# Absolute Immunity: Applying New Standards for Prosecutorial Accountability

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## Introduction

American prosecutors hold a unique position in American society. Tasked with the discretion to charge individuals under an ever-growing body of statutory law, their power over the lives of criminal defendants is only surpassed by the power of legislators and judges who make and apply these laws. However, as the adage states, "with great power comes great responsibility."[1] The problem accrues, however, when those wielding power are not held responsible. For prosecutors, the doctrine of absolute immunity prevents the public from pursuing this accountability function because it exempts prosecutors from liability for violating criminal defendants' constitutional rights.[2] This abdication of accountability results in a system that has thrust thousands of innocent criminal defendants behind bars and deprived them of a remedy against the prosecutors who wrongfully placed them there.[3]

Although The Civil Rights Act of 1871 subjects all public officials to liability for infringing citizens' civil rights, the Supreme Court has

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1 This statement has been attributed to sources ranging from comic book author Stan Lee to Renaissance philosopher Voltaire. *See* Adam Grant, Opinion, *Why Men Need Women*, N.Y. Times (July 20, 2013), http://www.nytimes.com/2013/07/21/opinion/sunday/why-men-need-women.html?pagewanted=all&_r=0. However, the phrase is most firmly traceable to William Lamb, an early 19th century Prime Minister of England. Thomas C. Hansard, 168 Parliamentary Debates, Official Report: . . . Session of the . . . Parliament of the United Kingdom of Great Britain and Ireland 1227 (1862) ("[T]he possession of great power necessarily implies great responsibility[.]"), https://play.google.com/books/reader?id=B6w9AAAAcAAJ&printsec=frontcover&output=reader&hl=en&pg=GBS.RA2-PT555.

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

3 *See generally An Epidemic of Prosecutor Misconduct*, Center for Prosecutor Integrity (2013), http://www.prosecutorintegrity.org/.

sacrificed accountability for convenience by placing prosecutors beyond the reach of this statute.[4] The rationale sounds in the deflection of frivolous claims and the need for these prosecutors to make prosecutorial decisions unencumbered by the fear that a criminal defendant will sue in retaliation.[5] But the doctrine has done more harm than good as wrongfully convicted criminal defendants are continually exonerated while courts and bar associations do little to punish the prosecutors responsible,[6] refusing criminal defendants the right to compensation and declining to sanction the prosecutors who erred.[7]

The resulting prosecutorial misconduct comprises willful actions or negligent omissions and includes the fabrication of evidence,[8] perjury,[9] placing unreliable witnesses on the stand,[10] failing to turn over exculpatory evidence,[11] and coercing witness testimony.[12] Shielded from the feedback mechanism of civil liability, prosecutors are free to engage in conduct, ethical and otherwise, devoid of the accountability brought to bear on officials and counselors in other fields of the law.[13] This creates an incentive for prosecutors to substitute precautionary

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4 *Imbler*, 424 U.S. at 410.

5 *Id.* at 427-28.

6 *See infra* Part II.A.

7 *See* KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, at 3-6 (2010), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs (describing a trend in which prosecutors are not sanctioned through criminal law or professional regulatory bodies).

8 *See* Zahrey v. Coffey, 221 F.3d 342, 349 (2d Cir. 2000) (holding that fabrication of evidence by a prosecutor acting in his investigative capacity violates a constitutional right).

9 *See* Grant v. Hollenbach, 870 F.2d 1135, 1139 (6th Cir. 1989) (holding prosecutor absolutely immune from liability under § 1983 for perjury before grand jury); *see also* Burns v. Reed, 500 U.S. 478, 482-83 (1991) (where a prosecutor in a probable cause hearing did not inform the judge that a mother's "confession" was taken under hypnosis and that the mother subsequently denied committing any crime).

10 *See* Imbler v. Pachtman, 424 U.S. 409, 414 n.8 (1976) (holding prosecutor immune from liability where he placed a witness on the stand despite sufficient cause to believe the witness would give false testimony).

11 *See* Brady v. Maryland, 373 U.S. 83, 84-86 (1963) (creating rule that prosecution's suppression of evidence favorable to the defense constituted a violation of the Due Process Clause of the Fourteenth Amendment).

12 *See* Whitlock v. Brueggemann, 682 F.3d 567, 584 (7th Cir. 2012) ("Coercively interrogating witnesses, paying witnesses for testimony, and witness-shopping may be deplorable, and these tactics may contribute to wrongful convictions, but they do not necessarily add up to a constitutional violation even when their fruits are introduced at trial.").

13 While prosecutors are absolutely immune from § 1983 liability, other public officials, including police officers, are entitled only to a qualified immunity defense. *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009).

functions aimed at avoiding the violation of civil rights with greater emphasis on attaining convictions.

Though built on a foundation of historical pedigree,[14] the argument for absolute prosecutorial immunity is largely buttressed by policy claims that prosecutors would be distracted from their duties by frivolous lawsuits if subjected to civil liability.[15] Proponents further argue that prosecutors would not only be distracted by litigation, but would find themselves hesitant to file charges in fear of retributive litigation.[16] And in addressing the implicit incentives toward misconduct that the immunity doctrine creates, the Supreme Court opined that criminal liability and professional discipline would serve as sufficient checks on prosecutorial misconduct.[17]

Much has changed in the years since 1976 when the Supreme Court extended absolute immunity to prosecutors. Qualified immunity has become a stronger defense,[18] pleading standards for civil claims have tightened,[19] and professional regulation has been mysteriously absent from the prosecutorial sphere.[20] In the absence of regulatory forces, absolute immunity for prosecutors has bred a profession ripe with moral hazard and unethical behavior, much of which likely

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14 The Supreme Court recognized absolute immunity as a defense against claims brought under 42 U.S.C. § 1983 pursuant to the doctrine's existence at common law preceding the passage of the Civil Rights Act in 1871. *See* Imbler v. Pachtman, 424 U.S. 409, 418 (1976) ("[Section] 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.").

15 "The Court found that the historical immunity of prosecutors was grounded on the same policies as the immunities of judges and grand jurors. 'These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.'" Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 81 (2005) (quoting Imbler v. Pachtman, 424 U.S. 409, 423 (1976)).

16 *Imbler*, 424 U.S. at 422-23. Advocates of the absolute immunity doctrine note that prosecutors' exposure to the threat of litigation would result in disproportionately more cases being pursued against lower income individuals who lack the resources to retaliate in civil court. *See* 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, 1142-43 (1996) (citing Imbler v. Pachtman, 424 U.S. 409, 421-27 (1976)).

17 *Imbler*, 424 U.S. at 428-29.

18 *See* Burns v. Reed, 500 U.S. 478, 494 (1991) ("The qualified immunity standard is today more protective of officials than it was at the time *Imbler* was decided.").

19 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); *see also* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (raising the evidentiary standard for pleadings such that courts only take factual allegations as true, disregarding merely conclusory statements).

20 *See infra* Part II.B.

goes unreported.[21] Without civil, professional, judicial, or legislative change, these officials will continue to swing the powerful sword of criminal prosecution with impunity from the unwarranted damage it so often wreaks.

In the absence of a change from absolute to qualified immunity, one avenue worth pursuing lies in municipal liability. By pursuing a standard that holds supervisors and policymakers responsible for the actions of prosecutors, municipalities may in turn exert greater pressure on their prosecutorial agents to comply with the requirements of the Constitution. Today, it is extremely difficult to assert a claim against a municipality because, although municipalities do not have immunity from § 1983, alleging a "failure to train" or "failure to supervise" theory requires a showing that the municipality acted with "deliberate indifference" toward a custom, policy, or pattern of similar violations.[22] The Supreme Court should accept a new rule defining such a pattern to comprise violations that are (1) perpetrated by the same type of agent (prosecutors), and (2) that violate the same broadly defined right.[23] For example, instead of requiring that constitutional violations at the hands of prosecutors trace from the same office, or that they share a sufficiently similar factual context to the cause of action pursued by a plaintiff, the Court should consider a pattern to have formed if a sufficient number of prosecutors in a particular geographic area have violated the same constitutional or statutory right — for instance, the right to a fair trial or due process under the Sixth or Fifth Amendments. The particulars of defining that geographic area and the number of prior incidents required is for the Court to decide – perhaps on a case-by-case basis – but the standard that prevails now is certainly insufficient to provide a workable remedy for the wrongfully convicted under either a theory of personal or municipal liability.

