SUING THE PROSECUTOR

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The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, at whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.¹

I. THE PROBLEM

The capacity to do great good is accompanied by a corresponding capacity to do great evil. Each virtue may be said to have a dark side—love and hate, trust and deceit, freedom and slavery, self-rule and tyranny. The latter of each of these pairs is like an evil twin, closely related, but ultimately the opposite or the perversion of the good. Robert Jackson's description of the good and evil uses of the power lodged in a prosecutor is as contemporary as the morning headlines. This Article will focus on the dark side of criminal prosecution and what, if anything, can be done about it.

Before turning to the dark side, however, the first part of Jackson's proposition must be acknowledged and embraced. The prosecutor at his or her best is indeed one of the most beneficent forces in our society. Whether it is the prosecution of small-time crooks or large-scale swindlers,² the conviction of murderers,³ serial killers⁴ or terrorists,⁵ or the rooting out of corruption, both

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¹ Attorney General Robert H. Jackson, Address Delivered at the Second Annual Conference of United States Attorneys (April 1, 1940), reprinted in 24 JUDICATURE 18, 18 (1940) (emphasis added).


³ VINCENT BUGLIOSI WITH KEN HURWITZ, TILL DEATH DO US PART: A TRUE MURDER
small and large, the prosecutor's diligence helps to ensure that no one is above the law. No diagnosis of the problem, nor prescription for cure, can ignore the indispensable role played by the prosecutor. It would be foolish to view the problem of the rogue prosecutor in isolation. Any diagnosis and prescription must take care not to jeopardize the independence and courage of the prosecutor who does the right thing. The problem of the rogue prosecutor, however, is not so uncommon as to be insignificant. Power brings the possibility of its abuse. This can be illustrated by looking at two cases, the first of which is the Duke Lacrosse case.

A. THE DUKE LACROSSE CASE

This was a case that, from the outset, had plenty of blame to go around. Members of the lacrosse team planned a party that turned into a "perfect storm." An exotic dancer told authorities that she had been raped at the house where the party was held and this set things in motion. Although it later became clear that no rape had taken place, the story took on a momentum of its own through the assistance of a nurse trainee with an agenda, a policeman who intensely disliked Duke students, a rogue prosecutor who seized on the case in order to bolster his chances for election, an academic community (with certain notable exceptions) that rushed to judgment to satisfy their own political views, and an eager media with preconceived scenarios that assumed guilt from the outset.

The storm that eventually led to a catastrophic breakdown of the criminal justice system began with a familiar occurrence - a gathering of college students for a house party near campus. This party was organized by a few members of the nationally ranked Duke lacrosse team, which was back on campus during spring break in order to practice for several important upcoming games. One team tradition was a bonding party during that week. The prior year involved a visit to a local strip club and, due to a recent crackdown on underage patrons, some seniors decided to bring the strippers to the team. Two young women were hired, through an escort service, to dance in the late evening on March 13, 2006, at the house party. One of the women, Crystal Mangum, was African-American, a single mom, with a history of psychological problems, as well as...
alcohol abuse. She and another dancer, Kim Roberts, arrived separately at the house by 11:40 p.m., where they met for the first time in the backyard. Mangum, however, had been drinking for most of the day and could neither dance nor speak coherently. She almost immediately fell to the floor and remained there while Roberts tried to save the situation by pretending to “dance” with her. The reactions from the players ranged from boredom and discomfort to disgust and anger, and a nasty exchange between several players and Roberts ensued. Roberts then stormed out of the house, followed by Mangum, who stumbled and banged into walls as she left. As time-stamped photos would later show, the performance lasted four minutes.

Two of the players, Dan Flannery and Dave Evans, followed the women outside to apologize for some of the comments that had been made and Flannery persuaded the women to go back into the house, saying that there would be apologies made by all. While Flannery and Evans were talking with Roberts and Mangum, another player, Reade Seligmann made calls on his cell phone. He made eight calls, including six to his Duke girlfriend, between 12:05 a.m. and 12:14. The last call hailed a taxicab, whose driver, Moezeldin Elmostafa, picked up Seligmann and another teammate at 12:19. Meanwhile, the women had locked themselves in the bathroom for several minutes. When they left the bathroom, sometime between 12:15 and 12:20, the women took most of their belongings. Roberts went to her car, where she changed her clothes. Mangum, who had been driven to the house, also went to Roberts’ car. By this point, many of the

11. Id. at 17, 19-20. I realize that telling this story involves considerable “landmines” relating to racial and gender issues. This account could easily be viewed as blaming the victim. It is my task, however, to tell the story accurately, and yet without giving offense, a hope that, in the present climate, may be very difficult to achieve. While the narrative here is accurate, I would acknowledge that it has been toned down to make it safe for law review purposes. It was indeed a very nasty incident. Further details may be found in the extended account set forth in UNTIL PROVEN INNOCENT. The principal goal in slowing down the narrative to provide certain details, and not others, was to give a timeline that essentially made the subsequent charge of rape highly implausible.

12. Id. at 23.

13. Id. at 24. The time was established by a time-stamped photo taken by a team member. Id. The assembling of an objective timeline through the collection of time-stamped photographs later became a key part of the defense.

14. Id. at 21.

15. Id. at 24.

16. Id.

17. Id. at 25.

18. Id.

19. Id.

20. Id. at 26.

21. Id.

22. Id. Seligmann was driven to an ATM, where a security video showed him taking out cash between 12:24 and 12:25. He then went to a restaurant, where he ordered carryout, and was then driven to his dorm, where his entrance card was swiped in at 12:46. Id.

23. Id. at 27.

24. Id.

25. Id.
players, including Colin Finnerty, had left the house. A neighbor, who observed the scene at about 12:25, later told police: “I noted that the skimpily dressed woman [Mangum] had exited the car, saying something to the effect that she would go back into [the party house] to retrieve her shoe.” Mangum went around the house to the backyard, where she made a call on her cell phone at 12:26 to another escort service. Between 12:30:12 and 12:31:26, there are five time-stamped photos, showing Mangum standing on the back stoop, without one shoe, but otherwise not distraught. There followed a six-minute, photo-free period, during which Mangum pounded on the back door, yelling for her shoe. The players did not let Mangum back in the house. During this time, Dave Evans left the house through the front door. Some players then heard a thump outside and found Mangum sprawled on the back stoop, apparently passed out. One of the players carried Mangum to Roberts’ car, helping her into the passenger seat in a 12:41:32 photo. Roberts noticed that Mangum did not have her purse and asked if she had the money from the job. Mangum answered her incoherently and so Roberts went back into the house to look for the purse. Finding nothing, Roberts headed back to her car at about 12:50. There was another exchange of racial insults between Roberts and the remaining players, with Roberts screaming: “F**k Duke. I’m calling the cops. That’s a hate crime.” Roberts then drove off, with the apparently passed out Mangum in the passenger seat. At 12:53, Roberts called 911 on her cell phone, saying that she and a friend had been passing by the party house, located at 610 North Buchanan, and that some guys had yelled racial slurs at them.

As Roberts drove, she asked Mangum if she had her money. There was no response. She asked her where she lived. Again, there was no response. Mangum was “basically out of it,” Roberts later told the police. Roberts then

26. Id.
27. Id. Roberts later told Ed Bradley, during an interview:
   Roberts: She obviously wasn’t hurt or – because, you know, she was fine. . . . She wouldn’t have went back in the house if she was hurt. She was fine.
   Bradley: What’d she say?
   Roberts: “There’s more money to be made.”

Id. at 28.
28. Id.
29. Id.
30. Id.
31. Id.
32. Id.
33. Id.
34. Id.
35. Id. at 29.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id. at 30.
41. Id. Roberts also tried to revive Mangum by pushing on her leg. Mangum allegedly said: “Go ahead, put marks on me. That’s what I want. Go ahead.” Id.
drove to a convenience store to get assistance, asking a security guard for help with her passenger. The security guard called 911. A Sergeant Shelton responded to the scene and he called in that the woman in the car was "just passed-out drunk." Shelton and another officer helped Mangum into one of the patrol cars. Shelton decided that Mangum met the criteria for involuntary commitment and told the other officer to take her to the Durham Access Center, a facility for processing patients with mental illness or drug issues. At the Center, she was asked if she had been raped, to which she nodded affirmatively. Although this was the first time that she had said anything about a rape – nothing had been said to Roberts at any point – this was her ticket out of the Durham facility.

Mangum was taken to the emergency room at the Duke University Medical Center for treatment and a sexual assault workup. During her time there, her story changed several times. The story told to Nurse Tara Levicy was particularly detailed. She named "Adam," "Brett," and "Matt" as her attackers and described the encounter with specificity. The doctors, however, found no physical evidence of the attack described by Mangum. Three days later, Mangum was back at a strip club where she danced, saying: "I'm going to get paid by the white boys."

With the rape charge now out there, the Durham police began their investigation. Taking the lead was Sergeant Mark Gottlieb, a detective who hated Duke students and who had an ugly history of abusing them. Gottlieb and Detective Hinman interviewed Mangum on March 16, two days after her treatment at the hospital, but there was no signed statement from her at the time.

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42. Id.
43. Id.
44. Id. at 31.
45. Id.
46. Id.
47. Id. Mangum had prior experience with involuntary commitment, having been committed in a hospital facility for a week during the prior summer. Id.
48. Id.
49. Id. Mangum told one officer that she "ended up in the bathroom with five guys who forced her to have intercourse and perform sexual acts." Id. When Sergeant Shelton questioned her, she said that "some of the guys from the party pulled her from the vehicle and groped her," but no one "forced her to have sex." Id. at 31-32. She told three doctors and four nurses who interviewed her over the course of six hours that she had been raped vaginally, but was not otherwise penetrated. Id. at 33. During an interview with a fifth nurse, she claimed, however, that she had been penetrated orally and anally, as well as vaginally. Id.
50. Nurse Levicy was described by authors Taylor and Johnson as a "strong feminist" who later acknowledged that she had never doubted the truthfulness of a single rape accuser. Id.
51. Id. at 34.
52. Id. at 32.
53. Id. at 35. Mangum later repeated this hope to the security manager at the strip club where she sometimes worked. Id. at 42.
54. Id. at 36.
55. Id.
this time claiming to have been strangled and kicked. Her ability to describe her attackers was very shaky and the only photos that she picked with certainty after attempts on March 16 and March 21 to identify her attackers did not include any of the eventual defendants. Asked for a better description, all she could say at that point was they all looked alike. Given her inability to provide a consistent description of the attack and her attackers, Gottlieb did not commit her to a written statement until he had time to work with her, some three weeks later. Although Detective Hinman took notes during these interviews, none of the potential exculpatory evidence of Mangum’s vague description of the attackers and her erroneous picks of the photos were initially turned over to defense counsel.

