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“SOMEBODY HELP ME UNDERSTAND THIS”: THE SUPREME COURT’S INTERPRETATION OF PROSECUTORIAL IMMUNITY AND LIABILITY UNDER § 1983

Kate McClelland*

INTRODUCTION

On March 29, 2011, the Supreme Court of the United States held in *Connick v. Thompson*¹ that a district attorney’s office could not be held liable under 42 U.S.C. § 1983 for a single *Brady*² violation by one of its prosecutors. The 5–4 decision split along ideological lines. The conservative branch of the Court refused to hold a district attorney’s office liable for what it saw as a single *Brady* violation by a lone, rogue prosecutor. The liberal wing of the Court interpreted the facts differently, and found egregious *Brady* violations that deprived the respondent of his constitutional rights. The case appalled commentators.³ In their opinion, the respondent clearly suffered an injustice at the hands of his prosecutors, and yet the Court’s opinion barely acknowledged his suffering and instead justified the decision on questionable (if not downright flimsy) grounds. One commentator went so far as to call the opinion one of the “meanest” Supreme Court decisions ever written.⁴ The case will have far-reaching

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¹ 131 S. Ct. 1350, 1356 (2011).

² *Brady v. Maryland*, 373 U.S. 83, 86 (1963) (holding that it is a violation of due process to withhold from the defense evidence that would tend to exculpate the defendant).

³ See, e.g., Editorial, *Failure of Empathy and Justice*, N.Y. TIMES, Apr. 1, 2011, at A26; Bennett L. Gershman & Joel Cohen, *Cops Are Stupid, But Prosecutors Are Smart*, HUFFINGTON POST (Apr. 1, 2011), http://www.huffingtonpost.com/bennett-l-gershman/cops-are-stupid-but-prose_b_843583.html; Wendy Kaminer, *When the Supreme Court Fears Too Much Justice*, ATLANTIC (Mar. 31, 2011), <http://www.theatlantic.com/national/archive/2011/03/when-the-supreme-court-fears-too-much-justice/73252/>; Scott Lemieux, *The Impunity of the Roberts Court*, AMERICAN PROSPECT (Apr. 1, 2011), <http://prospect.org/article/impunity-roberts-court>.

⁴ Dahlia Lithwick, *Cruel but Not Unusual: Clarence Thomas Writes One of the Meanest*

implications for prosecutorial accountability under *Brady* and the ability of criminal defendants to assert civil rights claims against prosecutors' offices under § 1983.

Prior to the Supreme Court decision, respondent John Thompson, in discussing his conviction, said, "They call it malfeasance of office and get a slap on the wrist while I'm up at Angola [the Louisiana State Penitentiary] on death row for 18 years. Somebody help me understand this."⁵ But practitioners and judges hardly have any clearer idea of when prosecutors can be punished for their misconduct. The Court's current approach to prosecutorial liability under § 1983 is a mess. The decisions in this area of law have made it more difficult for defendants to prove violations of their constitutional rights while increasing the strength of prosecutors' immunity for their actions (both individually and collectively as an office). Even in cases like *Connick*, where everyone agrees that a constitutional violation occurred, no punishment results. Without enforcement, *Brady* and other rules designed to protect a defendant's rights are effectively negated.

Currently, a former defendant bringing a § 1983 claim against a prosecutor's office must show a pattern of constitutional violations within the office that proves that: (1) the district attorney failed to properly train his or her subordinates and (2) that failure to train directly caused the violations.⁶ But the Court has never clearly defined what series of events in a prosecutor's office actually constitutes a "pattern." In lieu of a pattern, some case law suggests that municipal liability for failure to train can result from a "single incident,"⁷ if the need to train was "so obvious"⁸ that the municipal policymakers responsible for training were deliberately indifferent in not training their subordinates.⁹ However, *Connick* appears to reject the single-incident-liability approach, at least in the case of prosecutors' offices.¹⁰

Part I of this Comment will examine the *Connick* decision. This Part will walk through the facts of John Thompson's original case, the procedural history of *Connick* itself, the majority's reasoning in *Connick*, and the minority's counterpoints. Part II will examine the Supreme Court's

Supreme Court Decisions Ever, SLATE (Apr. 1, 2011, 7:43 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html.

⁵ Richard A. Webster, *Life Sentence: Justice Elusive for the Wrongfully Convicted Victims*, NEW ORLEANS CITY BUS. (Jun. 4, 2007), <http://www.r-a-e.org/press/life-sentence-justice-elusive-wrongfully-convicted-victims>.

⁶ See *Connick*, 131 S. Ct. at 1358; *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 407–08 (1997).

⁷ *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989).

⁸ *Id.*

⁹ See *Connick*, 131 S. Ct. at 1361; *Harris*, 489 U.S. at 390 n.10.

¹⁰ See *infra* notes 189–191 and accompanying text.

case law on prosecutorial immunity and municipal liability—precedent that ultimately shaped the *Connick* decision. Part III will discuss the problems with the rule established by *Connick* and the other cases. Part IV will assess alternatives to requiring the Supreme Court to overhaul its precedent in this area, including stricter ethical sanctions for prosecutorial misconduct and internal structural reform of prosecutors' offices. Finally, Part V will argue that the Supreme Court should overrule its precedent and adopt absolute immunity for prosecutors to put an end to the current confusion in the law.