Part I of this Comment will begin by discussing the civil rights statute that allows criminal defendants to sue prosecutors for wrongful

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[21] *See infra* Part II.B.

[22] *See* Connick v. Thompson, 563 U.S. 51, 62-63 (2011); Bryan Cty. v. Brown, 520 U.S. 397, 407-08 (1997); City of Canton v. Harris, 489 U.S. 378, 397 (1989) (O'Connor, J., dissenting); Thomas v. Cumberland Cty., 749 F.3d 217, 223 (3d Cir. 2014); Cash v. Cty. of Eerie, 654 F.3d 324, 336 (2d Cir. 2011).

[23] In 2011, the Supreme Court refused to accept four previous *Brady* violations as constituting a "pattern" for purposes of municipal liability under § 1983 because the previous instances did not include the same type of evidence as in the case before it. Connick v. Thompson, 563 U.S. 51, 63-64 (2011).

convictions as well as the limitations placed upon the ability to sue a prosecutor under this statute. It will go on to delineate between those activities of prosecutors according them qualified immunity as opposed to absolute immunity and discuss alternative theories for liability-based regulation of the prosecutorial profession. In Part II, this Comment analyzes the justifications for prosecutorial immunity against the backdrop of changing norms and standards in jurisprudence and the legal profession, evaluating whether the Supreme Court's reasoning in *Imbler v. Pachtman* for extending absolute immunity for prosecutors was sound. This Comment will conclude by suggesting that absolute immunity is an unnecessarily expansive method for dis-incentivizing frivolous lawsuits against prosecutors that has been largely obviated by changes in the law.

## I. BACKGROUND

### A. *The Civil Rights Act of 1871*

The movement towards greater government accountability for civil rights violations began in the mid-to-late 1800s with the passage of The Civil Rights Act of 1871, the federal statute that made it possible for citizens to sue state officials.[24] In order for the government, or an agent of the government acting in his or her official capacity, to be sued, the government must abrogate its sovereign immunity.[25] Congress did so in the language of The Civil Rights Act of 1871. By passing this legislation, Congress unequivocally abridged the sovereign immunity of every state government, thereby exposing state governmental employees to liability for acts undertaken within their official roles.[26] Federal employees are likewise liable for violations of civil rights under Supreme Court precedent.[27]

Congress first passed The Civil Rights Act of 1871 following the American Civil War to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments against state policies and officials intent on deny-

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[24] 42 U.S.C. § 1983 (2012).

[25] Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363-64 (2001) (holding the Eleventh Amendment confers to states sovereign immunity against federal legislation unless Congress acts unequivocally and under a valid grant of constitutional authority).

[26] *See id.*

[27] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395 (1971).

ing newly freed slaves equal protection under the Constitution and laws of the United States.[28] Originally referred to as the Ku Klux Klan Act, the thrust of the statute was to create a federal remedy against state officials, holding them civilly liable for violating the statutory and constitutional rights of the citizens they serve.[29]

Over time, the statute found its way into the United States Code at 42 U.S.C. § 1983. Today, its language guarantees that "every person who under color of any statute . . . subjects . . . any citizen . . . 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."[30] Thus, it has become the compensatory remedy for citizens who have suffered constitutional violations at the hands of state actors. For instance, a citizen has a private right of action for damages against a government agent's unreasonable search or seizure of his person, house, papers, or effects under the Fourth Amendment.[31] Another cause of action may spring from an employee's wrongful discharge from public employment for exercising his First Amendment right to free speech.[32] In fact, § 1983 is such a comprehensive remedy that it has been considered a sufficient alternative to some equitable remedies such as the Fourth Amendment's exclusionary rule.[33]

However, the benefits § 1983 might confer through its broad applicability and potential for compensatory relief are overshadowed by the difficulty of surmounting a public official's immunity.[34] In contravention to its clear and broad language[35] holding all public officials

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[28] Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 72-73 (2005).

[29] Johns, *supra* note 28, at 73.

[30] 42 U.S.C. § 1983 (2012).

[31] *See* Wilson v. Layne, 526 U.S. 603, 609 (1999) ("[Section] 1983 allows a plaintiff to seek money damages from government officials who have violated his Fourth Amendment rights.") (citing *Bivens*, 403 U.S. at 397).

[32] *See* Lane v. Franks, 134 S. Ct. 2369, 2380-81 (2014) (public employee asserting proper claim for relief under the First Amendment pursuant to § 1983).

[33] *See* Hudson v. Michigan, 547 U.S. 586, 597 (2006) (holding that exclusion of evidence seized during a search that violated the Fourth Amendment would not deter police misconduct, thus § 1983 was a preferable remedy).

[34] The Supreme Court created a good-faith immunity from civil liability for government officials in *Harlow v. Fitzgerald*. 457 U.S. 800, 818-19 (1982).

[35] The statute states that "*every* person" acting under color of authority is liable under § 1983. 42 U.S.C. § 1983 (2012) (emphasis added).

amenable to suit, the Supreme Court exempted some public officials from its grasp entirely, such as legislators, judges, and prosecutors.[36]

## B. *Qualified Immunity*

Qualified immunity evolved from common law precedents to protect public officials from civil claims under § 1983.[37] The rationale supporting this protection was that "public officers require [it] to shield them from undue interference with their duties."[38] Thus, since *Harlow v. Fitzgerald*, the Supreme Court has recognized a blanket qualified immunity defense that applies to all government officials.[39] This means that proving a public official violated a constitutional right is insufficient to attach liability as a matter of law. Rather, a plaintiff under § 1983 must prove that a government official violated a statutory or constitutional right that was clearly established at the time of the alleged violation.[40] The rationale for this requirement has its roots in the principle of fair notice: before a public official can be held liable he must be given fair notice that the conduct he has been charged with clearly violated a statutory or constitutional right.[41] Following this standard, the Supreme Court held the same logic to apply in civil lawsuits "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful."[42]

The case of *Safford Unified School Dist. No. 1 v. Redding*, involving a public school official's strip search of a 13-year-old female student under suspicion that she was hiding prescription and over-the-

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[36] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (holding prosecutors immune from liability for their prosecutorial functions); *see also* Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (holding that judges are immune from liability for acts within their judicial jurisdiction); Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (holding legislators immune from liability for their legislative functions).

[37] *Harlow*, 457 U.S. at 807-08.

[38] *Id.* at 806.

[39] *Id.* at 818.

[40] *See* Hope v. Pelzer, 536 U.S. 730, 741-42 (2002) (holding that Alabama prison guards are not entitled to qualified immunity for hitching a prisoner to a post when Department of Justice and Alabama Department of Corrections' reports clearly established the practice violated the Eighth Amendment); *see also* Wilson v. Layne, 526 U.S. 603, 605-06 (1999) (holding liability foreclosed under § 1983 because it was not clearly established that the presence of news reporters during a law enforcement search violated the Fourth Amendment).

[41] The Court analogized liability under § 1983 to its criminal companion statute, 18 U.S.C. § 242, under which a public official must be given fair notice that the conduct he has been charged with committing was criminal. United States v. Lanier, 520 U.S. 259, 268-71 (1997).

[42] *Pelzer*, 536 U.S. at 739 (quoting Saucier v. Katz, 533 U.S. 194, 206 (2001)).

counter pills, is illustrative.[43] Although the Court determined these unduly intrusive actions violated the Fourth Amendment, the school officials involved were nonetheless entitled to qualified immunity because the right not to be strip-searched under the Fourth Amendment on suspicion of possessing drugs[44] in a public school was not "clearly established."[45] Noting that several lower courts had disagreed as to the permissibility of strip-searching public school students on mere suspicion of drug possession under the Fourth Amendment, the Court determined that the question of law at issue was *not* "clearly established," and thus foreclosed § 1983 as a remedy.[46]

Next, qualified immunity requires that the clearly established law be one that a reasonable person would have known.[47] This *scienter*[48] element holds public officials to an objectively reasonable standard, denying application of liability where a reasonable person in the officer's shoes would not have been aware of the violation of the plaintiff's constitutional or statutory right.[49] *Hope v. Pelzer* provides a useful example.[50] In that case, officers of an Alabama correctional facility handcuffed a prisoner to a hitching post, depriving him of using a restroom for up to seven hours.[51] The officers engaged in this behavior despite the existence of Alabama Department of Correction (ADOC) regulations prohibiting such conduct, and Department of Justice reports disseminated to the ADOC indicating that such practices were unconstitutional.[52] Thus, because a reasonable officer of the ADOC "should have known" the hitching post practice violated

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43 557 U.S. 364, 368 (2009).

44 It bears noting that the "drugs" in question were limited to "four white prescription-strength ibuprofen 400–mg pills, and one over-the-counter blue naproxen 200–mg pill, all used for pain and inflammation but banned under school rules without advance permission." *Id.* at 368.

45 *Id.* at 377-79 (holding that a school official searching a student is "entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment" (quoting Pearson v. Callahan, 555 U.S. 223, 243-44 (2009))).

46 *Id.* at 378-79.

47 *See* Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982).

48 *Scienter*, the Latin word for "knowingly," represents the degree of knowledge required to hold an actor legally responsible for the consequences of his act or omission. *Scienter*, BLACK'S LAW DICTIONARY (10th ed. 2014).

49 *See, e.g.*, Marcavage v. City of Chicago, 659 F.3d 626, 636 (7th Cir. 2011) (arresting officer's conduct was protected under qualified immunity because of his reasonable reliance on a state policy requiring permits, regardless of whether that policy was unconstitutional).

50 536 U.S. 730, 741-42 (2002).

51 *Id.* at 733-35.

52 *Id.* at 741-42 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

the Constitution through the existence of these regulations and reports, the prisoner successfully overcame the defendant's qualified immunity defense.[53] Since it is less likely that a reasonable person will discover the violation of a less clearly established right, the *scienter* and clear establishment components of the test typically go hand-in-hand. Likewise, the fact that a reasonable person is unaware of a right lends some weight to the argument that it is not clearly established. Thus, as long as *either* the law is vague *or* a reasonable person would not have known that it violates a constitutional or statutory right, qualified immunity will normally attach.

### C. *Absolute Prosecutorial Immunity*

In 1976, the Supreme Court extended absolute immunity to prosecutors for acting within the scope of their "advocative" function on behalf of the government in *Imbler v. Pachtman*.[54] This meant that a prosecutor could not be sued under § 1983 for actions involving the initiation and pursuit of prosecution.[55] The case itself involved a prosecutor, Richard Pachtman, who charged Paul Imbler with first-degree felony murder.[56] At trial, Pachtman deployed a man named Costello as a witness, who a federal district court later determined was unreliable.[57] The district court would later find that Pachtman had "cause to suspect" the falsity of the witness' testimony.[58] The line between the "investigative" and "advocative" functions of prosecutors has been developed in subsequent decisions over the decades following *Imbler*, but the doctrine today still shields most prosecutorial conduct including the provision of testimony and introduction of evidence at trial.[59]

The *Imbler* court's extension of absolute immunity to prosecutors sits upon two rationales. First, in interpreting the statute, the Court in *Imbler* determined that when Congress passed the Civil Rights Act in 1871,[60] which exposed public actors to civil liability, it did not intend to eliminate the backdrop of tort immunities which had evolved at common law. One such immunity was the protection of prosecutors

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53 *See id.*
54 *See* Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976).
55 *Id.* at 431.
56 *Id.* at 411-12.
57 *See id.* at 412, 414-15.
58 *Id.* at 414 n.8.
59 *See* Van de Kamp v. Goldstein, 555 U.S. 335, 343 (2009).
60 The Civil Rights Act is now codified at 42 U.S.C. § 1983.

from civil liability. Second, the Court found certain persuasive policy arguments that bolstered its finding. If prosecutors were exposed to liability, the Court argued, they would likely "shade [their] decisions" to pursue prosecution for fear of being sued in retaliation.[61] Likewise, prosecutors could face an inundation of frivolous lawsuits that may distract them from their work.[62]

However, the Court was not so shortsighted as to dismiss obvious concerns over the negligent and unethical behavior that results from removing accountability to the public. In responding to these concerns, *Imbler* cited the presence of professional regulation—as through bar associations—and the judicial process as sufficient checks on prosecutorial misconduct.[63] As explained below, the devices of professional regulation, judicial process, and alternative liability have been insufficient to create the necessary level of accountability to punish and prevent widespread prosecutorial misconduct.[64] Wrongfully convicted persons, stripped of their right to restitution, too often pay the price of this miscalculation.

Since *Imbler* was handed down, the federal courts of appeal and the Supreme Court itself have struggled to define when a prosecutor is acting within his role as an advocate for the state—and thus is covered by absolute immunity—and when he is functioning more like an investigator or administrator—and therefore is protected only by qualified immunity. The line between the two determines whether a prosecutor will be amenable to suit at all or be exposed to the same level of liability as police officers,[65] who perform much of the investigative work leading up to the initiation of criminal prosecution.

In a string of decisions spanning from the early 1990s to 2012, the Supreme Court clarified the line between "advocative"[66] and "investi-

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61 *Imbler*, 424 U.S. at 422-23.

62 This contention will be discussed, *infra* Part II.C.2, as obsolete after the Supreme Court heightened the pleading standards for civil cases in the early 2000s.

63 *Imbler*, 424 U.S. at 428-29.

64 *See infra* Part II.A.

65 *See* Malley v. Briggs, 475 U.S. 335, 342-44 (1986) (police officers are entitled to qualified, but not absolute, immunity for their actions, even where they include submitting an affidavit in support of a warrant).

66 Advocative conduct generally denotes the prosecutor's role as an advocate for the state, comprising his in-court conduct related to presenting the state's case, introducing evidence, and examining witnesses. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 271 (1993) (quoting Burns v. Reed, 500 U.S. 478, 489-90 (1991)).

gative"[67] functions, but has still left much to be determined. Although more particularized rulings have applied since,[68] the seminal case of *Buckley v. Fitzsimmons*[69] set a general rule indicating that a prosecutor's actions must be considered investigative before a finding of probable cause,[70] as "a prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."[71] However, this does not imply that all prosecutors' conduct following the initiation of prosecution are categorically advocative. In fact, *Buckley* determined that a slanderous press conference held by the prosecutor in that case did not qualify as advocative.[72] In doing so, the Court laid out the primary advocative functions of a prosecutor as (1) the initiation of prosecution, (2) presentation of the State's case in court, and (3) actions involving preparation for these functions.[73]

The decisions rendered by the Supreme Court have displayed that wrongfully convicted individuals have no avenue for redress against prosecutors operating within the scope of their authority as advocates. That is to say, prosecutors are absolutely immune from liability for rights violations stemming from their introduction of fabricated, false, and coerced evidence at trial whether done maliciously or negligently.[74] Prosecutors are also absolutely immune from liability for the suppression of evidence favorable to the criminal defendant, as in *Kalina v. Fletcher*, where the prosecutor's affidavit at

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[67] Investigative conduct generally denotes the activities of police officers and government agents other than prosecutors who perform the investigative functions that precede a criminal case, such as interviewing suspects or experts and examining evidence at the scene of a crime. *See id.* at 273 (quoting Hampton v. City of Chicago, 484 F.2d 602, 608 (7th Cir. 1973)).

[68] *See, e.g.*, Rehberg v. Paulk, 132 S. Ct. 1497, 1508-09 (2012) (a prosecutor acts within an advocative role when he delivers testimony as a complaining witness); Kalina v. Fletcher, 522 U.S. 118, 129-31 (1997) (holding that a prosecutor's submission of an affidavit for an arrest warrant was an investigative function); Burns v. Reed, 500 U.S. 478, 490, 496 (1991) (holding that a prosecutor's delivery of legal advice to police officers was investigative in nature while participating in a probable cause hearing was advocative in nature).

[69] 509 U.S. 259 (1993).

[70] "Probable cause" in this instance refers to the probable cause required to arrest a suspect, or alternatively the probable cause required for a jury to reach a bill of indictment. *Id.* at 274-76.

[71] *Id.* at 274.

[72] *Id*. at 277-78.

[73] *Id*. at 278.

[74] *Cf.* Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (holding that prosecutors are absolutely immune for conduct within their role as an advocate for the state such as initiating and presenting the state's case against a criminal defendant).

a probable cause hearing relied on the appearance of the defendant's fingerprints at the scene of the crime.[75] What the prosecutor failed to disclose, however, was that the defendant had been contracted to install partitions at the scene of the crime and was present during that time with the consent of its owner.[76]

### D. *The Causation Barrier to Liability*

Although much behavior preceding the initiation of prosecution is considered to be investigative, this does not necessarily mean that a prosecutor is amenable to suit. All civil claims must also prove that the harm befalling the claimant was caused by the official being sued – in this case, the prosecutor. However, after the Supreme Court remanded *Buckley* to the Seventh Circuit Court of Appeals – which involved a prosecutor who shopped for a witness willing to fabricate evidence – the Seventh Circuit held that the prosecutor's fabrication of evidence did not cause harm to the wrongfully convicted claimant until its introduction at trial.[77] Since a prosecutor's introduction of evidence at trial is an advocative function, any "harm" the evidence's introduction might have occasioned upon the defendant was shielded from litigatory redress by absolute immunity.[78] This case would come to be known as *Buckley II*.

Before considering the different immunities at play during the fabrication of the evidence before trial and its introduction at trial, it may be difficult to discern the importance of this distinction. Since prosecutors are absolutely immune from liability for the introduction of evidence at trial, the Seventh Circuit—and other courts thereafter[79]—have held that criminal defendants could not sue prosecutors for evidence of fabrication and coerced witness testimony. This is because the fabrication and coercion do not harm the criminal defendant. Rather, it is the *introduction* of that evidence at trial, which causes the harm.[80]

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[75] Kalina v. Fletcher, 522 U.S. 118, 121, 129 (1997).

[76] *Id*. at 121.

[77] Buckley v. Fitzsimmons, 20 F.3d 789, 795 (7th Cir. 1994).

[78] *Id.*

[79] *See, e.g.*, Michaels v. New Jersey, 50 F. Supp. 2d 353, 363 (D.N.J. 1999), *aff'd,* 222 F.3d 118 (3d Cir. 2000); *Buckley*, 20 F.3d at 795.

[80] *See Buckley*, 20 F.3d at 795; *see also* House v. Belford, 956 F.2d 711 (7th Cir. 1992).

This harm-centric approach resulted in an expansion of the absolute immunity doctrine by taking clearly investigative conduct and finding that it does not cause harm until its introduction at trial when the prosecutor is absolutely immune from liability for its harmful effects. Where once prosecutors were accountable for their actions before trial and exposed to liability for them, the harm-centric approach allows them to fabricate evidence, shop for witnesses willing to lie on the stand, and engage in any number of other unethical or negligent actions as long as they bring the fruits of those actions to bear at trial, thereby entitling them to absolute immunity.

However, the Seventh Circuit has since backpedaled on this issue in *Fields v. Wharrie*, holding that a "proximate causation" standard can be established linking a prosecutor's actions during the investigative stage to the harm of wrongful conviction during the advocative stage of a proceeding.[81] The Second and Eighth Circuits have also employed the proximate causation standard, as has a district court in the Tenth Circuit.[82] Still other courts such as the Third Circuit adhere to the *Buckley II* method of harm-centric analysis tracing causation only to the introduction of evidence.[83] Thus, although the shifting winds of the Federal Circuit Courts display a return to liability for more investigative functions of prosecutors, it is still an issue ripe for decision by the Supreme Court, which may someday return a verdict consistent with the harm-centric analysis.

### E. *Municipal Liability*

Municipal liability represents a promising but currently untenable avenue through which the regulation of prosecutorial misconduct may be effectively administered. Instead of relying on lawsuits against individual prosecutors shielded by absolute immunity, municipal liability allows a wrongfully convicted defendant to pursue a claim against a municipal corporation such as a district attorney's office. This permits a civil rights plaintiff to sidestep the § 1983 immunities altogether. However, the judiciary has constructed alternate obstacles to bar the aggrieved party's relief under this theory as well.

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[81] Fields v. Wharrie, 740 F.3d 1107, 1115 (7th Cir. 2014).

[82] McGhee v. Pottawattamie Cty., 547 F.3d 922, 933 (8th Cir. 2008); Zahrey v. Coffey, 221 F.3d 342, 344 (2d Cir. 2000); Masters v. Gilmore, 663 F. Supp. 2d 1027, 1039-40 (D. Colo. 2009).

[83] *See Michaels*, 50 F. Supp. 2d at 363.

By suing a municipal entity such as a town, county or district attorney's office, a claimant alleges that the municipal entity failed in its responsibility to train or supervise its employees, and was therefore deliberately indifferent to a custom or policy of misconduct.[84] Although not as efficient as the foregone conclusion of direct civil liability, this approach would result in greater oversight of prosecutors by municipal entities that wish to avoid liability for the actions of their employees. However, examining the benefits of this mechanism places the cart before the horse, since in order to bring a successful claim under municipal liability, the wrongfully convicted defendant must first prove that his civil rights were violated as part of a pattern or policy of prosecutorial misconduct.[85]

It used to be that a wrongfully convicted person could win a municipal liability claim against a public office by merely proving that its policymakers or supervisors violated the claimant's rights through "deliberate indifference" towards the training or supervision of its agents notwithstanding the number of incidents occurring prior to the accrual of the claimant's cause of action.[86] Today, the Supreme Court holds that "deliberate indifference," a necessary element of municipal liability, is proved only after establishing a pattern of similar misconduct.[87] Thus, upon deciding *Connick v. Thompson* in 2011, the Supreme Court found that not only must there be a "pattern of constitutional violations,"[88] but the historical violations asserted to prove that pattern must be sufficiently similar.[89]

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[84] *See* Connick v. Thompson, 563 U.S. 51, 73-74 (2011) (Scalia, J., concurring); City of Canton v. Harris, 489 U.S. 378, 388-89 (1989); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

[85] *See Connick*, 563 U.S. at 74 (Scalia, J., concurring) (citing Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 409 (1997)) (holding that a pattern of similar misconduct is "ordinarily necessary" to demonstrate a district attorney's failure to train prosecutors).

[86] *Cf*. Canton v. Harris, 489 U.S. 378, 388-89 (1989) (holding that municipal liability is proper where the failure of an office to train its employees amounts to "deliberate indifference" towards the constitutional rights of persons with which the office interacts).

[87] *See Connick*, 563 U.S. at 62; 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, 960 (2010).

[88] Justice O'Connor advocated in her concurrence in *Canton v. Harris* that a pattern of constitutional violations must be present to hold a municipality liable for failure to train. 489 U.S. 378, 397-98 (1989) (O'Connor, J., concurring).

[89] Justice Thomas, writing for the majority, noted that the existence of four prior *Brady* violations did not amount to a "pattern" because they did not involve the same type of evidence as the instant case. *Connick*, 563 U.S. at 62-63.

In *Connick*, the plaintiff introduced evidence of a string of four previous *Brady* violations[90] in the county within the past ten years, but these instances of misconduct were deemed insufficiently similar to the blood evidence involved in his wrongful conviction.[91] Thus, the similarity between instances of misconduct that constitute a "pattern" cannot be said to derive from the right that is violated, since the alleged pattern in *Connick* was entirely composed of *Brady* violations. This makes municipal liability a very difficult theory to sustain for plaintiffs pursuing wrongful conviction claims.

It therefore appears that by barring some change in the *prima facie* formula for municipal liability or severe inroads abrogating the qualified or absolute immunity doctrines, there are no strong options for civil regulation of the prosecutorial profession. But the lack of redress for wrongfully convicted criminal defendants is only one side of the problem. The other deals with the incentives created by a system that places prosecutors beyond the reach of those whom they harm.

## II. ANALYSIS

### A. *Misplaced Incentives*

In our society, we recognize the necessity of liability in its capacity for restitution and deterrence. For example, it is well established that a pedestrian injured by a driver speeding through a red light is entitled to compensation for the harm inflicted on him because of the driver's dangerous action. Not only compensation, but also punitive damages may be attached to prevent that driver, as well as other drivers, from engaging in such risky behavior in the future. These are the reasons we accept civil liability: it serves as a mechanism for (1) restitution and (2) deterrence. The very same logic applies to holding factory owners accountable to the people whose property they pollute, surgeons accountable for their botched operations, and corporate officers accountable to their shareholders. Although much of this misconduct is subject to some form of accountability under the criminal

[90] *Brady v. Maryland*, 373 U.S. 83, 87 (1963), was a landmark Supreme Court case establishing that a prosecutor's knowing or reckless withholding of evidence that would exculpate a criminal defendant violates the defendant's constitutional rights under the Due Process Clause of the Fourteenth Amendment.

