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Prosecutorial Accountability after Connick v. Thompson

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INTRODUCTION

From the recent case of the prosecutor in the false rape allegations against Duke lacrosse players, who was found to have intentionally manipulated evidence, and to have made false statements to the court and inflammatory comments to the media, to the recent withholding of exculpatory evidence in the prosecution of recently deceased former Senator Ted Stevens, to the case of the prosecutor in the recent “jena six” case, an openly racially motivated prosecution, prosecutorial misconduct has been a recurrent news feature. Further, the Supreme Court has, in three cases in the last few terms, granted certiorari to cases involving civil liability for prosecutorial misconduct.

Many recent articles have been written about the spate of high profile cases of

1 I would like to thank my uncle Irwin E. Weiss Esq. for his proofreading and thoughts. I would also like to thank Professor Stephen Vladeck of American University Washington College of Law for his willingness to grade this as a independent study while I was in school, and hence the opportunity to write this article.
3 Id.
7 Id.
prosecutorial misconduct, and what to do about such misconduct\textsuperscript{10}. Indeed a recent book has been written about the danger of prosecutorial misconduct in the American system of absolute prosecutorial discretion in who to charge, when, how much, and what punishments to seek\textsuperscript{11}. However, this article's purpose is not simply to add to the number of articles and other works lamenting prosecutorial power or accountability for misconduct.

Part I of this article, attempts to delineate what we mean when we talk about misconduct, to give examples of types of misconduct, and to distinguish between things that are misconduct and what may be flaws in the system, but are not misconduct\textsuperscript{12}. It also introduces the reader to distinctions in misconduct that are helpful later in the article, such as the harmful vs. not harmful distinction, the investigative vs prosecutorial distinction, and the intentional vs. unintentional distinction\textsuperscript{13}.

Part II goes into detail on the current mechanisms available in American law (and even mechanisms available outside the law) to control prosecutorial misconduct\textsuperscript{14}. In doing so, it draws from many prior academic articles, and combines and updates their findings\textsuperscript{15}.

Part III goes into detail on the current proposals for reform, including one the Supreme Court recently rejected this fall in \textit{Connick v. Thompson}\textsuperscript{16}, where the plaintiff asserted that a


\textsuperscript{12} \textit{Infra}, Part I.

\textsuperscript{13} \textit{Infra}, Part I.

\textsuperscript{14} \textit{Infra}, Part II.

\textsuperscript{15} \textit{Infra}, Part II.

local government is liable under 42 U.S.C. § 1983\(^{17}\) for failure to train its prosecutors to avoid misconduct\(^{18}\). Though some proposals have some merit, this article will show why none of them really represents a good chance of controlling prosecutorial misconduct\(^{19}\).

Part IV of this article will then explain why a slight modification of the theory from Connick from its theory of “failure to train” liability to a theory of “failure to remedy” liability, shows a better chance of checking misconduct than both Connick, the current other reform proposals, and the current checks that exist to stem misconduct\(^{20}\).

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

A. Forms of Misconduct and Classifications of Misconduct

Before discussing the forms and classifications of misconduct, it must be explained what is meant by misconduct as used in this article. For the purposes of this article, the misconduct discussed is limited to actual legal violations that are attributed to the prosecutor. Thus, it does not include ethical violations that, while perhaps repugnant behavior, are legally permissible. Also, as explained infra, this is a discussion of accountability for actual misconduct by prosecutors and is not about wrongful convictions generally\(^{21}\).

The reasons this is limited to actual misconduct are twofold. First, this is meant to address remedies for misconduct, and is not itself a treatise on what prosecutors' roles should be in the criminal justice process, nor a discussion of how much power they should have. Secondly,
because, as will be seen, both the courts and legislatures (including Congress) have been unwilling to address even clearly illegal misconduct by prosecutors\textsuperscript{22}, legal conduct which only seems unethical seems to be something of a smaller concern. Thus, while many scholars who have written about the issue do note the vast powers afforded to prosecutors to choose who to prosecute for what and when, and what punishments to seek\textsuperscript{23}, this will not be discussing the related but distinguishable problem of prosecutorial discretion in the justice system.

The reason this is limited to misconduct and does not include all wrongful convictions requires one to distinguish between the two. It is true, of course, that the categories certainly overlap-as the victim of prosecutorial misconduct both can and often does end up the victim of a wrongful conviction. However, the categories are neither equal nor does one include the other. In other words, one could be the victim of misconduct and not be convicted (or not be convicted wrongfully), and one could be wrongfully convicted without any prosecutorial misconduct.

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

In contrast, when discussing prosecutorial misconduct, the focus is on the criminal

\textsuperscript{22} \textit{Infra}, part III.

\textsuperscript{23} \textit{See eg} \textsc{Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor,} (2007).
prosecutor. With misconduct, the focus is on the issue of whether the prosecutor followed his
ethical duties to the court and/or to the defendant. If he did not, he can be said to have
committed misconduct even if the misconduct is harmless and the defendant would easily have
been convicted anyway.

1. Common Forms of Misconduct

Obviously, listing all forms of prosecutorial misconduct is impossible, and here the article
focuses on many of the most common forms that are discussed by Courts in the criminal
procedure context when criminals are appealing their convictions or sentences. Further, as the
article later distinguishes prosecutorial from non-prosecutorial misconduct by prosecutors, this
leaves out clearly non-prosecutorial forms of misconduct that may be committed by prosecutors,
such as misconduct at the investigative stage.

a) “Suborning Perjury”

Possibly the most fundamental of all forms of prosecutorial misconduct, and the first to
be recognized by the United States Supreme Court, occurs when a prosecutor knowingly uses
perjured testimony to secure the conviction of a defendant\(^\text{24}\). The Court first recognized that this
first form of prosecutorial misconduct deprived a criminal defendant of his due process right
guaranteed by the fourteenth amendment of the Constitution in the famous case of \textit{Mooney v. Holohan}\(^\text{25}\), a case with an extraordinary history.

In that case, Thomas Mooney\(^\text{26}\), who had been convicted in California of a 1916

\(^{24}\) Mooney v. Holohan, 294 U.S. 103, 112 (1935) (rejecting the notion that notice and hearing alone satisfy due
process when a prosecutor suborns perjury).

\(^{25}\) Id.

\(^{26}\) Thomas Mooney was a radical labor activist. B.W. Gordon, Jr., Case Note, Arizona v. Youngblood, 109 S. Ct.
murder, and sentenced to death. At trial, the prosecution presented testimony that Mooney suspected to be perjured. After a motion for a new trial and the state intermediate court's denial of his appeal, Mooney sought review in the Supreme Court of California. While that appeal was pending, the California Attorney General, who did not officially represent the state in the appeal, admitted that the testimony Mooney suspected was perjured was indeed both perjured and known by the prosecution to be perjured at the time it was presented at trial. The Attorney General had apparently reviewed some letters written by a Mr. Oxman, one of the witnesses who had allegedly offended perjured testimony, for the prosecution, which the Attorney General and Mooney believed tended to show that Mr. Oxman had perjured himself and that the prosecution had known this when it had offered Mr. Oxman's testimony. Despite the state's attorney general admitting such, and consenting to reversal, the local prosecutor opposed a consent reversal motion, and the California Supreme Court denied the motion and upheld his conviction on the merits. Mooney then unsuccessfully applied to the trial court for a new trial, citing the Attorney General's admission. The trial court denied the motion for procedural reasons concerning the form of his petition, and Mooney again appealed to the Supreme Court of California. While that was pending, he also requested a stay of his death sentence from the

27 The allegations were that Mooney had planted a bomb at a rally in San Francisco as part of his activism. Ex parte Mooney, 73 P.2d 554, 557 (Cal. 1937).
28 Id. at 558-59.
29 Id. at 558.
30 See id. at 558
31 Id.
32 Id. at 559. The Supreme Court of California did not wish to look at evidence beyond the record (the Oxman letters) in the appellate context.
33 Id. The appeal on the merits did not raise the perjured testimony because of the denied prior motion on the issue.
34 Id.
35 Id.
36 Id.
Supreme Court of California\footnote{Id.}. While the California Supreme Court denied both the stay of his death sentence\footnote{Id.} and his appeal of his motion for retrial for the same procedural reasons as did the trial court\footnote{Id.}, the Court also found that his and the Attorney General's allegations of the knowing perjured testimony were not credible\footnote{Id.}. Mooney then turned to the federal courts for relief\footnote{Id. at 559-560.}.

Being unsuccessful there\footnote{Id. at 104.}, Mooney filed an original petition for a writ of habeas corpus in the Supreme Court of the United States\footnote{Mooney v. Holohan, 294 U.S. 103 (1935).}.

The United States Supreme Court heard the petition\footnote{Id. at 104.}.

During the original proceeding, the Attorney General represented the state\footnote{Id. at 111.}. The Attorney General admitted that testimony used to convict Mooney was known to be perjured when presented at trial\footnote{Id. at 111-12.}. However, now officially representing the State, he argued\footnote{Id.} that the knowing use of perjured testimony did not violate due process. Instead, he argued, no prosecutorial misconduct could by itself deny due process, unless the defendant was deprived of his notice and right to be heard\footnote{Id. Notice and the right to be heard are said to be the components of due process. Goldberg v. Kelly, 397 U.S. 254, 267 (1970).}. The Supreme Court disagreed.
with this version of the due process right\textsuperscript{49}. In disagreeing, the Court proclaimed the right to have a trial free of the knowing use of perjured testimony stating:

\begin{quote}
We are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. (citation omitted). It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the state, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a state, ‘whether through its legislature, through its courts, or through its executive or administrative officers.’\textsuperscript{50}
\end{quote}

In other words therefore, the Court held in the Moody case that prosecutorial misconduct of this order is a violation of the due process clause because it denies access to a fair trial by a governmental actor.\textsuperscript{51} Like many doctrines, the Court later expanded the doctrine\textsuperscript{52}. It now includes testimony known to be false but not solicited by the prosecution\textsuperscript{53}. It also includes the

\begin{footnotes}
\item[50] Id.
\item[51] See Id. Unfortunately for Mooney, the Court went on to find that despite this holding, it could not issue the writ because the state courts had not heard the case knowing that known perjured testimony was a violation of due process nor had it found that the testimony had actually been offered knowingly perjured. \textit{Id} at 114-15. The Supreme Court therefore held the opportunity had to be given again to the state to hear Mooney’s claims before the Supreme Court would issue the writ in original jurisdiction. \textit{Id}. When Mooney again returned to the state courts with a state court habeas claim, it was denied. \textit{Ex parte} Mooney, 73 P.2d at 596. The Supreme Court of California held after reviewing the enormous record of the case developed by 1937, that the allegation of the knowing use of perjured testimony was not credible. \textit{Id}. he had not done so. Shortly thereafter, Mooney finally received a gubernatorial pardon in 1937, over twenty years after his arrest. \textit{Lou Cannon, GOVERNOR REAGAN: HIS RISE TO POWER}, 515, n. 16 (2003).
\item[53] Id.
\end{footnotes}
use of knowingly false evidence related to credibility of a witness, rather than the underlying events\textsuperscript{54}.

Prosecutorial subornation of perjury thus was recognized not only as a form of misconduct that violated due process by itself, but as the first form of prosecutorial misconduct to itself create a deprivation of due process, and subsequently led to other forms of misconduct to become recognized as violations of due process\textsuperscript{55}.

b) "Brady Violations"

One such form of misconduct to arise following the recognition of suborned perjury as prosecutorial misconduct was the withholding of exculpatory evidence from the defense\textsuperscript{56}. This is another of the the most common forms of misconduct today. It is sometimes called a "Brady violation\textsuperscript{57}" which is a shorthand reference to the case of \textit{Brady v. Maryland}\textsuperscript{58}.

In \textit{Brady}, the Supreme Court held that, under the “due process” clause of the 14th amendment\textsuperscript{59}, there is an affirmative obligation of a criminal prosecutor to disclose any evidence known to the prosecutor that is favorable to the defendant and that is requested in discovery\textsuperscript{60}. Interestingly, the Court took its reasoning from the \textit{Mooney} case cited above, comparing the suppression of exculpatory evidence requested by the defense to the use of knowingly perjured testimony, in that they both strike at the heart of the fairness goals of a trial\textsuperscript{61}. Furthermore, because a violation of this duty causes a the defendant to be denied due process, the defendant

\begin{small}
\textsuperscript{55} See e.g. Brady v. Maryland, 373 U.S. 83, 86 (1963) (extending \textit{Mooney} to hold that a prosecutor had a duty to disclose exculpatory evidence to the defense).
\textsuperscript{56} Id.
\textsuperscript{57} Eg. Connick
\textsuperscript{58} Id.
\textsuperscript{59} U.S. CONST. amend. XIV, § 1.
\textsuperscript{60} Brady v. Maryland, 373 U.S. at 86.
\textsuperscript{61} Id.
\end{small}
earns the right to a new trial if this duty has been violated\textsuperscript{62}.

Significantly, however, the duty imposed in \textit{Brady} has been expanded since its creation\textsuperscript{63}, perhaps contributing to the prevalence of “\textit{Brady} violations” as a main form of misconduct. For example, in \textit{Giglio v. United States}, the Supreme Court expanded the \textit{Brady} duty to evidence that could be used to impeach the credibility of prosecution witnesses, even if the evidence did not directly exculpate the defendant\textsuperscript{64}.

Most importantly however, in \textit{United States v. Argus}, the Supreme Court ruled that the duty announced in \textit{Brady} extends even to material not specifically asked for by the defense during discovery, which, while protecting defendants, but simply in the possession of the prosecutor\textsuperscript{65}. Crucially then, prosecutors were now required to actively be on the look out for evidence which may exculpate the defendant, because such evidence now had to be turned over to the defense even if it was never requested. In other words, \textit{Brady} became an active duty always on prosecutors rather than a reactive duty.

Of course, there have also been limitations on \textit{Brady}\textsuperscript{66}. For example, prosecutors need not seek out evidence that may be exculpatory and do not violate \textit{Brady} by not knowing about subsequently found exculpatory evidence\textsuperscript{67}. Also, prosecutors also need not disclose evidence already known to the defendant or in the possession of the defendant in order to avoid a \textit{Brady} violation\textsuperscript{68}. However, by far the most important limitation on \textit{Brady} is that the duty to disclose

\begin{itemize}
\item \textsuperscript{62} \textit{See id} at 88-89.
\item \textsuperscript{63} \textit{See e.g. Giglio v. United States}. 405 U.S. 150 (1972).
\item \textsuperscript{64} \textit{Id} at 154-55.
\item \textsuperscript{65} \textit{United States v. Agurs}, 427 U.S. 97, 110-11 (1976).
\item \textsuperscript{66} \textit{See e.g. id.} at 112-113.
\item \textsuperscript{67} \textit{Id} at 109.
\item \textsuperscript{68} \textit{See Argus at 427 U.S. at 109, (citing \textit{In re Imbler}, 387 P.2d 6, 14 (Cal. 1963); Lafarve et al., CRIMINAL PROCEDURE § 24.3(b), n 57 available at Westlaw CRIMPROC (citing \textit{Rector v. Johnson}, 120 F.3d 551 (5th Cir. 1997); \textit{United States v. Paulino}, 299 F.Supp.2d 332 (S.D.N.Y. 2004); \textit{Jefferson v. State}, 234 S.E.2d 333 (GA App}
only applies to “material” evidence\textsuperscript{69}. “Material,” for this purpose, has been defined by the Supreme Court as not simply evidence which could be relevant, but evidence which is reasonably likely to make a difference in the case\textsuperscript{70}.

Despite these limitations however, the \textit{Brady} rule and its expansions have created an area for prosecutors to err, intentionally or not.

c) “Jury Selection Violations”

Another area where prosecutorial misconduct is talked about frequently is in jury selection\textsuperscript{71}. While it has been established since 1879 that the state may not enforce a statute prohibiting non whites from serving as jurors\textsuperscript{72}, prosecutors still had ways of excluding jurors from serving on the basis of race. Specifically, during the jury selection process, both the prosecutor and the defense\textsuperscript{73} are allowed to challenge jurors for cause and, to a limited extent, dismiss certain jurors for any reason they wish\textsuperscript{74}. This latter practice is referred to as a peremptory challenge\textsuperscript{75}. However, both parties, including prosecutors, have sometimes used this process of peremptory challenges to remove members of certain races\textsuperscript{76}. Most infamously, this tactic was used by prosecutors against black defendants by using peremptory challenges to remove black jurors\textsuperscript{77}.

\begin{itemize}
\item \textsuperscript{69} Agurs, 427 U.S. at 112-113.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} See e.g. \textbf{EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY} (2010).
\item \textsuperscript{72} Strauder v. West Virginia, 100 U.S. 303, 310 (1879).
\item \textsuperscript{73} See Georgia v. McCollum, 505 US 42, 59 (1992).
\item \textsuperscript{74} Id.
\item \textsuperscript{75} See \textbf{BLACK’S LAW DICTIONARY} 261 (9th ed. 2009).
\item \textsuperscript{76} See \textit{generally} Georgia v. McCollum, 505 US 42.
\item \textsuperscript{77} \textbf{EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY} 11,12 (2010).
\end{itemize}
To combat this practice, in *Batson v. Kentucky*, the Supreme Court for the first time allowed criminal defendants to tangibly challenge the selection of a juror based mainly upon the peremptory challenges of a prosecutor in the case against him. The Court has since expanded this right to cases in which the defendant and the excluded jurors are not of the same race, and when the exclusion is based upon gender.

Under *Batson*, when one party challenges the other's exclusion based upon race or gender, the other party must give a race or gender neutral reason for the exclusion. After this, the parties argue whether that reason was pretextual or real, with the burden on the challenging party.

Obviously however, despite the procedural right afforded to the defendant in *Batson*, the very nature of peremptory challenges still provides a way for the unscrupulous attorney to exclude jurors of the basis of race or gender and then provide reasons that are mistaken by the trial court as passing *Batson* muster.

d) Speedy Trial Violations

The prosecutor may also commit misconduct by unduly delaying a prosecution, thereby denying a criminal defendant of his right to a speedy trial. Though contained in the sixth

78 Prior to *Batson*, a defendant could only challenge the pool from which a jury was chosen, or provide multiple cases in which the same prosecutor's office had used peremptory challenges in case after case to exclude members of a certain race. *Batson* held this standard proved ineffectual for preventing jury discrimination. See *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986) (*overruling* *Swain v. Alabama*, 380 U.S. 202 (1965)).
79 *Batson*, 476 U.S. at 97-98.
82 *Batson*, 476 U.S. at 97-99.
83 *Id.*
84 See *infra* Part I.
amendment to the constitution\textsuperscript{86}, the right to a speedy trial was first held to apply to the states in 1967 in \textit{Klopfer v. North Carolina}\textsuperscript{87}. The right attaches upon formal charge or arrest\textsuperscript{88}.

In determining whether the right of a criminal defendant to a speedy trial has been violated courts consider the four factors mentioned in \textit{Barker v. Wingo}\textsuperscript{89}, namely, the length of the delay, which parts of the delay were the fault of the prosecution, the prejudice incurred by the defendant because of the delay, and the degree to which the defendant has asserted his right to a speedy trial\textsuperscript{90}. Of course, the uncertainty in this balancing test leaves lots of wiggle room for prosecutors to deliberately delay and not get caught.

e) Selective and Vindictive Prosecutions

Misconduct can arise, at the constitutional level, even from conduct for which the prosecutor has wide discretion\textsuperscript{91}. A prosecutor has discretion in who to prosecute, to what extent he will charge people he does prosecute, and what sentences he will seek-including the death penalty\textsuperscript{92}. Perhaps most significantly, this discretion includes what plea offers to make to a particular defendant\textsuperscript{93}. Therefore, while it is clear that a prosecutor's decisions to prosecute cannot be solely race based\textsuperscript{94}, a criminal defendant would have a very difficult time proving that the wide discretion used by the prosecutor was race based in his individual case\textsuperscript{95}. The Supreme Court has explained that prosecutorial decisions about whom to prosecute are owed a

\textsuperscript{86} U.S. CONST. amend. VI.
\textsuperscript{87} Klopfer, 386 U.S. at 223.
\textsuperscript{88} United States v. Marion, 404 U.S. 307, 323 (1971).
\textsuperscript{89} Barker v. Wingo, 407 U.S. 514, 531 (1972).
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{See e.g.} United States v. Armstrong, 517 U.S. 456, 464-65 (1996).
\textsuperscript{93} \textit{Id} at 43-60.
\textsuperscript{94} United States v. Armstrong, 517 U.S. at, 464-65.
\textsuperscript{95} \textit{Id} at 464.
presumption of regularity. Indeed, lower courts have held that a criminal defendant arguing selective prosecution on the basis of race bears a “heavy burden.” Particularly difficult may be showing that there are similarly situated possible defendants who were not prosecuted. This latter difficulty arises because by definition, no criminal records of the non prosecuted cases are available to show selectivity. Indeed the Supreme Court, as of this writing, has never overturned a conviction for selective prosecution.

The Supreme Court has, however, overturned convictions for vindictive prosecutions. In *Blackledge v. Perry* the Court held that a presumption of vindictiveness requiring conviction reversal attaches when a prosecutor makes higher charge after a defendant exercises some procedural right. The presumption may be rebutted however, when the alleged vindictiveness occurs before the first trial, such as where a defendant decides not to accept a plea agreement. However, some courts have held a vindictive prosecution may still take place in the charging phase, such as when the prosecutor uses a prosecution to intimidate a defendant into not filing civil charges against the police.

Whether for vindictive prosecution or selective prosecution however, the discretion afforded the prosecutor itself creates the possibility for abuse.

f) Impermissible Remarks or Attempts to Introduce Improper Evidence made by the

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96 *Id.*
97 *See e.g.* United States v. Berrios 501 F.2d. 1207, 1211 (1974) (holding there is a heavy burden when defendant seeks to argue selective prosecution).
98 Lafarv et all., *CRIMINAL PROCEDURE* § 13.4(a), available at Westlaw CRIMPROC.
100 *See* Blackledge v. Perry, 417 U.S. at 8-29. The state, like some states do, allowed for an automatic retrial for certain misdemeanors from the limited misdemeanor court in the regular felony or general jurisdiction court. *Id* at 22. After the defendant exercised this right, the prosecutor charged a higher felony charge. *Id* at 23.
102 *See e.g.* Dixon v. District of Columbia 394 F.2d 966, 968-969 (D.C. Cir. 1968). (Involving a vindictive prosecution for a complaint against the police over an incident.) *Id.*
Prosecution at Trial in Violation of Due Process

Perhaps the most visible form of misconduct is from the prosecutor's remarks at trial which violate the defendant's right to due process. Of all the misconduct however, this category is the broadest and most hard to define, list, and evaluate. Courts have often struggled to rule on whether remarks of a prosecutor are in violation of due process or simply effective trial lawyering\textsuperscript{103}. Complicating the process is that it is also hard to know when and whether a trial court has cured the problem with an instruction to the jury to “disregard” the comment\textsuperscript{104}.

In any case though, courts have sometimes found such misconduct\textsuperscript{105}. The misconduct may include references by the prosecutor to information not admissible, or not in existence at all\textsuperscript{106}. One example of this is that a prosecutor's personal beliefs and opinions about a witness' truth or the defendant's guilt may violate due process\textsuperscript{107}. Another example is when a prosecutor deliberately refers to inadmissible evidence after it has already been ruled inadmissible in a pre trial motion\textsuperscript{108}. Related to these factual issues coming into the jury's consideration, and sometimes just as problematic, is when the prosecutor misconstrues the law to the jury, such as by falsely characterizing reasonable doubt\textsuperscript{109}. Finally, though a closing or opening argument may appeal to emotion, some arguments go too far, such as asking the jury to put itself in the victim's shoes or argue the broader issues of crime control in the neighborhood\textsuperscript{110}.

\begin{footnotes}
\item[103] Lafarve et all., CRIMINAL PROCEDURE § 24.7(e), available at Westlaw CRIMPROC.
\item[104] Id at § 24.7(i).
\item[105] Id.
\item[106] Id at § 24.7(e).
\item[107] Id.
\item[108] Id.
\item[109] Id.
\item[110] Id.
\end{footnotes}
2. **Categorizing the Misconduct**

a. **Intentional v. Unintentional Misconduct**

One distinction that is helpful when referring to misconduct is the distinction between misconduct that is intentional and misconduct that is unintentional. Though not legally significant when dealing with the civil immunity of the prosecutor\(^{111}\), the distinction is referred to in the cases dealing with the civil immunity of the prosecutor\(^{112}\), and is clearly significant when it comes to the culpability of the prosecutor, and the mechanisms used to prevent the misconduct.

While the distinction’s nature is somewhat obvious, it is important to note that many forms of prosecutorial misconduct are by their very nature intentional. For example, a prosecutor cannot accidentally or unintentionally suborn perjury, since if the information is not known to be false, he is not actually suborning perjury, but simply presenting testimony, which later turns out to be false—which is not misconduct. Similarly, if the prosecutor excludes from a jury for racial reasons his very intent to use racial categories makes the conduct intentional. Furthermore, obviously, a malicious or selective prosecution is, by definition, intentional, again because what makes it selective or malicious is the precisely the intent of the prosecutor.

On the other hand however, other forms of misconduct need not be intentional to rise to the level of misconduct\(^{113}\). For example, information which is exculpatory and known to the prosecution and not disclosed to the defendant, is misconduct regardless of the intent of the

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112 E.g. id.
113 See e.g. United States v. Agurs, 427 U.S. 97, 110 (1976).
Similarly, a delay caused by the prosecutor that rises the level of a constitutional speedy trial violation is misconduct, regardless of the malicious intent of the prosecutor. Indeed, in such cases, the relevant question is not the intent of the prosecutor but the unfair and uncorrected prejudice to the defendant.

b. The Prosecutorial vs. Non Prosecutorial distinction.

Another distinction which is important when thinking about prosecutorial misconduct is the distinction between misconduct by the prosecutor in the role of a prosecutor, and misconduct in some other role. The main importance of this distinction is whether the prosecutor will be absolutely civilly immune, as will be discussed later. Furthermore, the exact line of what are prosecutorial vs investigatory or administrative activities of the prosecutor is unclear. For now, however, only a basic understanding of the distinction need be understood.

To understand the investigatory activities of a prosecutor, it must be understood than a prosecutor’s duties may entail many types of activities that do not involve taking steps in court against a particular defendant. A prosecutor may consult with police about the desirability and/or obtain-ability of a search warrant. He may advise police on whether a search warrant is necessary. He may discuss the case with the media to get hints on who may have done a particularity public crime. The exact line of what is prosecutorial and what is investigative is

114  Id.
116  Barker 407 U.S. at 531; Id.
117  Infra parts II and III.
118  Infra part II.
120  Id.
121  See e.g. N.C. State Bar v. Nifong, Case No. 06 DHC 35 (2007), http://www.ncbar.gov/orders/06dhc35.pdf (the prosecutor was disbarred partly for his comments to the media).
discussed later\textsuperscript{122}.