Gottlieb used Mangum’s remarks from March 16 to obtain a search warrant to search the house at 610 North Buchanan that evening. The players at the house were startled and baffled at first, but helped the officers find much of what they were looking for. The players did not invoke their constitutional rights. They volunteered to go to the police station, where they answered all questions, wrote and signed detailed statements, gave DNA, blood and hair samples, and even gave their passwords so that the police could access their e-mail and instant messenger accounts. When it became clear that the matter was not going to die down, the players subsequently retained counsel and began to organize a defense. A planned interview with most of the players was postponed in order to prepare with counsel. This, however, was viewed by the police as a sign of guilt and the investigation began to go public in order to put pressure on the players. Meanwhile, Detective Hinman interviewed Kim Roberts, whose seven-page handwritten statement contradicted Mangum on all important points. According to Roberts, no one had touched either woman, they remained at the house without fear for about forty-five minutes after the dancing, and Mangum had said nothing about being raped during all the time they were together. In fact, Hinman wrote in a later memo: “She stated that she heard that Ms. Mangum was sexually assaulted, which she stated is a ‘crock’ and she stated that she was with her the whole time until she left.”

Mike Nifong, the district attorney, then took personal control over the investigation. A little background is necessary here. In April of 2005, the

56. *Id.* at 38.
57. *Id.* at 38-39.
58. *Id.* at 38.
59. *Id.* at 42.
60. *Id.* at 39-41.
61. *Id.* at 42.
62. *Id.* at 42-43.
63. *Id.* at 43.
64. *Id.* at 50-52.
65. *Id.* at 56.
66. *Id.*
67. *Id.* at 57.
68. *Id.* at 46.
governor of North Carolina appointed the then serving district attorney to the bench. Although there were several candidates for the job, the governor chose an assistant district attorney, Mike Nifong, for the remainder of the twenty months of the term. In return, Nifong promised the governor that he would not run for a full term, thereby minimizing the possibility that the interim would be marked by political maneuvering within the office prior to the election. This promise proved to be empty. Upon taking office, Nifong immediately fired his chief rival, Freda Black, who then made plans to run in 2006. She had strong name recognition and therefore a strong candidacy and would undoubtedly return the favor against Nifong should she win. With his career in jeopardy, Nifong abandoned his promise to the governor and made plans to run for a full four-year term.

Not happy with either candidate, the African-American community in Durham turned to one of their own, Keith Bishop, to make a run for the office. Less than two months before the crucial Democratic primary, a private poll showed Nifong running a poor third, with his rival, Ms. Black, holding a commanding 17 point lead over Nifong.

Just when the political situation looked hopeless for Nifong, Crystal Mangum surfaced with her rape charge against the Duke lacrosse players. This was a game changer. Nifong saw the opportunity and made many highly publicized statements about the case that had the dual effect of inciting both the academic community and the local community against the eventual defendants, while at the same time providing him with vast amounts of free election publicity. On March 23, Nifong made an application to the court to obtain a DNA sample from each of the forty-six players at the party. The application withheld all of the exculpatory evidence, including the fact that Mangum had failed to identify any of the six initial prime suspects as well as thirty of the other players. The application also held out the following promise: "The DNA evidence requested will immediately rule out any innocent persons, and show conclusive evidence as to who the suspect(s) are in the alleged violent attack upon this victim." While defense lawyers had misgivings about the validity of this request, they told their clients to cooperate, reasoning that the DNA evidence would be an ally against any spurious charges. The trip to the police station, however, produced its own public relations consequences. The media had been tipped off and the players were greeted at the station by reporters and a

69. Id. at 81.
70. Id. at 82.
71. Id.
72. Id.
73. Id. at 83.
74. Id. at 84.
75. Id. at 99. Responding to concerns from his campaign manager that he might be going too far, Nifong stated: "I'm getting a million dollars of free advertisements." Id.
76. Id. at 57.
77. Id. at 58.
78. Id. at 59.
79. Id.
photographer. Some of the players had been told to hide their faces, in order to avoid public association of their faces with rape headlines and to prevent Mangum from later identifying them through the newspaper picture. News of this event spread quickly in the community, with the next day’s headlines and pictures of the covered faces suggesting guilt. Thereafter, it was open season on the players in the media. The treatment of the players within the Duke academic community was not any better.

Nifong took charge of the investigation, but he did not investigate. Instead, he simply postured. When defense counsel met with him to urge holding off charging until the DNA results came back, he threatened all the players with prosecution. His certainty about the case could not have been based on any personal interview with Mangum (he never interviewed her even though he was the chief investigator), nor on the testimony of Roberts, but on the March 14 report from Nurse Levicy at the Duke hospital. Nifong’s “investigation” consisted mostly of making inflammatory statements to the media.

The case began to unravel for Nifong on March 28 when the State Bureau of Investigation reported that there had been no semen, blood, or saliva anywhere on or in Crystal Mangum. The attempt to seal the case through examination of DNA evidence produced from the rape kit and a subsequent search of the house where the party occurred had backfired when the tests produced no matches of DNA with any of the members of the team. All members of the team had voluntarily given DNA samples upon the representation that it would be used to clear those who had not participated in the

80. Id. at 60.
81. Id.
82. Id. at 61.
83. Id. at 63-66.
84. Id. at 73-76, 103-117.
85. Id. at 85. As attorney Bob Ekstand recalled, Nifong said:
   If you've come here to ask me questions instead of telling me what you know about who did it,
   then we don't have anything to talk about. You're wasting my time. You tell all of your clients
   I will remember their lack of cooperation at sentencing. I hope you know if they didn't do it,
   they are all aiders and abettors, and that carries the same punishment as rape.
   Id.
86. Id. at 86.
87. Nifong’s statements included the following:
   In this case, where you have the act of rape — essentially a gang rape — is bad enough in and of
   itself, but when it's made with racial epithets against the victim, I mean, it's just absolutely
   unconscionable. . . . The contempt that was shown for the victim, based on her race was totally
   abhorrent. . . . My guess is that some of this stone wall of silence that we have seen may tend to
   crumble once charges start to come out.
   We don't know who the assailants are, but we know they came from this group.
   The thing that most of us found so abhorrent, and the reason I decided to take it over myself,
   was the combination gang-like rape activity accompanied by the racial slurs and general racial
   hostility. There are three people who went into the bathroom with the young lady, and whether
   the other there knew what was going on at the time, they do now and have not come forward.
   Id. Nifong's statements would eventually trigger disciplinary charges from the State Bar. Id. at 321.
88. Id. at 96.
89. Id. at 96-97.
alleged sexual assault. The results, however, were kept secret from defense counsel and the public while Nifong began to walk back from his earlier “the DNA will exonerate the innocent” statements. Knowing the results showed no matches, he told various reporters: “I would not be surprised if condoms were used.”

Nifong refused to consider defense counsel’s account of what had actually happened, including evidence in the form of photographs taken before, during, and after the alleged rape had taken place that would place considerable doubt on the complaining witness’s several (inconsistent) accounts. Sensing that his election chances could falter if he did not bring an indictment before the May 2 primary, Nifong needed an identification of someone by Mangum. Even though two previous photo ID sessions had shown Mangum completely unable to identify any attackers, Nifong ordered a third photo ID lineup. The process used violated the police’s own internal standards and, almost certainly, the defendants’ constitutional rights.

On April 4, Mangum picked Collin Finnerty, despite the fact that he bore no resemblance to any of the three descriptions she had given on March 16. She picked Reade Seligmann, despite the fact that he had left the party by the time the rape was alleged to have occurred. When she looked at Dave Evans’s photo, she hesitatingly identified him, saying, however, that the attacker had a mustache, while Evans never had a mustache at any time. On April 6, Mangum finally wrote out a statement, describing the March 14 rape, twenty-three days after her initial interviews with the nurses, doctors, and police at the hospital. This version of the events contradicted all of her previous versions as well as Roberts’s March 22 statement to the police. No attempt was made by Nifong to interview Mangum in order to clear up these discrepancies. Instead, he ordered more DNA tests and otherwise focused on campaigning.

On April 10, defense counsel finally received a copy of the initial DNA

90. Id. at 59.
91. Id. at 97.
92. Id. Mangum, however, had specifically denied that the attackers used condoms and, in any event, it was not possible that an assailant could have attacked her in the way she described without leaving some form of DNA. Id.
93. Id. at 97, 99, 161. Indeed, when witnesses with potential exculpatory evidence were identified, they were threatened with prosecution by the DA as part of an attempt to intimidate witnesses favorable to the defense. For example, the cab driver who picked up Reade Seligmann and drove him back to his dorm during the time the defendant was supposed to have been participating in the rape was threatened with prosecution for allegedly aiding a shoplifter a few years before. Id. at 219-20.
94. Id. at 154.
95. Id. at 154-57.
96. Id. at 157.
97. Id. at 26-27, 157.
98. Id. at 158.
99. Id. at 159.
100. Id. at 159-60.
101. Id. at 160.
102. Id.
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This report from the state showing no DNA matches with any of the players. This news was greeted by defense counsel and the players with great joy, as they believed that such exoneration would effectively end the case. Notwithstanding the absence of any DNA match, Nifong had decided, however, to get a second opinion and had hired a private lab, DNA Security, Inc., which promised a more sophisticated testing of the evidence. On the same afternoon that the first tests became known to defense counsel, Nifong was conferring with Mike Meehan of DNA Security, who gave him further bad news. Meehan's analysts had found foreign DNA from the rape kit with the more powerful test. Unfortunately for the prosecution's case, it consisted of DNA from Mangum's boyfriend and four other unidentified males. In other words, if the complaint was true, the defendants had to have committed a brutal rape without leaving any DNA trace while the evidence of five prior sexual encounters remained. The test, in fact, was so sensitive that it detected the presence of DNA from the lab tester himself, but none from any Duke lacrosse suspect. The findings amounted to conclusive proof of innocence and were known to Nifong before he sought an indictment. He, along with Meehan, agreed not to report these findings to defense counsel, as later admitted in court by Meehan.

Knowing that his own physical tests proved the innocence of the players, but faced with mounting pressure to bring an indictment, Nifong took the case to the grand jury. The grand jury heard from Detectives Gottlieb and Hinman only – and not from Mangum, Roberts, the players, or the doctors – and returned the indictment against Finnerty and Seligmann. Nearly one month later, Dave Evans was named by the grand jury as the third defendant in the case. At that point, Evans spoke out publicly for the first time:

I want to thank you all for letting me speak to you today. My name is Dave Evans, and I'm the captain of the Duke University men's lacrosse team. I have to say that I'm very relieved to be the person who can come out and speak on behalf of my family and my team and let you know how we feel. First, I want to say that I'm absolutely innocent of all the charges that have been brought against me today, that Reade Seligmann and Colin Finnerty are innocent of all of the charges that were brought against them.