[91] *Connick*, 563 U.S. at 62-63.

law, we still recognize the importance of civil liability apart from criminal sanctions. It is all the more important in cases where the actors requiring oversight are capable of inflicting extraordinary harm, e.g. strip mining companies and airplane pilots, to enforce civil liability against them.

Yet, when it comes to the subject of prosecutors, the risk of removing this mechanism is forgotten, as is the powerful role of the prosecutor in American society. On the federal level, criminal statutes have climbed to such a degree of complexity and numerosity that even the government has a hard time keeping track of them all. A Department of Justice undertaking to count the number of criminal statutes in existence during the 1980s and 90s revealed that as many as *approximately* 3,000 laws existed over 50 titles and 23,000 pages of text; the precise number remains elusive.[92] This does not even include state statutes and local ordinances, which are similarly abundant. Some such statutes and ordinances, in fact, do not require a *mens rea*[93] at all. Thus, prosecutors have thousands of pages of statutes from which to select their charges against criminal defendants and immunity from liability to protect them in the case of wrongful convictions.

Civil liability, in this context, is prevented from performing the function it was generated to achieve: namely, communicating to a class of actors how little of a particular type of conduct is demanded. Wrongfully convicted defendants communicate their desire to not be wrongfully convicted, and thus prevent and deter wrongful convictions, by bringing and winning lawsuits against the prosecutors who wrongfully convict them. When this feedback mechanism is removed from the equation, it results in prosecutors having the ability to pursue prosecution, introduce fabricated evidence, and suppress evidence favorable to the defense with relative impunity.

If property owners and parents were prevented from suing factory owners for their expulsion of hazardous materials that devalued their estates and irritated the lungs of their children, the factory owners would have no reason to stop or curb their hazardous activities. In fact, without fear of litigation, they might increase these activities, or put less effort into preventing the negligent operation of their facili-

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92 Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count the Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), http://online.wsj.com/news/articles/SB10001424052702304319804576389601079728920.

93 *Mens rea* refers to a criminal (or culpable) state of mind, which is often an element for liability under the criminal law. *See Mens Rea*, BLACK'S LAW DICTIONARY (10th ed. 2014).

ties. This phenomenon, known as moral hazard, affects prosecutors in a similar fashion. When prosecutors are no longer exposed to liability—or become more difficult to sue—it necessarily results in a shift of their attention from attempting to prevent the type of conduct that would give rise to liability towards a greater focus on their duty to attain convictions.

To counter these incentives toward misconduct—and *Imbler* did recognize the danger of removing liability—the Supreme Court relied on professional regulation and criminal sanctions as alternative accountability mechanisms:

> We emphasize that the immunity of prosecutors from liability . . . does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law . . . . Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.[94]

What the Court overlooked, however, was the lack of enforcement generated by the system of professional regulation through bar associations, criminal prosecution, and judicial oversight. Each of these avenues carries with it a set of distinct disincentives against the pursuit of disciplinary or criminal liability, resulting not only in the absolute immunity prosecutors enjoy from civil accountability, but an equally absolute lack of oversight regarding the actions of prosecutors generally.

Between the years of 1963 and 1999, 381 homicide cases were overturned because of prosecutorial misconduct.[95] Not one gave rise to criminal or professional liability.[96] Between 1970 and 2003, another study found that within a set of over 2,000 convictions overturned or reduced as a result of prosecutorial misconduct, only 44 induced pro-

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[94] Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976).

[95] Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999), http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story?page=1.

[96] *Id*.

fessional disciplinary action.[97] Not a single case led to criminal prosecution.[98] While numbers convey the multiplicity of rights violations, examples depict their intensity.

In 1987, John Thompson was convicted of murder and sat on death row for 14 years after a prosecutor withheld exonerating blood evidence in an unrelated armed robbery that, in effect, prevented Thompson from taking the stand in his own defense during the murder trial.[99]

In 1991, a woman was indicted, and search warrants were approved, after a prosecutor failed to disclose that her "confession" was predicated on an inference that she had multiple-personality disorder after using the third person to refer to herself during a hypnotized interrogation.[100]

One of the most comprehensive studies of prosecutorial misconduct to date focused on California,[101] finding between the years of 1997-2009, among 707 cases of judicially recognized prosecutorial misconduct,[102] only 159 resulted in reversed convictions and six of those in disciplinary sanctions on the prosecutors involved. Although the disparity between cases of misconduct and those in which the verdict was reversed can arguably be squared,[103] the fact that disciplinary actions were taken by the state bar in only *one percent* of cases where prosecutorial misconduct resulted in reversed convictions defies traditional notions of justice.[104]

## B. *Alternatives to Liability*

The Court in *Imbler v. Pachtman* was so confident in the criminal law and self-regulation of the legal profession that it extended to prosecutors immunity from the most effective form of regulation: civil liability. However, history has shown that neither criminal law nor self-regulation have served as sufficient checks on the moral hazard and

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97 Johns, *supra* note 28, at 60.

98 Johns, *supra* note 28, at 60.

99 Connick v. Thompson, 563 U.S. 51 (2011).

100 Burns v. Reed, 500 U.S. 478, 481-83 (1991).

101 Ridolfi & Possley, *supra* note 7, at 2.

102 Ridolfi & Possley, *supra* note 7, at 3.

103 In some cases, prosecutorial misconduct does not materially affect the guilty verdict, and therefore no reversal is necessary. *See, e.g.*, Baker v. State, 906 A.2d 139, 148-49 (Del. 2006) (articulating the "harmless error" rule).

104 *See* Ridolfi & Possley, *supra* note 7, at 3.

inclination towards prosecutorial misconduct generated from immunity against civil litigation.

1. Criminal Liability

Among the broad swaths of power delegated to prosecutors is the discretion to commence criminal prosecution. Where once individuals were able to initiate prosecution for themselves, as the Supreme Court stated in 1981, today "the decision to prosecute is solely within the discretion of the prosecutor."[105] For this very reason, the levying of criminal charges against a prosecutor requires that another prosecutor decide to initiate and pursue that case.

The very idea of prosecutors prosecuting prosecutors raises immediate concerns, particularly considering that the prosecutors with the greatest knowledge of and proximity to one another have likely established working and personal relationships. Yet, the regulatory effect of the criminal law remains one of the original bases for prosecutorial immunity in the American legal system. Additionally, this low probability of prosecution is further compounded by the high intent requirements of criminal statutes that apply to prosecutorial misconduct. For example, the Model Penal Code (MPC) requires that a defendant act "purposely" in order to convict him for fabrication of evidence[106]—the highest measure of intent required by any offense under the MPC. Because intent is required, prosecutors may be even less likely convicted than charged.

2. Professional Discipline

As a check on prosecutorial misconduct, professional discipline has its own host of inadequacies. One of the most important features of an effective regulatory system is its enforceability, which the disciplinary option lacks. Without swift administration of punitive action for violations, a framework of governance quickly loses legitimacy and falls into obsolescence. This is the problem that professional discipline faces as a tool for curbing prosecutorial misconduct.

There are many reasons a bar association or judge may choose, deliberately or otherwise, not to pursue disciplinary action against a prosecutor. The fact of the matter, however, is that despite wide-

105 Leeke v. Timmerman, 454 U.S. 83, 87 (1981).

106 MODEL PENAL CODE § 241.7 (AM. LAW INST. 2015).

spread adoption of Model Rule of Professional Conduct 3.8[107]–which requires that prosecutors disclose exculpatory evidence–very few cases of judicially recognized prosecutorial misconduct result in sanctions.[108]

One explanation for this trend is the disincentive for private, and especially public, criminal defense attorneys to file disciplinary complaints. Although these lawyers are in the best position to do so, they may not for fear of tainting a relationship with a powerful public official they are required to deal with on a regular basis throughout their professional career.[109]

Public defenders in particular, have scarce resources to allocate towards the discovery of prosecutorial misconduct in the first place, let alone to spend on pursuing a disciplinary complaint. Public defenders, and even private criminal defense lawyers, must make time and resource trade-offs not only as to which motions and leads to follow for *each* client, but also *as between* clients.