Similar to his investigative roles, a prosecutor's administrative duties do not involve court based actions against a criminal defendant. Such duties may include decisions about personnel for which he is responsible, such as hiring, firing and vacation time decisions.\textsuperscript{123}

c. The Harmful vs Not Harmful Distinction

Another distinction worth discussing is the distinction between misconduct which cases harm to the defendant and misconduct which does not cause harm to the defendant. At first blush, this may seem obvious and of little importance. After all is not all misconduct harmful?

The answers are as follows. First, while all misconduct certainly shows problems in the system of justice administration and casts doubt on the integrity of the offending prosecutor, and the public trust placed in him, from the prospective of an individual defendant, a prosecutor's misconduct may not be harmful directly. This may happen for multiple reasons. For example, a defendant who is the victim of a prosecutor's subornation of perjury may be acquitted by a jury nonetheless. If this happens, the testimony's purpose of convicting the defendant has been thwarted, and the misconduct is harmless. Similarly, but perhaps more commonly, if the defendant would have been convicted even if the misconduct had not been committed, then the misconduct is equally harmless to the defendant.

The second answer is that while it is possible that some misconduct is harmless (at least from the perspective of an individual defendant) certain categories of misconduct are by definition harmful. For example, for a \textit{Brady} violation to occur, a prosecutor's withholding of

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\textsuperscript{122} \textit{Infra} part III.
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the evidence must have been reasonably likely to have had an effect on the trial\textsuperscript{124}. Therefore, by definition, a \textit{Brady} violation can not be harmless, even to an individual defendant\textsuperscript{125}. Similarly if a prosecutor unduly delays prosecution, causing a speedy trial violation\textsuperscript{126}, then the trial has been delayed, and this may hurt the defendant, whether or not he is later convicted, as he may be anxious about the result. Furthermore, as with \textit{Brady} violations, one of the factors in the finding of a speedy trial violation itself is how much prejudice the defendant has experienced due to the delay\textsuperscript{127}.

In sum, while some types of misconduct can be harmless to the defendant, some types are always or nearly always harmful to the defendant, and all types are harmful to the public, even if not the defendant in a particular case.

3. \textit{The frequency of prosecutorial misconduct.}

The question of the frequency of misconduct is important if one is to discuss how to address it. This is because, while as discussed above, prosecutorial misconduct is always harmful in some sense, and often in a real sense to a convicted defendant, if the misconduct is not that common it may be not worth addressing. Cracking down on misconduct that is uncommon may chill the efforts of good prosecutors doing good work and thus cost far more than the benefit of good prosecution that takes criminals off the street and increases public safety. Furthermore, zealous prosecution increases the very public trust in the system that is hurt by over-zealousness, when that prosecution leads to the capture and incapacitation of dangerous

\begin{flushleft}
\textsuperscript{125} See id.
\textsuperscript{126} See \textit{e.g.} Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).
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criminals. In contrast, widespread prosecutorial misconduct may lead to the conviction of innocents, for crimes committed by those still free. Similarly, as discussed above, widespread misconduct by prosecutors leads to a lack of public faith in the prosecutor. This may lead to an unwillingness to assist in the prosecutor in even justified prosecutions and prosecutorial decisions. Finally, and most obviously, prosecutorial misconduct that is harmful to a defendant is fundamentally unjust and unfair to the defendant, causing often irreparable harm to a defendant's life, reputation, finances, and psychological well being.

Unfortunately however, prosecutorial misconduct is not measured directly by government statistics nor do records exist to compare misconduct of different types in different places over time. Much of the methodology for understanding the frequency of misconduct is based upon examining cases without knowing the exact number of cases in a class, and where the records were generally not created for the purpose of statistical research\textsuperscript{128}.

The most important and widest study of prosecutorial misconduct, in terms of geographical and chronological scope, concerning prosecutorial misconduct, demonstrates the problems with gauging the amount of prosecutorial misconduct\textsuperscript{129}. The study, conducted in 2003 by the Center for Public Integrity, found roughly 2000 state local and federal cases of misconduct which courts cited as a grounds for reversal at the appellate level since 1970\textsuperscript{130}. These cases were found by using the search term “prosecutorial misconduct” and putting into the well known legal case databases Lexis and Westlaw, for all appellate cases between 1970 and 2003\textsuperscript{131}.

\textsuperscript{128} See e.g. Harmful Error: Investigating America's Local Prosecutors, CENTER FOR PUBLIC INTEGRITY http://projects.publicintegrity.org/pm/ (last visited Aug. 15, 2010).
\textsuperscript{129} Id.
\textsuperscript{130} Id.
Though the search term revealed over 11,000 cases, the study found there was misconduct in the case and that misconduct warranted reversal in about 2000\textsuperscript{132}.

However, for a few reasons, this study gives the student of prosecutorial misconduct little information on the prevalence of misconduct. First, and most importantly, this “2000\textsuperscript{133}” number does not include cases in which the misconduct did not cause reversal of the conviction, or when reversal was caused by something else despite the presence of misconduct. It also did not include cases that did not reach the appellate level for whatever reason, or were unreported decisions\textsuperscript{134}. Second, this “2000” number does not explain what the denominator is, that is, what percent of the reported appellate cases had misconduct compared to those that did not\textsuperscript{135}. In other words, the study does not indicate how many cases were reported in Lexis and Westlaw that were criminal between 1970 and 2003, in order to provide a comparison number\textsuperscript{136}. Third, this “2000” number vastly underestimates the number of cases of misconduct, because unlike crime, which is generally recorded as reported regardless if not verified\textsuperscript{137}, misconduct is likely only to be mentioned when verified to some degree by a court that it occurred. Fourth, it does not distinguish between kinds of misconduct, such as intentional vs unintentional or prosecutorial vs. investigative\textsuperscript{138}. Finally, while the study discussed what prosecutorial

\textsuperscript{132} Harmful Error: Investigating America’s Local Prosecutors, CENTER FOR PUBLIC INTEGRITY http://projects.publicintegrity.org/pm/ (last visited Aug. 15, 2010).
\textsuperscript{133} Id.
\textsuperscript{135} Harmful Error: Investigating America’s Local Prosecutors, CENTER FOR PUBLIC INTEGRITY http://projects.publicintegrity.org/pm/ (last visited Aug. 15, 2010).
\textsuperscript{136} Id.
\textsuperscript{137} The most important crime statistical document, the Uniform Crime Report, published by the FBI, reports crime reports using uniform definitions across all jurisdictions. See, Uniform Crime Report, FEDERAL BUREAU OF INVESTIGATION http://www.fbi.gov/ucr/ncic2007/about/table_methodology.html (last visited Aug. 15 2010). While crime incidents found after investigation to be fraudulent are not reported, crime not solved but not verified is left on the reports. See id.
\textsuperscript{138} See generally Harmful Error: Investigating America’s Local Prosecutors, CENTER FOR PUBLIC INTEGRITY
misconduct was, it did not precisely define what it meant and whether unintentional or investigatory misconduct was included in its study\(^{139}\).

Studies which are more localized in scope are usually somewhat more rigorous\(^{140}\). For example, one survey by Marshall Hartman and Steven Richards, published in the John Marshall law review in 2001, found that twenty one percent of conviction reversals in death penalty cases in Illinois from 1980-1999 were the result of prosecutorial misconduct\(^{141}\). Reversals of sentence or conviction (by some court, including post conviction collateral attack) as a percentage of total death penalty sentences imposed was found to be about sixty six percent in another study study of all capital cases (including federal) nationwide between 1973 and 1995\(^{142}\). Putting these two numbers together, we are left with roughly fourteen percent of capital Illinois cases in that time period containing reversible prosecutorial misconduct. Of course, this study is limited by geographical location and type of case (i.e death penalty only and only in Illinois and only during the 1980's.)\(^{143}\). It also is limited by some of the factors in the Center for Public Integrity study, including lack of definition of prosecutorial misconduct\(^{144}\), an under-reporting due to the fact that misconduct is rarely mentioned by the court unless clear evidence of the misconduct is brought to the court's attention, and not including cases where misconduct was present but reversal was not ordered\(^{145}\).

Nevertheless, misconduct is clearly prevalent with regard to one issue-race based jury

\(^{139}\) Id.
\(^{141}\) Id. at 423.
\(^{142}\) Id. at 409.
\(^{143}\) Id. at 409.
\(^{144}\) See generally id.
\(^{145}\) See generally id.
exclusions. In June 2010, the Equal Justice Initiative found counties where prosecutors excluded 80% of black jurors with peremptory strikes. In one county, it found that blacks were excluded from jury service more than three times as often as whites. Finally, in some counties, it found prosecutors admitting to training sessions in which they would learn how to question black jurors to later find race neutral reasons for the strike. However, most of these findings were from surveys in the southern United States, and once again, the generalizable nature of such findings to the rest of the nation is unclear.

Thus even with regard to race based jury exclusions, it is unclear how and to what extent prosecutorial misconduct occurs. That it is not nonexistent nor exceedingly infrequent is not disputable however.

II. Current Ways of Holding Prosecutors Accountable.

A. Criminal Sanctions for the Prosecutor

Perhaps the most drastic deterrent to prosecutorial misconduct would be criminal sanctions for those who abuse the rights of the criminal defendant. Indeed, such a crime exists. Federal law codified at 18 U.S.C. § 242 criminalizes “willful” actions under color of law that violate constitutional rights. Conviction requires intent to violate the civil rights of the victim, and thus this form of sanction can only be used to target intentional misconduct.

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146 See generally EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010).
147 Id at 4.
148 Id at 14.
149 Id at 16.
151 Id.
152 Id. (using the word “willfully”).
Neither is this statute a dead letter, it having been famously used in many civil rights prosecutions\textsuperscript{153}. Perhaps most famously, it was used to prosecute the police officers who assaulted Rodney King after the officers had been acquitted of state crimes by an all white jury in California\textsuperscript{154}.

Theoretically, this statute could be used against prosecutors, whether they are state and local or federal. Indeed, in at least one documented case a conviction was entered against a prosecutor. However, that case appears to be the only conviction of a prosecutor for violation of 18 U.S.C. § 242 since the statute was passed in 1866\textsuperscript{155}.

Additionally, prosecutors can be held in criminal contempt of court if they violate rules of the court\textsuperscript{156}. Most recently, this sanction has been used against Michael Nifong, the prosecutor responsible for numerous instances of misconduct in the recent false rape case involving Duke University lacrosse players\textsuperscript{157}. As at least one scholar has pointed out, this form of criminal sanction is slightly more common, though it is less serious than 18 U.S.C. § 242, and perhaps, as some scholars point out, even less serious than professional discipline of the prosecutor or if the prosecutor had to pay civil damages\textsuperscript{158}.

Moreover, criminal measures are probably overkill in many cases. For example in a \textit{Brady} violation that quickly results in a new trial in which the accused is convicted anyway, criminal sanctions against the prosecutor would be uncalled for, despite the fact that the harm

\textsuperscript{153} See \textit{e.g.} Koon v. United States, 518 U.S. 81 (1996) (the criminal case against officers from the infamous Rodney King affair.

\textsuperscript{154} \textit{Id.}


\textsuperscript{158} See Brink, \textit{supra} at 27 n 150.
was great enough to merit a new trial.

Moreover, increasing criminal prosecutions of prosecutors would be very difficult. It is prosecutors, after all, that typically initiate the process of criminal sanctions. Prosecutors would be unlikely to participate in bringing charges against other prosecutors as they would be setting a cultural trend that could one day hit them if they step out of line. Moreover, at least some misconduct is not intentional\(^{159}\), and, because 18 U.S.C. § 242\(^{160}\) (and typically criminal contempt as well\(^{161}\)) requires the to be intentional, 18 U.S.C. § 242 would be inapplicable.

Of course, because these measures are rare, and because they may be overkill, they are not very effective in deterring misconduct by prosecutors.

**B. Employment and law license sanctions for Prosecutors.**

1. Direct Employment related sanctions

Prosecutors may also be subject to informal sanctions at their office, including being fired, if they violate office polices, particularly if those polices cause embarrassment to the office\(^{162}\). For example, a prosecutor who works at a low level is certainly subject to being fired or severely disciplined from employment, and particularly so if his employment begins with a trial period. As for higher level prosecutors, they may also be censured or fired. Even a chief prosecutor may be impeached or, if elected, voted out of office; more than ninety five percent of chief prosecutors hold elected offices\(^{163}\).

With regard to lower level prosecutors, it is difficult to know what effect supervisors and

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159  See supra part I.
160  18 U.S.C. § 242 (using the word “willfully”).
directs employment sanctions have on their actions, as at the time of writing of this article no discussion of this issue could be found in the available literature. However, given the inherent conflict of interest that the situation would produce (as the sanction would be coming from a supervising prosecutor with the same motivation and perspective in the adversarial process as the allegedly misbehaving prosecutor) it is difficult to see relying on this as the sole avenue of correcting misconduct. Indeed, were society to do so it might ask why we simply do not let supervisory police or corrections officers handle all instances of misconduct committed by their subordinates.

Additionally, with regard to the electoral consequences of elected prosecutors, it is a rather simple matter to see why the elected prosecutors do not suffer election consequences for prosecutorial misconduct: lack of electorate emphasis on the accountability of the office. This lack of emphasis can be seen in many places. First, as law professor Angela Davis explains in her book ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR, most local prosecutors campaign on the basis of being tough on crime, not on running effective and honest offices.\textsuperscript{164} Secondly, and unsurprisingly, this tough on crime attitude is likely appealing to the “court of public opinion”, about which it is often said a man is “guilty until proven innocent.” Indeed, this same public is statistically unlikely to find its way into prison, or local jail, for a crime\textsuperscript{165}, so unfair actions that hurt the accused are unlikely to affect them. At the same time, the benefits of crime control and public safety, thought to be brought on by tough on crime polices,

\textsuperscript{164} There is some evidence this may be changing, at least with respect to mandatory three strike laws, as has been evidenced by recent campaigns in California. Douglas Burman, California’s Three Strikes Law and its [effect on] the 2010 Race for State Attorney General. SENTENCING LAW AND POLICY, (July 30, 2010) http://sentencing.typepad.com/sentencing_law_and_policy/2010/07/californias-threestrikes-law-and-its-2010-race-for-state-attorney-general.html#comments.