I. *CONNICK V. THOMPSON*

John Thompson spent eighteen years in prison—fourteen of them on death row—for a crime that he did not commit.¹¹ He was charged with the murder of the son of a prominent New Orleans businessman in 1985.¹² John Thompson's face covered the New Orleans press.¹³ A local father whose three minor children had been victims of a recent attempted armed robbery showed them a newspaper and asked if Thompson was the man who had robbed them.¹⁴ They identified him as their attacker.¹⁵

Four prosecutors from the Orleans Parish District Attorney's Office handled Thompson's two cases.¹⁶ Assistant District Attorneys James Williams and Gerry Deegan were assigned to the armed robbery, while Williams and Eric Dubelier were assigned to the murder.¹⁷ Assistant District Attorney Bruce Whittaker approved the armed robbery indictment.¹⁸ Although Dubelier and Williams were two of the highest ranking attorneys in the office at the time, none of the prosecutors had even five years of experience as a prosecutor.¹⁹ Together the prosecutors made the strategic decision to proceed with the armed robbery trial first.²⁰ If Thompson were convicted of armed robbery prior to the murder trial, he would be vulnerable to impeachment if he took the stand in his defense at

¹¹ *Connick*, 131 S. Ct. at 1355.

¹² *Id.* at 1371 (Ginsburg, J., dissenting).

¹³ *Id.* at 1356 (majority opinion).

¹⁴ *Id.* at 1372 (Ginsburg, J., dissenting).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1379. Williams had been with the office for four-and-a-half years, Dubelier for three-and-a-half years, Whittaker for three years, and Deegan for less than one year. *Id.* at 1372 n.3.

²⁰ *Id.* at 1372.

the murder trial.²¹

The armed robber left blood behind on the pant leg of one of his victims.²² A crime lab technician took a swatch of the bloodied fabric from the pants and sent it to the crime lab one week before Thompson's armed robbery trial.²³ Whittaker received the report from the crime lab, and placed it on Williams's desk, but Williams denied ever seeing it in his later testimony at trial.²⁴ Meanwhile, Deegan checked out all of the physical evidence in the case from the police property room on the first day of trial, including the bloody swatch.²⁵ But when he checked all of the evidence into the courthouse property room, the swatch was missing.²⁶ Thompson's defense counsel never learned of its existence, and Thompson was convicted of the armed robbery.²⁷ Because of this conviction, he did not testify at his later murder trial, and later in 1985 he was also convicted of first-degree murder.²⁸

In 1994, Deegan was dying.²⁹ He confessed to his friend and fellow prosecutor Michael Riehlmann that he had hidden exculpatory blood evidence during Thompson's armed robbery trial.³⁰ Riehlmann did not tell anyone about this conversation for five years.³¹

In 1999, Thompson's private investigator—in a last-ditch effort to save his client from being executed—reexamined all of the prosecution's files on Thompson's cases.³² He uncovered the crime lab report on the blood evidence from the armed robbery.³³ The robber's blood was Type B.³⁴ Thompson is Type O.³⁵ When the new information came forward, a judge vacated the armed robbery conviction and in 2003, when he was retried for murder, Thompson was found not guilty.³⁶

After his release from prison in 2003, John Thompson filed suit against the Orleans Parish District Attorney's Office, District Attorney

²¹ *Id.*

²² *Id.* at 1356 (majority opinion).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 1373 (Ginsburg, J., dissenting).

²⁸ *Id.* at 1356 (majority opinion).

²⁹ *Id.* at 1374 (Ginsburg, J., dissenting).

³⁰ *Id.*

³¹ *Id.* at 1375.

³² *Id.* at 1356 (majority opinion).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 1357.

Harry Connick Sr., James Williams, and others under 42 U.S.C. § 1983.³⁷ Thompson alleged that the defendants violated his constitutional rights under *Brady*³⁸ by withholding the crime lab report.³⁹ Thompson put forward two theories.⁴⁰ First, he claimed that the district attorney's office had an unconstitutional *Brady* policy.⁴¹ In the alternative, he alleged that regardless of what Orleans Parish's official *Brady* policy was, the violation resulted from Connick's deliberate indifference to the need to train his subordinates in proper *Brady* procedure.⁴² In district court, the jury rejected the first claim, but agreed with Thompson that Connick was deliberately indifferent to the need to train.⁴³ They awarded Thompson \$14 million in damages⁴⁴—\$1 million for each year that he was on death row.⁴⁵

The Court of Appeals for the Fifth Circuit, sitting *en banc*, divided evenly on the failure-to-train issue, thus upholding the district court judgment.⁴⁶ The Supreme Court then granted certiorari “to decide whether a district attorney's office may be held liable under § 1983 for failure to train based on a single *Brady* violation.”⁴⁷ In a 5–4 decision, the Court held that an office could not be held liable based on a single *Brady* violation.⁴⁸

Justice Thomas wrote the Court's opinion.⁴⁹ He reasoned that Thompson's claim could not succeed because he did not prove a pattern of violations that would indicate a failure to train prosecutors.⁵⁰ Moreover, Thompson did not prove that the single violation in his case was sufficient to give rise to liability.⁵¹

Consistent with precedent, the opinion stated that “[a] pattern of similar constitutional violations by untrained employees is ‘ordinarily necessary’ to demonstrate deliberate indifference for purposes of failure to

³⁷ *Id.*

³⁸ *Brady v. Maryland*, 373 U.S. 83, 86 (1963) (holding that it is a violation of due process to withhold from the defense evidence that would tend to exculpate the defendant).

³⁹ *Id.*

⁴⁰ *Connick*, 131 S. Ct. at 1357.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ James Ridgeway & Jean Casella, *14 Years on Death Row. \$14 Million in Damages?*, MOTHER JONES (October 6, 2010, 3:00 AM), <http://www.motherjones.com/politics/2010/09/connick-v-thompson>.

⁴⁶ *Connick*, 131 S. