The Failed Legacy of Absolute Immunity Under *Imbler*: Providing a Compromise Approach to Claims of Prosecutorial Misconduct

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ABSTRACT

Since the Supreme Court decided Imbler v. Pachtman *in 1976, prosecutors have been absolutely immune from any suit under 42 U.S.C. § 1983 alleging that the prosecutors deliberately withheld exculpatory information from the defendant or knowingly used fabricated evidence against a defendant. The Court has continued to adhere to this broad grant of immunity, notwithstanding the fact that the rationale employed by the* Imbler *Court has been largely discredited and the fact that doing so has created significant moral hazard concerns. In fact, in several recent cases, the Court has shown great reluctance to allow courts or juries any questioning of prosecutors.*

This article explores the Court's continued embrace of Imbler *and concludes that this adherence is best understood in terms of the Court's identification of prosecutors with other participants in criminal proceedings and the Court's reluctance to subject prosecutors to possible lawsuits from those who are charged but not convicted. This article proposes that these concerns be addressed by limiting the potential size of the plaintiff class to those plaintiffs who make a threshold showing of factual innocence. Such a showing is the same that is required from criminal defendants who are suing their counsel for malpractice, and the concerns raised by the courts in these criminal defense malpractice actions mirror the concerns underlying prosecutorial immunity. Requiring plaintiffs to meet this threshold showing, as well as meet the current pleading requirements, could balance the Court's concerns with protecting prosecutors who fail to win a case with some accountability for the innocent victim(s) of deliberate prosecutorial misconduct.*

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TABLE OF CONTENTS

Thomas Lee Goldstein. Curtis McGhee. Terry Harrington. John Thompson. Delma Banks. Alberto Ramos. Collin Finnerty. Reade Seligmann. Dave Evans. These individuals share a common story. All were accused of significant crimes for which they were ultimately exonerated, and in each respective case, the prosecutors were later shown to have withheld

exculpatory evidence or to have used fabricated evidence against them.[1] Under the current state of the law, these accused also share one more thing: they cannot sue the prosecutor for the deliberate violations of their constitutional rights. Since the Supreme Court decided *Imbler v. Pachtman*[2] in 1976, prosecutors have been protected by absolute immunity for actions taken as advocates, even when they deliberately violate defendants' rights.

The *Imbler* decision rests on the Court's judgment that although immunity to prosecutors deprives "genuinely wronged" defendants of any recourse, 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."[3] But changes in the legal landscape, as well as historical research, have cast significant doubt on the continued validity of *Imbler*'s reasoning.[4] In addition, the external pressures on prosecutors to obtain convictions have grown since 1976.[5] Although many prosecutors adhere to their ethical and constitutional obligations, the names listed at the beginning of this article are hardly the only victims of prosecutorial misconduct. Studies have shown that prosecutorial misconduct has played a significant role in wrongful convictions[6] and that

1. Van De Kamp v. Goldstein, 555 U.S. 335, 339 (2009); Harrington v. State, 659 N.W.2d 509, 518 (Iowa 2003); Connick v. Thompson, 131 S. Ct. 1350 (2011); Banks v. Dretke, 540 U.S. 668, 675-76 (2004); People v. Ramos, 201 A.D.2d 78, 86 (App. Div. 1994); *see* Daniel Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2192-95 (2010) (discussing the Duke Lacrosse players case involving Finnerty, Seligman, and Evans) [hereinafter *Emotionally Charged*].

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

3. *Id.* at 428 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)). The Supreme Court has repeatedly quoted and cited this language from a Learned Hand opinion to support providing officials with immunity. *See Van de Kamp*, 555 U.S. at 340; Burns v. Reed, 500 U.S. 478, 484 (1991); Briscoe v. LaHue, 460 U.S. 325, 345 (1983); Nixon v. Fitzgerald, 457 U.S. 731, 752-53 n.32 (1982); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); Butz v. Economou, 438 U.S. 478, 518 (1978).

4. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 107-25, 131-39 (2005); s*ee infra* notes 97-117 and accompanying text.

5. *See, e.g.*, Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 8-14 (2009). *See infra* notes 163-77 and accompanying text.

6. *See* Fred C. Zacharias and Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 8-10 (2009); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 277-82 (2007); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 399 n.2 (2006) [hereinafter *Shaping Remedies*];

prosecutors are rarely held accountable in disciplinary proceedings for their misconduct.[7] As a result, commentators have called on the Court to reconsider the grant of absolute immunity to prosecutors.[8] Yet, the Court continues to embrace *Imbler*.[9]

The Supreme Court recently considered three cases involving deliberate misconduct by local prosecutors that resulted in wrongful convictions: *Van de Kamp v. Goldstein*,[10] *Pottawattamie County v. McGhee*,[11] and *Connick v. Thompson*.[12] In all three cases, the Supreme Court reviewed decisions that permitted actions brought under 42 U.S.C. § 1983 to proceed against either

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JAMES S. LIEBMAN, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-95; ii, 5 (2000).

7. *See* Joel B. Rubin, *The Supreme Court Assumes Errant Prosecutors Will be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537, 540-43 (2011) (citing prior studies); *Id*. at 544-71 (discussing case studies); Davis, *supra* note 6, at 278; Shelby A.D. Moore, *Who is Keeping the Gate: What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. TEX. L. REV. 801, 806-07 (2006); Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 U.D.C. L. REV. 275, 278-83 (2004); Johns, *supra* note 4, at 60-63. *See infra* notes 118-25 and accompanying text.

8. *See* Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, HARV. C. R.-C. L. L. REV. Journal On-line Companion (2010), *available at* http://www.harvardcrcl.org/2010/08/10/ [hereinafter *Bad Faith Exception*]; Johns, *supra* note 4, at 140-45; 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 (1997); 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, 1137-38, 1196-97 (1996).

9. Van de Kamp v. Goldstein, 555 U.S. 335, 341-43 (2009).

10. *Id.* at 335. Thomas Lee Goldstein spent twenty-four years in prison for a murder he did not commit before his writ for habeas corpus was granted by a federal district court on the ground that the prosecutor failed to disclose the benefits the jailhouse informant had received in exchange for his testimony. *Id*. at 338-40; *see* Goldstein v. City of Long Beach, 481 F.3d 1170, 1171-72 (9th Cir. 2007).

11. Pottawattamie Cnty. v. McGhee, 547 F. 3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009), *cert. dismissed*, 130 S. Ct. 1047 (2010). Terry Harrington and Curtis McGhee spent twenty-three years in prison for a murder conviction before the Iowa Supreme Court granted their post-conviction relief petition. *See* Harrington v. State, 659 N.W.2d 509, 514, 525 (Iowa 2003). The Iowa Supreme Court concluded that the two men's rights were violated because the police and district attorney had failed to disclose the numerous police reports that indicated another man as a suspect and had repeatedly and falsely denied that there were any other suspects. *Id*. at 517-19, 522-23.

12. 131 S. Ct. 1350 (2011). John Thompson spent fourteen years on death row before being released because the prosecutors failed to turn over a lab report that showed Thompson could not have committed a crime that was used to secure his conviction for murder and his death sentence. *Id.*

supervising attorneys in the prosecutor's office or the office itself. Given the fact that the § 1983 plaintiffs had prevailed in the lower courts, the Court's decision to grant *certiorari* in these cases itself signaled a reluctance to permit § 1983 actions involving prosecutors.[13] Additionally, in the two cases in which the Court issued a decision,[14] *Van de Kamp* and *Connick*, the Court prevented the victim of prosecutorial misconduct from seeking redress from either the supervisors or the district attorney's office.[15]

In fact, in *Van de Kamp*, the Court, repeatedly invoking *Imbler*, unanimously concluded that the claims against the supervising attorneys were barred.[16] Given the significant changes in § 1983 law since *Imbler* was decided in 1976[17] and the substantial questions that have been raised about *Imbler*'s understanding of the common law and faith in state bar proceedings,[18] *Van de Kamp*'s repeated invocation of *Imbler* to justify its position seems disingenuous. Indeed, the Court's assertion that the "very reasons that led this Court in *Imbler* to find absolute immunity require a similar finding in this case"[19] appears to have the same persuasive power as the statements of those who marveled at the emperor's "new clothes."[20]

Moreover, the reluctance of the Court to permit any scrutiny of prosecutors' conduct raises significant moral hazard concerns. These concerns are present whenever conduct is shielded from liability so that a person does

13. Barry Scheck, *Professionalism and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2220 (2010) [hereinafter *The Need for Integrity Programs*].

14. The County and prosecutors in Pottawattamie County settled with the plaintiffs for $12 million after oral argument. *See* Debra Cassens Weiss, *12M Settlement Ends Pending Supreme Court Case on Prosecutorial Immunity*, ABA Journal, (Jan 5, 2010, 7:16AM), *available at* http://www.abajournal.com/news/article/12m_ settlement_ends_pending_ supreme_court_case_on_prosecutorial_immunity. In 2012, the Eighth Circuit ruled that the police defendants were protected by qualified immunity with respect to the plaintiffs' malicious prosecution claims on the ground that a claim of malicious prosecution as a constitutional right was not clearly established in 1977. Harrington v. City of Council Bluffs, Iowa, 678 F.3d 676, 681 (8th Cir. 2012).

15. *Van de Kamp*, 555 U.S. at 338- 39; Connick v. Thompson, 131 S. Ct. 1350, 1358 (2011).

16. 555 U.S. at 338-39.

17. *See infra* notes 107-17 and accompanying text.

18. *See infra* notes 97-106 and accompanying text.

19. *Van de Kamp*, 555 U.S. at 348.

20. *See* HANS CHRISTIAN ANDERSON, *The Emperor's New Suit*, *in* FAIRY TALES OF HANS CHRISTIAN ANDERSON 438, 440 (1984).

not bear the cost of a decision.[21] These concerns are amplified when there are incentives for an individual to take risks and that risk-taking is not tempered by any potential for liability.[22] In fact, when the Court shields an official with immunity, it can effectively create, as one commentator has noted, "an environment of impunity."[23] This environment was only exacerbated when the Court, in its 5-4 decision in *Connick*,[24] made it more difficult to hold municipalities liable. In so doing, the Court removed an incentive for

21. Moral hazard concerns recognize the fact that individuals can be controlled by potential liability and that without the threat of this liability, persons will take risks that they otherwise would not take. *See* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 238 (1996) ("What moral hazard means is that, if you cushion the consequences of bad behavior, then you encourage that bad behavior.") (quoting James K. Glassman, *Drop Budget Fight, Shift to Welfare*, ST. LOUIS POST-DISPATCH, Feb 11, 1996, at B3).

22. As Professors Zacharias and Green recently noted, both "courts and commentators have been struggling to identify alternative mechanisms for holding prosecutors to their theoretical obligation to see 'that justice shall be done.'" Zacharias & Green, *supra* note 6, at 3-4 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). In fact, a number of commentators, including Zacharias and Green, have written on alternative means to reign in prosecutorial misconduct. *See, e.g.*, Moore, *supra* note 7 at 806-07; Joy, *supra* note 6, at 425-26; Yaroshefsky, *supra* note 7, at 278-83; Fred. C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001). Others have written on alternative means for compensating victims of prosecutorial excesses, *e.g.* 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, 707-08 (2004), or have advocated creating alternative systems, *see* Scheck, *supra* note 13, at 2217-18.

23. David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1217 (2005). Professor Levinson has challenged the conclusion that monetary damages in fact inhibit wrongful conduct by government officials. *See, e.g.*, Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). This article, consistent with the approach taken by the Court, assumes that the possibility of liability plays some role in official conduct. Indeed, if the possibility of liability has no impact on official thinking, then there would be no reason to be concerned about permitting such liability as it would not have the negative impact on governance that has consistently concerned the Court. *See, e.g.*, Filarky v. Delia, 132 S. Ct. 1657, 1665 (2012) (immunity "avoid[s] 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits"); *id.* ("[w]e have called the government interest in avoiding 'unwarranted timidity' on the part of those engaged in the public's business 'the most important special government immunity-producing concern") (citation omitted); Nixon v. Fitzgerald, 457 U.S. 731, 752 n.32 (1982) ("Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties.").

24. Connick v. Thompson, 131 S. Ct. 1350, 1355 (2011).

municipal governments to insist on proper training of assistant prosecutors to avoid violations of defendants' rights.

This article attributes the Court's unwillingness to reconsider its approach to two factors. First, the Court has consistently identified prosecutors with the other participants in the judicial process—judges, jurors, and witnesses.[25] The idea that prosecutors require absolute immunity has simply become a part of the Court's narrative. This narrative, however, is not supported by the realities of the role of prosecutors in the criminal justice system. Second, the Court is motivated by the very nature of our judicial system. As the Court has repeatedly recognized, in the adversary process there is always a winner and loser,[26] and the losers have a natural incentive to believe they were "wronged" by the prosecutor's decisions.[27] Even when a criminal defendant "wins" in a criminal proceeding, that individual will most likely suffer substantial losses as a consequence of facing criminal charges. Underlying the Court's decisions is an unwillingness to subject every prosecutor who decides to drop the criminal charges or who loses the criminal trial to a possible § 1983 suit.[28] Of course, there is reason to encourage careful thought with respect to initiating criminal prosecutions.[29] Yet, the difference between the standard for arrest (probable cause) and conviction (beyond a reasonable doubt) presupposes that the government will lose cases even when prosecutors are exercising care.

This article suggests that the Court's rigid position is unnecessary and that the Court should instead adopt a compromise position of limiting the size of the plaintiff class. Part I of this article examines the development of the law with respect to prosecutorial immunity and the critiques of the law prior to the decision in *Van de Kamp.* Part II discusses *Van de Kamp,* the substantial concerns created by that decision, and the likely reasons for the Court's continued adherence to absolute immunity for prosecutors. The article concludes by addressing those underlying reasons and suggesting that those concerns can be addressed by requiring any § 1983 claimant to produce evidence of factual innocence as well as satisfying the standards of *Ashcroft v.*

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25. *See, e.g.*, Wyatt v. Cole, 504 U.S. 158, 164-65 (1992); Tower v. Glover, 467 U.S. 914, 920 (1984).

26. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 521-22 (1985); Forrester v. White, 484 U.S. 219, 226 (1988).

27. Although the Court has significantly narrowed the class of state prisoners who can file § 1983 actions, *see infra* notes 114-17 and accompanying text, this limitation does not affect those who are not convicted of a crime.

28. *Connick,* 131 S. Ct. at 1355.

29. Medwed, *supra* note 1, at 2188-92.

Iqbal.[30] Such an approach would limit liability to the most egregious cases, thereby protecting most prosecutorial conduct from extensive litigation, while striking a more reasonable balance with respect to the moral hazard concerns than the Court's current doctrine provides.

I. THE DEVELOPMENT OF PROSECUTORIAL IMMUNITY AND CRITICISM OF THE DOCTRINE

The decisions on prosecutorial immunity are part of a larger picture of official immunity to § 1983 suits. Section 1983, which was enacted as part of the Civil Rights Act of 1871, is commonly understood as serving two goals: to deter violations of constitutional rights by state and local officials and to compensate those who suffer as a result of those violations.[31] Although the statute makes no mention of immunities from suit,[32] the Court has long read the statute as permitting government officials to raise claims of absolute or qualified immunity.[33]

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30. 556 U.S. 662, 678-79 (2009).

31. Carey v. Piphus, 435 U.S. 247, 254 (1978); Mitchum v. Foster, 407 U.S. 225, 240-43 (1972); Monroe v. Pape, 365 U.S. 167, 172 (1961). As Justice Blackmun wrote, § 1983 "stands for . . . the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the hands of the powerful." 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, 28 (1985).

32. Title 42 U.S.C. § 1983 (2006) provides that, "[e]very 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 . . . ."

33. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981) ("It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum . . . [o]ne important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."). The Court first addressed the question of whether officials could claim absolute immunity from suits brought under § 1983 in Tenney v. Brandhove, 341 U.S. 367, 371-72 (1951). In that case, the Court rejected the argument that the text of the statute precluded any immunity from suit because official immunity was so well-established in 1871 that the general language would not be read as abrogating common law immunities. *Id.* at 376 ("We cannot believe that Congress – itself a staunch advocate of legislative freedom – would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."). The Court reiterated this position in Pierson v. Ray, 386 U.S. 547, 554- 55 (1967). In these early cases, Justice Douglas argued in dissent that the grant of absolute immunity to state

Both types of immunity preclude a genuinely wronged individual from recovering from an official who has violated his or her rights. An official loses the shield of qualified immunity when the official's conduct is so unacceptable that it falls outside the realm of protected conduct.[34] By contrast, absolute immunity shields an official regardless of how egregious the conduct, because societal interests in protecting officials trump the individual's interest in compensation.[35] In a series of decisions from the 1950s to the early 1970s, the Court determined that state legislators and judges were entitled to absolute immunity.[36] At the same time, the Court concluded that state executives, school board members, and police officers were protected only by qualified immunity.[37]

The Supreme Court in *Imbler v. Pachtman*[38] extended absolute immunity to prosecutors when their challenged conduct was "intimately associated with the judicial phase of the criminal process."[39] Over the next two decades, the

officials contradicted the purpose of Congress in adopting § 1983. *Pierson*, 386 U.S. at 559-63 (Douglas, J., dissenting); *Tenney*, 341 U.S. at 383 (Douglas, J. dissenting).

34. As is discussed in *infra* notes 64-67 and accompanying text, the required showing for qualified immunity has changed over the years from a focus on the official's state of mind to an objective evaluation of whether the conduct violated a clearly established constitutional right.

35. *Pierson*, 386 U.S. at 554 ("This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences . . . . [The judge's] errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.") (citations omitted).

36. *Tenney*, 341 U.S. at 379 (state legislators entitled to absolute immunity); *Pierson*, 386 U.S. at 554-55 (state judges entitled to absolute immunity).

37. Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (governors and other state executive officials); Wood v. Strickland, 420 U.S. 308, 322 (1975) (school administrators); *Pierson*, 386 U.S. at 555 (police officers arresting civil rights workers).

38. 424 U.S. 409 (1976). In *Imbler*, the original prosecutor actually brought exculpatory information to the attention of the authorities. After the California Supreme Court affirmed Imbler's conviction for murder as well as his capital sentence, the prosecutor wrote a letter to the Governor describing exculpatory information that the prosecutor and a state investigator had uncovered after trial, including corroboration of Imbler's alibi and evidence that cast doubt on the trustworthiness of the prime witness against Imbler. *Id.* at 412-13. After the federal courts granted Imbler's habeas petition, Imbler brought an action against the prosecutor and various police officers alleging a conspiracy to deprive him of his constitutional rights. *Id.* at 415.

39. *Imbler*, 424 U.S. at 430.

Court examined absolute immunity questions raised in suits against both government officials in general and prosecutors in particular.[40] During this same period, the Court rendered decisions that substantially changed both qualified immunity and the availability of § 1983 actions for state prisoners.[41] As a consequence of these changes and empirical research, substantial doubt surfaced about the continued validity of *Imbler*'s reasoning by the time the Court heard *Van de Kamp* in 2009.[42]

A. *The Development of Prosecutorial Immunity*

1. *Imbler*: The Decision to Provide Prosecutors with Immunity

Imbler used a two-part test to evaluate the prosecutor's claim to absolute immunity: whether the common law provided absolute immunity in 1871 and whether the reasons for providing that immunity applied to the specific situation at hand.[43] The Court quickly determined that prosecutors satisfied the first, common-law test.[44] Turning to the second question, the Court considered both the prosecutor's role in the criminal justice system and the public's interest in effective criminal enforcement. The Court explained that a prosecutor is required to "exercise his best judgment both in deciding which suits to bring and in conducting them in court."[45] It predicted that if prosecutors faced the possibility of § 1983 actions, these actions "could be expected with some frequency."[46] The Court concluded that the potential onslaught of suits would undermine prosecutors' independent decision-making and distract prosecutors "from the pressing duty of enforcing the criminal law."[47]

The *Imbler* Court rejected the argument that the public's interest in effective law enforcement could adequately be protected by providing prosecutors with qualified immunity. This rejection rested explicitly on the nature of qualified immunity when *Imbler* was decided.[48] At that time, an official's claim to qualified immunity turned on whether an official was acting

40. *See infra* notes 54-87 and accompanying text.
41. *See infra* notes 66-70 and accompanying text.
42. *See infra* notes 96-125 and accompanying text.
43. *Imbler*, 424 U.S. at 434-36 (Whiting, J., concurring in judgment).
44. *Id.*
45. *Id*. at 424.
46. *Id*. at 425.
47. *Id.*
48. *Id*. at 419 n.13, 425-26. *See infra* notes 118-19 and accompanying text.

in good faith,[49] and that determination focused on the official's state of mind,[50] which could rarely be decided solely on the pleadings.[51] Consequently, under existing qualified immunity doctrine, prosecutors could be required to justify their decisions years later before a jury.[52] Thus, the Court concluded that this more limited immunity would not serve the broader public interest in effective criminal prosecutions.[53]

Finally, the Court acknowledged that the public had an interest in combatting prosecutorial misconduct, but it concluded that there were alternatives to § 1983 suits to protect this interest.[54] First, the Court pointed to the possibility of criminal and ethical proceedings against any prosecutor who engaged in willful misconduct.[55] Second, the Court observed that the accused has numerous post-trial avenues to correct any unfairness in trial.[56] Thus, the Court reasoned that deterring prosecutorial misconduct did not require subjecting prosecutors to § 1983 actions.[57]

The Court's decision shielded prosecutors from claims of deliberately failing to provide exculpatory evidence to the defense as well as from claims regarding trial conduct.[58] The Court did indicate, however, that the immunity

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49. As the Court explained in Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974), qualified immunity provided officials with defense from liability when an official could show "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief . . . ."

50. *Id.*

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

52. *Imbler*, 424 U.S. at 425-26 (noting that "[d]efending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials").

53. *Id.* at 427 ("[T]he alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.").

54. *Id.* at 428-29 ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

55. *Id.* at 429.

56. *Id.* at 427. In fact, the Court expressed its concern that defendants could be harmed by permitting these lawsuits. The Court hypothesized that courts might be less willing to grant relief from original convictions because of "the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Id.*

57. *Imbler*, 424 U.S. at 429.

58. *Id.* at 431 n.33. In his concurrence, Justice White disagreed with this extensive grant of absolute immunity and argued that actions should be permitted when prosecutors unlawfully suppressed evidence. *Id*. at 442-43. Justice White urged the Court to adopt a

was not unbounded. Absolute immunity only applied to claims when a prosecutor was acting in his or her capacity as an advocate for the state. The Court explained that this protection not only shielded prosecutors when they were in the courtroom, but also protected prosecutors when they were engaged in "[p]reparation, both for the initiation of the criminal process and for a trial," including "obtaining, reviewing, and evaluating" evidence.[59] When, however, a prosecutor was acting in an investigative or administrative capacity, the prosecutor was protected only by qualified immunity.[60]

2. The Development of the Functional Test

In the 1980s, the Court picked up on the language in *Imbler* about the "function" performed by the prosecutor and explicitly employed a functional test to evaluate officials' claims of absolute immunity.[61] Under this functional test, the Court focused not on the official before the Court, but on whether the nature of the conduct at issue was the type of action that requires an absolute shield from liability.[62] As the Court explained, "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches."[63]

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more limited version of absolute immunity for prosecutors. White argued that the Court should distinguish claims involving the use of evidence at trial from those involved in suppressing exculpatory information. *Id.* at 442-43. The majority rejected White's approach for two reasons: first, it saw no ethical distinction between the two types of conduct, and second, it was concerned that this distinction would not work in practice as a claim for use of perjured testimony could simply be pled as a claim of suppressing exculpatory evidence and thus, would in reality result in the parade of horrors for prosecutors that the Court had already identified. *Id.* at 431 n.34.

59. *Id.* at 431 n.33.

60. *Id.* The Court did acknowledge that the line between advocacy and investigative activities could prove difficult in practice. *Id.* (explaining that "[d]rawing a proper line between [the advocacy and the investigative/administrative] functions may present difficult questions").

61. *See, e.g.*, Forrester v. White, 484 U.S. 219, 224 (1988); Malley v. Briggs, 475 U.S. 335, 342 (1986); Mitchell v. Forsyth, 472 U.S. 511, 520-23 (1985).

62. *Forrester*, 484 U.S. at 227. The focus on the action that an official is taking means, as *Imbler* anticipated, that officials may be able to claim absolute immunity for certain activity, while being potentially liable under § 1983 for other actions. *See id.* at 225-28. Thus, for example, while legislators and judges are entitled to absolute immunity for decisions regarding legislation or pending cases, those officials can be sued for employment decisions that allegedly violate anti-discrimination laws. *Id.* at 229-30.

63. *Id.* at 227. This focus on the conduct being challenged reflected the Court's judgment that "immunity status is for the benefit of the public as well as for the individual concerned." Cleavinger v. Saxner, 474 U.S. 193, 203 (1985).

In applying this functional test, the Court started with the presumption that shielding an official with absolute immunity was the exception rather than the rule.[64] This general presumption was based on the Court's recognition of the "undeniable tension between official immunities and the ideal of the rule of law."[65] The presumption also reflected the moral hazard issues raised by a grant of absolute immunity. As the Court explained, the risk of litigation normally serves to encourage individuals to act in a lawful manner, and consequently, when the "threat of liability encourages . . . officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should."[66]

The Court required the official to bear the burden of demonstrating that absolute immunity from any § 1983 action was justified.[67] To satisfy this burden, the Court generally insisted on a showing that the claim of absolute immunity had a basis in the common law at the time of the adoption of § 1983.[68] The Court explained that requiring common law support was consistent with its proper role in statutory construction cases: "[w]e reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in

64. *Forrester*, 484 U.S. at 224; Malley v. Briggs, 475 U.S. 335, 340 (1986); Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982); Butz v. Economou, 438 U.S. 478, 506 (1978).

65. *Forrester*, 484 U.S. at 223.

66. *Id.*

67. *Mitchell*, 472 U.S. at 521-22; *Butz*, 438 U.S. at 512; *see Forrester*, 484 U.S. at 224 ("This Court has generally been quite sparing in its recognition of claims to absolute official immunity.").

68. *Mitchell*, 472 U.S. at 521; *Forrester*, 484 U.S. at 225; *Malley*, 475 U.S. at 340; Briscoe v. LaHue, 460 U.S. 325, 335-36 (1983). As David Achtenberg pointed out, the Court had some variation in this common law test in these cases. *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for Legislative Will*, 86 NW. U. L. REV. 497, 500 (1992). In some decisions, the Court stated that it would not recognize absolute immunity for an official unless that immunity was both "firmly embedded in nineteenth-century common law and . . . consistent with the purposes of § 1983." *Id.* at 500. In other cases, the Court approached the issue a bit more broadly, concluding that "every immunity which was recognized in common-law tort actions in 1871 (regardless of whether it was well established at that time) should presumptively be incorporated under § 1983." *Id.* at 500-01. Moreover, in one case, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the Court was willing to extend immunity to an official without a common law basis. In that case, the Court examined whether the President of the United States could be held liable for actions taken while he was President. The Court replaced the common law test with an historical analysis drawn "primarily from our constitutional heritage and structure" because the office of the President "did not exist through most of the development of common law." *Id.* at 748. Nevertheless, the general rule was that there be a showing of a common law basis for the provision of absolute immunity. See McNamara, *supra* note 8, at 1169-75.

interpreting Congress' intent by the common-law tradition."[69] The Court also compared the functions of the officials who were asserting a claim of absolute immunity with those officials whom the Court had already determined were, or were not, entitled to absolute immunity.[70] In so doing, the Court attempted to maintain a high degree of predictability by treating officials who performed similar functions in the same manner, regardless of their titles.[71]

Finally, the Court expressly considered the changes in its § 1983 jurisprudence in evaluating claims for absolute immunity.[72] The Court, in a series of decisions in the 1980s, transformed qualified immunity doctrine from a protection against liability to a shield from the litigation process itself.[73] It

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69. Malley v. Briggs, 475 U.S. 335, 342 (1986); *Tower*, 467 U.S. at 922-23.

70. In *Butz v. Economou*, the Court compared administrative law judges ("ALJs") and agency officials, who present the government's position in administrative hearings, to the actions of judges and prosecutors. 438 U.S. 478, 512-13. Because the actions were of a similar nature, the Court concluded that ALJ's and agency prosecutors were entitled to absolute immunity. *Id.* at 514. Similarly, in *Mitchell v. Forsyth*, it compared the Attorney General's claim to absolute immunity to the claim of White House aides for immunity from suit. 472 U.S. 511, 521 (1985). The Court concluded that because it had previously rejected White House aides' claim for absolute immunity, the Attorney General should also be limited to qualified immunity, at least when he was not functioning as a prosecutor. *Id.* at 520-24.

71. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 288 (1993) (Kennedy, J., concurring in part and dissenting in part) (explaining that one of the majority's concerns is a "restatement of one of the unquestioned goals of our § 1983 immunity jurisprudence: ensuring parity in treatment among state actors engaged in identical functions"). Throughout these decisions, the Court recognized that those who performed "quasi-judicial" functions were the "primary wellsprings" of absolute immunity. *Mitchell*, 472 U.S. at 521. Curiously, in 1871, when § 1983 was enacted, those who performed quasi-judicial functions were not entitled to absolute immunity. *See infra* note 106.

72. *See Mitchell*, 472 U.S. at 524 (explaining that in light of the new standard for qualified immunity after *Harlow v. Fitzgerald*, "[w]e emphasize that the denial of absolute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexatious complaints"); *Malley*, 475 U.S. at 341 (stating that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *Forrester*, 484 U.S. at 230 (concluding that the protections of qualified immunity were sufficient in a case against a state court judge involving allegations of sex discrimination in employment).

73. As the Court explained, the reasons for providing officials with any immunity from suit was not simply to shield them from worrying about liability in their decision-making process, but also to shield them from the costs of litigation, which can be "peculiarly disruptive of effective government." *Mitchell*, 472 U.S. at 526. In fact, Professor Chen wrote persuasively that, even before the decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), qualified immunity was so protective of officials that it was close to the functional equivalent of absolute immunity. Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L. J. 229, 232 (2006).

abandoned the subjective "good faith" test for qualified immunity in favor of an objective test that shields government officials from liability, unless their conduct violated a clearly established right.[74] In so doing, the Court protected officials from having to go to trial regarding their states of mind.[75] The Court also required district courts to resolve questions of immunity before permitting more general discovery to go forward.[76] In addition, the Court gave officials the right to immediately appeal denials of immunity claims, at least when the issue raised was an issue of law.[77] All of these changes played a role in the Court's rejection of officials' claims for absolute immunity during the 1980s.

3. Application of the Functional Test to Prosecutors

The Supreme Court returned to defining the contours of prosecutorial immunity in a trilogy of cases in the 1990s.[78] The Court could have used the

74. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Prior to this decision, qualified immunity was a defense from liability if an official could show "the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief . . . ." Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974). This understanding of qualified immunity required an investigation of the official's state of mind, and as a result, these cases were rarely decided on the pleadings. In 1982, the Court abandoned the "good faith belief" component of qualified immunity because of the costs involved to both the officials and society as a whole by that test. *Harlow*, 457 U.S. at 814. As the Court explained, claims are brought against the innocent as well as the guilty, and these claims not only subject officials to the expense of litigation, but they pose the dangers of deterring the "able citizens from acceptance of public office" and impairing the exercise of discretion by officials concerned about the possibility of lawsuits. *Id.* The Court went on to note that it had assumed that the qualified immunity standard adopted in the 1970s would "permit '[i]nsubstantial lawsuits [to] be quickly terminated,'" but that the litigation over officials' subjective good faith was not easily dismissed. *Id.* (quoting Hanrahan v. Hampton, 446 U.S. 754, 765 (1980)); *see also id.* at 816-17 ("[T]he judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment . . . . Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.").

75. *Harlow*, 457 U.S. at 817-18 ("[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery.").

76. *Id.* at 818 (explaining that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed").

77. *See Mitchell*, 472 U.S. at 530.

78. Burns v. Reed, 500 U.S. 478 (1991); Buckley v. Fitzsimmons, 509 U.S. 259 (1993); Kalina v. Fletcher, 522 U.S. 118 (1997). In *Burns*, the police suspected that Ms.

changes in qualified immunity to reconsider the *Imbler* decision. Alternatively, the Court could have relied on its decision in *Forrester v. White*, which permitted a discrimination suit against a state judge by a court employee,[79] to limit claims against prosecutors to those that involved administrative matters such as employment and personnel decisions. Ultimately, the Court chose neither approach, relying instead on the line drawn in *Imbler*,[80] and it resolved the claims of absolute immunity based on whether the prosecutor acted as an advocate or in an administrative or investigative capacity.[81]

Burns had shot and wounded her two sons. On the advice of the local prosecutor, the police hypnotized the mother and obtained what they viewed as incriminating statements during that session; in the hypnotized session, Ms. Burns referred to herself by a different name while under hypnosis. The police viewed this reference as supporting their theory that she suffered from a multiple-personality disorder. *Burns*, 500 U.S. at 482. Ms. Burns was arrested on the basis of these statements, and the prosecutor used the testimony of the police officer that she had confessed to shooting her children in a probable cause hearing without disclosing to the judge that these statements had been made while she was under hypnosis. *Id.* After the arrest, Ms. Burns was placed in a psychiatric hospital for four months, lost her job, and temporarily lost custody of her children. *Id.* at 482 n.1. Once the trial court granted the motion to suppress the statements obtained under hypnosis, all charges were dropped. *Id.* at 483. Ms. Burns sued the prosecutor for the advice he gave the police, as well as for his use of the statements during the probable cause hearing. *Id.* at 488, 493.

The plaintiff in *Buckley* was also deprived of his liberty as a consequence of the prosecutor's alleged misconduct. In that case, because Buckley was unable to post the $3 million bond, he was incarcerated for three years on murder charges before the charges were dismissed. 509 U.S. at 264. The primary evidence against Buckley was a boot print that was linked by the prosecutor's expert to a boot print left at the scene by the killer. *Id.* at 262-63. This evidence was the primary evidence introduced against Buckley at trial, and after the jury failed to reach a verdict, the trial court declared a mistrial. *Id.* at 264. Unable to post bond, Buckley remained in jail for two more years, despite the fact that a third party confessed to the murder. *Id.* It was only when the prosecution's expert witness – the one who "identified" the footprint – died that charges were dropped. *Id.* Once these charges were dropped, Buckley sued the prosecutor, claiming that the prosecutor had violated his rights by manufacturing the boot print as well as for statements made at a press conference held by the district attorney after the arrest. *Id.* at 264-65.

Finally, in *Kalina*, the deputy prosecutor completed an affidavit to support her motion for probable cause for arrest and that affidavit contained several false statements. 522 U.S. at 121. The trial court issued a warrant and the 1983 plaintiff was arrested and spent a day in jail. *Id.* at 121-22. The charges against him were later dismissed by the prosecutor. *Id.* Kalina's complaint focused on both the statement and the use of that statement in the hearing. *Id.* at 129.

79. Forrester v. White, 484 U.S. 219 (1988).

80. Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976). The "advocate" label entitles a prosecutor to absolute immunity, whereas the "administrative/investigative" label provides a prosecutor with qualified immunity. *Id.*

81. *Kalina*, 522 U.S. at 127; *Buckley*, 509 U.S. at 270; *Burns*, 500 U.S. at 485-86.

In all three cases, the Court acknowledged that the purpose of § 1983 is to provide remedies to those who are victims of official misconduct.[82] It emphasized that the Court had been "quite sparing" in recognizing any entitlement to absolute immunity from § 1983 actions.[83] It also reiterated the presumption in favor of qualified rather than absolute immunity.[84] Thus, the Court recognized that prosecutors had the burden of showing they were acting as advocates and were entitled to absolute immunity.[85]

The Court drew several lines in evaluating whether a prosecutor was acting as an advocate or in an administrative or investigative posture. First, using the comparative approach it had relied on in the 1980s,[86] the Court rejected prosecutors' claims of absolute immunity if their conduct involved actions that other officials, who were entitled only to qualified immunity, could have taken.[87] Second, the Court examined the distance of the challenged conduct

82. *Kalina*, 522 U.S. at 123; *Buckley*, 509 U.S. at 268; *Burns*, 500 U.S. at 484-86.

83. *Buckley*, 509 U.S. at 269 (quoting *Forrester*, 484 U.S. at 224); *Burns*, 500 U.S. at 487 (noting that the Court has "refused to extend [absolute immunity] any 'further than its justification would warrant'") (quoting *Harlow*, 457 U.S. at 811).

84. *Buckley*, 509 U.S. at 268; *Burns*, 500 U.S. at 485-87.

85. *Buckley*, 509 US at 274 ("The question . . . is whether the prosecutors have carried their burden of establishing that they were functioning as 'advocates' when they were endeavoring to determine whether the bootprint at the scene of the crime had been made by the petitioner's foot."); *see Kalina*, 522 U.S. at 131 (Scalia, J., concurring) (noting that the prosecutor "present[ed] no evidence that the administration of justice is harmed . . . ."); *Burns*, 500 U.S. at 486 (stating that "the official seeking absolute immunity bears the burden of showing that such immunity is justified . . . ."). Indeed, in evaluating the conduct of the prosecutor, the Court recognized that in these cases some of the prosecutor's conduct could be shielded by absolute immunity, while other related conduct could be protected only by qualified immunity. Thus, in both *Kalina* and *Buckley*, the Court shielded the prosecutors' activities as they related to conduct in a judicial proceeding, but permitted other claims to go forward. *Kalina*, 522 U.S. at 129; *Buckley*, 509 U.S. at 275-79.

86. *See supra* notes 60-64 and accompanying text.

87. In *Buckley*, the plaintiff claimed that the prosecutor had conspired with the police to develop false evidence that linked the accused's boot to a boot print left at the crime scene. 509 U.S. at 273-74. Recognizing that police officers could be sued for this conduct, the Court rejected the prosecutor's claim to absolute immunity. As the Court explained, "[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, [absolute] immunity should protect the one and not the other.'" *Id.* at 273 (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973)). Similarly, the Court in *Kalina* concluded that although the prosecutor was entitled to absolute immunity for presenting evidence before a judge in support of a motion for a search warrant, she was not entitled to absolute immunity for signing an affidavit supporting the evidence. 522 U.S. at 129. The Court reasoned that, in certifying the truth of the factual statements, the prosecutor was not entitled

from the judicial process in light of *Imbler*'s statement that prosecutors were protected for conduct that is "intimately associated with the judicial phase of the criminal process."[88] Finally, the Court in *Buckley* indicated that the challenged conduct would be too far removed from the judicial process to be considered an act of advocacy when probable cause did not exist.[89]

The limits on what constitutes work as an advocate might have resulted in limiting the situations in which prosecutors were entitled to absolute immunity. Indeed, several commentators predicted that plaintiffs would be significantly more successful in their attacks on prosecutorial misconduct after *Buckley*.[90] There are some lower court decisions in which the courts relied on *Buckley* to conclude that prosecutors were not acting as advocates when they acquired false evidence for use in later trials.[91] Yet, for the most part, lower courts continued to adhere to a fairly broad reading of *Imbler* and to shield prosecutors from most allegations of willful misconduct. Courts continued to preclude any claims based on *Brady* violations, even where there was evidence

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to absolute immunity, but only qualified immunity, because she was "perform[ing] an act that any competent witness might have performed." *Id.* at 129-30.

88. *Imbler*, 424 U.S. at 430. The Court concluded that the following were sufficiently tied to the judicial process to be protected by absolute immunity: appearing before a tribunal at a probable cause hearing and requesting a search warrant, *Burns*, 500 U.S. at 487, and preparing and filing motions for an arrest warrant, *Kalina*, 522 U.S. at 129. By contrast, the Court considered giving advice to police officers during a criminal investigation and making press statements too far removed from the judicial process to be entitled to absolute immunity. *Burns*, 500 U.S. at 496; *Buckley*, 509 U.S. at 278.

89. *Buckley*, 509 U.S. at 274 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.").

90. *Buckley*, 509 U.S. at 286-87 (Kennedy, J., dissenting); *see* Brian P. Barrow, Buckley v. Fitzsimmons: *Tradition Pays a Price for the Reduction of Prosecutorial Misconduct*, 16 WHITTIER L. REV. 301 (1995): James P. Kenner, *Prosecutorial Immunity: Removal of the Shield Destroys the Effectiveness of the Sword*, 33 WASHBURN L. J. 402 (1994); Deborah S. Platz, Buckley v. Fitzsimmons: *The Beginning of the End for Absolute Prosecutorial Immunity*, 18 NOVA L. REV. 1919 (1994).

91. *See* Milstein v. Cooley, 257 F.3d 1004, 1011 (9th Cir. 2001) ("[A]cquiring known false statements from a witness for use in a prosecution is . . . fabricating evidence that is unprotected by absolute immunity."); Moore v. Valder, 65 F.3d 189, 194 (D.C. Cir. 1995) ("Intimidating and coercing witnesses into changing their testimony is not advocacy. It is rather a misuse of *investigative* techniques . . . .") (emphasis added). Courts also rejected claims that the prosecutor was acting as an advocate when the activity was seen as outside the scope of prosecutorial conduct. *See* Harris v. Bornhorst, 513 F.3d 503, 510-11 (6th Cir. 2008) (prosecutor was not acting as an advocate when he instructed police to arrest the suspect); Yarris v. Cnty. of Del., 465 F.3d 129, 136 (3d Cir. 2006) (prosecutor was not acting as advocate when he destroyed evidence).

that the prosecutor was acting deliberately in bad faith.[92] In addition, where prosecutors could tie their gathering of evidence to preparation for trial, the courts concluded that the activities were those of an advocate and absolute immunity was appropriate.[93]

Moreover, two circuits concluded that even if claims of misconduct during the investigative phase were not protected by absolute immunity, plaintiffs may not have a cause of action against the prosecutor. The Seventh and Third Circuits determined that plaintiffs did not state a claim against prosecutors for misconduct during the investigative phases because it was not the misconduct itself, but the use of the evidence at trial that violated their rights.[94] Moreover, absolute immunity protected any claim based on the use of evidence at trial. Consequently, notwithstanding *Buckley*, these courts concluded prosecutors could not be sued for the fabrication of evidence.[95] In short, the predictions of the demise of prosecutorial immunity were not realized.

B. *Criticisms of the* Imbler *Assumptions*

The courts justified shielding prosecutors with absolute immunity with one word: *Imbler*. Yet, as time wore on, the pillars on which *Imbler* was based appeared to crumble. The Court's assessment of the common law did not withstand scrutiny. Later decisions substantially altered basic assumptions made by *Imbler*. Finally, the suggestion that the public interest in discouraging prosecutorial misconduct could be adequately addressed through state bar

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92. *See, e.g.*, Broam v. Bogan, 320 F.3d 1023, 1030 (9th Cir. 2003); Rowe v. City of Fort Lauderdale, 279 F.3d 1271, 1279-80 (11th Cir. 2002); Parkinson v. Cozzolino, 238 F.3d 145, 152 (2d Cir. 2001); Powell v. Spear, 6 Fed. Appx. 739, 741 (10th Cir. 2001); Smith v. Holtz, 210 F.3d 186, 199-200 n.18 (3d Cir. 2000); Fullman v. Graddick, 739 F.2d 553, 559 (11th Cir. 1984).

93. *E.g*, KRL v. Moore, 384 F.3d 1105, 1112 (9th Cir. 2004); Cousin v. Small, 325 F.3d 627, 635 (5th Cir. 2003).

94. Buckley v. Fitzsimmons, 20 F.3d 789, 794 (7th Cir. 1994); Michaels v. New Jersey, 222 F.3d 118, 121-22 (3d Cir. 2000). The Seventh Circuit recently reaffirmed this position. *See* Fields v. Wharrie, 672 F.3d 505, 514 (7th Cir. 2012).

95. As is discussed *infra* notes 197-98, the position of the Seventh and Third Circuits has been rejected by the Second and Eighth Circuits. Zahrey v. Coffey, 221 F.3d 342, 349 (2d Cir. 2000); Pottawattamie Cnty. v. McGhee, 547 F.3d 922, 933 (8th Cir. 2008), *cert. granted,* 129 S. Ct. 2002 (2009), *cert. dismissed,* 130 S. Ct. 1047 (2010). Moreover, this position has the support of at least one Supreme Court member, shown by Justice Thomas' dissent from the denial of certiorari in Michaels v. McGrath, 531 U.S. 1118-19 (2001) (Thomas, J., dissenting) ("I believe that the Second Circuit's approach is very likely correct, and that the decision below leaves victims of egregious prosecutorial misconduct without a remedy.").

associations and ethical proceedings proved to be unfounded. Thus, by the time the Supreme Court rendered its decision in *Van de Kamp*, the validity of *Imbler*'s reasoning had been significantly undermined.

1. Doubting *Imbler's* Understanding of the Common Law

Throughout the 1980s, the Court reiterated that a claim of absolute immunity needed to be supported by the common law that existed in 1871.[96] However, there was no absolute immunity for prosecutors at that time.[97] The first common law decision to provide prosecutors with absolute immunity, on which *Imbler* relied,[98] was not decided until 1896.[99] In fact, a number of states permitted suits against prosecutors for malicious prosecution well into the twentieth century.[100]

Moreover, the office of the public prosecutor did not exist in most jurisdictions in 1871. Rather, most crime victims relied on private prosecutors

96. *See* Burns v. Reed, 500 U.S. 478, 493 (1991) ("Absent a tradition of immunity comparable to the common-law immunity from malicious prosecution, which formed the basis for the decision in *Imbler*, we have not been inclined to extend absolute immunity from liability under § 1983."); Buckley v. Fitzsimmons, 509 U.S. 259, 268-69 (1993) ("[S]ome officials perform 'special functions' which, because of their similarity to functions that would have been immune when Congress enacted § 1983, deserve absolute protection from damages liability."); Kalina v. Fletcher, 522 U.S. 118, 123 (1997) ("[W]e have examined common-law doctrine when identifying . . . the defenses available to state actors."). At the same time, the Court did significantly deviate from the common law in 1982 in Harlow v. Fitzgerald, when it adopted the purely objective test for qualified immunity. *See* Anderson v. Creighton, 483 U.S. 635, 645 (1987).

97. Johns, *supra* note 4, at 107-17. As Professor Johns explained, "far from being a 'well-settled' doctrine in 1871, there is not one single case adopting any form of prosecutorial immunity until many years later." *Id.* at 114. Johns authored an amici brief in *Van de Kamp*, making this same argument. Brief Amici Curiae of Law Professors in Support of Respondents at 18, Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (No. 07-854).

98. Imbler v. Pachtman, 424 U.S. 409, 421 (1976). In Kalina v. Fletcher, the Court recognized in a footnote that "[t]he cases that the [*Imbler*] Court cited were decided after 1871." 522 U.S. 118, 124 n.11 (1997). The Court went on to explain that *Imbler* "drew guidance both from the first American cases . . . and perhaps more importantly, from the policy considerations underlying the firmly established common-law rules providing absolute immunity for judges and jurors." *Id.*

99. Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896). And, as Johns points out, this decision was not universally accepted. In fact, there was a split among the states with respect to the ability to sue public prosecutors. Johns, *supra* note 4, at 114-16.

100. Johns, *supra* note 4, at 116.

to pursue the perpetrators.[101] Those private prosecutors could be sued under the tort of malicious prosecution, and the elements of that tort match, in large part, the defense of qualified immunity.[102] In addition, there is reason to believe public prosecutors could likewise have been subject to suit. In 1871, the common law permitted other officials engaging in discretionary activities to claim "quasi-judicial immunity," but that immunity required the official to show that he was acting in good faith.[103] Thus, in 1871, those officials were only entitled to something close to qualified immunity as it existed when *Imbler* was decided.

Justice Scalia also explored the boundaries of official immunities under the common law of 1871.[104] In the trilogy, Justice Scalia (joined by others on the Court) wrote separately to express his concerns about the lack of a relationship between the 1871 common law and the holdings of the Supreme Court in the 1990's.[105] He noted that the approach taken by the Court was in fact far

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101. *Id.* at 108-10. As Johns explained, the criminal justice system employed by the states in the 1800s "bore little resemblance" to our current system of public administration of criminal laws. *Id.* at 108. Most crimes were not prosecuted by public prosecutors, but by attorneys hired by victims to bring a private criminal action against the alleged perpetrators. *Id.* at 109-10. These privately-retained prosecutors could be subject, along with the parties who hired them, to liability pursuant to the tort of malicious prosecution. *Id.* at 111-12.

102. *Id.* at 111.

103. *Id.* at 119-20.

104. As Justice Scalia pointed out in *Burns*, there were three types of immunity under the common law in 1871: judicial immunity, defamation immunity and quasi-judicial immunity. Burns v. Reed, 500 U.S. 478, 499-501 (1991) (Scalia, J., concurring). Judicial immunity, as it was recognized in 1871, cannot support *Imbler*'s grant of immunity to prosecutors because judicial immunity applied only to those who were adjudicating disputes between parties. *Id.* at 499-500 (Scalia, J., concurring). Defamation immunity protected all statements made in the course of a court proceeding from any action. *Id.* at 501 (Scalia, J., concurring). This defamation immunity could potentially support a claim that prosecutors should be immune from all statements made in the courtroom, and potentially all activities once in court. *See id.* at 501 (Scalia, J., concurring). However, while the complaining witness would be protected at common law from her statements in court, she could still be sued for malicious prosecution for her commencement of an action. *Id.* at 501 (Scalia, J., concurring).

105. *See* Kalina v. Fletcher, 522 U.S. 118, 131-32 (1997) (Scalia, J., concurring) ("I write separately because it would be a shame if our opinions did not reflect the awareness that our 'functional' approach . . . has produced some curious inversions of the common law as it existed in 1871, when § 1983 was enacted. A conscientious prosecutor reading our cases should now conclude that there is absolute immunity for the decision to seek an arrest warrant after filing an information, but only qualified immunity for testimony as a witness in support of that warrant. The common-law rule was, in a sense, exactly opposite."); *Id.* at 132 (Scalia, J., concurring) ("There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted."); Buckley v. Fitzsimmons, 509 U.S. 259, 280 (1993)

removed from the immunities granted to prosecutors at the time that § 1983 was enacted.[106] Justice Scalia, however, joined in the result reached by the Court based on the principle of stare decisis.[107]

2. The Changed Legal Landscape Since *Imbler*

Not only does the common law of 1871 fail to support absolute immunity for all prosecutorial decisions, but the legal landscape shifted so significantly during the 1980s and 1990s that many of the concerns voiced in *Imbler* carried significantly less force by the time the Court heard *Van de Kamp.*[108] *Imbler*'s concern about the effect of potential liability on prosecutors was explicitly predicated on the Court's understanding of the limited protections offered by qualified immunity and the burdens that litigation could place on prosecutors if they were only protected by qualified immunity.[109] The changes wrought by

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(Scalia, J., concurring) ("I have some reservation about the historical authenticity of the 'principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.'"); *Burns*, 500 U.S. at 499 (Scalia, J., concurring in the judgment in part and dissenting in part) ("[T]he first case extending *any* form of prosecutorial immunity was decided some 25 years after the enactment of § 1983") (emphasis in original). Justice Scalia was not alone. In *Kalina*, he was joined by Justice Thomas and in *Burns* he was joined by Justice Blackmun and, in part, by Justice Marshall. *See Kalina*, 522 U.S. at 131; *see also Burns*, 500 U.S. at 496.

106. *Kalina*, 522 U.S. at 132 (Scalia, J., concurring); *Buckley*, 509 U.S. at 280 (Scalia, J., concurring); *Burns*, 500 U.S. at 499 (Scalia, J., concurring).

107. *Kalina*, 522 U.S. at 135 (Scalia, J., concurring); *Burns*, 500 U.S. at 505 (Scalia, J., concurring).

108. *See* Johns, *supra* note 4, at 137; *see also* McNamara, *supra* note 8, at 1175-80.

109. As the Court explained in a footnote,

> [t]he procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.

Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976). The Court emphasized,

> suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and—ultimately in every case—the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that

Harlow v. Fitzgerald and other cases in the 1980s provided significantly more protection for all government officials than existed when *Imbler* was decided.[110] Qualified immunity in the 1970s focused on the official's state of mind, a question to be resolved at trial. Over the years, the Court had transformed qualified immunity into an objective test that shielded officials from any involvement in litigation as long as their conduct did not violate a "clearly established" right.[111]

Moreover, *Imbler* envisioned angry state prisoners sitting in prisons with nothing better to do than to file numerous claims against their prosecutors.[112] However, the Court addressed this concern in *Heck v. Humphrey*,[113] holding that a prisoner could not bring a claim for damages under § 1983 if a "judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,"[114] unless the prisoner could show that the conviction or sentence had been invalidated.[115] Thus, by the time *Van de Kamp* was before the Court,

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> the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

Id. at 425-26.

110. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Johns, *supra* note 4, at 136-37; McNamara, *supra* note 8, at 1175-78.

111. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). This understanding of qualified immunity continues to this day. *See* Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009) (explaining that "qualified immunity—which shields Government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights,' is both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation'") (citations omitted).

112. *See* 424 U.S. at 428.

113. 512 U.S. 477 (1994). In fact, the Court signaled that the availability of damages actions under § 1983 when a conviction had not been determined to be invalid was an open question in 1984 in Tower v. Glover, 467 U.S. 914, 923 (1984) (explaining that the Court had "no occasion to decide if a federal district court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself").

114. 512 U.S. at 487.

115. *Id.* at 486-87. In *Heck*, a state prisoner, while his direct appeal from his conviction was pending, brought a § 1983 action in federal district court against the two prosecutors and an investigator on the grounds that the three state officials had conducted an unlawful investigation and had destroyed exculpatory evidence. Heck sought monetary damages for these actions. The Supreme Court held that Heck did not have a cause of action

the Court's concerns about the ability of the lower courts to protect officials from involvement in meritless suits appeared to have been answered by changes in the law.

3. Failure of State Ethical Proceedings to Provide Adequate Protections

Finally, *Imbler*'s faith in state bar associations and ethical proceedings to reign in prosecutorial misconduct proved misplaced. During the 1990s and early 2000s, a number of studies indicated that prosecutorial misconduct played a significant role in wrongful convictions. For example, in 2000, the Innocence Project reported that prosecutorial misconduct played a role in over one-quarter of the cases of wrongful conviction.[116] Additionally, in 2003, the Center for Public Integrity ("CPI") investigated over 11,000 cases alleging prosecutorial misconduct and found over 2000 cases in which courts "dismissed charges, [overturned] convictions or reduced sentences because of prosecutorial misconduct."[117] Moreover, the CPI reported that in a number of other cases, the courts agreed that the prosecutor had engaged in misconduct, but refused to take action because of such doctrines as harmless error.[118] These conclusions were also supported by other widely cited studies.[119]

Imbler's assumption that the ethical boards could provide an antidote to prosecutorial misconduct proved to be unfounded because those attorneys

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under § 1983 because his conviction had not been undermined. An inmate may bring a § 1983 action if the inmate can show that the "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such [a] determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 487. Since the Court adopted the limitation on § 1983 actions in *Heck*, the Court has reaffirmed repeatedly that when a state prisoner's § 1983 action would imply that the conviction itself was invalid, that claim is not cognizable unless the conviction has been undermined. Skinner v. Switzer, 131 S. Ct. 1289, 1298 (2011); Wilkinson v. Dotson, 544 U.S. 74, 78 (2005); Nelson v. Campbell, 541 U.S. 637, 646 (2004); Edwards v. Balisok, 520 U.S. 641, 646 (1997).

116. JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000).

117. *See* Davis, *supra* note 6, at 278 (citing study).

118. *Id.*

119. *See* Ken Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 11, 1999, Innocence Project, *available at* http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story (conducting a study of 11,000 cases and finding widespread violations of *Brady*); *See* James S. Liebman, *A Broken System: Error Rates in Capital Cases, 1973-95*; 5 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf. All of these studies were cited repeatedly in articles. *See, e.g.*, Davis, *supra* note 6, at 279-80; Moore, *supra* note 7, at 807 n.39, 844 n.319; Johns, *supra* note 4 at 53 n.1.

rarely faced disciplinary proceedings. When Richard Rosen surveyed all fifty states and the District of Columbia, he discovered that prosecutors were rarely charged with violating ethical rules, and sanctions were even more infrequent.[120] While Rosen's study was conducted in the 1980s, numerous scholars have concluded that the threat of disciplinary action and real sanctions remains minimal at best.[121] Although there have been several cases in which prosecutors have been disciplined—most notably, Mike Nifong, the prosecutor in the Duke lacrosse players' case,—those prosecutions stand out because they are so unusual.[122] Indeed, the threat of real consequences being visited on a prosecutor who engages in a *Brady* violation, or other misconduct, appears to be—in the words of Richard Rosen—a "paper tiger."[123]

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120. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987).

121. *See* Zacharias & Green, *supra* note 6, at 15-16; BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 14.1, n.5 (2d ed. 2008); Yaroshefsky, *supra* note 7, at 276–77 (citing studies); Moore, *supra* note 7, at 808 nn.43-44 (same). In fact, as Professors Zacharias and Green point out, state disciplinary boards tend to rely on civil liability to deter attorney negligence. Zacharias & Green, *supra* note 6, at 15.

122. Davis, *supra* note 6, at 298. Professor Davis argues convincingly that the ethical proceedings against Nifong were an aberration and reflected the resources of the defendants, as well as their race and class. *Id.* at 297-99. She supports this conclusion by comparing what happened to Mike Nifong with the prosecutors in the Delma Banks case, Banks v. Dretke, 540 U.S. 668 (2004). Mike Nifong failed to disclose exculpatory information and acted in violation of his ethical responsibilities, but this evidence came to light before the young men were convicted and the young men never spent time in jail. Davis, *supra* note 6, at 298-99. By contrast, the prosecutors in *Banks* "threatened witnesses with jail time if they did not" testify in accordance with their theory of the case and withheld exculpatory evidence from the defense. Banks was convicted, received a capital sentence, and came within minutes of being executed. Davis, *supra* note 6, at 298 (citing *Banks*, 540 U.S. at 684-86). Yet, the prosecutors in that case were never disciplined. Davis argues that the difference in treatment of the prosecutors in the two cases is more attributable to the race and resources of the Duke lacrosse players—the players were able to hire attorneys with the reputation and resources to get the attention of the national media—than to the harm suffered as a result of the misconduct or the misconduct itself. Davis, *supra* note 6, at 301-03. Thus, while the fact that there was action taken is encouraging, she warns that the Nifong case should not be viewed as evidence that the state bar associations can be counted on to adequately police prosecutors. *See id.* at 298. This view of the Nifong disciplinary proceedings as an aberration has been echoed by others. *See* Zacharias & Green, *supra* note 6, at 12 (noting that "Nifong's disbarment in June 2007 was an exceptional instance in which disciplinary regulators imposed meaningful sanctions, but it involved the unusual situation in which a prosecutor intentionally, and for self-serving reasons, violated explicit ethics requirements.").

123. Rosen, *supra* note 120, at 693.

In short, as the Supreme Court was undoubtedly aware when it decided *Van de Kamp*, much of the reasoning of *Imbler* had been substantially undermined by intervening changes in the Court's § 1983 jurisprudence, historical research, and evidentiary studies. In fact, these points were argued in the briefs filed by *amici* in *Van de Kamp*.[124] Yet, as will be illustrated below, the *Van de Kamp* Court not only affirmed *Imbler*, but also potentially expanded the shield provided to prosecutors.

II. THE CONTINUED RELIANCE ON *IMBLER*

The three cases from the 1990s can be read as an attempt by the Court to balance the purposes of § 1983 with the public interest in effective criminal prosecutions. In *Van de Kamp*, however, the Court abandoned this balancing of competing concerns in favor of an exclusive focus on protecting prosecutors from litigation. Additionally, it glossed over the fact that the reasoning employed by the *Imbler* Court has been substantially undermined. Indeed, the Court not only reiterated the reasoning employed by *Imbler*, but *Van de Kamp's* sweeping language arguably expanded the reach of absolute immunity. This approach, in turn, has created substantial moral hazard problems.[125] These moral hazard problems are only exacerbated by the Court's restriction of municipal liability and by the substantial doubt the Court created by granting *certiorari* on the question of whether allegations of fabrications can constitute a cause of action. Given these issues, the Court's unanimous embrace of

124. *See* Brief of the Constitutional Accountability Center as Amici Curiae Supporting Respondent, Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (No. 07-854) (arguing in support of overruling *Imbler*); Brief Amici Curiae of Law Professors in Support of Respondent, Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (No. 07-854) (same); Brief of Amici Curiae the National Association of Criminal Defense Lawyers, the Cato Institute, and the American Civil Liberties Union in Support of Respondents, Pottawattamie Cnty. v. McGhee, 547 F. 3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009) (No. 08-1065), *cert. dismissed*, 130 S. Ct. 1047 (2010). There were also a number of briefs filed supporting the district attorney and absolute immunity. *See, e.g.*, Brief for the States of Kansas, et al. as Amici Curiae in Support of Petitioners, Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (No. 07-854); Brief of the National Association of Counties et al. as Amici Curiae Supporting Petitioners, Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (No. 07-854); Brief of Amici Curiae National District Attorneys Association et al. in Support of Petitioners, Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (No. 07-852); Brief for the United States as Amicus Curiae in Support of Petitioner, Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (No. 07-852).

125. *See* Martin A. Schwartz, *Supreme Court § 1983 Decisions–October 2008 Term*, 45 TULSA L. REV. 231, 256 (2009) (noting that "[a]lthough prosecutorial immunity has long been strong medicine, *Van de Kamp* strengthens it even more.").

absolute immunity may perhaps best be understood not as an enthusiastic endorsement of the doctrine as much as an unwillingness to adopt the suggested alternatives.

A. Van de Kamp: *A Retreat from the Functional Test (and More?)*

It is difficult to imagine a case with more sympathetic facts for the § 1983 plaintiff than *Van de Kamp.* Thomas Lee Goldstein was a Marine Corps veteran and engineering student with no criminal background who was imprisoned for twenty-four years before being released from jail.[126] After release, he filed a § 1983 action against the former district attorney and deputy district attorney.[127] Goldstein alleged that the supervising attorneys violated his rights under *Giglio v. United States*[128] by failing to give the assistant attorneys in the office the training and supervision necessary to understand their *Giglio* duties and by failing to develop a system for the office to track the deals made with informants.[129] Both the district court and the circuit court held that because the actions challenged were administrative in nature, the district attorney and his assistant were not protected by absolute immunity.[130] In reaching this decision, the courts relied on the decisions of two other circuits.[131]

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126. In 1979, Thomas Lee Goldstein became a murder suspect when a gunman ran into the apartment building where Goldstein was living. *See* Goldstein v. Superior Court, 195 P.3d 588, 590 (Cal. 2008). There was no "forensic evidence that connected Goldstein [to] the murder victim." *Id.* "Goldstein did not match [the eyewitness's] description of the [gunman]", nor did the witness select Goldstein from the photographic line-up that he was shown. *Id.* However, Goldstein was convicted of murder based on the in-court identification of him by the witness and the claim of a jailhouse informant that Goldstein had confessed. *Id.* After the eyewitness failed to identify Goldstein from the photographic line-up, a police detective then asked the eyewitness if Goldstein "could have been the person [he] saw running from the scene. [He] said it was possible, though he was not certain." *Id.* The jailhouse informant, Edward Floyd Fink, claimed that Goldstein admitted he had shot the man over a money dispute. *Id.*

127. *Id.* at 591.

128. Giglio v. United States, 405 U.S. 150, 155 (1972) (holding that failure to disclose promises made to a witness violated defendant's due process rights).

129. Goldstein v. City of Long Beach, 481 F.3d 1170, 1174 (9th Cir. 2007). Goldstein also brought claims against the County of Los Angeles under a *Monell* theory of liability. *Id.* at 1171. Those claims were not at issue before the Supreme Court. Van de Kamp v. Goldstein, 555 U.S. 335, 338 (2009).

130. *Goldstein*, 481 F.3d at 1172.

131. *Id.* at 1175 n.2. The Third Circuit had permitted claims to go forward on the ground that allegations regarding a failure to train are allegations relating to conduct that is administrative in nature, as opposed to the conduct that is intimately associated with the judicial process. *See* Carter v. City of Phila., 181 F.3d 339, 353 (3d Cir. 1999). The Second

The Supreme Court accepted that the challenged conduct was administrative.[132] Nonetheless, the Court unanimously concluded that absolute immunity protected the prosecutors and reversed the lower court rulings.[133] The Court fully embraced *Imbler*, without acknowledging any doubts that had been raised about that decision's assumptions.[134] Moreover, the Court deviated from the basic approach it had used to analyze immunity claims in several significant respects.

First, *Van de Kamp* largely abandoned the inquiry into the common law as it existed when § 1983 was adopted. Only one sentence in the opinion referenced the common law.[135] This lack of focus on the common law is hardly surprising, given the fact that *Imbler*'s reliance on the common law had been largely discredited.[136]

Circuit permitted a similar theory to proceed against a municipality. *See* Walker v. City of New York, 974 F.2d 293, 297 (2d Cir. 1992).

132. *Van de Kamp*, 555 U.S. at 344.

133. *Id.*

134. *Id.*

135. *Id.* at 341. (noting that in *Imbler* "the Court pointed out . . . that the law had also granted prosecutors absolute immunity from common-law tort actions . . .."). Even that sentence focused on what *Imbler* concluded, rather than on what the common law actually was in 1871.

136. In its most recent term, the Court explicitly addressed the fact that the common law as it existed in 1871 did not support the *Imbler* decision in Rehberg v. Paulk, 132 S. Ct. 1497, 1503 (2012). That case involved allegations that the chief investigator for the district attorney's office provided false testimony to a grand jury as part of a conspiracy against the 1983 plaintiff. In *Rehberg*, the Court acknowledged that the starting point in determining whether the investigator was entitled to absolute immunity was "'a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" *Id.* at 1503 (quoting Imbler v. Pachtman, 424 U.S. 409, 421 (1976)). At the same time, the Court in *Rehberg* explained that the Court did not "mechanically duplicate[] the precise scope of the absolute immunity that the common law provided." 132 S. Ct. at 1503. The Court used the decision to grant prosecutors absolute immunity as an example of when there has not been a duplication of the 1871 common law. The Court went on to explain that the decision to grant prosecutors immunity rested not on the common law that existed at the time of the act, but rather on the common law that evolved to provide prosecutors with absolute immunity from tort suits as the responsibility for prosecuting crimes shifted from private attorneys to public officials. *Id.* at 1503-04. Moreover, during oral argument in *Rehberg*, Justice Breyer, the author of *Van de Kamp*, expressed his skepticism about looking to the common law to determine an entitlement to absolute immunity. He interrupted counsel's argument invoking the common law with the statement "Suppose I don't accept that . . . . [E]xactly what happened in 1871 is not precisely always the convincing feature for me." Transcript of Oral Arg. at 16, Rehberg v. Paulk, 132 S. Ct. 1497 (2012) (No. 10-788).

Second, the structure of the *Van de Kamp* decision leaves the impression that the Court has eliminated the requirement that prosecutors bear the burden of demonstrating that they are entitled to absolute immunity.[137] While the Court's earlier decisions began with acknowledging the limits of absolute immunity, this decision begins with Learned Hand's famous quote: "'[i]t has been thought in the end better . . . to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'"[138] The Court then spent the next few pages reiterating the policy considerations enumerated in *Imbler.*[139] Noticeably absent from this discussion was any mention of the traditional concern of statutory construction: the purpose of the statute.[140] Also absent from this discussion was any acknowledgement of the changes in law and the empirical research that cast doubt on the basis for the *Imbler* decision. Instead, the Court boldly announced, "*every consideration* that *Imbler* mentions militates in favor of immunity."[141] This focus on the interests of the prosecutors appears to shift the burden to the § 1983 plaintiffs to justify removing the protections of absolute immunity from the prosecutor.

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137. Brink, *supra* note 5, at 6. The circuit courts, however, have largely continued to reiterate that the prosecutor bears the burden of justifying the claim of absolute immunity. *See, e.g.*, Adams v. Hanson, 656 F.3d 397, 401 (6th Cir. 2011); Ewing v. City of Stockton, 588 F.3d 1218, 1234 (9th Cir. 2009); Atherton v. D.C. Office of the Mayor, 567 F.3d 672, 683 (D.C. Cir. 2009).

138. *Van de Kamp*, 555 U.S. at 340 (quoting Gregory v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

139. *Id.* at 341-43. In particular, the Court concluded that *Imbler*'s concerns that prosecutors be protected from unfounded litigation that could "'cause a deflection of the prosecutor's energies from his public duties' and lead him to 'shade his decisions instead of exercising the independence of judgment required by his public trust'" were both present and serious. *Id.* at 341 (quoting *Imbler*, 424 U.S. at 423).

140. David Achtenburg examined the legislative history surrounding § 1983 and concluded that the 42nd Congress understood that "protection of individual rights was more than one desirable goal among many. It was a hierarchically superior purpose – a goal that government had a duty to achieve as completely as possible before other goals could be considered." Achtenberg, *supra* note 68, at 539. In light of this superior purpose, Achtenburg argues that the Court's balancing of the need to protect individual rights with the potential dangers of permitting liability is inconsistent with the basic structure of the statute. *Id.* at 549. In its decision in *Van de Kamp*, however, the Court went beyond the balancing of interests that Achtenburg and others have criticized. The Court completely ignored the purpose of the 42d Congress in adopting § 1983 and focused exclusively on the prosecutor's interests. *See Van de Kamp*, 555 U.S. at 340-44.

141. 555 U.S. at 346 (emphasis added).

Finally, the Court eliminated the line drawn by *Imbler* (and adhered to by the 1990s trilogy) between advocacy and administrative actions.[142] It stated that the fact that the actions were administrative in nature did not resolve the absolute immunity question.[143] Rather, the Court distinguished between two types of administrative decisions: administrative duties, such as employment and workplace safety, and administrative concerns that are "directly connected with the conduct of a trial."[144] The Court found that absolute immunity barred Goldstein's claim because "unlike with other claims related to administrative decisions, an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim."[145] In addition, the Court noted that the conduct involved "necessarily require[s] legal knowledge and the exercise of related discretion."[146] Thus, Goldstein could not sue the two supervising attorneys.[147]

It is difficult to square the Court's reasoning with the decisions from the 1990s.[148] *Van de Kamp* reasoned that Goldstein's claim against the district attorney was barred because the claim ultimately depended on a showing that

142. *See supra* notes 73-78 and accompanying text. This distinction was relied on by both the Ninth Circuit in the *Van de Kamp* case and by the Third Circuit in a similar case, *see* Carter v. City of Phila., 181 F.3d 339, 356 (3d Cir. 1999), as well as other lower court decisions. *See, e.g.*, Ireland v. Tunis, 113 F.3d 1435, 1446 (6th Cir. 1997); McSurely v. McClellan, 697 F.2d 309, 316 (D.C. Cir. 1982). However, the Supreme Court's analysis does reflect the approach taken by the Tenth Circuit in a decision issued prior to the Court's 1990s trilogy. Pfeiffer v. Hartford Fire Ins. Co., 929 F.2d 1484, 1490 (10th Cir. 1991) (explaining that "absolute immunity may attach even to such administrative or investigative activities 'when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court'") (citation omitted).

143. 555 U.S. at 344.

144. *Id.*

145. *Id.* Shortly after the *Van de Kamp* decision was issued, the Ninth Circuit relied on it to reject a defendant's challenge to the failure of the California Attorney General to develop a system to track appellate decisions that impact the validity of sentences being served by criminal defendants. Cousins v. Lockyer, 568 F.3d 1063, 1069 (9th Cir. 2009). The lower court explained that "supervising prosecutors retain absolute immunity regarding decisions to create information management systems where, as here, 'determining the criteria for inclusion or exclusion requires knowledge of the law,' and where, as here, the information is relevant only insofar as it relates to the prosecution of a particular case." *Id.* at 1069 (quoting *Van de Kamp*, 555 U.S. at 344).

146. *Van de Kamp*, 555 U.S. at 344.

147. *Id.*

148. In fact, several circuit courts relied on *Van de Kamp* in reversing district court's decisions that had relied on the 1990s trilogy to reject prosecutor claims of absolute immunity. *See* Fields v. Wharrie, 672 F.3d 505, 512-13 (7th Cir. 2012); Warney v. Monroe Cnty., 587 F.3d 113, 124-25 (2d Cir. 2009).

his rights were violated at trial.[149] Because Goldstein could not bring an action against the trial attorneys based on this conduct, the Court reasoned that the district attorney was also shielded by absolute immunity.[150] However, if the district attorney could not be held liable because this claim involved showing a *Giglio* violation in a particular trial,[151] one must question how a plaintiff could bring a claim against a prosecutor for fabricating evidence during the investigative phase.[152] Any claim regarding the fabrication of evidence also would involve showing the use of that evidence at trial. Yet, such a claim is precisely the claim that the Court in *Buckley* held was not entitled to absolute immunity.[153]

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149. *Van de Kamp*, 555 U.S. at 344.

150. *Id.* Professor Martin Schwartz has noted that Goldstein's claim was "a rather transparent attempt to circumvent prosecutorial immunity." Schwartz, *supra* note 125, at 258. This thought undoubtedly motivated the Court. However, in those circuits that permitted these actions, they had been limited by requiring a showing that the supervisor was aware of prior incidents that indicated the need for training. *E.g.*, Whitfield v. City of Phila., 587 F. Supp. 2d 657, 667 (E.D. Pa. 2008).

151. The Court in *Van de Kamp* found its answer in posing the hypothetical of whether a supervisor could be held liable in an individual case where the trial attorney violated his duties under *Giglio*. 555 U.S. at 345 Justice Breyer answered his own hypothetical by concluding that, given the fact that multiple prosecutors are frequently involved in the strategy of prosecution in a given case, holding a supervising attorney liable would not "alleviate *Imbler*'s basic fear, namely, that the threat of damages liability would affect the way in which prosecutors carried out their basic court-related tasks." *Id.*

152. Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 147-48 (2010).

153. Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993). In fact, the Court's approach in *Van de Kamp* bears more than a passing resemblance to the Seventh Circuit's analysis that was overruled by the Court in *Buckley* in 1993. In the Seventh Circuit's initial decisions, it concluded the prosecutor was entitled to absolute immunity because any injury from the prosecutor's actions occurred when the evidence was used against the defendant during the judicial process. Buckley v. Fitzsimmons, 919 F.2d 1230, 1241-44 (7th Cir. 1990); Buckley v. Fitzsimmons, 952 F.2d 965, 968 (7th Cir. 1992). In reversing this decision, the Supreme Court explicitly rejected the Seventh Circuit's focus on the location of the injury. 509 U.S. at 271-72. The Court concluded that such a focus was inconsistent with the Court's functional approach, which analyzed the nature of the conduct being attacked. *Id.* ("The location of injury . . . is irrelevant, however, to the question [of] whether the conduct of a prosecutor is protected by absolute immunity."). It is difficult to reconcile *Buckley*'s rejection of the location of the injury test with *Van de Kamp*'s concern about whether the § 1983 plaintiff's case will require a showing of error in a criminal proceeding.

The reasoning employed by *Van de Kamp* also appears to undermine the decision in *Burns* that the advice provided to the police by the prosecutor was not entitled to absolute immunity. The Court in *Van de Kamp* found it significant that the alleged misconduct related to actions that "necessarily require legal knowledge and the exercise of related discretion."

Van de Kamp illustrates a deep-rooted distrust of judges or juries second-guessing prosecutorial conduct. Traditional rules of statutory construction require the Court to give effect to the words and purpose of the statute that is being interpreted.[154] But in *Van de Kamp*, the Court makes no mention of the purposes of § 1983, and instead focuses exclusively on the need to protect the independence of prosecutorial decision-making. Even if there were legitimate reasons for continuing to adhere to some version of absolute immunity for prosecutors,[155] the Court's approach of lifting wholesale language from *Imbler* without acknowledging any of the changes in law or empirical research that has been done since 1976 undermines the legitimacy of its decision.

B. *The Costs of the Court's Current Approach*

The Court's approach to absolute immunity in *Van de Kamp* exacerbates the moral hazard problems created in the decision to grant prosecutors absolute immunity. Moral hazards occur when an individual's conduct is shielded from liability so that the individual does not bear the cost of her conduct.[156] As a result, the individual may take risks that she might otherwise avoid. Of course, any decision to provide an official with absolute immunity raises such moral hazard concerns. This problem is heightened, however, by the Court's willingness to embrace a broad reading of absolute immunity for prosecutors. Not only are trial prosecutors protected from liability for certain deliberate violations of a defendant's constitutional rights, but *Van de Kamp* relieved supervisors from the fear of liability for failing to provide oversight or training of subordinate attorneys.[157] The Court exacerbated moral hazard concerns with its decision in *Connick v. Thompson*[158] and its willingness in *Pottawattamie County v. McGhee*[159] to consider precluding suits even when absolute immunity does not apply.

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555 U.S. at 344. Of course, in *Burns*, the advice provided to the police was necessarily legal knowledge, and yet, that decision found the provision of legal advice to be actions entitled only to qualified immunity. 500 U.S. at 496. The Court thus seems to be shifting gears and moving towards the line drawn with respect to state judges in Forrester v. White, 484 U.S. 219, 229 (1988), in which the Court held that a judge was not entitled to absolute immunity in regards to an employment decision.

154. *E.g.*, Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997); Watt v. Alaska, 451 U.S. 259, 266-67 (1981).

155. *See infra* notes 214-223 and accompanying text.

156. *See* Baker, *supra* note 21, at 238.

157. *Van de Kamp*, 555 U.S. at 349.

158. 131 S. Ct. 1350 (2011).

159. 556 U.S. 1181 (2009).

1. Moral Hazard Concerns

Most prosecutors attempt to adhere to their constitutional and ethical responsibilities. Nonetheless, prosecutorial misconduct has caused numerous individuals to be wrongfully charged, and in some cases, wrongfully convicted.[160] When prosecutors abandon the ethical and constitutional rules governing their advocacy, the costs are high, both to the individuals who bear the brunt of the misconduct and to the integrity of the judicial system.[161] This misconduct breeds mistrust of the judicial process.[162] The misconduct also disserves the public interest because every time a person is wrongfully convicted, the real perpetrator remains on the street.[163] Consequently, much has been written about the need to provide some restraints on prosecutors.[164]

The Model Rules of Professional Conduct recognize that the prosecutor has the duty to see justice done as well as the duty to serve as an advocate.[165] In the oft-quoted words of Justice Jackson, a prosecutor is

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160. *See* Zacharias and Green, *supra* note 6, at 13-25; Moore, *supra* note 7, at 806-07; Davis, *supra* note 6, at 278-80; Yaroshefsky, *supra* note 7, at 278-83. Of course, not all wrongful convictions are attributable to prosecutorial misconduct. *See* Zacharias & Green, *supra* note 6, at 5-8.

161. *See* Ephraim Unell, *A Right Not to be Framed: Preserving Civil Liability of Prosecutors in the Face of Absolute Immunity*, 23 GEO. J. LEGAL ETHICS 955, 957-59 (2010). As Unell explains, the costs to the wronged individuals are "obvious, but there is [also] a less visible, yet significant deleterious, effect on society as a whole." *Id.* at 957. Societal costs include distrust of the judicial system and a diversion of resources to false prosecutions. *Id.* Moreover, a false prosecution, by definition, leaves the real perpetrator at large amongst the public. *Id.*

162. *See* Johns, *supra* note 4, at 123-25.

163. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 5 (Harvard Univ. Press 2011) (explaining that DNA evidence has not only assisted in exonerating persons wrongly convicted, DNA tests have also identified the real perpetrators).

164. *See* Zacharias & Green, *supra* note 6, at 13-25; Joy, *Shaping Remedies, supra* note 6, at 425-26; Moore, *supra* note 7, at 826-47; Yaroshefsky, *supra* note 7, at 297-99**.** In their recent article, Professors Zacharias and Green explored the possibility of interpreting the ethical rules governing prosecutorial conduct to require prosecutors to avoid the conviction of innocent individuals. Zacharias & Green, *supra* note 6, at 13-25. After exploring this thought experiment, the two concluded that "[a]lthough enforcement can be enhanced, discipline will never come close to playing the leading role in constraining prosecutorial misconduct that the Court assigns to it," and "[t]his may mean that the Court should rethink its prosecutorial immunity doctrines which it extended in the *Goldstein* case." *Id.* at 59.

165. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt.1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). Much has been

> the representative not of an ordinary party to a controversy . . . [his] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor . . . [b]ut, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[166]

Imbler embraced this understanding of the prosecutors as dispassionate individuals dedicated to the pursuit of justice.[167]

Imbler's view of prosecutors, however, ignores the substantial pressures that prosecutors face.[168] In most cases, the chief prosecutors for the state and local governments are elected officials.[169] During election campaigns, candidates frequently tout their conviction rates and promise to be "tough on crime."[170] Although assistant prosecutors are not elected, they also have a

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written on the inadequacies of these rules to address the fundamental problem of prosecutorial misconduct. *See supra* note 7.

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

167. *See Imbler*, 424 U.S. at 424-28.

168. Professor Joy attributes prosecutorial misconduct to "three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct . . . ." Joy, *supra* note 6, at 400. Joy goes on to note that "from a normative perspective, there are some societal pressures working against a prosecutor's duty to do justice." *Id.* at 405. Moreover, as one commentator has noted, in reality, the discretion that a prosecutor has may be limited by her position in the office, the type of crime charged, and the general tendency to submit close cases to the jury. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 385-88 (2001).

169. As Malia Brink recently noted, in forty-seven states, prosecutors are elected, and in the other three states, the attorney generals, who are elected, appoint the local prosecutors. Brink, *supra* note 5, at 13 (citing Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 589 (2009)).

170. Brink, *supra* note 5, at 13. Brink cites one recent election in a Michigan county in which both the incumbent and the challenger touted their desire to be tough on crime. *Id.* at 13-14. The incumbent promised: "My agenda is simple and direct: Be tough on crime." *Id.* at 13 (citing Lynn Turner, *Challenger Thomas D. Swisher Takes on Cass Prosecutor Victor A. Fitz*, KALAMAZOO GAZETTER, July 18, 2008, *available at* http://blog.mlive.com /kalamazoo_gazette_extra/2008/07/challenger_thomas_d_swisher_ta.html.) And the challenger expressed his concern that "[r]ight now there should be more focus on habitual criminals that are preying on the community." Brink, *supra* note 5, at 14. *See also* Joy, *Shaping Remedies*, *supra* note 6, at 405 (noting that elected prosecutors are accountable to the public and that "public support for the rights of the accused are not clear").

vested interest in high conviction rates.[171] Conviction rates serve as a tool to evaluate prosecutors, and trial prosecutors may use their rates of convictions to obtain both promotions within and positions outside of the office.[172] Moreover, the twenty-four hour news cycle, and the attention paid to crimes by both local and national media, increase the pressure on prosecutors both to bring charges and to secure convictions.[173]

Prosecutors not only have substantial external factors encouraging risk-taking to obtain convictions, their very mindsets may encourage them to take risks as well. Additionally, prosecutors generally believe that those whom they are prosecuting are guilty.[174] Almost invariably, prosecutors work closely with police officers on a daily basis, and they are therefore likely to believe that those police officers correctly identified the wrongdoer.[175] Finally, because prosecutors rely on police to obtain convictions, it may not be in prosecutors' professional interest to question police officers' versions of the events.[176]

Moreover, the way in which the Court has defined defendants' rights creates tensions between a prosecutor's desire to obtain convictions and her professional duties.[177] For example, *Brady requires* prosecutors to review the

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171. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134-35 (2004) [hereinafter *The Zeal Deal*]. In fact, as Professor Joy has noted, as the institution of the public prosecutor developed, "prosecutors also experienced public expectations that a good prosecutor was one who garnered high conviction rates." Joy, *Shaping Remedies*, *supra* note 6, at 410.

172. *See* Medwed, *The Zeal Deal*, *supra* note 171, at 134-35 (explaining that conviction rates "may provide a quantifiable method for superiors in the office to measure that prosecutor's success" and that "[p]rosecutors with the highest conviction rates (and, thus, reputations as the best performers) stand the greatest chance for advancement internally").

173. Brink, *supra* note 5, at 11-12.

174. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 327-31 (2006); Medwed, *The Zeal Deal*, *supra* note 171, at 138-40.

175. As Daniel Medwed has pointed out, because prosecutors work so closely with police officers, they "may begin to trust or at least defer to the detectives' judgment in the investigative aspects of the matter," and there may develop a "mutual orientation toward 'getting the bad guys.'" Medwed, *The Zeal Deal*, *supra* note 171, at 141. Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 315 (2001) ("Prosecutors and police feed on each other's desire to 'win' the case.").

176. Smith, *supra* note 168, at 392; *see* Chemerinsky, *supra* note 175, at 305 ("For obvious reasons, prosecutors are reluctant to alienate the very officers that they must work with and rely on in their cases."); *see id.* at 310-13.

177. *See* United States v. Bagley, 473 U.S. 667, 696-97 (1985) (Marshall, J., dissenting) ("[T]he prosecutor must abandon his role as an advocate and pore through his

government's files and turn over to the defense any material, exculpatory information.[178] But, this basic responsibility contradicts both the mindset of prosecutors and the prosecutors' role as an advocate.[179] Given the pressures faced by prosecutors, they may deliberately take a risk that either the evidence will never be uncovered or that a reviewing court will conclude that it is not material.[180] In addition, prosecutors simply may not recognize the information as exculpatory or they may dismiss the evidence as not material.[181] Indeed, prosecutors' bias may lead them to ignore or dismiss evidence in files that is exculpatory for a defendant.[182] In short, it should not be surprising that *Brady* violations are one of the major causes of wrongful convictions.[183]

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files, as objectively as possible, to identify the material that could undermine his case."). Bennett Gershman recently examined this problem in his article *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685 (2006) [hereinafter *Reflections*]. Under the materiality standard, appellate courts will not overturn a conviction on *Brady* grounds unless it concludes that "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. This standard, Gershman argues, encourages prosecutors to "play the odds" in favor of withholding evidence in the hope that the information will be found to be immaterial. Gershman, *Reflections*, *supra* note 177, at 715-19. *See* Smith, *supra* note 168, at 375-76.

178. *Bagley*, 473 U.S. at 675-76.

179. Gershman, *Bad Faith Exception*, *supra* note 8, at 6-7. Barry Scheck recently attributed *Brady* violations to three main causes: (1) the exculpatory information was not known to the prosecutor because the police failed to provide it to the prosecutor; (2) the prosecutor had the material in her files, but did not recognize it as exculpatory; and (3) the prosecutor did not turn over what she recognized as most likely *Brady* information "out of fear" of the consequences of disclosure. *See* Scheck, *supra* note 13, at 2227. As Scheck explained, the prosecutor could fear the following as a result of disclosure: (1) reprimand for late disclosure from a judge or supervisor, (2) fear of losing the case, (3) fear of getting the police in trouble, (4) fear of demotion, and (5) fear that a guilty defendant will be let free. *Id.* at 2236-37. At this point, what that prosecutor does not have to fear is that a failure to disclose may result in personal liability to the victim.

180. Gershman, *Reflections*, *supra* note 177, at 715-16.

181. Gershman, *Bad Faith Exception*, *supra* note 8, at 8-10.

182. Findley & Scott, *supra* note 174, at 296-307; Alafair S. Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1609-12 (2006). Moreover, as Professor Yaroshefsky has explained, there are some "true believers" in prosecutors' offices who believe that all defendants are guilty and that "the ends justify the means." Yarokshefsky, *supra* note 7, at 294. Because of these deeply-held convictions, these true believers "may engage in a skewed analysis of the facts and risk assessment." *Id.*; *see also* Gershman, *Bad Faith Exception*, *supra* note 8, at 8-10.

183. *See* Gershman, *Reflections*, *supra* note 177, at 686 n.8 (reviewing studies); Davis, *supra* note 6, at 277-80 (detailing studies showing that prosecutorial misconduct, and in particular, violations of *Brady*, are a pervasive problem).

Because absolute immunity provides a shield for prosecutors from the costs of their misconduct, prosecutors may take risks they might otherwise avoid, which is the very definition of a moral hazard.[184] These risks could be tempered by either the possibility of ethical or criminal proceedings or more oversight by supervisors within the prosecutors' offices. Yet, prosecutors rarely face ethical or criminal proceedings when they deliberately violate the rights of defendants,[185] and *Van de Kamp* removed an incentive for supervisors to provide oversight of, or training for, subordinate attorneys.

2. Exacerbating the Moral Hazard Problem

Our judicial system relies on private lawsuits to keep government conduct in check.[186] As David Rudovsky has written, "[r]edress for constitutionally based deprivations is of substantial importance if we expect that government will act within the bounds of the Constitution."[187] Providing officials with immunity, which cuts against this general approach, is based on a determination that other societal interests justify shielding officials from liability.[188] The shield provided to prosecutors in *Van de Kamp* raises

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184. *See* Baker, *supra* note 21, at 238. As Professor Yaroshefsky has written, this problem recognizes, "the human tendency to push margins when there are no sufficiently demanding external controls . . . ." Yaroshefsky, *supra* note 7, at 294. At the same time, as Justice White pointed out in *Imbler*, the result of holding prosecutors liable for *Brady* violations could be "induc[ing] [the prosecutors] to disclose more than is required. But, this will hardly injure the judicial process." *Imbler*, 424 U.S. at 443 (White, J., concurring). Rather, such disclosure will assist in the truth-seeking function of the justice system. *Id.*

185. *See supra* notes 118-126 and accompanying text. In one recent case, the Justice Department did file criminal charges against a former assistant United States Attorney for his suppression of evidence in a criminal action. *See* Koubriti v. Convertino, 593 F.3d 459, 464 (6th Cir. 2010). The prosecutor was acquitted on all counts, and the Michigan Attorney Grievance Commission did not bring any disciplinary charges. *Id.* The original defendant then brought an action against the prosecutor, but the Sixth Circuit ruled that the prosecutor was protected by absolute immunity. *Id.* at 472. Federal prosecutors have also faced discipline for failing to disclose exculpatory materials in the prosecution of Sen. Ted Stevens. See Charlie Savage, *Prosecutors Face Penalty in '08 Trial of a Senator*, N.Y. Times, May 12, 2012, *available at* www.nytimes.com/2010/11/04/us/politics/2-prosecutors-in-case-of -senator-ted-stevens-are-suspended.html (last visited Jan. 18, 2013). As with the Duke lacrosse players, Sen. Ted Stevens had the financial ability to challenge the government's conduct.

186. Monroe v. Pape, 365 U.S. 167, 172 (1961) *overruled in part on other grounds*, Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 695-701 (1978).

187. David Rudovsky, *supra* note 23, at 1202.

188. *See* Kit Kinports, Iqbal *and Constitutional Torts*, 114 PENN. ST. L. REV. 1291, 1292 (2010) (noting that "[i]n determining the reach of constitutional tort liability, the

significant concerns that prosecutors may, at a minimum, not be as concerned with their obligations toward the defendant and the criminal justice system as they ought to be.[189]

One response to these moral hazard concerns would be to encourage oversight of prosecutors' offices through the imposition of municipal liability. Given the fact that immunity is granted to prosecutors, not to benefit the prosecutors, but to protect the public's interest in effective prosecutions, placing the responsibility for non-compliance on the public through governmental liability would appear to be reasonable.[190] Yet, the Court in *Connick* appears to have rejected this approach. In a 5-4 decision, the Court rejected the attempt to hold a municipality liable for a prosecutor's violation of *Brady* on a failure-to-train theory.[191] The majority concluded that the district attorney's office could not be held liable for failing to train its assistant prosecutors on their *Brady* obligations and reversed the $14 million jury verdict John Thompson had received.[192]

Justice Ginsburg's dissent disagreed with the majority's evaluation of the evidence supporting the jury verdict.[193] More importantly, the dissent focused on the consequences of the majority's approach and argued that "[a] *Brady* violation, by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out. Because the absence of the withheld evidence may result

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Supreme Court has traditionally balanced the goals of deterring constitutional misconduct and compensating those whose rights have been violated against the governmental interest in ensuring that public officials are not unduly inhibited in the performance of their duties"); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisor Liability after* Iqbal, 14 LEWIS & CLARK L. REV. 279, 286 (2010) (explaining that the "primary policy concern" with respect to immunity "is that the functions performed are so very important that we do not want this defendant . . . to be worried about the possibility of being sued rather than focusing on making the difficult decisions that he or she is supposed to make").

189. *See* Peter A. Joy & Kevin C. Munigal, *Do Two Wrongs Protect a Prosecutor?*, 25 SPG CRIM. JUST. 23, 24 (2010) (noting that prosecutorial immunity "undermines specific and general deterrence of prosecutorial wrongdoing").

190. *See generally Buckley*, 919 F.2d at 1234 ("We must decide how far immunity doctrines extend in a world in which the most logical option, governmental liability, may well be foreclosed by *Monell v. Department of Social Services"*).

191. Connick v. Thompson, 131 S. Ct. 1350, 1366 (2011). Municipalities may only be held liable under § 1983 if the government itself is responsible for the misconduct. *Monell*, 436 U.S. at 691-94. This responsibility is generally shown through a policy or custom. Okla. City v. Tuttle, 471 U.S. 808, 818 (1985). However, a failure to train officials can form a basis of liability where that failure is shown to amount to a "deliberate indifference" to the rights of citizens. City of Canton v. Harris, 489 U.S. 378, 388 (1989).

192. *Connick*, 131 S. Ct. at 1363-64, 1366.

193. *Id.* at 1370-75 (Ginsburg, J., dissenting).

in the conviction of an innocent defendant, it is unconscionable not to impose reasonable controls impelling prosecutors to bring the information to light."[194] In short, the dissent was concerned about the moral hazard risks created by the majority's approach.

This lack of reasonable controls on prosecutors was also at issue in *McGhee v. Pottawattamie County*.[195] In that case, the Eighth Circuit had permitted Curtis McGhee and Terry Harrington to sue the county prosecutor for fabricating evidence prior to their arrest.[196] The Court agreed to determine whether allegations of fabricating evidence stated a cause of action.[197] This is precisely the claim that the Court in *Buckley* held was not shielded by absolute immunity.[198]

Pottawattamie County settled after oral argument.[199] Yet, the willingness of the Court even to grant *certiorari* to review the circuit court's decision permitting an action to proceed is troublesome.[200] A decision in the prosecutor's favor would have rendered *Buckley* meaningless, a result that

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194. *Id.* at 1385 (Ginsburg, J., dissenting). Ginsburg's concerns about *Brady* violations going undetected reflect the argument made by Justice White in *Imbler* to distinguish *Brady* from other decisions. *Imbler*, 424 U.S. at 440-44 (White, J., concurring in judgment).

195. Pottawattamie Cnty. v. McGhee, 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009), *cert. dismissed*, 130 S. Ct. 1047 (2010).

196. *Id.* at 933.

197. *Id.*

198. On remand to the Seventh Circuit, however, that court concluded that such a claim could not proceed because in the absence of the introduction of fabricated evidence at trial, there is no constitutional violation. Buckley v. Fitzsimmons, 20 F.3d 789, 800 (7th Cir. 1994). By contrast, the Second Circuit permitted such a claim to proceed on the ground that the deprivation of liberty as a result of the fabrication was reasonably foreseeable. Zahrey v. Coffey, 221 F.3d 342, 357 (2d Cir. 2000). For a thorough discussion of this circuit split, see Veronica Zhang, Comment, *Throwing the Defendant into the Snake Pit: Applying a State-Created Danger Analysis to Prosecutorial Fabrication of Evidence*, 91 B.U. L. REV. 2131, 2144-49 (2011).

199. See Scheck, *The Need for Integrity Programs*, *supra* note 13, at 2220 (citing Lee Rood, *$12 Million Wrongful Conviction Settlement is Hailed*, DES MOINES REGISTER, Jan. 5, 2010, at A1, *available at* 2010 WLNR 854334).

200. *Id.* The Supreme Court historically reverses around seventy percent of the cases it grants certiorari on each year. *See* Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals* 2010 at 1, 5, *available at* http://www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJan2010_Hofer.authcheckdam.pdf. Thus, when certiorari was granted to review the Eighth Circuit's decision to permit the lawsuit to proceed, it appeared possible that the Court could limit the ability of plaintiffs to hold prosecutors responsible for actions that were investigatory in nature. *See* Scheck, *The Need for Integrity Programs*, *supra* note 13, at 220.

clearly concerned at least one member of the Court during the *Pottawattamie County* oral arguments.[201] Moreover, ruling in the prosecutors' favor with respect to this issue would have led to one of two disquieting results. First, prosecutors would not be liable for fabricating evidence, even though police officers engaged in the same activity could be liable. Second, no one would face liability because fabrication of evidence does not violate the Constitution. The first possibility would contradict the Court's insistence that it is the nature of the conduct, as opposed to the position of the official, which determines the entitlement to absolute immunity.[202] The second possibility would raise moral hazard concerns to an alarming level and would fly in the face of due process notions.

The Court has recognized that "[t]he touchstone of due process is protection of the individual against arbitrary action of government."[203] When an official acts in a manner that shocks the conscience, that official conduct "can properly be characterized as arbitrary, or conscience shocking, in a

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201. *See* Transcript of Oral Arg. at 3, Pottawattamie Cnty. v. McGhee, 547 F. 3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009) (No. 08-1065), *cert. dismissed*, 130 S. Ct. 1047 (2010) (Kennedy, J.) ("[Y]our case here is a polite way of telling us we wasted our time in Buckley v. Fitzsimmons."). As noted above, the manner in which *Van de Kamp* dismissed the plaintiff's claim cast doubt on the continued viability of *Buckley* and *Burns*. *See supra* notes 147-51 and accompanying text. The apparent displeasure of at least some members of the Court with reading *Van de Kamp* as rejecting the prior decisions gives some pause to taking the language of *Van de Kamp* literally.

202. In addition, such a ruling would exacerbate one issue recently highlighted by Professors Zacharias and Green: the incentives for wrongfully charged and/or convicted defendants to shift blame from the prosecutors to other actors who may be held liable. Zacharias & Green, *supra* note 6, at 11. As the two authors explain, this incentive to sue others prevents the development of alternative means to discipline prosecutors because the prosecutors' role is less likely to be exposed or at least downplayed to emphasize the liability of those not protected by absolute immunity. *Id.* Moreover, as Professor Rosenthal recently pointed out, a number of courts permit the wronged defendant to sue police under the theory of malicious prosecution, and yet, because the decision to charge is made by the prosecutor, such a claim against others appears to be an "oxymoron." Rosenthal, *supra* note 152, at 137. Yet, the Seventh Circuit recently issued a decision that appeared to accept different treatment for prosecutors and police officers for the same conduct. *See* Fields v. Wharrie, 672 F.3d 505, 514 (7th Cir. 2012) ("We recognize that this analysis allows for police officers to potentially incur financial liability where a prosecutor may not, even though the prosecutor and the police officers may both fabricate or suppress evidence."). And, the Sixth Circuit recently explained that "the fact that prosecutors often engage in work that resembles traditional police activities does not remove such acts from the protections of absolute immunity if they were done during the course of preparing for trial." Howell v. Sanders, 668 F.3d 344, 352 (6th Cir. 2012).

203. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).

constitutional sense.'"[204] Lower courts have interpreted this understanding of due process to permit claims when the police deliberately framed a defendant or planted evidence against that defendant.[205] To hold, as the prosecutors urged in *Pottawattamie County*, that there is no constitutional "right not to be framed" runs contrary to a common sense understanding of the right to a fair trial.[206] Indeed, a deliberate decision by a government official to frame an individual seems precisely the type of arbitrary and capricious action that should "shock the conscience" of any court.[207]

The Court was required to address the situations in both *Pottawattamie County* and *Connick* because it continued to adhere to *Imbler*. When the Court heard *Van de Kamp*, a number of amici filed briefs urged the Court to reconsider its 1976 ruling.[208] Yet, the nine Justices signed a unanimous opinion expanding the protections provided to prosecutors based on the *Imbler* decision.[209]

C. *The Lesser of Evils Approach*

The only indication that the Court considered the arguments against *Imbler* is Justice Breyer's comment that "[i]mmunity does not exist to help prosecutors

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204. *Id.* at 846-47 (quoting Collins v. Harker Heights, 503 U.S. 115, 128 (1992)).

205. *See* Good v. Curtis, 601 F.3d 393, 401 (5th Cir. 2010); Moldowan v. City of Warren, 578 F.3d 351, 405 (6th Cir. 2009); Wilkins v. DeReyes, 528 F.3d 790, 805 (10th Cir. 2008); Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003) (en banc); Riley v. City of Montgomery, 104 F.3d 1247 (11th Cir. 1997). As the Sixth Circuit recently explained, if there is no possibility of bringing a *Brady*-based claim against police officers, "then the state could sidestep its constitutionally-mandated disclosure obligations by maintaining an unstated, but nevertheless pervasive, wall of separation between the prosecutor's office and the police with regard to the existence of potentially exculpatory evidence." *Moldowan*, 578 F.3d at 377.

206. *See* Reply Brief of Petitioner at 9-10, *Pottawattamie Cnty.* 547 F. 3d 922, *cert. granted*, 129 S. Ct. 2002 (2009) (No. 08-1065), *cert. dismissed*, 130 S. Ct. 1047 (2010).

207. Lawrence Rosenthal recently questioned the conclusion that the use of false evidence should be considered a due process violation. Rosenthal, *supra* note 152, at 145-46. Rosenthal noted that the due process clause simply requires a fair trial, not a trial free of false evidence. *Id.* At the same time, he acknowledged that the deliberate fabrication of evidence could be seen as shocking the conscience. *Id.* at 146.

208. *See* Brief of the Constitutional Accountability Center as Amicus Curiae Supporting Respondent, Van De Kamp v. Goldstein, 555 U.S. 335 (2009) (No. 07-854) (arguing in support of overruling *Imbler*); Brief Amici Curiae of Law Professors in Support of Respondent, Van De Kamp v. Goldstein, 555 U.S. 335 (2009) (No. 07-854) (same); Brief of the Innocence Network and the Innocence Project as of Amici Curiae in Support of Respondent, Van De Kamp v. Goldstein, 555 U.S. 335 (2009) (No. 07-854).

209. *Van de Kamp*, 555 U.S. at 340-44.

in the easy case; it exists because the easy cases bring difficult cases in their wake."[210] One explanation for the unwillingness of the Court to revisit *Imbler* is that it viewed the suggested alternatives as more problematic than the current regime. Critics of *Imbler* have generally suggested two different approaches: create a limited exception that permits suits for the deliberate withholding of exculpatory information,[211] or replace the grant of absolute immunity with qualified immunity.[212] The Court's continued adherence to *Imbler* suggests that these suggestions fail to adequately take into account the Court's underlying concerns with limiting prosecutor's potential exposure to litigation.

1. Evaluating a *Brady* Exception

In his *Imbler* concurrence, Justice White argued that absolute immunity should not shield claims that prosecutors withheld exculpatory information from the defendant.[213] Several commentators have expanded on White's argument and proposed that prosecutors lose the claim to absolute immunity when there is evidence of deliberate *Brady* violations.[214] As Professor Gershman argues, adopting such an exception addresses the twin problems of "the widespread occurrences of *Brady* violations and the lack of effective sanctions to deter such misconduct."[215]

Developing a limited exception for deliberate *Brady* violations would focus on an area of prosecutorial misconduct that causes a number of wrongful convictions. At the same time, as the majority in *Imbler* pointed out, it is difficult to distinguish a *Brady* violation from other claims, such as the

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210. *Id*. at 349.

211. Gershman, *Bad Faith Exception*, *supra* note 8; at 3, 42; Weeks, *supra* note 8, at 933-34.

212. Johns, *supra* note 4, at 107; McNamara, *supra* note 8, at 1137.

213. 424 U.S. at 432, 442-43 (White, J., concurring). White argued that the public interest supporting absolute immunity do not apply to these claims:

> The absolute immunity extended to prosecutors . . . is designed to encourage them to bring information to the court which will resolve the criminal case . . . It would stand this immunity rule on its head, however, to apply it to a suit based on a claim that the prosecutor unconstitutionally *withheld* information from the court. Immunity from a suit based upon a claim that the prosecutor suppressed or withheld evidence would *discourage* precisely the disclosure of evidence sought to be encouraged by the rule granting prosecutors immunity from defamation suits.

Id.

214. Gershman, *Bad Faith Exception*, *supra* note 8, at 38-46; Weeks, *supra* note 8, at 854-55.

215. Gershman, *Bad Faith Exception*, *supra* note 8, at 38.

knowing use of false evidence.[216] Both types of conduct violate the defendant's constitutional rights and the rules of professional ethics. Moreover, as the *Imbler* Court concluded, most claims against prosecutors could simply be pled as *Brady* violations.[217] In addition, because *Brady*'s materiality standard implies that a conviction occurred,[218] a *Brady* exception would preclude those who were not convicted from bringing an action. It is difficult to justify excluding these individuals from bringing an action against a prosecutor who deliberately violates the constitutional and ethical rules. In fact, neither plaintiffs in *Buckley* and *Burns* were ever convicted.[219] Yet, both suffered significant harm as a result of the alleged prosecutorial misconduct.[220] A rule that permitted only those actually convicted of a crime to sue the prosecutors does not reflect the real harm that can be done by subjecting someone to criminal proceedings. Thus, the Court likely sees creating a *Brady* exception as problematic.

2. Evaluating Reliance on Qualified Immunity

Justice Breyer's language about "difficult cases" may be an oblique reference to the calls to limit prosecutors to qualified immunity—the same immunity provided to other executive officials. There are likely two reasons for the failure of these appeals to work: the Court's historical narrative identifying the prosecutor with the other participants in the judicial system, and the Court's fear that prosecutors will become inundated with lawsuits from "winners" in the criminal justice system.[221] Unless these concerns are

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216. *Imbler*, 424 U.S. at 431 n.34.

217. *Id.*

218. *Brady* only requires the prosecution to disclose evidence that is both exculpatory and material. Under United States v. Bagley, 473 U.S. 667, 682 (1985) (Blackmun, J., alternative holding), evidence is only considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." As the Court recently explained, "[a] reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" Smith v. Cain, 132 S. Ct. 627, 630 (2012) (alteration in original) (citations omitted).

219. *Buckley*, 509 U.S. at 261, 264; *Burns*, 500 U.S. at 483.

220. *Buckley*, 509 U.S. at 261; *Burns*, 500 U.S. at 482 n.1.

221. As the Supreme Court explained in Mitchell v. Forsyth, "[t]he judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser." 472 U.S. 511, 521 (1985); *see id.* at 521 (explaining that the loser has an incentive to "pin the blame on judges, prosecutors, or witnesses"); Forrester v. White, 484 U.S. 219, 226 (1988) ("[T]he nature of the adjudicative function requires a judge frequently

addressed, the Court is likely to see no other choice than to remain with the imperfect world of *Imbler.*

The theoretical and practical functions served by these various players differ sufficiently to justify differing approaches to the question of immunity. The judicial system assumes that both judges and jurors are impartial and disinterested in the outcome of a particular proceeding.[222] By contrast, although prosecutors are bound by ethical rules designed to ensure that justice is done,[223] prosecutors are not impartial—they are expected to advocate for the state.[224] Identifying prosecutors with judges and jurors ignores this important difference.[225] Moreover, witnesses are subject to cross-examination, giving the defense the opportunity to reveal any witness bias.[226] Obviously, prosecutors are not subject to cross-examination. More importantly, as Justice White pointed out in *Imbler,* prosecutorial misconduct, such as withholding

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to disappoint some of the most intense and ungovernable desires that people can have. [T]his is the principal characteristic that adjudication has in common with legislation and with criminal prosecution, which are the two other areas in which absolute immunity has most generously been provided.").

222. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."); Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'") (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

223. MODEL RULES OF PROF'L CONDUCT R. 3.8.

224. Zacharias & Green, *supra* note 6, at 29-30 (noting the fact that prosecutors serve multiple, potentially conflicting objectives). As a practical matter, the external and internal factors that prosecutors face dampen their zealous pursuit of justice. *See supra* notes 1168-183 and accompanying text.

225. Of course, many state judges also are elected. The recent removal of three Iowa Supreme Court justices who concluded that the state ban on same-sex marriage violated the Iowa constitution's equal protection clause stands as a reminder that judges may be removed for unpopular decisions. *See* A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 3, 2010, *available at* www.nytimes.com/2010/11/04/us /politics/04judges.html (last visited Nov. 10, 2012). In addition, any decision by a judge is reviewable by higher state courts and the United States Supreme Court. A decision by a prosecutor to not provide the defense with evidence is more difficult to uncover and hence police. Gershman, *Bad Faith Exception*, *supra* note 8, at 11-12.

226. Briscoe v. LaHue, 460 U.S. 325, 333-34 (1983) ("[T]he truth-finding process is better served if the witness' testimony is submitted to 'the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.'") (quoting *Imbler*, 424 US at 440) (White, J., concurring in the judgment).

exculpatory evidence, is by definition difficult to correct through the criminal proceeding because the evidence is hidden from the defense.[227]

Not only does the Court's identification of prosecutors with judges and jurors make it resistant to changing its doctrine, but the Court is concerned with the specter of prosecutors being inundated by lawsuits from those who are successful in defeating criminal charges.[228] Amici in *Van de Kamp* attempted to address the Court's concerns that prosecutors could be inundated with claims by noting that the decision in *Heck v. Humphrey* limited the ability of state prisoners to sue under §1983.[229] However, there is no comparable protection when the suspect or defendant is not convicted. Our system of justice accepts the fact that some individuals will suffer in the criminal justice process before emerging victorious.[230] In fact, the difference between the standard for bringing charges (probable cause) and the standard for conviction (reasonable doubt) presupposes that some who are charged and suffer these consequences will ultimately not be convicted—and may well be innocent.[231] In such situations, criminal suspects could still suffer significant losses, and they could certainly wish to blame the public face of the criminal proceeding—the prosecutor—for these losses.[232]

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227. *See Imbler*, 424 U.S. at 443-44; Connick v. Thompson, 131 S. Ct. 1350, 1385 (2011) (Ginsburg, J., dissenting). As Professor Yaroshefsky points out, because the prosecutor is likely to believe that the defendant is actually guilty, she is less likely to recognize evidence in her file as being either exculpatory or material. Yaroshefsky, *supra* note 7, at 294-95. This problem has been noted by others as well. *See* Gershman, *Bad Faith Exception*, *supra* note 8, at 7-8; Weeks, *supra* note 8, at 834.

228. *See Van de Kamp*, 555 U.S. at 341; Mitchell v. Forsyth, 472 U.S. 511, 521 (1985); *Imbler*, 424 U.S. at 422-23.

229. 512 U.S. 477 (1994). *See* Brief of the Constitutional Accountability Center as Amici Curiae Supporting Respondent, *Van De Kamp*, 555 U.S. 335 (2009) (No. 07-854); Brief Amici Curiae of Law Professors in Support of Respondent, *Van De Kamp*, 555 U.S. 335 (2009) (No. 07-854); Brief of Amici Curiae the National Association of Criminal Defense Lawyers, the Cato Institute, and the American Civil Liberties Union in Support of Respondents, Pottawattamie Cnty. v. McGhee, 547 F. 3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009) (No. 08-1065), *cert. dismissed*, 130 S. Ct. 1047 (2010).

230. *See* Flagler v. Trainor, 663 F.3d 543, 547 (2d Cir. 2011) (noting that "while absolute prosecutorial immunity may leave an injured party without a remedy, society has found more benefit in insulating the exercise of prosecutorial discretion.").

231. Buckley v. Fitzsimmons, 919 F.2d 1230, 1233 (1990), *vacated by In re* J.S., 502 U.S. 802 (1991).

232. For example, in both *Buckley* and *Burns*, the criminal prosecutions ended without convictions. *Buckley*, 509 U.S. at 264; *Burns*, 500 U.S. at 483. Yet, the criminal suspects, turned plaintiffs, suffered significant losses. Buckley was imprisoned for three years. *Buckley*, 509 U.S. at 261-64. Burns was not only placed in a psychiatric hospital, she temporarily lost custody of her children. *Burns*, 500 U.S. at 482 n.1.

It is these potential plaintiffs, incentivized to blame someone for the criminal prosecution, who likely are the real source of the Court's concerns.[233] Even with the significant changes in qualified immunity doctrine,[234] the Court is simply unwilling to treat prosecutors like other government officials. Suggesting that the Court do so ignores the fact that there is still a fair amount of litigation involving officials' claims to qualified immunity.[235] Permitting actions against prosecutors would involve prosecutors in this type of litigation. The Court seems unwilling to allow this without some assurance that courts can control prosecutors' exposure to litigation.[236] Thus, in order to alleviate the Court's concerns, the prosecutors' possible exposure to lawsuits needs to be limited by more than the qualified immunity standard. In short, there must be a limit on the potential plaintiff class.

III. A COMPROMISE POSITION: LIMITING THE POTENTIAL PLAINTIFF CLASS

The unwillingness of the Court to reconsider *Imbler* is based on an "all or nothing" approach: either prosecutors have absolute immunity, or they will face the possibility of baseless suits from anyone who is aggrieved by a prosecutor's decision to initiate a criminal proceeding. The enhanced protections provided by qualified immunity did not persuade the *Van de Kamp* Court that prosecutors had sufficient protection against the threat of vexatious lawsuits. At the same time, maintaining the status quo ignores the purpose of § 1983 in providing relief for those who are victims of governmental abuses of power, as

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233. As Chief Justice Roberts stated during the *Pottawattamie County* arguments, "what if there's an acquittal? Then you have at least a jury not believing the evidence, and that also is strong support for at least supporting an allegation [of fabrication against a prosecutor]." Transcript of Oral Arg. at 30, *Pottawattamie Cnty.*, 547 F. 3d 922, *cert. granted*, 129 S. Ct. 2002 (2009) (No. 08-1065), *cert. dismissed*, 130 S. Ct. 1047 (2010).

234. By 2009, qualified immunity offered far more protection to government officials than was provided when *Imbler* was decided. *See supra* notes 116-22 and accompanying text; Johns, *supra* note 4, at 54-57; McNamara, *supra* note 8, at 1189-95. A few months after *Van de Kamp* was decided, the Court enhanced those protections in Ashcroft v. Iqbal, 556 U.S. 662 (2009).

235. Indeed, there have been a number of studies on the impact of *Iqbal* in the lower courts. *See, e.g.*, Colleen McNamara, Iqbal *as Judicial Rorschack Test: An Empirical Study of District Court Interpretations of* Ashcroft v. Iqbal, 105 NW. U. L. REV. 401, 420-21 (2011); Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 584-85 (2010). One interpretation of these studies is that there is still litigation against officials, even if those suits are dismissed.

236. *See* Transcript of Oral Arg. at 28-30, Pottawattamie Cnty. v. McGhee, 547 F. 3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2009 (2009) (No. 08-1065), *cert. dismissed*, 130 S. Ct/ 1047 (2010).

well as the moral hazard concerns raised by shielding most prosecutorial conduct from any potential liability. A middle ground could be reached by limiting the class of potential plaintiffs who are entitled to bring actions against prosecutors. Plaintiffs would be required to make a showing of actual innocence before they could pursue a § 1983 claim against a prosecutor. Once such a showing is made, the prosecutor would lose the protection of absolute immunity, but would still retain the protections of qualified immunity. This proposal could bring a more appropriate balance to the need to provide innocent victims with redress, while protecting prosecutors from a multitude of meritless claims.

A. *The Actual Innocence Requirement*

Our judicial system generally enforces professional standards through malpractice actions brought by clients against their former attorneys. Notwithstanding this reliance on private actions, the vast majority of jurisdictions have adopted higher standards for malpractice actions involving criminal defendants suing their attorneys than for claims by other types of clients.[237] In actions involving a criminal defendant, most states require the client to produce evidence of actual innocence before he or she can maintain a malpractice action against defense counsel.[238]

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237. As a general rule, in order to recover for legal malpractice, a plaintiff must show: (1) the attorney owed a duty to the plaintiff, (2) the attorney breached that duty, (3) the breach was the proximate cause of the plaintiff's injuries, and (4) damages occurred. *See, e.g.*, Rodriguez v. Nielsen, 650 N.W.2d 237, 240 (Neb. 2002); Mahoney v. Shaheen, Cappiello, Stein & Gordon, 727 A.2d 996, 998 (N.H. 1999); Wiley v. Cnty. of San Diego, 966 P.2d 983, 985 (Cal. 1998); Peeler v. Hughes & Luce, 909 S.W.2d 494, 496 (Tex. 1995).

238. *See* Humpries v. Detch, 712 S.E.2d 795, 801 (W. Va. 2011); Herrera-Corral v. Hyman, 948 N.E.2d 242, 244 (Ill. Ct. App. 2011); Kuehne v. Hogan, 321 S.W.3d 337, 342 (Mo. Ct. App. 2010); Correia v. Fagan, 891 N.E.2d 227, 233 (Mass. 2008); Ang v. Martin, 114 P.3d 637, 641 (Wash. 2005) (en banc); Hicks v. Nunnery, 643 N.W.2d 809, 824 (Wis. Ct. App. 2002); Rodriguez v. Nielsen, 609 N.W.2d 368, 374 (Neb. 2000); Mahoney v. Shaheen, Cappiello, Stein & Gordon, 727 A.2d 996, 998-99 (N.H. 1999); Backer v. Kentucky Bar Ass'n., 952 S.W.2d 220, 224 (Ky. 1997); Wiley v. County of San Diego, 966 P.2d 983, 985 (Cal. 1998); Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987); Gomez v. Peters, 470 S.E.2d 692, 695 (Ga. Ct. App. 1996); Peeler v. Hughes & Luce, 909 S.W.2d 494, 498 (Tex. 1995). A few jurisdictions do not have this actual innocence requirement. *See* Marrero v. Feintuch, 11 A.3d 891, 898 (N.J. Super. Ct. App. Div. 2011); Rantz v. Kaufman, 109 P.3d 132, 136 (Colo. 2005); Godby v. Whitehead, 837 N.E.2d 146, 151 (Ind. Ct. App. 2005); Krahn v. Kinney, 538 N.E.2d 1058, 1061 (Ohio 1989). However, this position is in the distinct minority. *See Humphries*, 712 S.E.2d at 799-801; Kevin Bennardo, Note, *A Defense Bar: The 'Proof of Innocence' Requirement in Criminal Malpractice Claims*, 5 OHIO ST. J. CRIM. L. 341, 342 (2007).

Relying on the actual innocence test to limit claims against prosecutors seems particularly appropriate because the issues raised by the courts in criminal defense malpractice actions are analogous to the concerns with permitting suits against prosecutors.[239] Both types of suits could protect the public interest in having justice served. Criminal defendants are entitled to adequate representation by counsel under the Sixth Amendment.[240] When they do not receive constitutionally adequate representation, the judicial system does not function as it should in "protect[ing] the fundamental right to a fair trial."[241] Because one of the two goals of tort liability is deterrence,[242] permitting malpractice actions against defense counsel can be seen as reinforcing the Sixth Amendment's requirement of competent defense counsel.[243]

Similarly, as the Court has repeatedly recognized, the prosecutor plays an essential role in our judicial system. The Model Rules place a special onus on the prosecutor to serve the system by seeking justice as well as obtaining convictions.[244] In fact, in the *Brady* decision itself, the Supreme Court made clear that requiring prosecutors to disclose exculpatory information was consistent with the role of the prosecutor in the judicial process.[245] Thus,

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239. Although the Court has been reluctant to have § 1983 claims be a mirror of state common law rights, *see* Rehberg v. Paulk, 132 S. Ct. 1497, 1504-05 (2012), the Court has also recognized that the statute created "'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." Carey v. Piphus, 435 U.S. 247, 253 (1978) (quoting *Imbler*, 424 U.S. at 417). The use of state malpractice law to help define the limits of a claim against a prosecutor seems particularly appropriate for two reasons. First, as is discussed below, when a prosecutor engages in deliberate misconduct, that prosecutor is in effect committing malpractice against the judicial system. Second, in the most analogous case, *Heck v. Humphrey*, the Court expressly relied on the common law cause of action for malicious prosecution in holding that the § 1983 plaintiff must first show that the conviction has been undermined. 512 U.S. at 484.

240. Strickland v. Washington, 466 U.S. 668, 684-85 (1984).

241. *Id.* at 684.

242. *See, e.g.*, Glenn v. Aiken, 569 N.E.2d 783, 788 (Mass. 1991) (noting that the "underpinnings of common law tort liability [are] compensation and deterrence . . .").

243. *Id.* at 790 (Liacos, C.J., concurring) ("[T]he public not only has an interest in encouraging the representation of criminal defendants, but it also has an interest in making sure that the representation is, at the very least, not negligent.").

244. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt.1; Berger v. United States, 295 U.S. 78, 88 (1935).

245. Brady v. Maryland, 373 U.S. 83, 87-88 (1968). Even before the Supreme Court ruled in *Brady* that a prosecutor's failure to disclose exculpatory information violates due process, the ethical rules prevented prosecutors from suppressing facts "capable of establishing the innocence of the accused." *See* Joy, *Shaping Remedies*, *supra* note 6, at 411 (quoting CANONS OF PROF'L ETHICS, Canon 5 (1908)). These earlier rules were based on an

claims that a prosecutor deliberately withheld exculpatory information or knowingly fabricated information against the defendant are not simply claims that concern an individual defendant. They are claims that assert that the prosecutor has committed malpractice against the judicial process. Thus, actions against both defense attorneys and prosecutors can be seen as reinforcing our system's devotion to ensuring fair trials.

Yet, courts have restricted the class of plaintiffs in criminal malpractice actions to those who can show actual innocence.[246] The reasons courts have adopted this innocence requirement seem strikingly similar to the concerns relied on to shield prosecutors from suit. First, in both malpractice actions against criminal defense attorneys and § 1983 actions against prosecutors, courts acknowledge the reality that those who lose in litigation have a tendency to blame others.[247] As a number of courts have explained, the actual innocence requirement prevents criminal defendants from either shifting blame from themselves or profiting from a situation that is ultimately attributable to their own wrongdoing.[248] When defendants are seeking recovery from prosecutors, it seems equally problematic to allow those who actually committed a criminal act to recover because they were not convicted.

Second, the courts that have adopted the actual innocence requirement for malpractice claims have done so in recognition of the public interest in encouraging attorneys to represent criminal defendants.[249] Given the incentive that those convicted have to blame others, requiring proof of factual innocence protects the interest in ensuring counsel for criminal defendants "by reducing the risk that malpractice claims will be asserted and, if asserted, will be

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understanding of the duty of a prosecutor to the judicial system, as well as to performance as an advocate. Joy, *Shaping Remedies*, *supra* note 6, at 410-11.

246. *See supra* notes 236 & 237.

247. *Compare* Ang v. Martin, 114 P.3d 637, 642 (Wash. 2005) (en banc) (noting that the actual innocence requirement will "prevent a flood of nuisance litigation"), *with* Mitchell v. Forsyth, 472 U.S. 511, 521-22 (1985) (noting the incentive that a criminal defendant has to "pin the blame on judges, prosecutors, or witnesses").

248. *See Wiley*, 966 P.2d at 986; *Ang*, 114 P.3d at 642; *Humphries*, 712 S.E.2d at 801; *Glenn*, 569 N.E.2d at 788. As one court has explained,

> [t]he underpinnings of common law tort liability, compensation and deterrence, do not support a rule that allows recovery to one who is guilty of the underlying criminal charge. A person who is guilty need not be compensated for what happened to him as a result of his former attorney's negligence. There is no reason to compensate such a person, rewarding him indirectly for his crime.

Glenn, 569 N.E.2d at 788.

249. *Mahoney*, 727 A.2d at 999 (explaining that "the pool of legal representation available to criminal defendants, especially indigents, needs to be preserved"); *see Glenn*, 698 N.E.2d at 788; Bailey v. Tucker, 621 A.2d 108, 114 (Pa. 1993).

successful."[250] Thus, although an actual innocence barrier may preclude meritorious claims against defense counsel,[251] it is justified by a larger concern with the public interest in an effective criminal justice system. Of course, a larger concern with protecting the public interest in the criminal justice system is a constant theme in the Supreme Court's decisions on prosecutorial immunity.[252]

Finally, jurisdictions that have adopted this approach distinguish between a defendant's ability to obtain relief from the state on a constitutional claim and the ability to recover damages from his counsel.[253] Thus, while a defendant who establishes an ineffective assistance of counsel claim is entitled to a new trial or sentencing proceeding,[254] prevailing on an ineffective assistance of counsel claim does not establish a malpractice claim. A criminal defendant who wishes to pursue a malpractice claim must go a step further and show that the attorney's failures resulted in the conviction of a factually innocent individual.[255] The added burden recognizes that a claim of malpractice by a criminal defense attorney not only impacts the criminal defendant, but also impacts the proper functioning of a criminal justice system. In applying this test to § 1983 actions, courts would be able to make a similar distinction between relief from the state and suing the prosecutor.

Jurisdictions imposing the actual innocence requirement in malpractice actions make a distinction between legal innocence and factual innocence, and a plaintiff must satisfy a threshold showing of factual innocence by a preponderance of the evidence before the case can proceed.[256] It is not sufficient to show that, but for the attorney's conduct, the defendant would not have been convicted or sentenced.[257] Nor is it sufficient to show that the

250. Rodriguez v. Nielsen, 609 N.W.2d 368, 374 (Neb. 2000) (quoting *Glenn*, 569 N.E.2d at 788).

251. *See, e.g.*, Peeler v. Hughes, 909 S.W. 2d 494, 496-98 (Texas 1995).

252. *See* Van de Kamp v. Goldstein, 555 U.S. 335, 341 (2009); *Imbler*, 424 U.S. at 424.

253. *Humphries*, 712 S.E.2d at 799; *Wiley*, 966 P.3d at 988-90; *Peeler*, 909 S.W.2d at 498.

254. *Imbler*, 424 U.S. at 427.

255. *Humphries*, 712 S.E.2d at 798-801; *Wiley*, 966 P.3d at 988; *Peeler*, 909 S.W.2d at 498; *see* Wilkinson v. Zelen, 83 Cal. Rptr. 3d 779, 785 (Cal. Ct. App. 2008).

256. *See Van de Kamp*, 555 U.S. at 341; *Imbler*, 424 U.S. at 424.

257. In one leading case, defense counsel failed to tell the client that the prosecuting attorney had offered transactional immunity to her in exchange for her testimony. The client learned of the offer after pleading guilty. *Peeler*, 909 S.W.2d at 496. The court refused to permit the client to proceed against the defense counsel, even though she produced an

conviction was overturned in post-conviction proceedings.[258] Rather, the plaintiff must show that "he [or she] was innocent of the [crimes] charged in the underlying criminal proceeding."[259] In so ruling, courts recognize there is a distinction between legal innocence and factual innocence.[260] As Judge Posner explained, "because of the heavy burden of proof in a criminal case, an acquittal doesn't mean that the defendant did not commit the crime for which he was tried; all it means is that the government was not able to prove beyond a reasonable doubt that he committed it."[261] In short, the absence of a conviction is not a sufficient basis to overcome the substantial concerns raised by permitting the claim to proceed against the defense attorney.

Judge Posner's concerns about the realities of the burden of proof required of the state in criminal prosecutions were also highlighted in *Imbler*:

> A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages.[262]

The actual innocence test answers this concern. If the Court were to adopt the actual innocence test, simply losing a case would not subject a prosecutor to

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affidavit from the prosecutor stating he had offered transactional immunity to counsel. *Id*. at 496 n.1.

258. *See Ang*, 114 P.3d at 642; *Wilkinson*, 83 Cal. Rptr. 3d at 781.

259. Correia v. Fagan, 891 N.E.2d 227, 234 (Mass. 2008) (quoting Glenn v. Aiken, 569 N.E.2d 783, 787 (Mass. 1991)). *See* Levine v. King, 123 F.3d 580 (7th Cir. 1997); *Ang*, 114 P.3d at 642; *Wiley*, 966 P.3d at 987.

260. *Correira*, 891 N.E.2d at 233-34; *Ang*, 114 P.3d at 642; *Mahoney*, 727 A.2d at 999; *Wiley*, 966 P.2d at 987.

261. Levine v. Kling, 123 F.3d 580, 582 (7th Cir. 1997). Moreover, there are a number of protections offered to defendants to protect the judicial system that are "wholly unrelated to the propriety" of a guilty verdict. Abney v. United States, 431 U.S. 651, 661 (1977). Rules such as the exclusionary rule and the prohibition against double jeopardy fall within this category. *See, e.g*., Mapp v. Ohio, 367 U.S. 643, 656 (1961) ("[T]he purpose of the exclusionary rule 'is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.'") (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)); United States v. Scott, 437 U.S. 82, 85-86 (1978) (purpose of double jeopardy bar is to prevent multiple prosecutions).

262. 424 U.S. at 426 n.24.

liability.[263] Rather, a plaintiff would have to make a showing of actual innocence before a court would entertain a § 1983 action against a prosecutor.[264]

The actual innocence requirement imposes a burden on the plaintiff to establish by a preponderance of the evidence that she is factually innocent before the court will hear the merits of any malpractice claim.[265] Applying this threshold test to § 1983 actions would serve as a gateway requirement for any § 1983 claim in the same way that the *Heck* bar serves as a threshold requirement for any state prisoner seeking to bring a § 1983 action.[266] In evaluating whether this requirement was satisfied, a judge would apply the general pleading standards required by *Iqbal*. Moreover, even where the plaintiff has satisfied this threshold showing, the plaintiff retains the burden of establishing this element throughout the proceeding.[267] Thus, even if a prosecutor were to lose a motion to dismiss, she could continue to challenge the plaintiff's claim of innocence either in a summary judgment motion or before any jury.

It could be argued that this showing of actual innocence is under-inclusive. Requiring a showing of factual innocence before entertaining a § 1983 action would result in some victims of prosecutorial misconduct being unable to be compensated for that misconduct. Yet, the fact that the requirement is under-inclusive and some victims would be left without a remedy is not a reason to conclude that the courts should not employ such a threshold test. Indeed, the same consequence is seen in numerous limitations on recovery, including the *Heck* bar, the harmless error rule, and especially in the very principle of qualified immunity.[268] Permitting those who can show factual innocence to

263. Similarly, a decision to dismiss charges would not subject a prosecutor to liability, just as a dismissal of an indictment does not show actual innocence for purposes of a criminal malpractice action. *See* Herrera-Corral v. Hyman, 948 N.E.2d 242 (Ill. Ct. App. 2011).

264. Of course, a showing of actual innocence would not in itself result in liability on the part of the prosecutor. The § 1983 plaintiff would still have to allege and prove that the conduct of the prosecutor violated the plaintiff's constitutional rights. *See infra* note 268 and accompanying text.

265. *See, e.g.*, *Humphries*, 712 S.E.2d at 800; *Mahoney*, 727 A.2d at 998-99; *Rodriguez*, 650 N.W.2d at 240; *Correia*, 891 N.E.2d at 235-36; *Ang*, 114 P.3d at 642.

266. *See Mahoney*, 727 A.2d at 999 (explaining that "[a]s a matter of law, the gateway to damages will remain closed unless a claimant can establish that he or she is, in fact, innocent of the conduct underlying the criminal charge").

267. *See, e.g.*, *Correia*, 891 N.E.2d at 235; Salisbury v. Cnty. of Orange, 31 Cal. Rptr. 3d 831, 838 (Cal. Ct. App. 2005).