\textsuperscript{165} United States Department of Justice Bureau of Justice Statistics, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, 1 (2003) (showing an estimated 6.6% lifetime likelihood of a adult American at random ever going to state or federal prison or local jail, based on current rates).
are good for everyone. Indeed, for a recent, specific, and powerful example of how little accountability the election process provides against misconduct, one need only look at the highly publicized case of Michael Nifong, who committed repeated misconduct against the falsely accused Duke University Lacrosse players. Specifically, Nifong was publicly called out by the media with overwhelming evidence of his misconduct prior to his 2006 reelection to office, which occurred while he was still on the case.

2. Law License Sanctions

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

His conclusions are well founded empirically and logically. First, on the empirical side,

168 Id.
170 Id at 723.
171 Id at 754-55.
Professor Zacharias attempts to note the differences between the manor in which prosecutors are disciplined by professional authorities and the way other attorneys are disciplined. To do this, he first made an exhaustive study of reported cases involving professional discipline of prosecutors and compared it to reported cases involving all lawyers. He found that prosecutors (as well as criminal defense counsel) were far less likely to be disciplined than attorneys handling civil cases. He also found that the proceedings were most likely to be brought against prosecutors motivated by personal greed, such as bribery to drop charges, not excessive zeal in trying to convict. Though he admitted to his methodology being flawed, because it relied on reported data, and for other reasons, his findings did find a vastly greater number of cases in the civil context than the prosecutorial context. Indeed, because he tries only to study the rate of professional sanctions to prosecutors relative to private counsel, he does not need to concern himself with the frustrating problem experienced in Part I of this article when discussing attempts to try to figure out how much misconduct there is in the first place. In other words, in this case, there is no need to know the total number of cases of misconduct relative to those sanctioned-(only the sanctions of prosecutors relative to others).

Further, his empirical findings were later supported in 2003, when the Center for Public Integrity conducted a survey of the forty four cases it found since 1970 in which prosecutors faced disciplinary proceedings for prosecutorial misconduct that had “a substantial effect on

172 Id at 723-54.
173 Id at 723-25.
174 Id at 754-55.
175 Id at 757.
176 Id at 743-44.
177 Id at 754-55.
178 Id at 743-44.
179 supra part I.
The small number of cases found aside, it found that of the forty four cases only two resulted in disbarment, and misconduct such as suborning perjury and hiding exculpatory evidence resulting sometimes in only sixty day suspensions\textsuperscript{181}. This separate finding of the Center for Public Integrity, utilizing a different methodology, and coming to the same conclusion, strongly supports Zacharias' conclusions.

On the theoretical side, Zecharias' findings were also supported by strong logical arguments. Among other arguments, he noted that prosecutors do not have clients in the typical sense of the word, (their “client” is perhaps the crime victim, or perhaps the sovereign, depending on the philosophy of the prosecutor) and clients, in the true sense of the word are one of the most likely to report misconduct of attorneys to disciplinary authorities\textsuperscript{182}. (Indeed, though he does not explicitly say it himself, Zacharias' argument is made stronger by noting that the State and the victims, the very people who prosecutors are said to represent, actually benefit from overzealous misconduct!). He also points out that prosecutors who commit misconduct are often elected, in which case bar authorities may feel they are trampling on the decisions of the electorate and thus being politically unpopular\textsuperscript{183}. Complementing this problem, he argues, is that if they are low level employees working for elected officials, they are likely to move on from prosecution as most prosecutors are not career prosecutors, and specific deterrence of the conduct is made less important by the fact that overly zealous prosecutors will eventually move on to other things\textsuperscript{184}.

\textsuperscript{180} See generally \textit{Harmful Error: Investigating America's Local Prosecutors}, CENTER FOR PUBLIC INTEGRITY http://projects.publicintegrity.org/pm/ (last visited Aug. 15, 2010).
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id.}
Whether on the logical or empirical side therefore, it seems conclusive that bar sanctions are unlikely to restrain misconduct, due to their low probability of occurring, and the light sanctions that occur when they do happen.

C. The Criminal Procedural Process

Probably the most “front line” defense toward prosecutorial misconduct in the trial process are the procedural rights afforded to the defendant. These include discovery, confrontation of witnesses, the right to an attorney, and the right to an appeal and to collaterally attack a conviction with writs of habeas corpus. All of these tools are in place to prevent wrongful convictions of the defendant, and indeed, such protections can be of use in preventing misconduct. For example, a prosecutor who knows his conduct is likely to lead to an appellate reversal or a mistrial is unlikely to go ahead with it, particularly if he could safely secure a conviction without resorting to it. However, for a number of reasons this too is an ineffective real control on prosecutorial misconduct.

To understand one reason why, one must recall what prosecutorial misconduct is-and recall the distinction between prosecutorial misconduct and wrongful convictions discussed in Part I of this article. That is, wrongful convictions refers to the situation when a criminal defendant has been convicted and should not have been, while misconduct refers to the actions of the prosecutor. Thus, often misconduct occurs in cases where there was no wrongful conviction and vice versa. Because the protections afforded a criminal defendant are designed

185 Lafarve et al., CRIMINAL PROCEDURE §§ 24, 27-28, available at Westlaw CRIMPROC.
186 Id.
187 supra part I.
188 Id.
189 Id.
not to reign in prosecutors but to guard against wrongful convictions, such protections fall short. For example, in the appeals or collateral review process, an appellate court may designate many forms of misconduct to be “harmless error”-essentially meaning that despite the misconduct the defendant would clearly have been convicted anyway\(^\text{190}\). This demonstrates an important case where the prosecutors misconduct goes unsanctioned by the trial and appeals process because it does not affect the possibility of a wrongful conviction, despite clearly being a case of prosecutorial misconduct.

Previous articles on prosecutorial accountability have pointed out other manifestations of this focus of the trial and appeals process on the defendant, rather than the prosecution\(^\text{191}\). For example, Margaret Johns has pointed out that even prosecutors who are scolded by trial courts and appellate courts for misconduct are rarely identified by name in the case, as the name of the prosecutor is irrelevant to the appeal\(^\text{192}\).

Another reason why the trial and appeals process does not effectively root out misconduct is the problem of detection and proof. In many of the main types of misconduct discussed in part one, an information gap exists between the court and the prosecutor itself. That is, the prosecutor is the only one who knows what is in the prosecutor's file, so unless someone else learns he has withheld exculpatory evidence, the trial and appellate courts can not effectively take action. Similarly, obviously, only the prosecutor and his cooperating witnesses would know if the prosecutor has suborned perjury and only the prosecutor knows for sure if he used race as a consideration in making charges or striking jurors.

Thus, a combination of low probability of particularly dishonest conduct being caught in

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\(^\text{190}\) Lafarve et al., CRIMINAL PROCEDURE §§ 27.6, available at Westlaw CRIMPROC.
\(^\text{191}\) Margaret Z. Johns, Reconsidering Absolute Prosecutorial Immunity, 2005 BYU L. REV. 53, 68.
\(^\text{192}\) Id.
the criminal appeals process, and a narrow focus on its effect on the criminal case, not the
prosecutor, combine to make the normal criminal process itself unlikely to root out misconduct.

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

Wrongful conviction statutes exist in a number of jurisdictions to compensate monetarily
those who have been wrongfully convicted\(^{193}\). As the law stands with absolute immunity from
civil liability for prosecutors (discussed *infra*\(^{194}\)), these statutes represent what is possibly the
only way for those wrongfully convicted to gain monetary relief from wrongful convictions after
one has been released from incarceration. However, such legislation fails to deter misconduct
for the same reasons as many of the other checks on misconduct.

First, similar to the trial and appeals process, the focus of a proceeding under a wrongful
conviction statute is to compensate the wrongfully convicted, not to publicize the nature of the
misconduct. Indeed, some wrongful conviction statutes do not even require misconduct, only
that the conviction itself be wrongful\(^{195}\). Similarly, the same detection and proof problems for
finding perjured testimony, withheld evidence, and racial preferences exist in the context of
wrongful conviction statutes

Second, as the leading authority on wrongful conviction compensation statutes, Adele
Bernhard, has demonstrated, the statutes do not exist in all jurisdictions (at the time of her article
only thirty six out of fifty states had such statutes), and those that do have them often have very
minimal compensation and onerous requirements for the wrongfully convicted to satisfy to


\(^{194}\) *Infra* part II, III.

receive the compensation\textsuperscript{196}. For example, as Bernhard explains, in some states, even if the courts have clearly said a person was actually innocent (instead of merely not responsible or merely not demonstrably guilty or fairly convicted) and yet served prison time anyway, he must still get an (entirely discretionary) pardon from the Governor to be eligible for wrongful conviction compensation\textsuperscript{197}. Of course, it is not hard to imagine why getting a pardon is difficult in any situation, and particularly not hard to imagine why a Governor would question the need to pardon the already innocent. Similarly, nearly all states have a statutory maximum on the amount a prisoner can recover\textsuperscript{198}. In some states, it is as low as $10,000, notwithstanding the number of years a person has been in prison\textsuperscript{199}. Many states prevent those who plead guilty from getting compensation even if they were demonstrably innocent but intimidated into pleading guilty\textsuperscript{200}. Finally, with regard to private bills from the legislature, (laws passed by a legislature to specifically compensate a person who can not be legally compensated in court but who deserves compensation for a state action) Bernhard notes that many state constitutions prevent such bills from being valid, and, even when they do not, such bills depend on the wrongfully convicted person being politically popular or influential enough to plead his case to the legislature\textsuperscript{201}.

Thus, wrongful conviction statutes and private bills suffer from similar problems as do other checks in that they suffer from detection problems, are not focused on misconduct, and are

\begin{footnotesize}
\begin{itemize}
\item[199] \textit{Id.}
\item[200] \textit{Id} at 108-09.
\item[201] \textit{Id} at 94-95.
\end{itemize}
\end{footnotesize}
not employed often enough nor are they robust enough when employed to become a deterrent on
the state to help prevent misconduct from occurring.

E. Journalistic Shaming of Prosecutorial Misconduct

Journalistic shaming is another device currently used to deter prosecutorial
misconduct\(^{202}\). The theory is that publication of negative accounts of prosecutor's work in the
media will cause potential misbehaving prosecutors to take note and realize they should not
follow in the ways of the disgraced current prosecutor\(^{203}\). Like other current checks on
prosecutorial misconduct however, this method is also inadequate.

Some of the main reasons why journalistic shaming doesn't adequately deter misconduct
are explained by Professor Angela Davis in ARBITRARY JUSTICE, THE POWER OF THE AMERICAN
PROSECUTOR\(^{204}\). For example, she notes that most Americans receive their knowledge of the
justice system through the news media, especially television\(^{205}\). Further, the media does report on
crime often, in fact perhaps too often. Noting the journalistic adage, “if it bleeds it leads,” Davis
argues that the over-reporting of crime itself may cause the populace to believe crime runs
rampant and needs to be controlled further, which is a far cry from reporting on prosecutorial
misconduct\(^{206}\). Further, Davis argues, much of what the news media covers concerning the
justice system itself are things such as celebrity trials and other high profile cases where the
defendants have excellent legal representation, which is not an accurate microcosm of the actual
justice system\(^{207}\). Professor Davis has a good point here. Indeed, one of the most recent high

\(^{203}\) Id.
\(^{204}\) Id.
\(^{205}\) Id.
\(^{206}\) Id.
\(^{207}\) Id.
profile cases of prosecutorial misconduct was against wealthy university lacrosse players who had excellent legal representation\footnote{208}{N.C. State Bar v. Nifong, Case No. 06 DHC 35 (2007), http://www.ncbar.gov/orders/06dhc35.pdf (disbarring Mr. Nifong, the prosecutor in that case).}, and whose story may never have come to media attention were it not for the toxic dynamics of a poor black girl falsely accusing rich white men of rape. Another such case where a criminal defendant was victimized by prosecutorial misconduct but had excellent legal representation and was against then United States Senator, the late Ted Stevens of Alaska\footnote{209}{Nedra Pickler, Justice Dept. Lawyers in Contempt for Withholding Stevens Documents, WASH. POST, Feb. 3, 2009, at A7.}

Davis also cites another problem with the media lying in the context of the popular image of the prosecutor portrayed by the media. She notes that it seems most popular crimes shows of late have been on the prosecutorial side\footnote{210}{Shows not cited by Davis but illustrating her point are Bones, (still running) Without a Trace, (ending in 2009) NCIS and its spin offs, (still running) NYPD Blue, (ending in 2005) The Wire, (ended in 2008) COPS, (still running and CSI and its several spin offs (still running).}, especially, the Law and Order series and its spin offs, many of which are still running, which often portray the prosecutor's office itself quite extensively\footnote{211}{ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 171-76 (2007).}. While not stated by Davis, probably the most popular crime show about a defense attorney, Perry Mason, went off the air in decades ago in 1966\footnote{212}{Other popular shows dramatizing criminal defense include Matlock, which went off the air in 1995, and The Practice, which went off the air in 2004.}. Such an imbalance in popular perception of prosecutors as heroes and defense side advocacy as the “dark side.”

Thus, the public perception of prosecutors as heroes and current journalistic patterns and viewership are neither conducive nor adequate to substantially deter prosecutorial misconduct.