Once the obstacles to filing disciplinary complaints are surmounted by the aggrieved party, however, there are still veto gates through which the disciplinary complaint must pass before resulting in a disciplinary inquiry, let alone an investigation or a finding in favor of sanctions.[110] In the case of the Department of Justice, "this determination is a matter of investigative judgment."[111] Adding state bar associations' disinclination towards interference with judicial proceedings, it is easy to see why so many instances of misconduct go unaddressed by professional regulatory bodies. It may be alluring to

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107 MODEL RULES OF PROF'L CONDUCT r. 3.8 (2013).

108 Armstrong & Possley, *supra* note 95.

109 "[D]efense attorneys who need to practice against the same prosecutors in the near future are reluctant to stir the pot, and . . . bar authorities are reticent to interfere with the judicial system." 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, 960 (2010).

110 The Department of Justice's Office of Professional Responsibility determines whether to pursue an allegation, launch an inquiry, or establish an investigation:

> Upon receipt, OPR reviews each allegation and assesses whether further inquiry or investigation is warranted. If so, OPR determines whether to conduct an inquiry, in which it typically gathers documents and information and obtains written submissions from subjects and components, or a full investigation, in which it also interviews relevant witnesses. This determination is a matter of investigative judgment and involves consideration of many factors, including the nature of the allegation, its apparent credibility, its specificity, its susceptibility to verification, and the source of the allegation.

OFF. OF PROF. RESP., U.S. DEP'T OF JUSTICE, ANN. REP. 2 (2012), http://www.justice.gov/opr/annualreport2012.pdf.

111 *Id.*

abstractly state that greater professional regulation is a sufficient check on prosecutorial misconduct, but the numbers, the incentives, and the history of its practice indicate otherwise.

3. The Judicial Process

"The judicial process" is an amorphous, perhaps even metaphysical concept embodying all of society's ideals of liberty, justice, and due process of law. However, what the Court in *Imbler v. Pachtman* meant when it stated the "judicial process" would sufficiently check prosecutorial misconduct was likely the "beyond a reasonable doubt" standard in criminal law, as well as the host of other protections afforded by the safeguards built into the criminal justice system. This includes, for example, the requirement of probable cause to initiate a prosecution or serve an arrest or search warrant. Prosecutorial immunity, however, pervades even probable cause hearings, as prosecutors are absolutely immune from liability for perjuring themselves or withholding exculpatory evidence during testimony.[112]

In fact, the line between advocative and investigative activities for prosecutors has undergone some judicial surgery in the federal courts of appeals, and—in effect—expanded the absolutely immune functions of the prosecutor to clearly investigative activities in some cases. For example, after the Supreme Court's decision in *Buckley v. Fitzsimmons* was remanded, the Seventh Circuit held that activities conducted by a prosecutor even during the investigative phase of the case, before a finding of probable cause, were shielded absolutely from liability since the introduction of evidence procured during the investigative phase *at trial* is what causes harm to the criminal defendant.[113] In applying this circuitous reasoning, the court gave prosecutors the ability to shield activities that would otherwise leave them exposed to civil suit by simply introducing the fruits of these activities during the trial.

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[112] *See* Burns v. Reed, 500 U.S. 478, 492 (1993) (holding that participating in a probable cause hearing is an advocative function warranting absolute immunity for prosecutors).

[113] "*Obtaining* the confession is not covered by immunity but does not violate any of Buckley's rights; *using* the confession could violate Buckley's rights but would be covered by absolute immunity . . . . Prosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trial even if they present unreliable or wholly fictitious proofs." Buckley v. Fitzsimmons, 20 F.3d 789, 795 (7th Cir. 1994) (citing Buckley v. Fitzsimmons, 509 U.S. 259, 266-67 (1993)) (emphasis in original).

### C. *Alternatives for Regulation*

Thus far, this Comment has examined each of the justifications for absolute prosecutorial immunity and dissected the extent to which they succeed in regulating wrongful convictions, including the incentive structures each avenue has upon prosecutorial behavior. These evolving areas of inquiry have shown over time that the Supreme Court's views of professional disciplinary systems and judicial checks on prosecutors' power were overly optimistic and even misguided. Perhaps the Supreme Court's misplaced faith in judicial process and professional and criminal oversight were understandable in a time during which the slew of exonerations stemming from the advent of DNA evidence had not yet despoiled much of the faith placed in the American justice system.[114] Today, it is unwise to subscribe any further to these failed systems of regulation.

#### 1. Municipal Liability

By requiring a wrongfully convicted person to prove a pattern of misconduct in municipal liability claims, the Supreme Court has taken the teeth out of many otherwise meritorious claims. For some, a pattern of misconduct may exist but may be difficult or expensive to unearth or establish in court. For others, the violation of their rights may stem directly from the absence of oversight or failure to train but their case only represents the first among a string of violations to follow in the months, years, or decades to come. By endorsing the addition of a "pattern" element to municipal liability claims, the Court has not only made it more difficult for deserving plaintiffs to assert claims, receive restitution, and instill the regulatory oversight necessary to prevent future misconduct, but it has revealed a preference for protecting defendants whose rights have been violated later in time at the expense of those whose rights were violated earlier. It has effectively estopped a mass of wrongfully convicted individuals from asserting claims simply because their harm accrued earlier than others'.

The Supreme Court has also made establishing a pattern more difficult by requiring that instances of misconduct be sufficiently simi-

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[114] *Imbler v. Pachtman* was decided in 1976. 424 U.S. 409 (1976). Since 1989, there have been 317 DNA-related exonerations, with the average sentence served in each case comprising 13.6 years. *DNA Exoneree Case Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited July 11, 2014).

lar.[115] In *Connick v. Thompson*,[116] the plaintiff provided evidence of four prior instances within the past decade wherein the Louisiana state courts had reversed convictions due to *Brady* violations,[117] but the Court held that these instances were insufficiently similar to the instant blood evidence to put the District Attorney on notice of a need for further training or supervision.[118] However, a violation of the *Brady* rule is not a *malum prohibitum*[119] offense, and the fact that four violations had occurred under the District Attorney's watch is certainly indicative on its face, regardless of the type of evidence involved in each case, that further training or punitive action was warranted.

One of the primary errors made in contemplating municipal liability is the Court's belief that, absent a pattern of misconduct, imposing liability would amount to a *respondeat superior* standard for municipalities.[120] This approach ignores alternative, and greater, indicators of customs and policies that violate civil rights. One such consideration is the number of public actors involved in the alleged violation.[121] The First Circuit embraced this criterion by holding that a single incident may give rise to liability where it "involves the concerted action of a large contingent of individual municipal employ-

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115 *See* Thomas v. Cumberland Cty., 749 F.3d 217, 223 (3d Cir. 2014) ("Ordinarily, '[a] pattern of similar constitutional violations by untrained employees' is necessary 'to demonstrate deliberate indifference for purposes of failure to train.'").

116 563 U.S. 51 (2011).

117 *Brady v. Maryland*, 373 U.S. 83, 87 (1963), was a landmark Supreme Court case establishing that a prosecutor's knowing or reckless withholding of evidence that would exculpate a criminal defendant violates the defendant's constitutional rights under the Due Process Clause of the Fourteenth Amendment.

118 Connick v. Thompson, 563 U.S. 51, 62 (2011).

119 "An act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." *Malum Prohibitum*, BLACK'S LAW DICTIONARY (9th ed. 2009). This is differentiated from its counterpart, *malum in se*, which denotes "a crime that is inherently immoral." *Malum in Se*, BLACK'S LAW DICTIONARY (9th ed. 2009).

120 *See Connick*, 563 U.S. at 70 ("As our precedent makes clear, proving that a municipality itself actually caused a constitutional violation by failing to train the offending employee presents 'difficult problems of proof,' and we must adhere to a 'stringent standard of fault,' lest municipal liability under § 1983 collapse into *respondeat superior*."). The doctrine of *respondeat superior* is applied primarily in tort law. Translated from Latin, the expression reads "let the superior make answer" and imposes liability directly upon a principal for the malfeasant actions of his or her agent. *Respondeat Superior*, BLACK'S LAW DICTIONARY (9th ed. 2009).

121 *See* Bordanaro v. McLeod, 871 F.2d 1151, 1156-57 (1st Cir. 1989) (finding that "[T]he fact that all these officers acted in concert is further evidence that there was a pre-existing practice of breaking down doors when apprehending felons.").

ees."[122] This holding is a derivative of Justice White's "single incident" theory from *City of Canton v. Harris*.[123] In *Harris*, the Court concluded that a single incident of misconduct may make the need for training so obvious as to indicate a policy or custom of deliberate indifference, and thus give rise to liability without the showing of a pattern.[124] The example Justice White provided was based upon a hypothetical in which a police department issued firearms to its officers without training them on the constitutional limitations of using deadly force.[125] Such a failure to train would be "so obvious," wrote Justice White, that it "could properly be characterized as 'deliberate indifference' to constitutional "rights."[126] Although this may have been considered *dictum* at the time it was written, subsequent Supreme Court and federal courts of appeals decisions have paid it sufficient deference to solidify it as a rule.[127]

In *Bordanaro v. McLeod*, the First Circuit applied the single-incident rule to a scenario in which the defendants received "brutal beatings . . . at the hands of Everett, Massachusetts police officers."[128] The court instructed that since the incident involved "the entire night watch of the Everett Police Department[,]" the requirement of a "custom or practice" under a § 1983 municipal liability claim could be "inferred from the event itself."[129] Commenting on the Supreme Court's general avoidance of the single-incident claim as an applicable theory, the First Circuit noted:

> While it is true that evidence of a single event alone cannot establish a municipal custom or policy, where other evidence of the policy has been presented and the 'single incident' in question involves the concerted action of a large contingent of individual municipal employees, the event itself provides some proof of the existence of the underlying policy or custom.[130]

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122 *Id.*

123 *See* City of Canton v. Harris, 489 U.S. 378, 390 (1989).

124 *See id.*

125 *Id.* at 390 n.10.

126 *Id.*

127 *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 70 (2011); Thomas v. Cumberland Cty., 749 F.3d 217, 223 (3d Cir. 2014).

128 *Bordanaro*, 871 F.2d at 1153.

129 *Id.* at 1156.

130 *Id.* at 1156-57 (citing Kibbe v. City of Springfield, 777 F.2d 801, 805-06 (1st Cir. 1985) (internal citation omitted) (footnote omitted).

Thus, the First Circuit recognized and applied the single-incident theory of municipal liability in the context of a multiple-actor scenario, but tempered the rule by stating that it must be accompanied by at least some other evidence corroborating the existence of the policy or custom that was alleged to have violated a plaintiff's civil rights.

The Supreme Court's most significant municipal liability decision of late recognized this "single incident" theory, but its jurisprudence in this field has yet to be developed.[131] Adopting the First Circuit's multiple-actor rule would be a good first step down the road of developing the "single incident" theory and towards stricter regulation of prosecutors. By holding that the number and depth of involvement of municipal actors in a single incident provides substantial evidence of deliberate indifference, civil claimants could participate in the regulation of prosecutorial misconduct where a wrongful conviction involved several municipal employees.

Under this theory, *Connick v. Thompson*,[132] which involved four prosecutors, might have been decided differently.[133] Under a "single incident" theory where the multiplicity of actors is indicative of deliberate indifference, along with other relevant factors, such as the ongoing nature and deliberateness of the incident, the Court would likely have decided in favor of Justice Ginsburg's dissenting opinion. This would allow for wrongfully convicted individuals who are estopped by absolute prosecutorial immunity to attain compensation and serve as a disincentive towards future violations.

Not only would use of the "single incident" theory give birth to a new jurisprudence effecting restitution for those whose civil rights were invaded at the hands of the government, it would also encourage more stringent hiring, training, and supervisory policies. Conse-

131 *See Connick*, 563 U.S. at 68.

132 563 U.S. 51 (2011).

133 Justice Ginsburg recited the facts of the case as such:

> From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived *Brady*'s compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutors' conduct relating to Thompson's trials, a fact trier could reasonably conclude that inattention to *Brady* was standard operating procedure at the District Attorney's Office.

*Id.* at 79 (Ginsburg, J. dissenting).

quently, since the theory sounds in municipal liability, it also avoids the Supreme Court's concern over the distraction of prosecutors. Instead, "single incident" claims would target supervisors and municipal administrators above the fray of prosecutorial decisions. Coupling this with a test that recognizes a "pattern" of misconduct through the type of right that is violated would further contribute to the regulatory effect of municipal liability. Municipalities that wish to avoid the "distraction" and fiscal inconvenience of § 1983 suits for prosecutorial misconduct would be forced to take preemptive steps to ensure that it is not amenable to suit.

Furthermore, if the Supreme Court is determined to retain the "pattern" element within the *prima facie* case for municipal liability, it should revise this element to give life to legal actions taken within this theory. As *Connick* displayed, even alleging a pattern of misconduct by the same type of actor within the same geographic location is insufficient to hold a municipality liable over the similar pattern requirement.[134] Not even proof that these actors—prosecutors in the relevant case—violated the same right by withholding exculpatory evidence in violation of *Brady v. Maryland*[135] was sufficient to overcome the Supreme Court's seemingly impenetrable requirement of a sufficient pattern.[136] However, adopting a construction of the pattern requirement that would render it fulfilled—*prima facie*—where a plaintiff offers proof that a group of (1) the same type of actor,[137] (2) violated the same statutory or constitutional right, would likely have the opposite result.[138] This Comment will refer to this formulation as the actor-and-right test.

Adopting this framework would first give life to an avenue of regulation the prosecutorial function in American society sorely lacks. Since absolute immunity has proven a high and expansive bar that is difficult to surpass,[139] the development of municipal liability may be the most effective field of § 1983 litigation through which regulation of America's many prosecutors might be achieved. The actor-and-right test posited in the previous paragraph does not tip the scales

134 *See* Connick v. Thompson, 563 U.S. 51, 71-72 (2011).

135 373 U.S. 83 (1963).

136 *See supra* note 133.

137 In this case, prosecutors.

138 In this case, the right under the Due Process Clause not to have exculpatory evidence withheld by a prosecuting attorney.

139 *See supra* Part I.C.

unduly in favor of a plaintiff. Rather, it allows a wrongfully convicted individual with a *prima facie* meritorious claim to simply place his foot within the door of litigation. If a plaintiff in such a lawsuit can allege sufficient facts to overcome the pleading standards of *Twombly* and *Iqbal*,[140] and prove that both his constitutional right has been violated as well as a pattern of violations of that same right by prosecutors within the jurisdiction of a particular municipality, any measure of justice would mandate that the claimant be given an opportunity to have his case heard.

Unlike the nebulous opinion in *Connick*, which held the violations alleged by the plaintiff were not sufficiently similar to constitute a pattern but declined to develop a metric for whether or when a string of incidents might *be* sufficiently similar,[141] the actor-and-right test allows the balanced development of a municipal liability framework within the context of a basic starting point. Questions such as "when are two state officials working within the same jurisdiction sufficiently similar to constitute the 'same type of actor'" or "what are the criteria for determining whether the same right has been violated"[142] are left to be developed by the courts—and ultimately, likely the Supreme Court. By allowing these cases to be heard, the Court can take a measured approach towards resolving the regulatory failures that give rise to wrongful convictions while assuring restitution for those with meritorious claims against prosecutors instead of ignoring the class of cases altogether under the precedent of *Connick v. Thompson*.

2. Qualified Immunity

*a. Qualified Immunity is a Preferable Standard for Prosecutorial Regulation*

Qualified immunity protects many government officials, including police officers, from liability for civil claims.[143] Likewise, prosecutors

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[140] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

[141] *See* Connick v. Thompson, 563 U.S. 51, 70-72 (2011).

[142] For instance, would all violations of the Fifth Amendment constitute violations of the same right? Likely not. Even violations of the Due Process Clause of the Fifth Amendment might not be categorized as the "same right" for purposes of this test.

[143] *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009); *see also* Anderson v. Creighton, 483 U.S. 635, 638-39 (1987).

are entitled to qualified rather than absolute immunity for their investigative activities.[144] In order to establish a claim under § 1983, a plaintiff must prove that the prosecutor violated a clearly established constitutional right of which a *reasonable person* would have been aware.[145] Thus, a judge has the ability to throw out all claims involving rights of which a reasonable person would not have been aware. This means that prosecutors are protected from the large slews of frivolous claims the Court fears would constrain the abilities of prosecutors to perform their duties.[146]

The objective reasonable person element also ensures that prosecutors are held accountable for the violation of rights they know, or should have known, existed. Thus, if prosecutors were not otherwise absolutely immune, they would be liable for *Brady* violations and other offenses arising from their conduct at trial. As the evidence has shown, enforcement of professional disciplinary measures has been unsuccessful despite the aims of bar association codes to craft language that requires the turning over of exculpatory evidence.[147] The problem, in part, stems from the particularity in wording and completion of professional codes of conduct, which tend to incentivize strategic behavior rather than compliance with the spirit of justice and respect for the rights of due process and fair trial.[148] On the whole, however, it is the absence of amenability to liability that does the most

144 Imbler v. Pachtman, 424 U.S. 409, 430 (1976); *see generally* Erwin Chemerinsky, *Prosecutorial Immunity*, 15 TOURO L. REV. 1643, 1653-56 (1999) (examining the line between advocative and investigative conduct by reference to whether the prosecutor's activity (1) was conducted in or out of court, (2) was a function normally performed by another actor, and (3) was highly discretionary).

145 *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that government officials performing discretionary functions are immune from civil liability if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known.").

146 *See* Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("Permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.").

147 MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (2015) (requiring a "[T]imely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . .").

148 *Cf*. Fred C. Zacharias, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 25 (Feb. 2009) ("A game-like attitude would result, with prosecutors interpreting the rules literally and viewing the codes as requiring nothing more than the specified behavior.") (citing Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 261 (1993)).

damage and perverts incentives towards the commission of wrongful behavior. Without a mechanism through which claims are likely to be brought, which neither professional discipline nor criminal liability satisfy, prosecutors will not be properly regulated.

Although it is only prosecutors' investigative conduct that is currently subject to qualified immunity,[149] the line between advocative and investigative conduct has shifted over time towards holding more conduct absolutely immune.[150] Civil liability, however, is the lifeblood of an efficient regulatory framework. Thus, extending liability towards more prosecutorial conduct while protecting against the concerns of *Imbler* should serve as a superior policy to professional regulation and criminal liability, neither of which deliver the necessary level of oversight to prevent widespread prosecutorial misconduct.[151]

The "good faith" standard of qualified immunity is particularly relevant to prosecutors and its ability to require of them that they act as a "reasonable person" would have in their shoes. Thus, since the rights of fair trial and due process of law are "clearly established" under the jurisprudence of constitutional law and the mandates of *Brady v. Maryland*, which require prosecutors to disclose exculpatory evidence,[152] it is entirely inconsonant with American justice not to hold prosecutors accountable for violations of which they had reason to know. Under a qualified immunity standard, the only violations for which prosecutors would be liable are those of which they had reason to know.[153] To oppose the extension of liability to these actions is to deny justice and restitution to thousands of past and future wrongfully convicted individuals, and to communicate to prosecutors that they are permitted to violate the due process rights of those they prosecute with little fear of professional, judicial, or criminal retribution.

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149 Justice Stevens best described this distinction in *Buckley v. Fitzsimmons*:

> [W]hen a prosecutor "functions as an administrator rather than as an officer of the court" he is entitled only to qualified immunity. There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand.

509 U.S. 259, 273 (1993) (quoting Imbler v. Pachtman, 424 U.S. 409, 431 n.33 (1976)).

150 *See supra* Part I.C.

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

152 Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

153 Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

*b. Heightened Pleadings are Sufficient to Deflect Frivolous Claims*

The Court in *Imbler* was fundamentally incorrect in its assumption that for prosecutors to "shade" their prosecution decisions was necessarily a negative influence.[154] In fact, one of the primary features of regulation is to cause its adherents to more closely scrutinize their decisions and deter them from wrongful conduct; not even the *Imbler* Court claimed that prosecutors should be free from all regulation.[155] Just as a butcher aware of FDA regulations will more closely inspect his meat for bacteria to prevent selling foul food, a prosecutor aware of civil liability for withholding exculpatory evidence will more closely sift through his materials to ensure that he discloses all of the relevant information to the criminal defendant's counsel. Viewed in this light, prosecutors *ought* to shade their decisions, at least at the optimal level–above the point at which they are incentivized towards willful or negligent behavior and below the point at which they fail to bring charges against parties more likely to be guilty than not. Although absolute amenability to civil suit could arguably result in the latter scenario, police officers and other public officials have long been exposed to liability under *qualified* immunity without any great outcry that they are failing to perform their duties for fear of legal retaliation.[156]

Although the distraction of prosecutors from their duties was a primary concern of *Imbler* in contemplating civil liability, the Court also noted in *Burns* that, "the qualified immunity standard is today more protective of officials than it was at the time *Imbler* was decided."[157] In fact, the body of law governing claims against officials

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154 *Imbler*, 424 U.S. at 423 (expressing concern that, given the risk of civil litigation, prosecutors would "shade" their decisions to prosecute by abstaining from bringing charges or pursuing them rigorously in fear of retaliatory litigation).

155 *See id.* at 428-29.

156 In fact, if media coverage is any metric, police misconduct is extraordinarily high even with officers being exposed to liability. In 2010 alone, there were 4,861 unique reports of police misconduct nationally. David Packman, *2010 National Police Misconduct Statistics and Reporting Project (NPMSRP) Police Misconduct Statistical Report*, THE CATO INSTITUTE (2010), http://www.policemisconduct.net/statistics/2010-annual-report/.

157 *See* Burns v. Reed, 500 U.S. 478, 494 n.8 (1991) (noting that the qualified immunity standard at the time of *Imbler* only required a subjective showing of intent by a public official, and adopting a new objective standard to deflect distracting claims by making a § 1983 claim against a public official more difficult to attain) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

protected by qualified immunity has left open the possibility of a heightened pleading standard.[158] Although the judiciary is not in resolute agreement as to the applicability of a heightened pleading standard, judges will generally require a plaintiff to overcome the defense of qualified immunity before proceeding to discovery.[159] This requirement acts as a buffer between the prosecutor and plaintiff, serving to weed out frivolous claims before they reach discovery that initiates a time-consuming process likely to become burdensome on prosecutors if allowed in every case before a showing that the prosecutor acted in such a way that voided his immunity.[160]

The evidentiary standard for all pleadings in civil cases has also changed since *Imbler*, the Supreme Court holding in *Twombly* and *Iqbal* that "a claim must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.' "[161] The Court in these two cases established a higher bar for plausibility than had previously been recognized in pleading jurisprudence, effectively bending the Federal Rules of Civil Procedure. Because of this standard, civil rights claims under § 1983 must overcome this new, higher pleading standard in addition to defeating a prosecutor's absolute and qualified immunities in order to gain relief for a wrongful conviction. It further means that the concerns of *Imbler* are already met in today's jurisprudence by the mechanisms built into the judicial system as well as the qualified immunity doctrine, obviating the need for an additional safeguard. Absolute immunity is no longer necessary because the requirements of *Twombly* and *Iqbal* sufficiently deflect frivolous claims that may otherwise unnecessarily distract a prosecutor from his duties.

## CONCLUSION

Prosecutorial immunity has resulted in a distorted system under which prosecutors are incentivized to trade ethics and reasonable care

158 *See* Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (explaining that "if the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery.").

159 *Id*.

160 *Cf.* Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.").

161 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

for high conviction rates. Predictably, this has led to many wrongful convictions. Still worse, it has done more than that by depriving wrongfully convicted persons of their right to compensation under the Civil Rights Act, a statute originally designed to remedy such invasions of liberty.[162] To restore accountability to the prosecutorial profession, prosecutors should be stripped of absolute immunity, municipalities should be suable under a single-incident theory, and patterns of misconduct should be defined to include instances that violate the same civil right at the hands of the same kind of state actor.

[162] *See supra* Part I.A.