* and *Kalina*. In *Buckley*, the Court focused on the chronology of the case. It concluded that since the boot print evidence was evaluated before probable cause was established, the prosecutor was necessarily acting as an investigator, not as an advocate.[703] In *Kalina*, the Court focused on the fact that the prosecutor was acting as the complaining witness, and not as an advocate.[704]

These cases reveal the unsatisfactory nature of the current functional approach. A hypothetical example illustrates the problem. Assume a defendant had been arrested after a judicial finding of probable cause. The prosecutor then bribed a witness to sign an affidavit of false facts and introduced that affidavit into evidence. The *Buckley* case would not resolve the question because the misconduct occurred after probable cause was established. Arguably, under *Buckley*, the hypothetical prosecutor was acting as an advocate because the misconduct occurred after the establishment of probable cause.[705] And the *Kalina* case would not solve the question because the prosecutor did not sign the false affidavit as a witness. Under *Kalina*, she was arguably acting as an advocate because she prepared a document for the purpose of submitting evidence in the judicial proceeding.[706] If she were acting as an advocate under *Buckley* and *Kalina*, she would be entitled to absolute immunity. But this result seems entirely at odds with the outcome in both decisions.

A better approach would treat all cases of evidence fabrication identically. Rather than considering whether probable cause has been established (the *Buckley* approach), or whether the prosecutor is acting as a witness (the *Kalina* approach), courts should consider the nature of the misconduct: manufacturing false evidence. It is the same offense in each case and should be treated the same in each case. Manufacturing false evidence is neither an investigative function nor an advocacy function; it is a crime.[707] It is equally wrong whether it occurs early or late in the case. It is equally wrong if the prosecutor swears to the false evidence herself or has a third party swear to it. As the *Buckley* Court held, there is no common-law tradition protecting this misconduct.[708] If the prosecutor

703. *Buckley*, 509 U.S. at 274–76.

704. *Kalina*, 522 U.S. at 130–31.

705. *Buckley*, 509 U.S. at 274.

706. *Kalina*, 522 U.S. at 129.

707. 18 U.S.C. §§ 242, 1512, 1623 (2004).

708. *Buckley*, 509 U.S. at 274–75.

compounds the problem by persisting in the misconduct by both preparing the false evidence and then introducing it, the subsequent additional misconduct should not redound to the prosecutor's benefit by effectively extending absolute immunity beyond the judicial phase of the proceedings.[709]

Moreover, as with cases involving the suppression of exculpatory evidence, under the functional approach prosecutors and police officers should receive the same immunity for the same misconduct. Under existing case law, police officers are entitled to qualified immunity for fabricating evidence.[710] The prosecutor should receive no greater protection.[711] It is inconsistent and incongruous to afford prosecutors absolute immunity for the same conduct for which police officers receive only qualified immunity.[712]

If absolute immunity is retained at all, it should not be extended to out-of-court evidence fabrication, but rather should be confined to the narrowly defined judicial phase of the prosecution for several reasons. First, a narrow application of absolute immunity is consistent with the historical common-law immunities on which the Court relies as the starting point for immunity analysis.[713] Second, a narrow application assures that the safeguards on which the Court relies to protect the accused—defense counsel, court supervision, appellate review[714]—will in fact be available.[715] Third, it strikes the proper balance between protecting the prosecutor and the accused.[716] Fourth, it provides the same immunity to prosecutors and police who engage in the same misconduct.[717] Finally, it eliminates some measure of the unnecessary confusion complicating this area of the law.[718]

709. *See supra* Part IV.B.2; Zahrey v. Coffey, 221 F.3d 342, 352–54 (2d Cir. 2000) (discussing whether the subsequent use of tainted evidence breaks the chain of proximate causation).

710. *See* Pierce v. Gilchrist, 359 F.3d 1279 (10th Cir. 2004) (applying qualified immunity where a police forensic chemist fabricated inculpatory evidence); Manning v. Miller, 355 F.3d 1028, 1030–31 (7th Cir. 2004) (applying qualified immunity where an FBI agent induced a jailhouse informant to fabricate a story); Spurlock v. Satterfeld, 167 F.3d 995, 1006–07 (6th Cir. 1999) (applying qualified immunity where an officer induced a jailhouse informant to create a false statement).

711. *Buckley*, 509 U.S. at 273.

712. Kalina v. Fletcher, 522 U.S. 118, 126 (1997).

713. *Buckley*, 509 U.S. at 268–69.

714. Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

715. *See id.* at 443 (White, J., concurring).

716. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982).

717. *Buckley*, 509 U.S. at 273.

718. *See supra* Part V.B.6.

VII. CONCLUSION

Absolute prosecutorial immunity should be reconsidered. Empirical studies establish that prosecutorial misconduct is a significant factor leading to the wrongful conviction of many innocent people.[719] The supposed checks on prosecutorial misconduct fail to deter or punish misconduct or to protect the wrongfully accused.[720] Civil liability will provide a needed check on misconduct and a needed remedy to the victim. Qualified immunity provides sufficient protection to the honest prosecutor while permitting the development of constitutional doctrine, the evolution of enforceable professional norms, and the implementation of needed remedies.[721] Ultimately, prosecutorial accountability for constitutional misconduct will enhance the integrity of the criminal justice system.[722]

719. *See supra* Part II.

720. *See supra* Part II.

721. *See supra* Part V.B.

722. *See supra* Part V.B.