\section*{F. Civil Liability of the Prosecutor and Supervisory Prosecutors to the Victim of the Misconduct.}

The main reason that threat civil liability is not an adequate deterrent to prosecutorial
misconduct is the absolute immunity of prosecutors in civil liability that applies in nearly all cases\textsuperscript{213}. To understand immunity, one must recall the distinction in Part I between misconduct which is actually prosecutorial, and misconduct which is not prosecutorial, but is rather investigative or administrative.

1. Absolute Immunity for Prosecutorial Duties

Regarding actual prosecutorial duties, all criminal prosecutors, whether federal state or local, are afforded absolute immunity from civil liability from suit under any federal law for actual prosecutorial duties\textsuperscript{214}. This immunity applies to civil actions brought under federal law, whether or not the misconduct was intentional, whether or not the action had an effect on the criminal case or was harmless error, and whether or not the conduct was clearly unconstitutional\textsuperscript{215}. This absolute immunity is also present in nearly all-if not all-states for state law claims against prosecutors\textsuperscript{216}. Recently, it has also been extended to apply to cover those administrative duties intimately associated with the prosecutorial process, such as the supervision of the conduct of a subordinate prosecutor\textsuperscript{217}. The only other officials to receive such wide absolute civil immunity for their official functions are the President of the United States when acting in his official capacity, judges and judicial witnesses acting in their respective capacities, and members of legislative bodies, such as Congress and state legislatures\textsuperscript{218}. Other officials, including other officials associated with the criminal process such as criminal defense attorneys, police officers, and correctional officials, are not afforded this level of immunity and rather

\textsuperscript{213} Imbler v. Pactman, 424 U.S. 409, 427 (1976).
\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} Restatement (Second) of Torts § 895D cmt. e (1979).
\textsuperscript{217} Van de Kamp v. Goldstein, 129 S.Ct. 855, 862-63 (2009)
receive only qualified immunity, which is discussed infra in this part\textsuperscript{219}. Notably, the only one of the officials that get absolute immunity that is not neutral to the justice process, (such as a witness, judge, or legislator), but rather acts in an argumentative and adversarial role, is the prosecutor.

The reasons for this total immunity were explained by the Supreme Court in \textit{Imbler v. Pachtman}, a 1976 case\textsuperscript{220}. The plaintiff in that case was Paul Imbler, an admitted accomplice to a bank robbery involving the death of a market owner\textsuperscript{221}. Suspecting Imbler of a different, older, robbery as well, also involving a death, prosecutors charged Imbler with felony murder for the death in that older robbery\textsuperscript{222}.

Maintaining his innocence in the second robbery and resulting death, Imbler went to trial\textsuperscript{223}. The prosecution provided eyewitness testimony of one witness who, though unable to identify Imbler from the first robbery, did identify a man named Leonard Lingo, whom Imbler admitted to knowing, and with whom Imbler admitted to participating in the second robbery\textsuperscript{224}. The prosecution also produced two witnesses who did positively identify Imbler\textsuperscript{225}.

Imbler's defense was one alibi witness, who testified to having bar hopped with Imbler the night of the first robbery\textsuperscript{226}. He also testified for himself, maintaining he met Lingo for the first time the day before the second, admitted, robbery\textsuperscript{227}. Imbler was convicted, sentenced to

\begin{thebibliography}{9}
\footnotesize
\bibitem{219} Id.
\bibitem{221} Id. at 411.
\bibitem{222} Id.
\bibitem{223} Id. 411-412
\bibitem{224} Id.
\bibitem{225} Id.
\bibitem{226} Id.
\bibitem{227} Id.
\end{thebibliography}

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death, and his conviction and sentence were upheld on appeal\textsuperscript{228}.

After the conviction, a subsequent prosecutorial investigation found corroborating witnesses for Imbler's alibi, as well as information calling into doubt the credibility of the prosecution's eyewitnesses. In response, he wrote to the Governor of California describing the evidence\textsuperscript{229}. Imbler's scheduled execution was stayed shortly thereafter\textsuperscript{230}. Imbler sought post conviction relief in the California courts, where a hearing was held and the new evidence presented\textsuperscript{231}. Furthermore, at that hearing, one of the prosecution's witnesses recanted\textsuperscript{232}. Crucially, despite the prosecutor coming forward and saving the life of Imbler with his investigation letter to the Governor, and despite the prosecutor's contention that the new evidence did not turn up until after the trial, Imbler's counsel accused the prosecutor of using knowingly false testimony at trial, and covering up exculpatory evidence as well\textsuperscript{233}.

In any case, Imbler lost in the state court post conviction proceeding\textsuperscript{234}. The state court found the recantation of the prosecutor's witness less credible than his original testimony, and the new corroborating alibis were found not very credible\textsuperscript{235}. Imbler sought, and was later granted, a federal writ of habeas corpus ordering that Imbler be retried or freed\textsuperscript{236}. The court, which held no hearing, but reread the record, found that the prosecutors had indeed engaged in the misconduct claimed by Imbler's counsel\textsuperscript{237}. When prosecutors appealed this finding, the federal court of

\begin{footnotes}
\item[228] \textit{Id.}
\item[229] \textit{Id.} at 412-414.
\item[230] \textit{Id} at 414 n 5.
\item[231] \textit{Id} at 414.
\item[232] \textit{Id.}
\item[233] \textit{Id.}
\item[234] \textit{Id.}
\item[235] \textit{Id.}
\item[236] \textit{Id.} at 414-15.
\item[237] \textit{Id.}
\end{footnotes}

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appeals for the ninth circuit upheld the writ\textsuperscript{238}. The state elected to not retry Imbler, and he was freed\textsuperscript{239}.

In this rather dubious context, Imbler filed a civil suit against the same prosecutor who had originally come forward with the new evidence\textsuperscript{240}. His complaint under 42 U.S.C. § 1983, sought 2.7 million dollars in damages\textsuperscript{241}.

Refusing to accept the stringent textual reading of § 1983\textsuperscript{242}, of the Supreme Court formulated and applied the doctrine of absolute immunity to prosecutorial functions\textsuperscript{243}. In doing so, it relied on its prior decisions exempting other absolutely immune officials, such as legislators, from liability, on the theory that § 1983 was never intended to abrogate such common, existing immunities prior to the enactment of the statute\textsuperscript{244}. The Court then cited state cases from as old as 1896 involving prosecutors bringing charges without probable cause, and showing that absolute prosecutorial immunity had long existed under state law\textsuperscript{245}.

\textsuperscript{238} \textit{Id}. In 1976, federal courts held a much greater power of habeas corpus when reviewing state convictions than they hold today, being limited by a short statute of limitations and a high deference owed to the state courts. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 104-05 (1996) (creating limits on federal habeas corpus including a one year statute of limitations and deference to state court findings of law). Thus, the writ was permitted to issue many years after the new evidence was found and the state court proceedings were finished, and the state courts were not given any deference to their legal findings. Both of these things would make the issuance of this writ impossible today.

\textsuperscript{239} Imbler v. Pactman, 424 U.S. 409, 415 (1976).

\textsuperscript{240} \textit{Id} at 415-16.

\textsuperscript{241} \textit{Id}.

\textsuperscript{242} 42 U.S.C. § 1983 states “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. “ \textit{Id}. The law was passed as part of the Civil Rights Act of 1871. 17 Stat. 13, 1 (1871).

\textsuperscript{243} Imbler v. Pactman, 424 U.S. at 417-431.

\textsuperscript{244} Imbler 424 U.S. at 417-431 (citing Tenney v. Brandhove, 341 U.S. 367 (1951)).

\textsuperscript{245} Imbler, 424 U.S. at 417-431(citing Bradley v. Fisher, 13 Wall. 335 (1872)).
The Court then explained the public policy reasons for absolute prosecutorial liability\textsuperscript{246}. The first reason it cited was focused on the possibility of frivolous litigation, even if no liability were ultimately found\textsuperscript{247}. It explained that the burden of frivolous litigation would subject the prosecutor to fear than any actions he took would eventually be the subject of litigation against himself, cooling his ability to zealously prosecute wrongdoers\textsuperscript{248}. Such wrongdoers, the Court explained, would frequently file suits against the prosecutor, believing that any acquittal or other failure to get a conviction creates a potential civil suit against an allegedly dishonest prosecutor\textsuperscript{249}. Of course, it goes without saying, that frivolous litigation not only could cool the zeal of the prosecutor, but also clog the courts with needless litigation, and subject prosecutors to defending such frivolous litigation. This argument is strengthened by the fact that criminal defendants are often insolvent, which makes monetary sanctions, the normal remedy and deterrent for filing a frivolous lawsuits, a worthless endeavor. The \textit{Imbler} Court then added that qualified immunity (the immunity given other officials) was not enough to shield prosecutors from litigation, because qualified immunity (at the time of the Imbler decision) required the prosecutor to show good faith, and good faith was a factual question that required factual discovery such as interrogatories and depositions, and that alone was too burdensome, even if the prosecutor ultimately escaped liability.\textsuperscript{250}

The other reasons the Court cited for absolute immunity, were focused on the possibility of unfair liability to the prosecutor\textsuperscript{251}. It feared that such liability might subject honest

\begin{itemize}
  \item \textsuperscript{246} \textit{Imbler}, 424 U.S. at 417-431.
  \item \textsuperscript{247} \textit{Id.}
  \item \textsuperscript{248} \textit{Id.}
  \item \textsuperscript{249} \textit{Id.}
  \item \textsuperscript{250} \textit{Id.}
  \item \textsuperscript{251} \textit{Id.}
\end{itemize}

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prosecutors to potential liability when such prosecutors might be using testimony believed true, but which turned out to be false, requiring a civil court to essentially retry the criminal case in a different context\textsuperscript{252}. The Court acknowledged that in this second consideration the prosecutor was not unlike other officials, such as police officers, who received only qualified immunity\textsuperscript{253}. However, the Court explained, the time pressures of the prosecutor's office, and the limited information a prosecutor has, make it more difficult for prosecutors, compared to other officials, to establish their immunity (or, if not their immunity, that the prosecutor's conduct otherwise was innocent)\textsuperscript{254}. Similarly, the Court noted, subjecting the prosecutor to damages for prosecutorial misconduct may deter courts from making findings for the defense in the criminal case, because the judges would know that the rulings could give rise to future damages to the prosecutor for “mistaken judgment”\textsuperscript{255}.

The court also rejected counterarguments that the cost of absolute immunity to genuine litigants was too great\textsuperscript{256}. After pointing out that prosecutors remain subject to criminal liability, the Court noted in a notoriously, and ironically, often cited passage,

“[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. (citation omitted). 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.”\textsuperscript{257}

After Imbler, prosecutorial immunity doctrine was limited somewhat, notably by giving

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\textsuperscript{252} Id.
\textsuperscript{253} Id.
\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{256} Id.
\textsuperscript{257} Id. at 429.
only qualified immunity to prosecutors when they act in an investigative and administrative function, so long as the administrative function is not intimately associated with prosecution. However, for prosecutorial misconduct which is part of the actual trial and prosecution functions of a prosecutor, such as those actions described in Part I of this, prosecutors continue to enjoy absolute civil immunity, regardless of how egregious, harmful, and clearly unconstitutional their conduct.

2. Qualified Immunity for Other Duties.

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

In Harlow v. Fitzgerald, decided in 1982, six years after Imbler, the Supreme Court responded to a serious problem with the doctrine of qualified immunity that most officials enjoy. It noted that the then main question in deciding whether qualified immunity attaches to regular officials is the question of whether the official acted in “good faith.” That is, whether their conduct was malicious or an oversight. Explaining that the purpose of immunity should be to root out frivolous litigation and to allow officials to defeat such lawsuits without going to trial or engaging in excessive litigation, the Court noted that having “good faith” be the test for

260 supra part I.
261 Van de Kamp, 129 S.Ct. at 863-64.
262 Id.; Burns, 500 U.S. at 481-82.
264 Id.
265 Id.
266 Id.
267 Id at 815.
268 Id.
qualified immunity was incompatible with this purpose of qualified immunity, because good faith is a factual, subjective issue of intent, which requires evidence to decide\textsuperscript{269}. Because the taking of evidence is a time consuming procedure requiring depositions, interrogatories, and even trials, the “good faith” or subjective standard of immunity which had controlled until that point, was overruled\textsuperscript{270}. Instead, the Court prescribed the now current doctrine of qualified immunity\textsuperscript{271}. Under \textit{Harlow}, the test for qualified immunity is whether the plaintiff charges in the pleadings that the government official has violated “clearly established” law, or has only violated the law in such a way that reasonable officials could not have been on notice that the law would evolve to make their conduct unconstitutional\textsuperscript{272}. Notably, this question is a legal one, not a factual one. Thus, under the new standard, a court can decide whether the plaintiff is alleging a clearly established violation of the law or a violation which is only questionably unconstitutional, even if the court ultimately decides that it is unconstitutional.

As later discussed in part III, some have made the (repeatedly unheeded) argument that this change in qualified immunity justifies the abrogation of all absolute immunity, because absolute immunity was at least in part based on the inability of the then controlling doctrine of qualified immunity to prevent time consuming, fact intensive, frivolous litigation against prosecutors\textsuperscript{273}. Regardless however, it is this level of immunity which applies to prosecutors acting as investigative officials\textsuperscript{274}. Thus, even where the prosecutor is not entirely immune from liability, substantial legal hurdles continue to effect a prospective plaintiff even for investigatory

\begin{thebibliography}{9999999}
\bibitem{269} \textit{Id.} at 815-819.
\bibitem{270} \textit{Id.}
\bibitem{271} \textit{Id.}
\bibitem{272} \textit{Id.}
\bibitem{273} \textit{Infra} part III.
\end{thebibliography}
actions taken by the prosecutor. Further, qualified immunity is focused on the investigative functions of a prosecutor, and thus in part because other actors, such as police, are more focused targets for those who wish to prevent misconduct committed at the investigatory stage, and prosecutors are hired and focus their jobs on being prosecutors, not managers or police officers.

Of course, immunity, though perhaps the biggest hurdle, is not the only issue in a civil case against a prosecutor brought by a former criminal defendant. Even where a prosecutor is not immune, obviously, the plaintiff must still prove the prosecutor has violated his rights. Furthermore, if the misconduct had an effect on the criminal case, then under *Heck v. Humphrey* (a 1994 Supreme Court case) suits against government officials for actions that would call into question the legality of the conviction or sentence (such as harmful prosecutorial misconduct) had to wait until a resolution of the criminal case in favor of the criminal defendant. Obviously this excludes and lawsuit where the prosecutorial misconduct is excused as harmless error eliminating much of the deterrent value. Because of the wait, the criminal defendant's evidence against the prosecutor may go stale, witnesses may die, and memories may fade. Notably, because *Heck* requires that such cases be dismissed before discovery if the plaintiff has not met his burden, the plaintiff must often wait until long after the deed to even discover the evidence of the misconduct. Finally, with regard to federal prosecutors, an additional problem arises in that the § 1983 cause of action, which would hold state and local prosecutors liable for deprivation of rights when not immune, does not apply to federal officials by its text. Instead, litigants who got past immunity would need the courts to find a federal cause of action against

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275 *supra* part I.
the prosecutors by implication, similar to what was done for federal law enforcement officials for violations of the fourth amendment. Recent cases have shown that even when a federal right is violated and no other remedies seem readily available, the courts have been unwilling to read in a private right of action for the deprivation of even established rights, unless Congress has been clear about its intent to protect the right with the threat of private lawsuits. Similarly, even when a judgment is entered against a prosecutor individually, depending on the nature of the misconduct, the prosecutor may not be indemnified by his employer for the misconduct, and the more egregious and intentional the misconduct, the less likely the prosecutor is to be indemnified. This may leave a “successful” plaintiff with a worthless judgment against an insolvent party. Insolvency can discourage bringing of a suit in the first place, and thus the entire deterrent value of the prospective liability, if the lawyer works on the basis of a contingent fee.

Thus, whether because of absolute or qualified immunity, or the perils of civil litigation brought by the formerly accused, civil lawsuits are not an effective deterrent for prosecutorial misconduct.

### III. Proposals to Reform Prosecutorial Accountability

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279 See e.g. Wilkie v. Robbins, 551 U.S. 537, 568 (2007) (declining to find an implied right of action against the federal government for retaliation for invoking land rights under the 5th amendment’s “takings clause.”
280 Cf 28 U.S.C. §1346 (excepting most intentional torts of federal employees from indemnification by the federal government). Many state governments model their Tort Claims Acts after this statute and do not indemnify intentional torts by governmental employees. See e.g. MD CODE ANN. STATE GOVERNMENT § 12-304 (2008).
281 The claims do not receive priority in the distribution of assets in bankruptcy, even among the unsecured creditors, which take only if there are assets that are at least partially unencumbered by liens, and which exceed the exemption amount. See 11 U.S.C. § 507 (2010). Further, though “malicious” torts are not dischargeable in bankruptcy, so that a creditor may collect after the bankruptcy from post bankruptcy assets, that does not mean any such assets will ever exist. See 11 USC. § 523(a)(2) (2010).
Current proposed reforms for the problem of misconduct without any real check on the corrupt prosecutor range from the logically rational but politically impossible (or rejected) to the possible yet woefully inadequate.

A. Calls for an end to absolute prosecutorial civil immunity.

Probably the most intuitive and often repeated reform proposal is the regular call for an end to absolute prosecutorial civil immunity, at least for intentional or clearly unconstitutional and harmful misconduct, such as withholding exculpatory evidence. The idea is that removing the full immunity will deter prosecutors from committing misconduct or risk being held personally liable.

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

The decision in *Imbler* granting absolute immunity for all prosecutorial functions was criticized first by the concurring justices in the *Imbler* opinion itself. Justice White, in his concurring opinion, agreed that the early common law immunity for prosecutors was for malicious prosecution and for defamation, that is, actions in choosing to prosecute and statements made during the course of trial. He also agreed that lowering the immunity to the good faith form of qualified immunity that was in place at the time for most officials, would not be enough to prevent the chilling of prosecutorial zeal. Prosecutors, he explained, who were not sure of the credibility of a witness, but who did not know if that witnesses was lying, might not put a witness on the stand for fear of a future civil suit claiming he knew of the

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283 *Id.*
284 *Id.*
285 *Id.* to accompany n. 274
286 *Id.*
falsehood\textsuperscript{287}. Similarly, prosecutors who did not know what charges were true and which were not prior to charging would fear charging slightly weaker claims for fear of a future civil suit\textsuperscript{288}.

Thus, Justice White agreed with the majority that the prosecutor should maintain absolute immunity for these actions to protect the juridical process\textsuperscript{289}. However, Justice White could not see how absolute immunity for other prosecutorial functions, such as withholding evidence, would help the process\textsuperscript{290}. Indeed, he thought, a prosecutor who turned over evidence with even a slight chance of being exculpatory (so as to prevent civil liability) would be helping the truth seeking process, rather than shying away from bringing charges, testimony, or arguments to the courts attention for fear of future liability\textsuperscript{291}. Justice White thus concurred in the judgment because Imbler's claims rested mostly on alleged subornation of perjury, but he also warned against extending absolute immunity as far as the majority had done\textsuperscript{292}. The majority's rejoinder to Justice White's arguments was that both perjured testimony and withholding evidence were as bad for the system of justice, and claims for knowing use of perjured testimony could be re-framed as hiding the exculpatory impeachment evidence\textsuperscript{293}.

Unfortunately, it is perhaps possible that the majority missed Justice White's point in distinguishing the two types of cases. Justice White's idea was that while it is true that withholding exculpatory evidence and suborning perjury could be just as bad for the defendant, the point of immunity was to free the prosecutor from burdens that might cause a prosecutor to withhold questionable evidence from the case, limiting the pool of available evidence.. However,
immunizing prosecutors for withholding Brady material has the exact opposite effect. Namely, it lowers the deterrent value for prosecutors not to make available evidence known. Of course, Justice White’s view did not control as he was joined by only two other votes out of the eight justices on the Court who voted in the case.

Further, regarding the argument that a perjury claim could be re-framed as a Brady claim, this fear has proven unfounded. Indeed, even separating different types of Brady material has proven easily done by the courts. For example, evidence that challenges the credibility of a witness for the prosecution is of a different category than true Brady material tending to show the actual innocence of the criminal defendant, and the former category was not recognized as exculpatory material by the Supreme Court until years after the duty to disclose was first placed on prosecutors.

Academic criticisms of Imbler were not far behind Justice White. As early as 1978, Lawrence Morrison railed against the Imbler decision in the Southwestern University Law Review. Among his arguments, he wondered why, if the frivolous litigation concerns of the Imbler majority are so serious, do not other criminal justice officials, such as police, defense attorneys, and corrections officials also share the same immunity level that prosecutors do?

This is an important point. After all, the same litigious population of criminal defendants that might construe a lack of a guilt finding as ill will on the part of the prosecutor may also construe searches and prison conditions as illegal when they are not. Further, such officials vastly outnumber prosecutors, and have the potential for much more litigation sources than prosecutors.

294 Justice Stevens did not vote. Id. at 432.
295 Id.
297 See id at 329.
who are only involved in the process in the courts while police and corrections deal with the
same potential litigants on a daily basis. The argument from the Imbler Court that prosecutors
may cool and not zealously prosecute for fear of litigation, is also applicable to these other
justice officials; (imagine a corrections officer using less force than necessary to protect other
inmates for fear of litigation) yet they do no receive absolute immunity.

Morrison’s argument can also be used against the Imbler Court’s second reason for
imposing absolute immunity: that prosecutors are somehow more likely than other officials to
have trouble proving their qualified immunity (which, at that time, still meant their “good faith”)
because of time constraints and limited information. Given that the other officials in the
criminal justice system who get only qualified immunity include police and corrections officers,
who often make split second decisions about use of force in high intensity situations, the idea
that a prosecutor’s limited information or time makes him special rings somewhat hollow.

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

After the cases of Harlow v. Fitzgerald and Heck v. Humphreynew arguments
against immunity surfaced. The argument presented by the Harlow case has already been stated
in part II, namely that the new form of qualified immunity created by Harlow, which cuts down
on the litigation required to get qualified immunity, makes less forceful the need for absolute
immunity for prosecutors to prevent excessive litigation. Similarly the argument from Heck

301  See supra part I.
was also alluded to in part II\textsuperscript{302}. That argument is that after \textit{Heck} a prisoner must have his
criminal case resolved in his favor prior to proceeding with any litigation against officials that
question the validity of his conviction or sentence\textsuperscript{303}, such as prosecutorial misconduct,
dramatically lowering the class of plaintiffs and reducing the freshness of their evidence. Of
course, these two arguments were made with force in the legal academic community following
those cases\textsuperscript{304}.

For example, as recently as 2005, Professor Margaret Johns of the University of
California Davis School of Law, wrote a scathing attack on prosecutorial immunity that was
published in the Brigham Young University Law Review, and widely cited in other law journals
since its writing\textsuperscript{305}. In addition to making the arguments against absolute immunity from \textit{Heck}
and \textit{Harlow},\textsuperscript{306} Professor Johns presents other arguments against absolute immunity: the
confusion of the line between prosecution and investigation\textsuperscript{307}, and the historical immunity for
prosecutors not being as absolute as the court thought in \textit{Imbler}\textsuperscript{308}.

\begin{itemize}
\item[a)] Confusion between “Investigatory” and “Prosecutorial”
\end{itemize}

First, Johns noted, there has been some confusion regarding where to draw the line
between investigative and prosecutorial misconduct\textsuperscript{309}. For example, she noted that the Supreme
Court had held in \textit{Burns v. Reed}, that a prosecutor providing incorrect advice to the police
regarding when they may question a suspect, and then using the resulting information to generate

\begin{itemize}
\item[302] See supra part II.
\item[303] Heck, 512 U.S. at 477.
\item[304] See e.g. Margaret Z. Johns, \textit{Reconsidering Absolute Prosecutorial Immunity}, 2005 BYU L. REV. 53 131-140.
\item[305] Id. (passim).
\item[306] Id. at 131-140.
\item[307] Id at 79-106.
\item[308] Id 107-122.
\item[309] Id at 79-106
\end{itemize}
probable cause for an arrest, was investigatory, and subject to only qualified immunity\textsuperscript{310}. It seemed after this opinion that probable cause was the dividing bright line test for prosecutors between absolute and qualified immunity.

Later, however, she noted, that in \textit{Buckley v. Fitzgerald}, the bright line of probable cause was questioned\textsuperscript{311}. There, the Court explained that even when the prosecutor takes fabricated evidence, which he used to procure probable cause, and later uses it at trial, he was not entitled to absolute immunity for its pre-probable cause use\textsuperscript{312}. Though this upheld the pre probable case rule, the Court was careful to note that if, when procuring the evidence, the prosecutors purpose was adversarial rather than investigatory, absolute immunity would apply\textsuperscript{313}. Therefore \textit{Buckley} raised the notion that the motive of prosecutor, and not the timing of the misconduct, was the key to which form of immunity applied.

The confusion came to a fore in \textit{Kalina v. Fletcher}, another opinion by the United States Supreme Court\textsuperscript{314}. There, the Court held that a prosecutor swearing out a false arrest warrant affidavit, together with charging documents, before probable cause, was a prosecutorial function and protected by absolute immunity\textsuperscript{315}. It reasoned that the prosecutor was not testifying to the facts in the affidavit, but rather arguing that those facts supported probable cause, which is done as an advocate, and not done as an investigator\textsuperscript{316}. This holding further blurred the line of the probable cause requirement, because it represented a way in which misconduct could be absolutely immune even before probable cause.

\textsuperscript{310} Burns v. Reed 500 U.S. 478, 494 (1990).
\textsuperscript{311} See \textit{e.g.}, Margaret Z. Johns, \textit{Reconsidering Absolute Prosecutorial Immunity}, 2005 BYU L. REV. 53 131-140 (citing Buckley v. Fitzsimmons 509 U.S. 259 (1993)).
\textsuperscript{312} Buckley, 509 U.S. at 274.
\textsuperscript{313} Id.
\textsuperscript{314} Kalina v. Fletcher, 522 U.S. 118 (1997).
\textsuperscript{315} Id. at 130-31.
\textsuperscript{316} Id.
The line continues to be blurred as of this writing\(^317\). Circuits have split on the question of what immunity applies when a prosecutor, before probable cause is issued, coerces a witness into perjury for the purpose of using that evidence at trial, and does not use it until trial.\(^318\) In these cases, unlike in *Buckley*, the prosecutor actually did not use the evidence at the pre-probable cause stage. The question is tough: Is he acting as an investigator because the fabrication is pre probable cause and part of gathering evidence, both of which seem to point toward an investigatory function like in *Buckley*? Or is he acting as an adversary because his conduct has the ultimate motive of trial use, which is clearly prosecutorial? The courts have also split on the related question as to whether the pre probable cause fabrication of testimony, even if not immune, is even a constitutional violation at all, because the evidence has not yet been used against the defendant\(^319\). The Supreme Court tried to resolve the question in the October 2009 term, but the case settled after the Court had granted certiorari\(^320\). Thus, the confusion for the line between investigation and prosecution remains, continuing to frustrate the courts. Given the other reasons for switching to qualified immunity, it is arguable that this confusion creates yet another reason to switch to qualified immunity.

b) Professor Johns' Argument that Absolute Immunity is not as Historically Justified as the Imbler Court Believed.