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103. Id. at 162.
104. Id. at 162-63.
105. Id. at 158.
106. Id. at 163.
107. Id.
108. Id. at 163, 309.
109. Id. See also id. at 194.
110. Id. at 178. This is a classic example of the difference between the grand jury and a preliminary hearing. Nifong had no evidence other than Mangum's wildly inconsistent statements and the undependable (and unconstitutional) photo identifications. He had no DNA matches and no corroborating testimony from Roberts or any other witnesses. A preliminary hearing, where the proffer of this as evidence of probable cause would have been shredded by defense counsel, would have been a disaster for Nifong. The grand jury, on the other hand, said to be famous for its inability to distinguish between a true criminal and a ham sandwich, was just what Nifong needed.
111. Id. at 177-79.
112. Id. at 225.
These allegations are lies, fabricated – fabricated, and they will be proven wrong.\textsuperscript{113} Evans proved to be correct in his prediction. Through the diligent (and expensive) efforts of defense counsel, the case eventually unraveled on Nifong. The nearly two thousand page DNA report from DNA Security was finally turned over as a result of a hearing on October 27.\textsuperscript{114} Defense counsel eventually figured out that the raw data not discussed in the report actually exonerated the defendants.\textsuperscript{115} This was demonstrated, dramatically, on December 15. The defense had brought a motion relating to the prosecution’s failure to turn over exculpatory DNA evidence connected with the four unidentified males.\textsuperscript{116} Responding in court, Meehan admitted that he and Nifong had agreed to withhold evidence that was highly probative of innocence:

Mr. Cooney: Did your report set forth the results of all of the test and examinations that you conducted in this case?

Dr. Meehan: No. It was limited to only some results.

Mr. Cooney: Okay. And that was an intentional limitation arrived at between you and representatives of the State of North Carolina not to report on the results of all examinations and tests that you did in this case?

Dr. Meehan: Yes.\textsuperscript{117}

With the case now in shambles, Nifong dropped the rape charges, although he told defense counsel that he intended to proceed on sexual assault and kidnapping charges.\textsuperscript{118} The public and professional pressure against Nifong increased, however. On December 28, the State Bar brought disciplinary charges against the prosecutor, which created a conflict of interest for him in the criminal proceeding.\textsuperscript{119} Nifong bowed out on January 12, asking the Attorney General’s office to take over the case.\textsuperscript{120} Finally, on April 11, over one year after the party at 610 North Buchanan, the Attorney General announced that the case would be dismissed, stating his belief that Evans, Finnerty, and Seligmann were innocent of all charges.\textsuperscript{121} Nifong eventually was disbarred and he even served a, mostly symbolic, day in jail.\textsuperscript{122} A civil suit was filed by Williams & Connolly, a major Washington, D.C. law firm, with nationally known lawyers, Brendan Sullivan and Barry Scheck, included on the signature pages.\textsuperscript{123}

\textsuperscript{113} Id. at 225-26.
\textsuperscript{114} Id. at 301.
\textsuperscript{115} Id. at 302.
\textsuperscript{116} Id. at 307.
\textsuperscript{117} Id. at 311.
\textsuperscript{118} Id. at 316.
\textsuperscript{119} Id. at 321.
\textsuperscript{120} Id. at 328.
\textsuperscript{121} Id. at 351-52.
\textsuperscript{123} David F. Evans, et al. v. City of Durham, North Carolina, et al., U.S. District Court for the Middle District of North Carolina, No. 1:07CV739 (M.D.N.C. April 2, 2008).
has since filed a Chapter 7 bankruptcy petition.\textsuperscript{124}

\textbf{B. THE POTAWATTAMIE COUNTY CASE}

Another example of egregious prosecutorial misconduct is also a recent case.\textsuperscript{125} It began, however, on July 22, 1977, with the murder of John Schweer, a recently retired police captain, who was working as a security guard for three car dealerships in Council Bluffs, Iowa.\textsuperscript{126} Schweer's body was found near one of the dealerships. He had died of a 12-gauge shotgun wound to the chest.\textsuperscript{127} The police made plaster casts of footprints and dog prints in the area around the body.\textsuperscript{128} Officers also reported finding shoe and dog prints nearby that were of the same type and shape as those found at the crime scene.\textsuperscript{129} An employee from a nearby office told police that he had seen a man running by the office wearing overalls, carrying a shotgun and accompanied by a dog.\textsuperscript{130} When Detective Larsen, one of the lead investigators, heard that a man and a dog had been seen around the area of the murder, he thought of Charles Richard Gates, a white male who lived in the area and was known to carry a shotgun while walking his dogs.\textsuperscript{131} Gates was subsequently identified from a photograph by a witness who had seen him walking his dogs in the area.\textsuperscript{132} Other witnesses from the neighborhood described a man wearing overalls walking his dogs near the crime scene as recently as July 22.\textsuperscript{133}

In checking out Gates, Detective Larsen learned that "neighbors described him as a 'spooky type individual' who constantly walked his three dogs and was 'strictly a loner.'"\textsuperscript{134} In his report, Larsen also noted that Gates had been a suspect in a homicide fourteen years earlier and that when he had taken a polygraph test in the present case, the tester believed that Gates had not been truthful when he denied owning a shotgun or shooting Schweer.\textsuperscript{135} Larsen recommended further investigation of Gates.\textsuperscript{136} However, the investigation

\textsuperscript{124} \textit{In re Nifong}, WL 2203149 2008 (Bankr. M.D.N.C. May 27, 2008). On May 27, 2008, the bankruptcy court lifted the automatic stay in order to permit the plaintiffs, Evans, Finnerty, and Seligmann, to proceed with their civil action against Nifong.


\textsuperscript{126} McGhee v. Pottawattamie County, Iowa, 475 F.Supp.2d 862, 867 (S.D. Iowa 2007).

\textsuperscript{127} \textit{Id.} at 868.

\textsuperscript{128} \textit{Id.} Early in the investigation, it was learned that Schweer had written a note to a dealership employee, stating that he had chased away a man trying to get into one of the trucks on the lot the night before. Schweer also had a conversation in the early morning hours of July 21 with a police officer, reporting that he had seen a man with a rifle or car jack at one of the dealerships and that he believed the man and his dog were still in the area. \textit{Id.}

\textsuperscript{129} \textit{Id.}

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.} at 869.

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.}
dropped Gates as a suspect without resolving any of these issues. There was no footprint comparison ever undertaken, nor any search of Gates's house. The file did not even contain any explanation of why Gates was eliminated as a suspect.\footnote{137}

Instead, attention began to focus on a "car theft ring\[.\]"\footnote{138} On September 1, 1977, two cars were stolen from a dealer in Fremont, Nebraska.\footnote{139} The suspects were three African-American youths that were driving a Black Oldsmobile Cutlass that had been reported stolen from one of the Council Bluffs dealerships.\footnote{140} When they were later apprehended in Lincoln, Nebraska, they were riding in a Cadillac that had been stolen from Fremont.\footnote{141} The driver, Kevin Hughes, denied that he had stolen the Cadillac. He claimed that three other individuals, Terry Harrington, Anthony Houston, and "Cub" (later identified as Curtis McGhee), had stolen the car from Fremont, and had also stolen the Black Cutlass from Council Bluffs.\footnote{142}

After being notified by Nebraska authorities that there may be information on the Schweer homicide, Detective Larsen and Brown traveled to Lincoln to interview Hughes.\footnote{143} According to the complaints later filed in this case:

Hughes was told that police knew he was involved in the car theft ring, and that police knew that he and his fellow car thieves were responsible for Schweer's murder. Hughes was purportedly told that he would not be charged with murder if he gave authorities someone else, and that there was a $5,000.00 reward for information leading to the arrest and conviction of Schweer's murderer or murderers. Additionally, Hughes was told that authorities would help him with numerous pending charges if Hughes helped them on the Schweer case.\footnote{144}

Subsequently, the Council Bluffs authorities began to pressure Hughes to implicate Harrington and McGhee in the Schweer homicide.\footnote{145} Hughes eventually told investigators that Harrington and others told him that they had killed Schweer.\footnote{146} When challenged on this, however, Hughes admitted that he was lying.\footnote{147} Hughes then told police that he had been present on the night of the murder. Hughes was brought to the crime scene. It was later alleged that although the police knew Hughes was a liar, they "worked with" him, in order to implicate Harrington and McGhee "by editing [his] story to eliminate those items that could be proved false and by providing [him] with more details of the crime to make his story more credible."\footnote{148} For example, Hughes first claimed
that Schweer had been shot with a pistol, but later said that the murder weapon
was a 20-gauge pump shotgun.\textsuperscript{149} When told by authorities that Schweer had
been killed with by a 12-gauge shotgun, he then switched his story to say that a
12-gauge shotgun had been used to murder Schweer.\textsuperscript{150} Hughes also told police
that he had gone to one the car dealerships on the night of murder with Anthony
Houston, but he dropped Houston from the story after being told that Houston
was in jail that night.\textsuperscript{151} Ultimately, Hughes claimed that he, Harrington, and
McGhee drove around the three car dealerships the night of the murder.\textsuperscript{152}
When they parked in order to steal one of the cars from the dealership, Hughes
said that he remained in the car, listening to music and smoking cigarettes.\textsuperscript{153}
He said he heard a shot and saw Harrington, McGhee, and Houston (later
dropped from the narrative) running back to the car.\textsuperscript{154}

Harrington was arrested in Omaha on November 16 and McGhee was
arrested in Omaha on November 17 and both were extradited to Pottawattamie
County, Iowa on December 22.\textsuperscript{155} The authorities allegedly sought out prisoners
who were in jail with McGhee to testify falsely against him.\textsuperscript{156} Several did so,
furnishing more detail to the story and lessening the dependence on the ever-
evolving testimony of Hughes.\textsuperscript{157} Meanwhile, the prosecutors were aware of the
potentially exculpatory reports from the investigation of Gates, but did not turn
them over to defense counsel before or during the criminal trial.\textsuperscript{158} McGhee was
convicted of first-degree murder on June 13, 1978 and was sentenced to life
imprisonment without parole.\textsuperscript{159} Harrington was convicted on August 4, 1978
and received the same sentence.\textsuperscript{160}

The first post-conviction review occurred in 1987. In neither case was the
existence of an alternative suspect revealed. In fact, there were
misrepresentations to the opposite effect.\textsuperscript{161} In 1999, Anne Danaher, an
employee of the prison where Harrington was incarcerated, got to know
Harrington and his family and requested a copy of the Schweer murder file.\textsuperscript{162}

\begin{footnotesize}
\begin{enumerate}
\item[149.] Id. at 870-71.
\item[150.] Id. at 871.
\item[151.] Id. at 870-71.
\item[152.] Id. at 871.
\item[153.] Id.
\item[154.] Id.
\item[155.] Id. at 873.
\item[156.] Id.
\item[157.] Id. at 873-74.
\item[158.] Id. at 873, n. 6.
\item[159.] Id. at 874.
\item[160.] Id.
\item[161.] Id. McGhee's counsel "served an interrogatory requesting 'the names and addresses of all
suspects in the case.'" The response was that there were none, other than McGhee and Harrington. Id.
Another interrogatory requested information about the report of the man and dog seen in the vicinity and
the response was that they were "never found or identified." Id. There was no mention of the fact that
the investigation of Gates had progressed so far as to have him subjected to a polygraph test that he had
failed on the crucial questions. Id. at 869. Harrington's counsel likewise had served a global discovery
request, but no mention of Gates had been forthcoming. Id. at 874.
\item[162.] Id. at 874.
\end{enumerate}
\end{footnotesize}
The withheld reports concerning Gates were in the materials provided to her. Harrington brought a new post-conviction relief petition based in part on the fact that these reports had been withheld at trial. The Iowa district court denied the petition, but the Iowa Supreme Court reversed, holding that Harrington's due process rights had been violated. The new district attorney, Matthew Wilber, had to decide whether to retry Harrington and McGhee, whose own petition for post-conviction relief was in process. Wilber's actions thereafter appeared to be intended primarily towards vindicating the prior prosecutions of Harrington and McGhee. In any event, McGhee eventually made an Alford plea, which was accepted, and he was re-sentenced to time served. Shortly thereafter, Wilber announced that he had decided to discontinue the prosecution of Harrington.

Now, it was Harrington's and McGhee's turn. They both brought suit in federal court for damages, naming the county, the prosecutors, and the principal detectives who worked on the case. On motions for summary judgment brought by the defendants, the court held that: (1) the prosecutors were absolutely immune for filing the information, but not immune for actions taken prior to the information; (2) the prosecutors were absolutely immune from liability for failure to turn over exculpatory information; (3) the prosecutors were absolutely immune from liability for their role in coercing and fabricating jailhouse informant testimony; (4) the prosecutors were not entitled to qualified immunity from liability in connection with the arrests without probable cause; (5) the police officers were entitled to qualified immunity on the Brady claim for failure to turn over exculpatory evidence; and (6) the state law claims against the prosecutors under the Iowa Tort Claims Act were not barred, to the extent that the claims arose from acts taken outside the scope of the their activities as state employees, except to the extent the claims arose from the

163.  Id.
164.  Id.
165.  Id.  See Harrington v. State, 659 N.W.2d 509 (Iowa 2003). The court concluded that material exculpatory evidence had been withheld that may have caused a jury to have reasonable doubt that Harrington shot Schweer.  Id. at 525.
166.  McGee, 475 F.Supp.2d at 874-75.
167.  Id. at 875-78.
168.  See North Carolina v. Alford, 400 U.S. 25, 37 (1970) (recognizing that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime").
169.  McGee, 475 F.Supp.2d at 900. McGhee continued to maintain his innocence and said he would take any deal just to be able to go home.  Id. at 877.
170.  Id. at 877.
173.  Id. at 895-96.
174.  Id. at 896-97.
175.  Id. at 898-901. Prosecutor Wilber, however, was held to be absolutely immune because his acts related directly to his functions as an advocate.  Id. at 901-02.
176.  Id. at 910-13.
concealment of exculpatory evidence. On appeal, the Eighth Circuit reversed on several of the state tort claims, but affirmed the decision that the prosecutors were not entitled to qualified immunity for violation of the plaintiffs’ due process rights. The United States Supreme Court granted certiorari and, after the case had been submitted following oral argument, the matter settled. The combined settlement was reported to be $12 million.

C. A PAUSE FOR REFLECTION ON THE NATURE OF THE PROBLEM

So, before we continue, what is going on here? How did these cases go so far off track? We have professionals, with no doubts as to their competency. Yet they seem to be caught up in scenarios that they themselves would have condemned had they taken a step back. In the Duke case, there is a prosecutor who knows he is indicting innocent defendants. It is not just self-centeredness. He knew. Could it be that he thought he wouldn’t get caught? Yes, possibly, because it took extraordinary effort by defense counsel to pull the meaning from nearly two thousand pages of raw data. Going back to “he knew,” the question becomes “he knew what.” When one lives in the fast lane, be it for pleasure or glory, the opportunities for self-examination may be overwhelmed by the pressures of the moment. Did Mike Nifong ever think beyond himself, to how his exercise of power would affect other human beings? Arrogance can dull the moral senses and this may be all we can take away from this.

In a less direct, but no less fundamental way, how could the prosecutors in Pottawattamie County have been so obtuse to what they were doing? At some point, one must take a step back and conclude that Hughes was so unreliable as

177. Id. at 915-26.
178. McGhee v. Pottawattamie County, Iowa, 547 F.3d 922 (8th Cir. 2008).
182. See, e.g., 2 Samuel 12: 1-7 (King James Version):
And the Lord sent Nathan unto David. And he came unto him, and said unto him, There were two men in one city; the one rich, and the other poor. The rich man had exceeding many flocks and herds: But the poor man had nothing, save one little ewe lamb, which he had bought and nourished up: and it grew up together with him, and with his children; it did eat of his own meat, and drank of his own cup, and lay in his bosom, and was unto him as a daughter. And there came a traveller unto the rich man, and he spared to take of his own flock and of his own herd, to dress for the wayfaring man that was come unto him; but took the poor man's lamb, and dressed it for the man that was come to him. And David's anger was greatly kindled against the man; and he said to Nathan, As the LORD liveth, the man that hath done this thing shall surely die: And he shall restore the lamb fourfold, because he did this thing, and because he had no pity. And Nathan said to David, Thou art the man.

Id.
to be worthless. So, why did they, especially the new prosecutor, Wilber, continue? The institutional demands of self-preservation may justify the first response, but didn’t the more fundamental question – is this the right thing to do? – ever surface? If what went wrong in the Duke lacrosse case was a case of monumental ego, the problem in the Pottawattamie case may have been one of mundane administrative ineffectiveness (with, probably, a unhealthy dose of racism thrown in for no extra charge). In both cases, the practice of law without a conscience had practical consequences for those who had inadvertently found themselves in the path. In any event, we are left with the problem of what to do about this.

II. SUING THE PROSECUTOR: THE LAW

The complaints filed in the civil actions against Mike Nifong and the Iowa prosecutors constitute a catalogue of various theories to assert against the rogue prosecutor.183 This section will briefly describe the principal theories and will then consider the chief obstacle to recovery under those theories – the defense of prosecutorial immunity.

A. MALICIOUS PROSECUTION

Malicious prosecution is the chief uncontroverted model for wrongful litigation. Everyone is against frivolous claims being asserted through the judicial process against innocent parties. Wrongful litigation involves a judicial “shake-down” that punishes those who are its targets by forcing a Hobson’s choice of paying tribute to buy peace or paying the costs of defense. For malicious prosecution, the prior judicial or administrative proceeding must have been brought by (or instigated by) the defendant without probable cause and with malice, it must have been terminated in favor of the plaintiff, and the plaintiff must have suffered special injury as a result.184

When a malicious prosecution claim arises out of a prior criminal proceeding, the cause of action is usually stated as a civil rights action because some or all of the defendants may have been acting under color of state law.185 The claim is rooted in the Fourth Amendment’s protection against unreasonable seizures.186

183. David F. Evans, et al. v. City of Durham, North Carolina, et al., U.S. District Court for the Middle District of North Carolina, No. 1:07CV739 (M.D.N.C. April 2, 2008). Following a total of twelve federal civil rights claims, the complaint restated many of the claims as common law tort claims, such as malicious prosecution, obstruction of justice and conspiracy, intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress. However, the complaint did not allege defamation. Harrington’s complaint included, in addition to the civil rights claims, malicious prosecution and intentional infliction of emotional distress. McGhee v. Pottawattamie County, Iowa, 475 F.Supp.2d 862, 866-67 (S.D. Iowa 2007). McGhee’s complaint alleged thirty-two counts, including malicious prosecution, false arrest and imprisonment, and defamation. Id.


186. See, e.g., Pitt, 491 F.3d at 510 (malicious prosecution was actionable under section 1983 to the
B. FABRICATION OF EVIDENCE, CONCEALMENT OF EVIDENCE

The fabrication of evidence may be actionable if it is used to establish probable cause for the bringing of charges or the issuance of an arrest warrant. Likewise, the prosecutor’s knowing failure to preserve exculpatory evidence may result in liability. Destruction of evidence, when not closely connected to an ongoing criminal prosecution, may be actionable. As the Third Circuit stated:

We believe that destroying exculpatory evidence is not related to a prosecutor’s prosecutorial function. Unlike decisions on whether to withhold evidence from the defense, decisions to destroy evidence are not related to a prosecutor’s prosecutorial function. As our late colleague Judge Becker aptly observed in Wilkinson v. Ellis, 484 F.Supp. 1072, 1083 (E.D. Pa. 1980):

[O]nce the decision is made not to furnish evidence to the defense, no additional protectable prosecutorial discretion is involved in deciding to dispose of it, and ..., while deciding not to furnish the prosecution’s evidence to the defense may be an act of advocacy, throwing the evidence away is not such an act.

C. FALSE ARREST AND FALSE IMPRISONMENT

To the extent that an arrest is not supported by probable cause there may be vulnerability to a civil suit. The cause of action is based primarily on the common law theory of false imprisonment. “False arrest arises when one is
taken into custody by a person who claims but does not have proper legal authority.”

D. ABUSE OF PROCESS

Abuse of process is a recognized claim for what may be termed “legal harassment.” Abuse of process involves “misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish.”

The policy underlying abuse of process may be found in Board of Education v. Farmingdale Classroom Teachers Ass’n:

While it is true that public policy mandates free access to the courts for redress of wrongs and our adversarial system cannot function without zealous advocacy, it is also true that legal procedure must be utilized in a manner consonant with the purpose for which that procedure was designed. Where process is manipulated to achieve some collateral advantage, whether it be denominated extortion, blackmail or retribution, the tort of abuse of process will be available to the injured party.

The tools of litigation have great power to affect lives and fortunes, for good or ill. When misused, they reflect the worst cynicism about the end justifying the means. It is the practice of law without a conscience.

A recent civil case from the Montana Supreme Court illustrates the possibilities with this tort. In Seltzer v. Morton, the court affirmed awards of $1.1 million in compensatory damages and $9.9 million in punitive damages against Gibson, Dunn & Crutcher, a major national law firm. In 1972, Morton purchased a painting from Kennedy Galleries in New York for $38,000. Morton obtained verbal assurances, but no written verification, that the painting was by the well-known Western artist, Charles M. Russell. In 2000, Morton had decided to sell the painting and the original estimate was that it would go for approximately $650,000. There were some questions raised, however, about the authenticity of the painting and so Morton contacted Seltzer, who was a recognized expert on Russell, as well as on O.C. Seltzer (Seltzer’s grandfather), who was a student and contemporary of Russell. Seltzer expressed his...
opinion that it was not the work of Russell, but rather of his grandfather.\textsuperscript{201} Morton sought a second opinion from the leading Russell expert who also confirmed that it was a Seltzer, not a Russell.\textsuperscript{202} Knowing that there were serious questions as to its authenticity, Morton nevertheless tried twice to sell the painting as an authentic Russell, but the auction houses refused to do so.\textsuperscript{203} Morton, with the aid of an attorney who was of counsel with the Gibson Dunn law firm, began to seek a remedy. He contacted the Kennedy Galleries and asked them to make good on the difference.\textsuperscript{204} He asked Seltzer to recant his opinion.\textsuperscript{205} The claim against the Galleries cooled because the original sale had not been accompanied by written authentication. So, Morton focused attention on Seltzer and attempted again to force him to recant his opinion.\textsuperscript{206} Seltzer refused and was sued for defamation and intentional interference with business relations and prospective economic advantage.\textsuperscript{207} The suit ended in favor of Seltzer when Morton could not produce any expert that would say the painting was a Russell.\textsuperscript{208} Then it was Seltzer’s turn.

Seltzer sued Morton, his lawyer, and the Gibson Dunn law firm for malicious prosecution and abuse of process. Apparently, Montana juries don’t like bullies because they returned a verdict against the defendants for a total of $1.35 million in compensatory damages and $20 million in punitive damages.\textsuperscript{209} The award was reduced by the trial according to the \textit{State Farm v. Campbell} formula\textsuperscript{210} and was affirmed by the Montana Supreme Court on appeal.\textsuperscript{211}

\textit{Seltzer v. Morton} is an important case for an expanded use of abuse of process. It recognizes that the litigation process itself may become a form of extortion in the hands of an unscrupulous litigator. This is no less so in the criminal side when the purpose is to seek publicity and political gain through convicting the innocent. It is not enough, at the end of a lawsuit that never should have been brought, after putting parties through the time and the stress of litigation, emotional and financial, to then say: “Sorry for the inconvenience.”

E. SECTION 1983 CIVIL RIGHTS ACTION

Although there were many causes of action alleged in the civil action

\textsuperscript{201} Id. at ¶ 23, 154 P.3d at 572.
\textsuperscript{202} Id. at ¶¶ 27, 31, 154 P.3d at 574, 575.
\textsuperscript{203} Id. at ¶ 35, 154 P.3d at 575.
\textsuperscript{204} Id. at ¶ 33, 154 P.3d at 574. The estimated value of the painting as a Seltzer was less than 10 percent of the value if it had been a Russell. Id.
\textsuperscript{205} Id. at ¶ 41, 154 P.3d at 576.
\textsuperscript{206} Id. at ¶ 43, 154 P.3d at 577.
\textsuperscript{207} Id. at ¶ 44, 154 P.3d at 577.
\textsuperscript{208} Id. at ¶¶ 48-49, 154 P.3d at 578. By the time that the lawsuit was dismissed, Seltzer had incurred over $45,000 in legal fees. Id. at ¶ 49, 154 P.3d at 578.
\textsuperscript{209} In \textit{State Farm v. Campbell}, 538 U.S. 408 (2003) the U.S. Supreme Court laid out a formula for review of punitive damages awards to assure that they comport with the Due Process Clause and do not amount to a gross or arbitrary punishment. See \textit{Seltzer}, 2007 MT at ¶ 51, 154 P.3d at 579.
\textsuperscript{210} \textit{Seltzer}, 2007 MT at ¶ 51, 154 P.3d at 579.
\textsuperscript{211} Id. at ¶¶ 119-20, ¶ 199, 154 P.3d at 594, 615.
against Nifong, the primary mode of relief sought was section 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . 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 . . . .

In other words, a prosecutor (who certainly acts under color of state law) is vulnerable under this statute when he or she has deprived a citizen of rights secured by the Constitution or laws. This statute was part of the Civil Rights Act of 1871, passed in response to reports of civil rights violations in the aftermath of the Civil War.212

The initial question is whether this statute is of any use when the “citizen” seeking relief is not African-American, nor even a natural person. Although the statute had a recognized context that motivated its passage, its language was not limited to those particular circumstances. Thus, people who were neither slaves nor of African-American ancestry may sue for redress under the civil rights statutes.213 Moreover, a corporation qualifies as a “person” under section 1983 and its rights secured by the Constitution, including the right to due process of law, are protected.214

III. THE DEFENSE OF PROSECUTORIAL IMMUNITY

With these theories in mind, the principal United States Supreme Court cases considering the question of immunity as applied to prosecutors will demonstrate how narrow the parameters of an action against a prosecutor actually are.

A. IMBLER V. PACTHMAN

Imbler was convicted of felony-murder for a homicide that occurred during the course of a robbery and was sentenced to die.215 After his conviction was affirmed on appeal, the prosecutor (evidently experiencing some misgivings about the conviction, the death sentence, or both) wrote to the Governor of California and described newly discovered evidence that corroborated Imbler’s alibi defense as well as revelations about the chief witness against Imbler that indicated the witness was less trustworthy than originally represented.216 Imbler
then brought a state habeas petition that was ultimately rejected by the California Supreme Court. After denial of his state habeas petition, Imbler’s death sentence was overturned. Finally, he brought a federal habeas petition that reiterated the grounds rejected by the state courts. This time, however, the habeas petition was successful and Imbler eventually gained his freedom. He sued the prosecutor pursuant to 42 U.S.C. § 1983, arguing that the prosecutor and others had conspired to unlawfully convict him through suppression of exculpatory evidence. Imbler’s section 1983 action was dismissed on grounds of immunity and the United States Supreme Court granted certiorari.

The Supreme Court observed that, although the broad sweep of the language of 1983 had no immunity exception, the section was not to be assumed to have abrogated common law immunities existing at the time of its adoption 1983. The Court concluded that the prosecutor had absolute immunity against 1983 actions arising out of his or her actions as a prosecutor. The Court explained the policy behind this conclusion:

If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine the performance of his duties no less than would the threat of common-law suits for malicious prosecution. . . . The public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State’s advocate. [citations omitted] Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor’s possible knowledge of a witness’ falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument . . . the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusion. The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issue by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently

220. Imbler, 424 U.S. at 414.
222. Id., 424 U.S. at 415-16.
223. Id. at 416-17.
224. Id. at 417.
225. Id. at 418-19.
226. Id. at 427.
acting under serious constrains of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivations. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.227

The Supreme Court did not say, however, that the prosecutor was absolutely immune for all activities. If it had, the discussion of prosecutorial immunity would be done. Rather, it noted that its decision did not address other potential functions of a prosecutor’s office besides that of indicting and trying actions against criminal defendants.228 The Court noted that sometimes prosecutors have investigative duties that are similar to those of police and other law enforcement, which are under a qualified immunity standard:

We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor’s responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate.229

That occasion would come later in the case of Burns v. Reed.230 Before that, however, the Court would consider another aspect of prosecution – that of enforcement of regulatory law through the administrative process.

B. BUTZ V. ECONOMOU

This case followed shortly after Imbler v. Pachtman. In Butz,231 the plaintiff, who was a commodity futures commission merchant, filed suit against officials in the U.S. Department of Agriculture, claiming they had instituted an investigation and administrative proceeding against him in retaliation for his criticism of that agency. Among the ten causes of action pleaded were violations of First Amendment rights and due process. The Supreme Court rejected the claim of the government that the defendants were entitled to absolute immunity

227. Id. at 424-26. I quoted the policy considerations at length here in order to give a sense of the strength of the resistance to the notion of suing the prosecutor.

228. See id. at 430. Thus, the Court has recognized absolute immunity for judges acting in their judicial capacity. See, e.g., Dennis v. Sparks, 449 U.S. 24, 27 (1980); Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967). The Court has not recognized absolute immunities for judges when acting in their administrative capacity, such as a decision to demote and discharge a court officer See, e.g., Forrester v. White, 484 U.S. 219 (1988).

229. Imbler, 424 U.S. at 430-31. The Court also stated:

We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. . . . Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

Id. at 430-31 n. 33.


231. 438 U.S. 478 (1978). For political aficionados, Earl Butz was a Secretary of Agriculture in the Nixon administration, who was forced to resign after making several controversial statements, including a tasteless joke about the Pope and a reprehensible comment about African-Americans. See Richard Goldstein, Earl L. Butz, Secretary Felled by Racist Remark, Is Dead at 98, N.Y. Times, February 4, 2008.
for all actions.\textsuperscript{232} It held that the administrative proceeding launched against the plaintiff was akin to a judicial proceeding and therefore was entitled to absolute immunity.\textsuperscript{233}

The Court then made a number of observations that will prove to be an obstacle to potential plaintiffs:

We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. \textit{The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought.} The Commodity Futures Trading Commission, for example, may initiate proceedings whenever it has "reason to believe" that any person "is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Commission." \textsuperscript{7}U.S.C. § 9 (1976 ed.). A range of sanctions is open to it. \textit{Ibid.}

\textit{The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete.} Cf. \textit{Imbler v. Pachtman}, 424 U.S., at 426 n. 24, 96 S.Ct., at 993 n. 24. While there is not likely to be anyone willing and legally able to seek damages from the officials if they do \textit{not} authorize the administrative proceeding, cf. \textit{id.}, at 438, 96 S.Ct., at 998 (WHITE, J., concurring in judgment), there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts. A corporation will muster all of its financial and legal resources in an effort to prevent administrative sanctions. "When millions may turn on regulatory decisions, there is a strong incentive to counter-attack." [\textit{Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution}, 184 U.S.App.D.C. 397, 401, 566 F.2d 289, 293 (1977).]

\textit{The defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding.} An administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself. The respondent may present his evidence to an impartial trier of fact and obtain an independent judgment as to whether the prosecution is justified. His claims that the proceeding is unconstitutional may also be heard by the courts. Indeed, respondent in this case was able to quash the administrative order entered against him by means of judicial review. See \textit{Economou v. U. S. Department of Agriculture}, 494 F.2d 519 (C.A.2 1974).

We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant

\textsuperscript{232} \textit{Butz}, 438 U.S. at 485.

\textsuperscript{233} \textit{Id.} at 512-13.
in such a proceeding provide sufficient checks on agency zeal, we hold that those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision.\footnote{234}

This is almost a showstopper. That is, the observations here will undoubtedly provide considerable comfort to the administrative prosecutor, like an attorney general, who might use the administrative process to advance personal political objectives. Even so, I do not think \textit{Butz} ended the discussion. This case occurred shortly after \textit{Imbler} and there remained the possibility that the Court would find similar limitations as it did later with the rogue prosecutor in \textit{Buckley v. Fitzsimmons}.\footnote{235} Before bringing the action, an attorney general acts as an investigator and has duties with respect to protecting the public as well as sorting out the non-lawbreakers and the lawbreakers. Second, there are cases after \textit{Butz} that give hope to this possibility.\footnote{236} Third, the activities that are outside of the administrative proceedings themselves, such as issuing press statements and, possibly, testifying before Congress, that may not be accorded the same level of immunity.

\subsection{C. Burns v. Reed}

In this case, the Supreme Court addressed the question of absolute prosecutorial immunity in all respects.\footnote{237} Specifically, it considered whether there was immunity when the prosecutor gave legal advice to police regarding the legality of their investigative conduct and whether the prosecutor had immunity when participating in the probable cause hearing. The Court found qualified immunity for the former and absolute immunity for the latter. The basis for the distinction was that it would be "incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice."\footnote{238}

While establishing that the prosecutor is not absolutely immune while performing all functions of the office, it did not define the line between the protected adversarial functions and the semi-protected investigatory or administrative functions.

\subsection{D. Buckley v. Fitzsimmons}

This case had several factors remarkably similar to the Nifong situation.\footnote{239}
The prosecutor was facing a difficult re-election challenge when he took charge of a high profile murder case. The zeal of the prosecutor led to incendiary pretrial remarks to the press, fabrication of evidence, and rejection of contrary expert reports until he found the conclusion he was seeking. Buckley was charged with the murder of an eleven year-old child on the basis of a footprint identification made by the prosecution’s expert, an anthropologist, who had a history of fabricating expert testimony. His trial ended in a mistrial when the jury could not reach a verdict. Because he could not raise the $3 million bail, he remained in prison for another two years until someone else confessed to the crime. Buckley was released and brought suit against the prosecutors and the police.

With respect to the action against the prosecutors, the claim focused on the statements made by Fitzsimmons at the press conference held twelve days before the primary election and the alleged fabrication of the footprint evidence. The prosecutors moved to dismiss, asserting the defense of absolute immunity. The district court granted the motion as to the evidence fabrication claim, framing the question as to whether “the effort ‘to obtain definitive boot evidence linking [petitioner to the crime] was in the nature of acquisition of evidence or in the nature of evaluation of evidence for the purpose of initiating the criminal process.’” The district court concluded that it was more evaluative than acquisitive and thus protected by absolute immunity. As to the press conference, the judge denied the motion to dismiss. Both sides appealed and the Seventh Circuit ruled that both claims were entitled to absolute immunity. The Supreme Court vacated this decision and remanded it back for reconsideration in light of Burns. The Seventh Circuit affirmed its earlier decision and the Supreme Court reversed, holding that both claims were only entitled to qualified immunity.

In reviewing its prior decisions in Imbler and Burns, the Court re-affirmed the distinction between the investigatory function and the advocacy function. But how does one distinguish between the two functions? The description of the evidence fabrication claim provides an important observation:

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indictment 12 days before the primary election. Petitioner claims that respondents’ misconduct created a “highly prejudicial and inflamed atmosphere” that seriously impaired the fairness of the judicial proceedings against an innocent man and caused him to suffer a serious loss of freedom [three years of incarceration], mental anguish, and humiliation.

Id.
240. Id.
241. Id.
242. Id. at 264.
243. Id.
244. Id.
245. Id. at 262
246. Id. at 265.
247. Id.
248. Id. at 264.
249. Id. at 267.
250. Id. at 270-71.
We first address petitioner’s argument that the prosecutors are not entitled to absolute immunity for the claim that they conspired to manufacture false evidence that would link his boot with the bootprint the murderer left on the front door. To obtain this false evidence, petitioner submits, the prosecutors shopped for experts until they found one who would provide the opinion they sought. [citation omitted] At the time of this witness shopping the assistant prosecutors were working hand in hand with the sheriff’s detectives under the joint supervision of the sheriff and state’s attorney Fitzsimmons.251

The Court concluded that this was investigatory in nature and therefore not entitled to absolute immunity:

After Burns, it would be anomalous, to say the least, to grant prosecutors only qualified immunity when offering legal advice to police about an unarrested suspect, but then to endow them with absolute immunity when conducting investigative work themselves in order to decide whether a suspect may be arrested. That the prosecutors later called a grand jury to consider the evidence this work produced does not retroactively transform that work from the administrative into the prosecutorial. A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as “preparation” for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial. When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.252

The Court then added what should be a touchstone rule in these situations: “A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.”253

With respect to the prosecutor’s statement to the press, Fitzsimmons made false assertions that numerous pieces of evidence, including the bootprint evidence, tied Buckley to the crime.254 Fitzsimmons also released mug shots of Buckley to the media that were prominently and repeatedly displayed on television and in the newspapers.255 Statements to the press were not entitled to absolute immunity. “The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state’s case in court, or actions preparatory for these functions.”256

This case illustrates the different functions of the prosecutor’s office. There is the investigatory function where the prosecutor works with the police to evaluate the case and to make the important decision to charge someone with a crime. Before the decision to prosecute, the prosecutor has an interest in pursuing the criminals and ruling out those who have not committed crimes.

251.  Id. at 272 (emphasis added).
252.  Id. at 275-76 (emphasis added and citations omitted).
253.  Id. at 274.
254.  Id. at 276.
255.  Id.
256.  Id. at 278.
There are duties to the victim, to the public, as well as to those who are innocent. After the decision to prosecute, the prosecutor functions as an advocate. The duty to the accused is now channeled to the duty to the court and there is no civil liability for wrongs, even intentional misconduct. The conflicting duties of the prosecutor means that the prosecutor is not entitled to absolute immunity until there is probable cause.

E. KALINA V. FLETCHER

Kalina was a deputy prosecuting attorney for King County in the state of Washington who commenced a criminal proceeding against Fletcher.257 She filed a burglary information, supported by her certification, under oath, to support the charge that Fletcher had stolen computer equipment from a school.258 Based on this certification, the court found probable cause and ordered that the arrest warrant be issued.259 The certification contained two factual statements that were inaccurate. First, although Fletcher’s fingerprints had been found on a glass partition in the school, it was stated that he had never had permission to be on the school premises. In fact, he had performed installation of partitions with authorization.260 Second, Kalina stated that Fletcher had been identified from a photo montage by an employee at an electronics store as the person who had asked for an appraisal of the stolen computer. In fact, the employee had not identified Fletcher.261 Fletcher was arrested and spent one day in jail. The charges were later dismissed on the prosecutor’s own motion.262

Fletcher brought a section 1983 action, seeking damages for an alleged violation of his constitutional right to be free from unreasonable seizures.263 Kalina moved for summary judgment, arguing that the documents filed to commence the action and the arrest warrant issued pursuant thereto were protected by absolute immunity.264 The district court denied the motion, the Ninth Circuit affirmed, and the Supreme Court granted certiorari.265 The question presented was “whether a prosecutor may be held liable for conduct in obtaining an arrest warrant . . . .”266

The Court reviewed the prior immunity cases and observed:

[T]he absolute immunity that protects the prosecutor’s role as an advocate is not grounded in any special “esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process.

258. Id. at 121.
259. Id.
260. Id.
261. Id.
262. Id. at 122.
263. Id.
264. Id.
265. Id. at 122-23.
266. Id. at 123.
Although the Court acknowledged that the filing of the information and motion for an arrest warrant was protected by absolute immunity, the critical question was whether the prosecutor was acting as a complaining witness, rather than as a lawyer, when she filed the certification under penalty of perjury. The Court concluded that she was acting as a witness and therefore not entitled to the immunity protecting the prosecutor:

Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required "Oath or affirmation" is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.

While reaffirming their basic principle that the prosecutor is absolutely immune when acting as an advocate, the Court held that the prosecutor is not protected by such immunity when acting as a complaining witness.

F. **VAN DE KAMP v. GOLDSTEIN**

In 1980, Goldstein was convicted of murder. The conviction was based, in critical part, upon the testimony of a jailhouse informant, the aptly named Edward Floyd Fink. In the past, Fink had received reduced sentences for providing testimony in cases. Some prosecutors in the Los Angeles County District Attorney’s Office knew of this arrangement, but this information had not been provided to the Goldstein’s lawyer before the trial. Eventually, this information did surface and Goldstein brought a federal habeas action in 1998. The district court found that Fink had not been truthful and that, had the information about his favorable treatment for jailhouse confessions been known, it might have made a difference. The court ordered the State to retry or release Goldstein and the State opted, after the district court’s decision had been affirmed, to release him, in light of the fact that he had already served twenty-four years of his sentence.

Mindful of the immunity provided the prosecutor for trial decisions, Goldstein brought a section 1983 action, alleging that the violation of his constitutional rights occurred as a result of an administrative failure – the failure of the District Attorney’s office adequately to train and to supervise the prosecutors, as well as the failure to establish an information system about

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267. *Id.* at 127 (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).
269. *Id.* at 130-31.
270. *Id.* at 131.
272. *Id.*
273. *Id.*
274. *Id.*
informants. The Court accepted this characterization and framed the question presented as the extent of immunity when a prosecutor is engaged in certain administrative activities. It concluded, however that the administrative activities complained of were absolutely protected:

Even so, we conclude that prosecutors involved in such supervision or training or information-system management enjoy absolute immunity from the kind of legal claims at issue here. Those claims focus upon a certain kind of administrative obligation – a kind that itself is directly connected with the conduct of a trial. Here, unlike with other claims related to administrative decisions, an individual prosecutor’s error in the plaintiff’s specific criminal trial constitutes an essential element of the plaintiff’s claim. The administrative obligations at issue here are thus unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like. Moreover, the types of activities on which Goldstein’s claims focus necessarily require legal knowledge and the exercise of related discretion, e.g., in determining what information should be included in the training or the supervision or the information-system management. And in that sense also Goldstein’s claims are unlike claims of, say, unlawful discrimination in hiring employees. Given these features of the case before us, we believe absolute immunity must follow.