268. Rudovsky, *supra* note 23, at 1214-1255 (discussing limitations imposed by the Court on remedies for violations of constitutional rights).

proceed would allow those who are most worthy of restitution—defendants who are innocent and yet framed or railroaded by an overzealous or misguided prosecutor—to obtain compensation. Further, it would send a message that prosecutors could potentially be held accountable for deliberate and reckless behavior to their victims. In short, as opposed to the current state of the law, the actual innocence test would mitigate at least some of the moral hazard problems created by the Court's insistence on protecting prosecutors from an avalanche of lawsuits.

B. *The Protections Offered by Qualified Immunity*

Once a showing of actual innocence is made, prosecutors would still retain the ability to contend they were entitled to qualified immunity. In fact, there are times when it would not be appropriate to hold a prosecutor liable for initiating charges or going to trial against an individual who is actually innocent. The prosecutor may not be aware of, or responsible for, a violation of the defendant's rights that resulted in the decision to bring criminal charges.[269] In addition, there will be unfortunate situations in which persons who are actually innocent are prosecuted, and even convicted, without any cognizable wrongdoing by any government official.[270] If the actual innocence requirement were adopted, prosecutors would still be protected in both of these situations with qualified immunity. The protection that *Iqbal* now offers to government officials, coupled with an actual innocence requirement, is sufficient to protect honest prosecutors from harassing litigation, while permitting plaintiffs to pursue claims against prosecutors who deliberately engage in misconduct.

First, plaintiffs would be required to plead a violation of a right that was clearly established. If such a right were not alleged, the prosecutor could

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269. *See* Zacharias & Green, *supra* note 6, at 6-7 (recognizing that prosecutors are not the sole, or even in many instances the primary, cause of prosecutions and convictions of innocent persons).

270. For example, in Arizona v. Youngblood, 488 U.S. 51 (1988), the Supreme Court rejected the claim that the failure to preserve evidence properly to permit DNA testing violated the constitutional rights of the defendant in the absence of a showing of bad faith. In that case, a young boy was raped, and while the rape kit was refrigerated, the boy's clothing was not. The failure to refrigerate the clothing meant the clothes could not be DNA-tested. The defendant was convicted. In 2000, the clothing was tested using newer and more sophisticated DNA technology and the defendant was exonerated. *Id.* at 53-54. *See Larry Youngblood*, THE INNOCENCE PROJECT, *available at* www.innocenceproject.org /Content/Larry_Youngblood.php (last visited Oct. 30, 2012).

obtain a dismissal by the trial court.[271] Second, any claims against a prosecutor would have to be based on a claim that the prosecutor herself knowingly violated the plaintiff's rights.[272] Although the full impact of *Iqbal* is the subject of much debate,[273] there is substantial evidence that the decision expanded the protection provided to officials.[274] The Court in *Iqbal* announced, "[i]n a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer."[275] Thus, the Court concluded that "[b]ecause vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."[276] Whether the dissent's accusation that the majority eliminated "supervisory liability

271. In *Pearson v. Callahan*, 555 U.S. 223, 227 (2009), the Court gave the lower courts permission to dismiss claims based on a determination that the asserted right was not clearly established without reaching the question of whether such a right actually existed. The lower courts have responded to this ruling by dismissing numerous claims on the basis that the asserted right was not clearly established, without reaching the more complicated analysis of whether the right asserted was in fact a right protected by the Constitution. *See, e.g.*, Decotiis v. Whitmore, 635 F.3d 22, 38 (1st Cir. 2011); Jones v. Horne, 634 F.3d 588, 592 (D.C. Cir. 2011); Weise v. Casper, 593 F.3d 1163 1165 (10th Cir. 2010); Turkmen v. Ashcroft, 589 F.3d 542 (2d Cir. 2009); Cousins v. Lockyer, 568 F.3d 1063, 1066 (9th Cir. 2009).

272. Ashcroft v. Iqbal, 556 U.S. 662, 667-78 (2009).

273. Both the impact of *Iqbal* on supervisory liability and the extent to which *Iqbal's* approach permits courts to engage in case-specific "fact finding, unsupported by evidence, at the pleading stage," Schwartz, *supra* note 125, at 538, is a source of academic debate. Most commentators see *Iqbal* as significantly changing the pleading requirements and, citing to the decision's call for judges to apply their own common sense, assert that the decision does permit courts wide discretion to dismiss complaints based on their conclusion that the plaintiff's claims are not plausible. *See* Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 158-59 (2010) ("In determining plausibility, courts seem free to impose their own views of what facts are plausible and what conclusions are plausible (or most plausible) from the facts pled."); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 30-32 (2010); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 875 (2010); Schwartz, *supra* note 125, at 238. Others urge a more restrained reading of the decision. *See* Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298-99 (2010); Edward A. Hartnett, *Taming* Twombly *Even After* Iqbal, 158 U. PA. L. REV. 473, 474 (2010).

274. *See* Patricia Hatamyar Moore, *An Updated Quantitative Study on* Iqbal*'s Impact on 12(B)(6) Motions*, 46 U. RICH L. REV. 603, 615 (2011) [hereinafter Moore, *Updated Study*].

275. 556 U.S. at 677.

276. *Id.* at 676.

entirely" is accurate,[277] the lower courts have interpreted the language as limiting liability under § 1983 to an individual's own conduct.[278] Thus, in an action against a prosecutor, it would not be sufficient for the plaintiff to show that the evidence used was false.[279] Rather, the plaintiffs would have to allege the prosecutor engaged in wrongful conduct.[280]

Moreover, *Iqbal* requires complaints to contain more than broad assertions of elements such as knowledge without identifying facts on which those

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277. *Id.* at 693 (Souter, J., dissenting). As the dissent in *Iqbal* pointed out, the government conceded that the officials could be held liable if it was shown that the supervisor had knowledge of a subordinate's unconstitutional conduct and was deliberately indifferent to that conduct. *Id.* The dissent not only disagreed with the substance of the majority's understanding of supervisory liability, it criticized the majority for reaching this decision when there had been no briefing or oral argument on the limits of supervisory liability in 1983 actions. *Id*. at 691-95. This criticism has also been voiced by several commentators. *See* Nahmod, *supra* note 188, at 292-93. As Professor Nahmod wrote,

> Whatever one thinks should be the proper standard for supervisory liability, it is surprising from a process perspective that the Court announced that it was adopting the constitutional approach to supervisory liability under circumstances of no briefing and no argument. This is particularly troubling because the circuits for the most part adopted the causation approach. At the very least, the Court should have explained itself much more than it did.

Id. In fact, several commentators have argued that perhaps the Court's decision should not be read as having such a drastic change in the law. *See* Kinports, *supra* note 188, at 1308-13 (concluding that "there is reason to hope that the Court did not, in three quick paragraphs, work a sea change in the rules governing supervisory liability"); Nahmod, *supra* note 188, at 294-97 (arguing that the Court eliminated the ability of plaintiffs to bring § 1983 suits against supervisors based on claims of deliberate indifference to inferiors' conduct and replaced it with a requirement that the supervisors be shown to have the intent required to make out the underlying constitutional violation).

278. *See* Leavitt v. Correctional Medical Servs., Inc., 645 F.3d 484, 502 (1st Cir. 2011) ("It is axiomatic that the liability of persons sued in their individual capacities under section 1983 must be gauged in terms of their own actions."). *See also* Wagner v. Jones, 644 F.3d 259, 275 (8th Cir. 2011); Backes v. Village of Peoria Heights, 662 F.3d 866 (7th Cir. 2011); Brown v. Montoya, 662 F.3d 1152 (10th Cir. 2011); Porter v. Epps, 659 F.3d 440 (5th Cir. 2011); AFL-CIO v. City of Miami, 637 F.3d 1178 (11th Cir. 2011); Santiago v. Warminster Township, 629 F.3d 121 (3d Cir. 2010).

279. In fact, the use of false evidence itself does not violate the due process clause. Rosenthal, *supra* note 152, at 145-46. Rather, it is the knowing use of that evidence that the Court has found to be a due process violation. Napue v. Illinois, 360 U.S. 264, 269 (1959).

280. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011). As the Court noted this past term, "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 2085 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

assertions are based.[281] *Iqbal*, relying on *Bell Atlantic v. Twombly*,[282] instructed that plaintiffs are required to provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[283] Plaintiffs, according to the Court, are required to show "more than a sheer possibility that a defendant has acted unlawfully,"[284] and thus, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'"[285] This requirement would apply not only to the pleading of the constitutional claim, but to the plaintiff's claim of actual innocence. Thus, it would not be sufficient to allege the conclusion that the plaintiff was innocent. The plaintiff would be required to plead specific facts supporting this general allegation.

Lower courts have insisted that plaintiffs provide such specific factual support and have dismissed claims when that support is lacking.[286] In fact, the

281. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). As Patricia Hatamyar described *Iqbal*, the decision is "*Twombly* on Steroids." Hatamyar, *supra* note 235, at 575. Even those who argue that *Iqbal* is not as significant an impediment to plaintiffs as others contend, such as Professor Steinman, they agree that the Court has placed some burden to present factual allegations supporting the claim. As Steinman explains, "[a] plaintiff's complaint must provide an adequate transactional narrative, that is, an identification of the real-world acts or events underlying the plaintiff's claim." Steinman, *supra* note 273, at 1334.

282. 550 U.S. 544 (2007).

283. *Iqbal*, 556 U.S. at 678.

284. *Id.*

285. *Id.* (quoting *Twombly*, 550 U.S. at 557). In order to determine whether a complaint satisfies this standard, the Court instructed the lower courts to undertake a two-part analysis. First, although a court must accept all factual allegations as true, this acceptance does not extend to legal conclusions or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555). Thus, courts should eliminate conclusory statements, "formulaic recitation[s] of the elements of a cause of action," and "naked assertions" from their evaluation of the complaint. *Id.* Second, having eliminated those conclusory statements from consideration, courts must consider whether the factual allegations that remain "plausibly give rise to an entitlement to relief." *Id*. at 679. This determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. Moreover, the Court warned that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'shown' – 'that the pleader is entitled to relief.'" *Id*. (quoting FED. R. CIV. PROC. 8(a)(2)).

286. Patricia Hatamyar Moore recently published an updated study of *Iqbal*'s impact on 12(b)(6) motions. *See* Moore, *Updated Study*, *supra* note 274. In this study, Professor Moore shows that, post-*Iqbal*, there is an increase in the filing of these motions, *id*. at 630, an increase in court's granting these motions, *id*. at 614, and an increase in grants of these motions with leave to amend, *id*. at 621. In addition, constitutional civil rights claims seem to be particularly vulnerable to dismissal after *Iqbal*. *Id.* at 618-19. *See* Rosalie Berger

rate of dismissal of constitutional civil rights claims has increased since *Iqbal* was decided.[287] For example, the Third Circuit recently affirmed the dismissal of a case against supervisors in a police department for a search carried out by officers under their command.[288] Because the plaintiff's allegations were "nothing more than a recitation of what [the plaintiff] said the [police officers] did to her,"[289] and did not provide any factual support for the claim that these actions were directed by the supervisors, the court concluded that the claims were "naked assertions" that were insufficient to provide "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[290]

One possible question is the nature of the allegations that would be required to sustain a complaint alleging a *Brady* violation. *Iqbal* indicated that courts should apply the mens rea of the underlying constitutional violation in § 1983 actions.[291] Because *Brady* violations occur whenever material,

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Levinson, *The Many Faces of* Iqbal, 43 URB. LAW. 529, 534 (2011) (noting data from the Federal Judicial Center showing increased rates of dismissal for civil rights claims). This finding would appear to be in conflict with a recent study by the Federal Judicial Center, which reported that there was no "statistically significant" increase in motions to dismiss. Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 UNIV. OF HOUSTON LAW CTR., Paper No. 1904134 (2011), *available at* http:/ssrn.com/abstract=1904134. However, Lonny Hoffman points out that the data behind this study showed that motions to dismiss were more likely to be filed after *Iqbal* and that "in every case category . . . there were more orders granting dismissal after *Iqbal* than there were before *Twombly*." *Id.* Moreover, as Moore points out, the Federal Judicial Center's study excluded qualified immunity cases. Moore, *Updated Study*, *supra* note 274, at 634.

287. *See* Moore, *Updated Study*, *supra* note 274, at 618-19.

288. Santiago v. Warminster Township, 629 F.3d 121 (3d Cir. 2010).

289. *Id*. at 131.

290. *Id*. at 129 (citation omitted). In fact, the circuits appear to be quite comfortable dismissing actions on the basis of *Iqbal*. *See, e.g.*, Wilson v. City of Phila., 415 Fed. Appx. 434, 436-37 (3d Cir. 2011) (reversing district court decision permitting claims to go forward on the ground that the plaintiff failed to support conclusions with factual allegations); Nettles v. City of Leesburg Police Dep't, 415 Fed. Appx. 116, 121 (11th Cir. 2010) (upholding dismissal of claim where plaintiff failed to provide factual support for allegations that he was illegally searched and unlawfully arrested); Jones v. Horne, 634 F.3d 588, 604 (D.C. Cir. 2011) (concluding that dismissal was appropriate because complaint lacked factual allegations supporting claims); Sanchez v. Pereira-Castillo, 590 F.3d 31, 49-50 (1st Cir. 2009) (dismissing complaint against supervisors because of failure to produce factual allegations to support assertion that prison administrators failed to supervise lower-level employees); Cooney v. Rossiter, 583 F.3d 967, 970-71 (7th Cir. 2009) (upholding dismissal of claim for failure to allege facts to support conclusion that defendants conspired to deprive plaintiff of her constitutional rights).

291. *Iqbal*, 556 U.S. at 679; *see* Nahmod, *supra* note 188, at 294-97.

exculpatory information is suppressed, regardless of the intent of the prosecutor, an argument could be made that the prosecutor's knowledge should be irrelevant.[292] However, given the Court's emphasis on the need for individual wrongdoing for the imposition of § 1983 liability,[293] this argument is not likely to be successful.[294] Prosecutors have been assigned the responsibility of identifying and disclosing exculpatory information under *Brady* because they are in the best position to ensure the underlying concern of protecting the defendant's right to a fair trial.[295] In other words, prosecutors act in a supervisory role for purposes of *Brady*. Therefore, the standards by which a supervisor may be held liable for the conduct of her employees would apply to evaluating a claim against a prosecutor based on an alleged *Brady* violation. In short, there would need to be a showing of wrongdoing by the prosecutor before a § 1983 action, based on a *Brady* claim, could survive a motion to dismiss.[296] Because a prosecutor would not face liability where she was

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292. *Brady*, 373 U.S. at 87 (explaining that a violation occurs when exculpatory material is not provided to the defense "irrespective of the good faith or bad faith of the prosecution"); Strickler v. Greene, 527 U.S. 263, 288 (1999) ("[U]nder *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.").

293. *Al-Kidd*, 131 S. Ct. at 2085; *Iqbal*, 556 U.S. at 678.

294. For example, in Porter v. White, 483 F.3d 1294 (11th Cir. 2007), a § 1983 plaintiff sought damages after having his conviction vacated on Brady grounds and relied on the earlier court decision to support his claim. 483 F. 3d at 1301-02. The Eleventh Circuit rejected this approach, concluding that the "no-fault standard of care *Brady* imposes on prosecutors . . . has no place in a § 1983 damages action against a law enforcement official in which the plaintiff alleges a violation of due process." *Id*. at 1306. As the Eleventh Circuit explained,

> [M]ere negligence or inadvertence on the part of a law enforcement official in failing to turn over *Brady* material to the prosecution, which in turn causes a defendant to be convicted at a trial that does not meet the fairness requirements imposed by the Due Process Clause . . . cannot provide a basis for liability in a § 1983 action seeking compensation for loss of liberty occasioned by a *Brady* violation.

Id. at 1308. Thus, the court concluded that a § 1983 claim based on a *Brady* violation could not be brought against police officers without proving that the officers were acting in bad faith.

295. As Rosenthal wrote, such a decision makes sense as prosecutors are the "'cheapest cost avoider[s]' best positioned to minimize the likelihood of an unfair trial." Rosenthal, *supra* note 152, at 144.

296. *Iqbal*, 556 U.S. at 675; *see Sanchez*, 590 F.3d at 49 (To plead successfully against a supervisor, the plaintiff "must show 'an affirmative link,' whether through direct participation or through conduct that amounts to condonation or tacit authorization between the actor and the underlying violation.") (citations omitted).

unaware of the exculpatory information, the "honest" prosecutor would thus be protected against significant, protracted litigation, which is the bottom-line concern of the Supreme Court.

IV. CONCLUSION

The blanket the Court has thrown over prosecutorial misconduct is not supported by the purpose of § 1983. The approach of the Supreme Court has been largely to rely on policy concerns in determining whether a claim against officials should be heard. [297] If the Court is going to use such an approach, then its policy decisions should be able to withstand scrutiny. The decision to provide prosecutors with blanket absolute immunity does not.

The purpose of the 1871 statute was to provide remedies for persons whose constitutional rights were violated. In order to give this purpose its due, the Court traditionally required a greater justification for absolute immunity than for qualified immunity. This approach is justified by the significant moral hazard concerns associated with absolute immunity. At the same time, the current Court is clearly motivated by concerns about interfering with the legitimate exercise of prosecutorial discretion. However, these concerns do not justify the blanket immunity now given to prosecutors. Rather, the Court's concerns and the moral hazard issues could both be addressed by adopting an actual innocence threshold requirement, coupled with qualified immunity for prosecutors.

Indeed, the most valid criticism of this article's proposal may be that it provides too much protection for prosecutorial misconduct. In an ideal world, this author might well agree with such a criticism. The hurdles presented by qualified immunity alone are daunting, to say the least,[298] and this article puts forth yet another hurdle for those harmed by the deliberate misconduct of prosecutors. However, it appears the Court would be no more likely to be moved by an argument based on the changed pleading standards than it was moved by the arguments raised in 2009 that the standards had changed sufficiently to protect prosecutors.

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297. Although the Court as recently as 2012 in *Rehberg v. Paulk*, 132 S. Ct. 1497, 1502 (2012) explained that "we do not have a license to create immunities based solely on our view of sound policy," the Court also concluded that it was not bound by the common law of 1871 and should conduct a "considered inquiry" into that common law and the interests served by it. *Id*. at 1503.

298. *See* Moore, *supra* note 284, at 614-34; s*ee also* Scheck, *supra* note 13, at 2221-22 ("All considered, it is, appropriately and by design, extremely difficult to obtain civil liability against prosecutors for a *Brady* violation, or any other act of misconduct.").

The primary advantage of the proposal contained in this article is that it squarely addresses the underlying concerns of the Court—the need to protect prosecutors who drop charges or fail to obtain a conviction—while simultaneously providing a way for those most egregiously injured to seek compensation from our court system. In so doing, the proposal allows for the possibility of a prosecutor being answerable to those whom he or she harms with deliberate misconduct. Furthermore, the proposal restores some balance to the moral hazard problem and attempts to give some force to Theodore Roosevelt's often-quoted words: "[n]o man is above the law and no man is below it: nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked as a favor."[299]

299. I THEODORE ROOSEVELT AND HIS TIME SHOWN IN HIS OWN LETTERS 258 (Joseph B. Bishop ed. 1920).