Professor Johns also argues that the absolute immunity is not as historically justified as the Imbler Court believed\(^321\). Specifically, she takes note that the Court in *Imbler* argues that §

\(^319\) Id.
\(^321\) Id 107-122.
1983, which created the private civil cause of action for violations for violations of the Constitution under color of state or local law\textsuperscript{322}, was never intended to abrogate immunities that existed when it was passed\textsuperscript{323}. In response to this, she argues, the first reported American case of a prosecutor being said to have absolute immunity, actually postdates the passing of the civil right of action for violation of constitutional rights\textsuperscript{324}. She contrasts this with the common law immunity of judges and legislators, which she explains was fully developed in America at the time of the passing of section 1983\textsuperscript{325}. Thus, she argues, how is it possible that incorporating absolute immunity for prosecutors into the statute is justified, when the common law immunity was not fully developed until afterwards?\textsuperscript{326}

To support her contention, she further points out that public prosecution, or the practice of having government employed prosecutors, rather than private specially appointed prosecutors for the victims, did not exist in many jurisdictions in the United States when §1983 was passed\textsuperscript{327}. Though not made explicit by her, the professor’s argument is made stronger by the fact that many of the things we think of now as prosecutorial misconduct, such as perjured testimony and withheld exculpatory evidence, were not even recognized by the Supreme Court as misconduct until years into the 20\textsuperscript{th} century, long after 1871, when § 1983 was passed\textsuperscript{328}. Finally, perhaps lending the most support to John's arguments is that no lesser a student of the historical meaning of the law than Justice Scalia, appears to at lest somewhat agree with Professor John's historical assessment of absolute immunity for prosecutors. However, he has

\begin{itemize}
  \item \textsuperscript{322} 42 U.S.C. § 1983 (2010).
  \item \textsuperscript{323} Margaret Z. Johns, \textit{Reconsidering Absolute Prosecutorial Immunity}, 2005 BYU L. REV. 53 89-107.
  \item \textsuperscript{324} \textit{Id.}
  \item \textsuperscript{325} \textit{Id.}
  \item \textsuperscript{326} \textit{Id.}
  \item \textsuperscript{327} \textit{Id.}
  \item \textsuperscript{328} Civil Rights Act of 1871. 17 Stat. 13, 1 (1871), \textit{See also supra} part I.
\end{itemize}
consistently voted to uphold it nonetheless on grounds of stare decisis.\(^{329}\)

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

Both Professor Johns\(^ {330}\), and other academic writers, (one as recently as 2009\(^ {331}\)), argue that new developments in the real world of prosecutors dictate a reexamination of the absolute immunity declared in \textit{Imbler} on policy grounds. They argue that prosecutors increasingly have pressures to get convictions and not to do justice.\(^ {332}\) They argue the media role has become greater, and put greater pressure on prosecutors\(^ {333}\). They argue that new evidence has come forward about the severity of misconduct since \textit{Imbler}, and the lack of administrative sanctions\(^ {334}\). Mostly, these arguments have been rehashes of the policy arguments in \textit{Imbler}, at times poised right before a particularity important case regarding the line between investigation and prosecution.

4. Why the Court Will Not be Overruling Absolute Immunity in the Near (or long term) future.

Advocates of overruling \textit{Imbler} certainly make good points, as discussed above both in this part and part II\(^ {335}\). However, their arguments are doomed to fail, as a number of things show

\(^{330}\) Margaret Z. Johns, \textit{Reconsidering Absolute Prosecutorial Immunity}, 2005 BYU L. REV. 53,
\(^{335}\) \textit{See supra} parts I and II.
that the Court is committed to absolute immunity for prosecutors, and has plenty of arguments it may use to respond to calls that absolute immunity should be overruled.

The best indication that the Supreme Court is committed to absolute immunity is the Court's most recent case on the distinction between prosecution and administration\(^{336}\). To understand, that case, one should recall from *Imbler* that the Court declared that administrative roles (as opposed to prosecutorial roles) would not necessarily be included within the scope of absolute immunity\(^{337}\). The most recent case on this administrative and prosecutorial distinction was decided in the October 2008 term, in *Van de Kamp v. Goldstein*\(^{338}\). In that case, a case involving the withholding of *Brady* material\(^{339}\), the plaintiff knew that the defendant prosecutor would be immune from a § 1983 claim that he withheld evidence on based on the trial phase. To bypass this problem, the plaintiff decided to sue not the prosecutor, but the prosecutor’s supervisor, for failure to train his subordinate not to withhold *Brady* material\(^{340}\). Plaintiff alleged that the supervisor had not set up a system in that jurisdiction for insuring that subordinate prosecutors were aware of and able to execute their duty to turn over exculpatory evidence\(^{341}\).

The Supreme Court's opinion unanimously rejected Goldstein's theory, in a rather short opinion\(^{342}\). Recognizing that the prosecutor's supervisor, (named Van de Kamp), was indeed acting in an administrative, rather than prosecutorial role when supervising his subordinates, the Court decided to *expand* absolute immunity to certain administrative functions\(^{343}\). In particular,

\(^{338}\) *Van de Kamp*, 129 S.Ct. at 855.
\(^{339}\) More precisely, the exculpatory material was evidence calling into question the credibility of prosecutions witnesses, a type of exculpatory material that prosecutors are also bound to turn over.
\(^{340}\) *Van de Kamp*, 129 S.Ct. at 855, 855-860.
\(^{341}\) *Id.*  at 855-864.
\(^{342}\) *Id.*
\(^{343}\) *Id.*
the Court decided, that Van de Kamp's breach of his possible duty to supervise prosecutors and prevent misconduct, is itself a duty intimately associated with the same trial and advocacy related functions of a typical prosecution, and liability from such duties had been held protected with absolutely immunity in *Imbler*\(^{344}\). Specifically, the Court believed that substituting the supervisory prosecutor, and not the actual prosecutor, as defendant would not alleviate the concerns of *Imbler*\(^{345}\). The Court further explained that the threat of frivolous litigation hurting the functioning of the prosecutor's office, was the same whether it was the prosecutor or the prosecutor’s supervisor who could be sued\(^{346}\). In other words, *Imbler* was not just about protecting the prosecutor himself, but rather the process of prosecution. The Court also noted that *Imbler's* concern about the honest prosecutor being subject to liability was also implicated, the Court explained, as a supervisory prosecutor's system would be quite complex and even a good faith effort may subject him to liability if a court found it inadequate\(^{347}\).

The Court also was bothered by the fact that under Goldstein's theory of liability, many anomalies would result\(^{348}\). Specifically, supervisory prosecutors negligently failing to instruct prosecutors on the importance of producing exculpatory evidence could be liable, while trial prosecutors would be immune from intentional misconduct, including willful subornation of perjury\(^{349}\). Further, small office prosecutorial supervisors, where supervisors were involved in nearly every case, would retain immunity, because of their trial involvement, while prosecutorial supervisors who were strictly administrative, such as is found in larger offices, would be subject

\(^{344}\) Id.
\(^{345}\) Id.
\(^{346}\) Id.
\(^{347}\) Id.
\(^{348}\) Id.
\(^{349}\) Id.
to liability. Finally, the Court worried that Imbler's absolute immunity, which was intended to prevent the taking of evidence, under Goldstien's theory, would be easily bypassed by styling the complaint against a supervisor rather than the officer, causing factual litigation to ensue, causing a burden on the office regardless of merit.

Thus, the Court unanimously and quickly made short work of Goldstein's attempt at limiting immunity around the edges. Of course, if the Court reacted that way to limiting immunity, it is logical to think it would be even more averse to overruling Imbler entirely. Furthermore, overruling Imbler would require an analysis of Imbler's stare decisis value. As noted above, Justice Scalia, for example, has upheld absolute immunity on stare decisis grounds, despite his belief that it is historically unjustified. Particularly important in that analysis would be the fact that prosecutors have come to rely on their absolute immunity, and reliance is key consideration in stare decisis. Additionally, because immunity for any official, including absolute immunity for prosecutors, is not a constitutional issue, but rather a principle of the common law held to not be altered by the passing of the § 1983 statutory cause of action, the principle of stare decisis can be said to have extra force, as the legislature (in this case Congress) may alter the construction of § 1983 to exclude absolute immunity for prosecutors if the doctrine were so unworkable as to need reexamination. Thus, while there are abundant policy, historical, and legal development considerations favoring the rejection of absolute immunity for prosecutors, and perhaps replacing it with qualified immunity, at least the current

350 Id.
351 Id.
352 Supra part IV.
355 Id.
Court is not inclined to do so on policy grounds, and future Courts may rely on heavy considerations of stare decisis in refusing to do so, even if they disagree.

5. Congress will not remove absolute immunity for Prosecutors either.

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

First, doctrines like immunity, as shown in this article, are extremely complex and inherently associated with the function and efficiency of the judicial process and administration, and Congress often thinks polices such as those are best left to the Courts. Nowhere is this shown better than in the way Congress has approved the federal rules of evidence and the federal rules of civil procedure, both of which was circulated by academics and the courts first as drafts, and then adopted by Congress later, pursuant to the Rules Enabling Act356.

Second, Congress, like other political actors, generally does not like being perceived as “soft on crime,” and action exposing prosecutors to further liability would be subject to political attack as being soft on crime357. When Congress does make statutory reform for the benefit of criminal defendants, it generally does so only with a nudge from the Courts. A good example of this is the recently passed law358 equalizing the sentences for crack cocaine and powder cocaine. Though people had been criticizing the disparity for long before the law was passed359, and even

357 See supra part II
359 See e.g. William J. Spade, Jr., Beyond the 100:1 Ratio: Towards A Rational Cocaine Sentencing Policy, 38
the United States Sentencing Commission had done so\textsuperscript{360}, it was not until the Supreme Court allowed sentencing judges to consider the (then) discrepancy in sentencing between “coke” and “crack”\textsuperscript{361}, that the equalization law was signed into law\textsuperscript{362}. Another barrier to a congressional fix is the fact that there is not a great constituency for it. Criminals don’t vote, and most people will never serve time in the future for an offense. Finally, liability (and litigation) costs money, and prosecutors would need to either carry personal insurance or the government (i.e. the taxpayer) would need to specifically indemnify them, which they do not do by default, unless the government had some role in the liability beyond respondeat superior\textsuperscript{363}

B. Proposed Reforms Targeted Only at \textit{Brady} Violations

Regarding \textit{Brady} violations one suggestion has been an open file discovery rule, where the entire contents of the prosecution’s folder is open to the defense counsel\textsuperscript{364}. However, as noted by Sara Gurwitch, a supervising attorney at the New York Office of the Appellate Defender, this proposal is problematic because often \textit{Brady} material is in the form of physical evidence or credibility information not written in the file\textsuperscript{365}. Further, this proposal creates burdensome new rules for prosecutors (which means more rule they can violate unaccountably). It also puts at risk names of confidential informants who may be named in the file. Finally, it only addresses the \textit{Brady} violation, and not misconduct as a whole.

\begin{flushleft}
\textsuperscript{361} Kimbrough v. United States, 128 S.Ct. 558, 576 (2007).
\textsuperscript{363} See infra this part.
\textsuperscript{365} \textit{Id} at 316.
\end{flushleft}
Ms. Gurwitch’s own proposal for Brady violation accountability of prosecutors, recently published in the Santa Clara Law Review, is that Brady violations be sanctioned by an absolute bar to retrial on the charge for which a Brady violation is found. Her theory is essentially that this form of sanction would provide a much more serious deterrent to prosecutors, and would be similar to the exclusionary rule for violations of the fourth amendment, which prevents most evidence seized in violation of the fourth amendment to be used at trial. She bolsters her argument that under the current retrial remedy, a prosecutor is really in no worse shape by withholding the evidence and risking retrial, than he is before the first trial begins, which is often when the prosecutor chooses not to disclose the evidence. In fact, she argues, the prosecutor may stand to benefit if the conviction is obtained and the misconduct never discovered. To limit over-application of such a rule and excessive “windfall” innocence she suggests that the complete bar to retrial be limited to only intentional misconduct, an exception she considered somewhat akin to the “good faith reliance on a bad warrant” exception to the exclusionary rule.

Frankly however, Ms. Gurwitch’s proposal suffers from the same abhorrence that many feel toward the exclusionary rule, and thus the resistance which those people would have toward a similar rule in the context of Brady. Fourth amendment protections have undergone significant limitation since its application to the states in that the exclusionary remedy has been trimmed.

Many people simply do not understand why the guilty should go free “because the constable has

366 Id at 320-31.
367 Id.
368 Id.
369 Id.
370 Id.
371 See e.g. United States v. Leon, 468 U.S. 897, 922 (1984) (the good faith reliance on a warrant exception to the exclusionary rule).
blundered, \(^{372}\) and indeed this is a legitimate concern with the rule. Because of this problem, and
the fact that it is a proposal limited to \textit{Brady} violations, rather than prosecutorial misconduct as a
whole, Ms. Gurwitch's suggestion is not likely adequate to prevent much misconduct.

Thus, these \textit{Brady} centered reforms are either ineffective or hard to establish as rules.

C. Miscellaneous suggestions of the academy in combating misconduct.

Other proposals to combat misconduct exist, but, as noted by Professor Gershowitz of
South Texas School of Law, most of them require massive redirection of funding, such as
creating prosecutor grievance counsels, or requiring bar authorities to investigate misconduct\(^ {373}\).

As Professor Gershowitz notes, diverting funding to pursue prosecutors is unlikely\(^ {374}\). Ironically
however, Gershowitz's own proposal, of creating law school projects to go after prosecutorial
misconduct and report them to bar officials, (similar to the Innocence Project, which pursues
Wrongful Convictions)\(^ {375}\), suffers from the same problem of requiring the massive realignment
of resources, albeit at the law school level rather than the governmental level.