The administrative decisions here are ultimately connected to the trial, to the evidence, here impeachment, presented in the case, and not to office matters, such as hiring and firing. Thus, the remedy was limited to the habeas relief. The section 1983 cases provide a viable, albeit limited window of opportunity because the courts have to reconcile the conflicting two strong policy grounds: the protection of civil rights of citizens from invasion by those who act under color of state law (abuse of position) and the protection of public officials who carry out their duties in good faith, sometimes angering those who are adversely affected by the government actions. The case law is filled with failed attempts, most of which were justified in their outcome. The power of the prosecutor to adversely affect life, liberty, and property will often generate some unhappy “customers.” The law is very protective of the government and those who work for it and will find against liability in most cases. Only when the actions are egregious will the courts entertain the possibility of holding officials, and especially prosecutors, accountable for their actions.

275. Id.
276. Id. at 861.
277. Id. at 861-62.
278. Imbler, 424 U.S. 409 (1976). The Imbler Court noted with respect to this dissatisfaction: “Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State’s advocate.” Id. at 425.
279. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949). Chief Judge Learned Hand described prosecutorial immunity as a balance of “evils.” Id. “[T]he end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.” Id.
IV. OTHER CASE AUTHORITIES SUPPORTING ACTIONS AGAINST THE PROSECUTOR

It is fair to say that the Supreme Court cases set a fairly high threshold for liability of the prosecutor. There are many, many cases in favor of the prosecutor. Nevertheless, the following are examples of those cases that have been successful in getting past summary judgment.

A. STATE ADMINISTRATIVE CASES

Although the Supreme Court cases, except for Butz, involve a local prosecutor, they have applicability to the state attorney general’s office as well as the state administrative prosecutors. The application of the section 1983 immunity cases to administrative proceedings will be shaped by the probable cause threshold by looking at what evidence supported the decision to prosecute. If it turns out that administrative enforcement put prosecution before investigation, then I believe that the qualified immunity standard will be applied.

I. Freeman v. Blair

The Freemans operated a KOA campground in western South Dakota. An employee from the state department of health arrived unannounced at the campground and requested permission for an inspection. The Freemans refused unless he had a search warrant and the health department employee left. After consulting with the Attorney General and staff lawyers, several health department officials again arrived at the campground and requested permission to inspect. Again, the Freemans refused permission and one of the officials then served an order summarily suspending the campground license. On the advice of their attorney that the suspension was improper, the Freemans continued to operate the campground. Threats of criminal prosecution for failure to submit to an inspection and for operating without a license followed. The Freemans finally consented to an inspection, but later brought suit against state officials, including the Attorney General, for violation of their constitutional rights.

The district court granted summary judgment in favor of the defendants on the basis of Butz because the “decisions to initiate administrative proceedings were ‘analogous’ to a prosecutor’s decision to commence prosecution.”

281. 793 F.2d 166 (8th Cir. 1986) [hereinafter Freeman I]. See also Freeman v. Blair, 862 F.2d 1330 (8th Cir. 1988) [hereinafter Freeman II].
282. Freeman I at 169.
283. Id.
284. Id.
285. Id. at 169.
286. Id. at 169-70.
287. Id. at 170.
Eighth Circuit reversed, holding that the state officials were not entitled to absolute or qualified immunity, stating:

[W]e view the decisions to inspect, and more particularly to inspect without a warrant, as ones that were not attended by any of the characteristics normally associated with the judicial process. These decisions are analogous to the kind of administrative or investigative functions for which courts ordinarily do not extend absolute immunity to prosecutors . . . .

The Supreme Court granted certiorari, and vacated and remanded. On remand, the Eighth Circuit held that the defendants were entitled to qualified immunity with regard to the search warrant claim, but were not entitled to qualified immunity on the due process and retaliation claims.

2. Gagan v. Norton

In this case, the plaintiff was convicted of various theft offenses and his conviction was affirmed on appeal. Dissatisfied with his appellate counsel's failure to raise a right to speedy trial issue, Gagan filed a pro se habeas petition in federal court. He requested that certain transcripts be prepared at government expense. This request was approved by a state trial judge. The assistant Attorney General on the case, however, countermanded the judge's order. The judge called this conduct "outrageous" and ordered the Attorney General's office to cease and desist. Gagan's habeas petition was ultimately denied, but he brought suit against the assistant Attorney General and the Attorney General for violation of his constitutional right to access to the courts. The district court dismissed, but the Tenth Circuit reversed as to the assistant Attorney General, holding that the action was not the kind of advocacy relating to the initiation and prosecution of criminal proceedings to which absolute immunity attaches.

3. Blouin ex rel. Estate of Pouliot v. Spitzer

In this case, the Attorney General won, but it is significant because the court held that the Attorney General is only entitled to qualified immunity. The Attorney General intervened in a case where family members and physicians had agreed that only palliative care would be used for a patient, with no intrusive, life-prolonging, or resuscitative measures. He claimed that no third parties were competent to direct the withdrawal of life-prolonging measures. As a result of the Attorney General's actions, the patient was given

288. Id. at 171.
289. Freeman II, 862 F.2d at 1332.
290. 35 F.3d 1473, 1474 (10th Cir. 1994).
291. Id. at 1474-75.
292. Id. at 1475.
293. Id. at 1476.
294. 356 F.3d 348 (2d Cir. 2004).
295. Id. at 351.
296. Id.
hydration and nutrition for approximately two months. It became apparent
during this treatment that the patient suffered intensely, with no corresponding
medical benefit. The patient died shortly after the treatment was terminated
pursuant to a court order, over the Attorney General's objections. Family
members sued the Attorney General, Eliot Spitzer, and the assistant Attorney
General, who had handled the matter with Spitzer. The district court concluded
that the Attorney General was entitled to qualified immunity because the
intervention violated no clearly established constitutional right of the patient.

The Second Circuit affirmed on slightly different grounds. The court
rejected the Attorney General's claim of absolute immunity, holding that the
intervention did not involve the functions of a prosecutor. The court stated:
In short, Spitzer and Thurlow's challenged actions - even after state-court
proceedings commenced - were sufficiently distinct from traditional
prosecutorial or even adversarial functions that they are required to show
independent historical support for their entitlement to absolute immunity.
But they have not done so. The unavailability of absolute immunity in
this context does not impose a particularly onerous burden on
governmental officials, nor does it inappropriately expose them to vexatious litigation. It simply means that, when considering an
intervention into the medical treatment of a gravely ill patient, the AG's
office may "have to pause to consider whether a proposed course of action
can be squared with the Constitution and laws of the United States."

The court concluded that the Attorney General had qualified immunity
because the plaintiff had not shown that clearly established federal law barred
the defendants from advocating the state's interest in prolonging the life of one
of its citizens. What is significant about this case is that the court did not
immediately accord blanket immunity for all activities connected with the
litigation, but instead engaged in a more particularized inquiry into the relation
of the activities to the prosecutorial function.

B. CASES INVOLVING MEDIA STATEMENTS BY PROSECUTORS OR OTHER
EXECUTIVE OFFICIALS

1. Martin v. Merola

The six plaintiffs in this action were indicted on felony charges arising out
of an alleged loan-sharking operation. They brought an action under section
1983 alleging that the right to a fair trial had been infringed by the district
attorney, who had announced to the press the arrest of the plaintiffs with the
assertion that they were linked directly to Mafia crime families. The plaintiffs

297. Id. at 351-52.
298. Id. at 356.
299. Id. at 357.
300. Id. at 358 (quoting Mitchell v. Forsyth, 472 U.S. 511, 524, 105 S.Ct. 2806, 2807-08 (1985)).
301. Id. at 361.
302. 532 F.2d 191, 193 (2d Cir. 1976).
303. Id. at 194.
also alleged that the press had repeated the district attorney’s description of them as “vultures.” The district court granted the defendants’ motion for summary judgment, noting that while the statements to the press may have breached professional responsibility rules, they did not amount to a deprivation of rights under the Constitution. The Second Circuit dismissed the appeal, without prejudice, as premature because the claim of deprivation of the right to a fair trial could not be evaluated until after the prosecution had concluded. In a concurring opinion, Judge Lumbard stated that prosecutorial immunity would not “protect the prosecutor against responsibility for his acts when they are clearly beyond the proper exercise of his authority and exceed any possible construction of the power granted to his office . . .” Judge Lumbard noted:

While any criminal affiliations of the plaintiffs may become relevant to their sentencing if and when they are convicted at trial, at the time of the press conferences held by the appellees, these plaintiffs were innocent in the eyes of the law. As Mr. Justice Frankfurter recognized long ago, he who occupies the prosecutorial office and “wields the instruments of justice wields the most terrible instruments of government.” It was the plaintiffs’ constitutional right to have the prosecutor refrain from making any statements not relevant to their indictment and arrest which might prejudice their obtaining a fair trial.

2. Marrero v. City of Hialeah

This case has some similarities to the Duke lacrosse case in that the political ambition of the prosecutor is very apparent. Police executed a warrant authorizing the search of a jewelry store operated by the appellants and owned by a corporation of which the appellants were the sole officers and shareholders. After the search uncovered none of the items listed in the warrant, the police brought in several victims of local robberies to assist in the identification of stolen goods. Only one of them could identify any of the jewelry as stolen, and that was only one piece. Nevertheless, the police seized the entire inventory of the store and arrested the appellants. This was all covered by the local television media, who had arrived at the store simultaneously with the police. Later, the police made a public announcement that stolen property had been recovered from the appellants’ store and that victims of robberies should come to the police station to identify their

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304. Id.
305. Id.
306. Id. at 194-95.
307. Id. at 195 (Lumbard, J., concurring).
308. Id. at 196 (Lumbard J., concurring) (citations omitted).
310. Id.
311. Id.
312. Id.
313. Id.
property.\textsuperscript{314} After the public had the opportunity to view the property, appellants were charged with receipt of stolen property.\textsuperscript{315} The state court granted their motion to suppress the seized evidence, except for the one piece previously identified.\textsuperscript{316} There were no further proceedings against the appellants before they filed their complaint against the city and the prosecutors, including then state’s attorney for the county, Janet Reno (later Attorney General in the Clinton administration).\textsuperscript{317}

The Fifth Circuit denied the claim of absolute immunity:

Just as the Court in \textit{Butz} held that federal executive officials are not entitled to absolute immunity when they engage in roles other than their quasi-judicial roles, we now similarly hold that state prosecutors are not entitled to absolute immunity when they perform functions other than their quasi-judicial functions of “initiating prosecutions and presenting the State’s case.”\textsuperscript{318}

The court singled out the making of statements outside of the courtroom as beyond the protection of absolute immunity:

\textit{[W]hen a prosecutor steps outside the confines of the judicial setting, the checks and safeguards inherent in the judicial process do not accompany him, and thus there is greater need for private actions to curb prosecutorial abuse and to compensate for abuse that does occur. No surveillance comparable to that of a judge serves to check a prosecutor’s zeal when he makes statements about individuals outside the courtroom or when he engages in investigative activities of directing, advising, assisting, or participating with, the police in obtaining evidence. Moreover, when a prosecutor engages in unconstitutional conduct outside the courtroom, absent are the remedies which the judicial process by its nature provides for illegal conduct occurring within the process. When a prosecutor makes false allegations against a defendant in the course of a trial, the opposing counsel is available to counteract immediately the damaging statements and an impartial panel of jurors is present to sift through the allegations and evidence to determine where the truth lies. Similarly, when a prosecutor engages in illegal conduct in the course of a trial, the judge, the jury, the opposing counsel, the witnesses, and the appellate process all serve in differing ways to mitigate the impact of that conduct. No comparable self-remedying mechanisms, however, exist outside the judicial phase of the criminal process, and thus there is more compelling need for private actions to serve as a means of vindicating constitutional rights.}\textsuperscript{319}

This is probably the best statement for a business or industry that is being pressured by, for example, a politically ambitious local prosecutor or attorney general. The damage inflicted occurs well before the attorney general steps into the courtroom. The impact of the publicity on the business can be immediate.