\textit{D. The possibility rejected by \textit{Connick v. Thompson}}

1. The factual buildup

Recently, the Supreme Court rejected the latest proposal to hold prosecutors
accountable\(^ {376}\). Like so many other cases involving misconduct, this one involved a \textit{Brady}
violation\(^ {377}\). Specifically, during his trial for murder, Thompson had elected not to testify, for

\begin{itemize}
  \item \(^{372}\) People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (a famous sentiment of then Judge Cardozo).
  \item \(^{373}\) Adam Gershowitz, \textit{Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct}, 42
  \item \(^{374}\) \textit{Id}.
  \item \(^{375}\) \textit{Id}. at 1097-1105.
  \item \(^{376}\) \textit{Connick v. Thompson}, 131, S.Ct. 1350, 1366 (2011).
  \item \(^{377}\) \textit{Id} at 1356.
\end{itemize}
fear his prior armed robbery conviction would come into evidence against him. He was convicted of the murder and sentenced to death. Fourteen years after his conviction for the murder, it was found that prosecutors in the original robbery case had intentionally suppressed a lab report showing that Thompson was innocent of that robbery. Though his robbery was then vacated, the problem remained that had he not had the armed robbery conviction, Thompson likely would have testified at his murder trial, which could have made a difference in that case.

Thus, Thompson's murder conviction was reversed on the grounds that the wrongful armed robbery conviction induced an unfair murder trial. When retried on the murder following the reversal of that conviction, he was found not guilty of the murder as well.

2. Civil Immunity was Not a Problem for § 1983 Suits Against Local Governments, thus Allowing this Case.

Obviously, a civil suit by Thompson against his armed robbery prosecutor would obviously have failed due to absolute immunity, and perhaps this is why it was never brought. Further, though Thompson did name as a defendant, Harry Connick, the supervisory prosecutor, in his individual capacity, for failure to train and supervise his subordinate prosecutors, that claim, as an individual, was dismissed before trial. Notably, the recent Supreme Court decision in Van de Kamp dictates the dismissal of those claims as correct, as it held that supervisory prosecutors receive the same absolute immunity for failure to train prosecutors that prosecutors in their prosecutorial functions enjoy. Where Thompson's claims were novel, and

\[\text{\cite{Id.}}\]
\[\text{\cite{Id.}}\]
\[\text{\cite{Id.}}\]
\[\text{\cite{Id. at 1356-57.}}\]
\[\text{\cite{Id at 1357.}}\]
\[\text{\cite{Id.}}\]
\[\text{\cite{Van de Kamp v. Goldstein, 129 S.Ct. 855, 855-60 (2009).}}\]
the reason the case went to the Supreme Court, regarded his claims against the local government entity itself.

Thus, as a threshold matter, it is important to understated that immunity did not bar Thompson's suit and *Connick* was not an immunity case. While local government's individual officers retain their official immunities, the local government itself, when sued directly under federal law, is not entitled to any sort of sovereign immunity given to sovereign such as State of Federal governments, nor the qualified immunity afforded to officials.\footnote{Owen v. Independence, 445 U.S. 622, 638 (1980).} Indeed, though this seems anomalous, and a possible argument for extending the official absolute immunity that individual prosecutors get to their local governments themselves, this argument did not seem to appeal to the Supreme Court, which denied certiorari on the immunity question in this case\footnote{Connick v. Thompson, 130 S.Ct. 1880, 1880 (2010) (granting cert as to only the §1983 issue).}, leaving in tact the decision of the lower courts denying immunity. Normally of course, a denial of certiorari does not mean that the Court disagrees or agrees with the issue proposed for certiorari, but, given that the court took the case, but specifically avoided that question, and there is no case actually applying official immunity to local governments, one can conclude the Court would decline to do so even had it taken up the issue.

3. The Real Issue in *Connick*: The Theory of Liability and why Thompson lost.

Though immunity was a problem for plaintiff Thompson, he remained unsuccessful in the *Connick* case as Thompson was unable to show that the Parish was liable under § 1983 for the misconduct of its employees.

To understand why he lost, one must get into the law of vicarious liability of local
governments. Normally, under state common tort law, an employer, (in this case a local
government) is liable for the negligent (and some intentional) misconduct of his employee\textsuperscript{387}. This doctrine, firmly entrenched in tort law, is known as the doctrine of respondeat superior. This theory of respondeat superior however, is not available in actions under § 1983\textsuperscript{388}. This lack of availability is because of the way the Court has interpreted the language of the statute in the background of its legislative history\textsuperscript{389}. Specifically, in \textit{Monell v. Dept. of Social Services}, the court read the words “caused to be subjugated” in § 1983 as meaning there must be a heightened culpability standard for holding local governments liable for the actions of their employees, and a hibernated causal link between the governmental employer and the actor responsible for the harm to become remediable under § 1983\textsuperscript{390}. Therefore, as explained by the Court in \textit{City of Canton v. Harris}, a plaintiff cannot simply argue that the negligence of the office in failure to supervise and train which caused a violation of a constitutional right, amounted to a cause of action under section 1983, unless the negligence was of so high a character as to show “deliberate indifference” to the constitutional right, and it was the “moving force” behind the violation of the constitutional right\textsuperscript{391}.

Unfortunately for Thompson, it was just this “failure to train” liability that he relied on in his suit against the parish, in that he claims that the parish did not adequately train the prosecutors in their duty to disclose exculpatory evidence\textsuperscript{392}. Though the jury found for him on

\textsuperscript{387} \textit{Restatement (Third) of Agency} §§ 219, 245 (2006).
\textsuperscript{389} \textit{Id.}
\textsuperscript{390} \textit{Id.}
\textsuperscript{392} \textit{Connick v. Thompson}, 131, S.Ct. 1350, 1357 (2011). Thompson also suggested that there was an office policy that made it difficult for prosecutors to disclose exculpatory \textit{Brady} material, but the jury found against him on this subject. \textit{Id.}
this issue\textsuperscript{393}, and the lower courts ultimately did not set aside the verdict\textsuperscript{394}, the Supreme Court reversed, finding as a matter of law that there was no deliberate indifference\textsuperscript{395}. As the Court pointed out, there was no pattern of \textit{Brady} violations in the parish prior to the finding of this violation, and thus it is nearly impossible that there could have been “deliberate indifference” to such violations arising from only one incident\textsuperscript{396}. Furthermore, while the Court acknowledged that there could potentially still be deliberate indifference without a pattern of violations in other contexts, such as when dealing with non-lawyers, in the prosecutor context, the court explained, a prosecutor's training as a lawyer should enable him to know his \textit{Brady} duties, and any violation of \textit{Brady} is likely to be either a result of the law of large numbers, or the deliberate misconduct of an individual prosecutor-both of which lower the culpability of the local government to make them a far cry from the deliberate indifference required in \textit{City of Canton}\textsuperscript{397}.

IV. Forward from \textit{Connick}, Failure to Discipline Litigation

Even if \textit{Connick} had been decided the other way, it seems clear that failure to train litigation against local government's for prosecutorial misconduct is doomed to fail when it is clear the conduct of the prosecutor was intentional. After all, no amount of “training” can prevent prosecutors who get carried away in their adversarial role from going beyond the ethical line. Furthermore, many of the types of misconduct mentioned in Part I of this article, such as suborning perjury or a \textit{Batson} violation, are inherently intentional\textsuperscript{398}. What is needed, seemingly, is some deterrent that gives an incentive to the would be \textit{Brady} violator or witness manipulator

\begin{thebibliography}{1}
\bibitem{393} Id.
\bibitem{394} Id at 1357-58.
\bibitem{395} Id at 1366.
\bibitem{396} See id at 1360.
\bibitem{397} Id at 1361.
\bibitem{398} See supra part I.
\end{thebibliography}
not to do so. Further, any such deterrent must have a reasonable probability of detecting violators.

However, as Connick also shows, at least one avenue of litigation is not closed..
Specifically, a slight modification of the theory in Connick of suing the local government from the theory of “failure to train prosecutors to prevent misconduct” to the theory of “failure to discipline prosecutors for misconduct” both may be accepted by the Court in this context, and has significant advantages over nearly all of the proposed reforms in part III and the current checks on misconduct mentioned in part II, and also has precedent for its use as a theory in other contexts.

A. Failure to Discipline liability could be accepted by the Court

Connick did get past (at least temporarily) one of the main hurdles in prosecutorial accountability thus far: prosecutorial immunity. As explained supra, by suing the local government directly under federal law, (rather than individuals) all immunity arguments are bypassed. With immunity bypassed, the next obstacle is showing deliberate indifference under § 1983. Where Connick seemed to error here however, is not in stating that a local government had deliberate indifference to prosecutorial misconduct, but in stating that the proof of that was “failure to train” the prosecutors. I suggest, instead, that the new theory of indifference be, not failure to train, but failure to discipline.

If given the courts' blessing, to prove a case of failure to discipline, the plaintiff would have to prove that the local government had, at the time of the prosecutorial misconduct, a culture of turning a blind eye or having insufficient procedures to hold its own prosecutors liable.

399 See supra n. 385. Unless of course the Supreme Court decides to extend prosecutorial immunity to local governments but see supra p 63, indicating why that may not be happening any time soon.
As explained supra, the plaintiff is likely to find evidence of this in at least some jurisdictions, as current controls on prosecutors currently do little to deter prosecutors.

1. The Best authority to control prosecutors are prosecutors, and “failure to discipline liability” creates an incentive for prosecutorial control.

As described in part II and III, many of the problems of the current checks on misconduct stem from the problem of detecting the misconduct\textsuperscript{400}. For example, trial courts, appellate courts, or bar counsel, must rely on limited information when determining whether testimony was known by the prosecutor to be false in the hindsight of current knowledge that a witness was lying for the purpose of post conviction remedies. They work in hindsight and with limited information when investigating reasons for speedy trial violations, \textit{Batson} violations, and how intentional and harmful were the evidence rule violations of a prosecutor. Wrongly convicted persons in prison may not know for years about the hidden exculpatory evidence, and thus do not bring post conviction proceedings or wrongful conviction compensation actions for many years.

However, local government employers, with the authority and ability to establish internal controls and detection mechanisms for misconduct, are in a unique position to stop misconduct, as they have near absolute control of the resources and decisions of the prosecutor. Further, as the true “client” of the prosecutor, local governments referring prosecutors to bar authorities for discipline (instead of waiting for the bar to come to the prosecutor) would be well within their right and traditional role as clients, as many bar discipline cases start by referral from clients. However, while currently, as described in part II\textsuperscript{401}, there is a conflict of interest in the local government employer pursuing such prosecutors, because of the politics and nature of prosecutor

\textsuperscript{400} See supra Parts II and III.
\textsuperscript{401} See supra Part II.
offices, establishing this failure to discipline liability will create such an incentive where there now exists a disincentive to fighting misconduct.

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

Moreover, “failure to discipline” liability for local governments employing prosecutors, has the advantage of targeting the most egregious behavior of prosecutors. Plaintiffs suing local governments that refuse to respond to egregious cases of misconduct, could dramatically demonstrate the heightened culpability standard required by Monell for local government § 1983 liability. Moreover, it can often easily be showed that such failure to discipline creates a culture of misconduct that is the true cause of the conduct in question, meeting the higher causality requirements of Monell. Furthermore, this focus on deliberate misconduct dovetails with the true reasons and causes of the misconduct this article has recited, which are often not a lack of understanding of the rules, but a lack of incentive to follow those rules.402

3. “Failure to discipline leads to sunlight on the issue and provides hope for compensation.”

Furthermore, “failure to discipline” liability may create an incentive for local governments to keep records and statistics on the incidents and responses to misconduct, which, as part II shows, is something somewhat lacking now.403 These records have the added benefit of providing a defense to liability for the more honest jurisdictions. Furthermore, such sunlight on the incidents may pave the way for political action for actual compensation for victims of the misconduct specifically and wrongful convictions generally, which is severely lacking.

402 Id.
403 Id.
Moreover, for reasons of solvency successful plaintiffs are more likely to collect under actual judgments under § 1983 against local governments than they are for individuals, making both compensation and deterrence stronger.

B. Failure to discipline liability has worked in other contexts.

Perhaps recognizing that the need for governmental officials to be controlled by their local governments is of importance in many contexts, “failure to discipline” liability has been sanctioned by the Courts in those other contexts, including in the criminal defendant context. For example, in the police brutality context, the second circuit has recognized “failure to remedy” as a form of heightened culpability and causality and upheld it as an alternative theory for Monell liability against a department. In the incarceration conditions context, specifically the failure to provide medical care to detainees, the sixth circuit has held that the failure to punish sheriffs who do not take proper care in assuring medical care to detainees could provide a theory of Monell liability against the local government. Thus, prospective plaintiffs arguing failure to discipline and control prosecutors for egregious misconduct have legal precedent for use in getting such suits past the pleading stage. Moreover, states have not yet tried to place their officials entirely under state control to attach sovereign immunity to the actions of the governmental employer and escape liability, and they are unlikely to do so for prosecutors, as it would require realignment of the entire responsibility for prosecutors.

V. Conclusion

Though many mechanisms exist to control misconduct, none as of yet can really said to be a deterrent. Further, as the main obstacle to compensation and accountability (absolute

404  Fiacco v Rensselaer, 783 F2d 319, 327 (2nd Cir. 1986).
405  Marchese v Lucas, 758 F2d 181, 187 (6th Cir. 1985).
immunity) appears here to stay every avenue should be explored to encourage the strengthening of the tools we currently have. However, with slight modifications to its theory, *Connick*’s legacy could provide a starting point for a culture of accountability and control of prosecutorial misconduct.