\textsuperscript{314} Id.
\textsuperscript{315} Id.
\textsuperscript{316} Id.
\textsuperscript{317} Id.
\textsuperscript{318} Id. at 507 (quoting \textit{Imbler v. Pachtman}, 424 U.S. 409, 431 (1976)).
\textsuperscript{319} Id. at 509-10 (emphasis added).
and devastating, just like with the owners of the small jewelry store in Janet Reno's neighborhood.

3. Gobel v. Maricopa County

The plaintiffs were arrested and charged with issuance of bad checks. Both were wrongly arrested as a result of mistaken identifications and the charges against both were subsequently dropped. The suit under section 1983 alleged that the county attorney "had ordered a public roundup of bad check offenders in order to enhance his public image and political career" and that he had made false statements to the news media. The district court granted a motion to dismiss on the ground of absolute prosecutorial immunity. The Ninth Circuit reversed this ruling, holding that it was error to conclude that the false statements "fell within the scope of prosecutorial immunity [simply] because the 'publicity of sting operations serves as a substantial crime deterrent.'" The court held that the allegations met the "defamation plus" requirement of Paul v. Davis, and that the defendants were not entitled to absolute immunity: "[T]he act of making false public statements about arrestees is not intimately associated with the judicial phase of the criminal process."

4. DiBlasio v. Novello

In a more recent case, the plaintiff charged that state health officials had deprived him of due process in connection with the summary suspension of his medical license. He also alleged that the commissioner of the state department of health made defamatory statements in a press release. With respect to this claim, the Second Circuit stated:

DiBlasio's complaint alleges that Novello's statements to the press on May 31, 2000 and June 30, 2000 are actionable as a component of a "stigma plus" violation. "Stigma plus" refers to a claim brought for injury to one's reputation (the stigma) coupled with the deprivation of some "tangible interest" or property right (the plus), without adequate process. See Paul v. Davis, 424 U.S. 693, 701-02, 711-12, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); Neu v. Corcoran, 869 F.2d 662, 667 (2d Cir. 1989). Although it is clear that defamation "plus" loss of government employment satisfies the Paul "plus factor," we have also observed that, outside that context, "it is not entirely clear what the 'plus' is." Neu, 869 F.2d at 667. For purposes of this appeal, we need not consider this issue because, in the proceedings before the district court, defendants apparently conceded that Novello's allegedly defamatory
statements to the press deprived DiBlasio of his "tangible interest" in the practice of medicine.\textsuperscript{329}

Like the statements made to the press in \textit{Buckley v. Fitzsimmons}, public statements made by administrators can have a profound effect on any business that is the target of the statements. Although some administrators may view that as a part of their core function, the immunity cases do not shield such statements with the protection of absolute immunity.

C. CASES INVOLVING FABRICATION OF EVIDENCE BY THE PROSECUTOR OR OTHER EXECUTIVE OFFICIALS

When the prosecutor fabricates evidence in order to make the case, this is egregious misconduct. There are positive cases that hold this to be a violation of section 1983.\textsuperscript{330} This was also the focus of the argument in the Pottawattamie County case that was recently argued before the Supreme Court.\textsuperscript{331} The plaintiffs had prevailed on the fabrication claim at both the district court\textsuperscript{332} and the Eighth Circuit\textsuperscript{333} and the settlement for a reported $12 million after oral argument\textsuperscript{334} indicates that the petitioners (and their insurance companies) didn't like their chances and the ever more likely prospect of facing a jury in Council Bluffs.

V. WILL THE \textit{Buckley} LINE HOLD?

The granting of certiorari and the subsequent oral argument in the \textit{Pottawattamie County} case provides some evidence of dissatisfaction on the Court with the existing case law. Although it might be risky to place too much weight on questions asked during oral argument, I believe the exchanges revealed unresolved tensions in the doctrinal development. Stated simply, I think there is a serious question whether there is a principled basis on which to keep 	extit{Imbler}'s absolute immunity in balance with 	extit{Buckley}'s limited exception for qualified immunity based on function and probable cause.

\begin{footnotesize}
\begin{enumerate}
\item [329.] \textit{Id.} at 302. \textit{See also} Carradine v. State of Minnesota, 511 N.W.2d 733 (Minn. 1994) (in a defamation case, there was qualified immunity only for statements made by a state trooper to a reporter that differed significantly from statements made in the arrest report).
\item [330.] \textit{See, e.g.}, Ray v. Pickett, 734 F.2d 370 (8th Cir. 1984) (function of parole officer in submitting an intentionally false report to parole commission was neither adjudicatory nor prosecutorial in nature so as to warrant absolute immunity); Zahrey v. Coffey, 221 F.3d 342 (3d Cir. 2000) ("right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity is a constitutional right, for purposes of precluding qualified immunity"); Milstein v. Cooley, 257 F.3d 1004 (9th Cir. 2001) ("district attorneys were not entitled to absolute immunity with regard to allegations of misconduct in acquiring known false statements"). \textit{See also} Michaels v. McGrath, 531 U.S. 1118 (2001) (Thomas, J., dissenting) (prosecutorial misconduct in gathering evidence).
\item [332.] McGhee v. Pottawattamie County, Iowa, 475 F.Supp.2d 862 (S.D. Iowa 2007).
\item [334.] \textit{See supra} note 181.
\end{enumerate}
\end{footnotesize}
Even though the petitioner's counsel and amicus counsel both had trouble articulating what principle should be used to overturn the lower courts' decision,\textsuperscript{335} Justice Alito immediately took after the respondents' counsel who attempted to defend the line drawn in \textit{Buckley}:

\textbf{JUSTICE ALITO}: When the issue, when the ... claim is based on the evaluation of the truthfulness of a witness who eventually testifies at trial, where's the line to be drawn between the investigative state and the prosecutorial stage?

\textbf{MR CLEMENT}: Well, I think, Justice Alito, the place to draw the line is the place this Court drew the line in \textit{Buckley}, which is probable cause. And before probable cause, when prosecutors are engaging in investigatory functions, I don't think we want them shaping the witness for trial. I think we want them trying to figure out who actually committed this crime and who would we have probable cause to perhaps initiate process against.

\textbf{JUSTICE ALITO}: What concerns me about your argument is ... a real fear that it will eviscerate \textit{Imbler}...

A typical witness is ... well, let's take the case of the prosecution of ... the CEO of a huge corporation for insider trading or some other white-collar violation. And the chief witness against this person is, let's say, the CFO of this company, who when initially questioned by law enforcement officials and investigatory officials, made ... statements denying any participation in any wrongdoing, but eventually changed his story and testifies against the CEO at trial in exchange for consideration in a plea deal.

Now, your argument, in a case like that ... or you could change the facts, make it an organized crime case, make it a prosecution of a drug kingpin who's testifying ... the witness against him is a lower-ranking person in the organization who has a criminal record, maybe has previously committed perjury, has made numerous false statements, is subject to impeachment. In all of those cases a claim could be brought against the prosecutor.\textsuperscript{336}

As the questioning and responses developed, it became apparent that Justice Alito was testing two aspects of \textit{Buckley} – first, whether there actually is a principled distinction between the prosecutorial and investigatory functions\textsuperscript{337} and, second, whether the attempt to make probable cause a bright-line rule is, in practice, workable in light of the shifting tides of probable cause during the course of a case dependent on shaky witnesses.\textsuperscript{338}

With respect to the line between the prosecutorial and the investigative functions, both Chief Justice Roberts and Justice Alito expressed skepticism that that two functions could be so neatly separated.\textsuperscript{339} The prosecutor may be doing

\textsuperscript{336} \textit{Id.} at 27-29.
\textsuperscript{337} \textit{Id.} at 31-33.
\textsuperscript{338} \textit{Id.} at 52.
\textsuperscript{339} CHIEF JUSTICE ROBERTS: * * * *

We have also recognized that in the prosecutorial area, and trying to draw the line where you
both at the same time and thus the attempt to immunize the knowing use of fabricated evidence at trial may produce perverse results. Likewise, the probable cause line may be “evanescent,” in Justice Alito’s words: “[P]robable cause is - - is evanescent. It comes, and it goes. It is - - it is - - it is inextricably intertwined with what the prosecutor is doing in questioning the witness.” These tensions may be more fully explored in the next case the Court takes up on prosecutorial immunity. It seemed to the parties, however, that the risk of waiting for the answer to Justice Alito’s concerns was too great and thus a settlement prior to the release of a decision mooted the case.

VI. CONCLUSION

After stating very strongly in Imbler and Butz the reasons why absolute prosecutorial immunity was important to preserve the criminal and administrative enforcement process, the Court began to recognize exceptions to absolute immunity with the pivot point, in Buckley, said to be probable cause. “A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.” This bench line, for now, has held up reasonably well. It may not hold in future cases, however, if a better answer to Justice Alito’s questions is not forthcoming. The probable cause line represents a compromise that cannot and will not satisfy all parties, but, at this point, it is clearly preferable to the all or nothing alternatives.

If it is true that the person will go about the process of making a decision differently if he or she knows that someone will be looking at it later, then the benefits and the costs of impacting the decision-making process must be acknowledged. On the benefit side, the potential for liability for a knowing violation of the defendant’s constitutional rights is an important check on what otherwise would be unbridled authority. The challenge yet today is to do so without unduly chilling the prosecutorial function.

See supra note 181.

593 U.S. at 274.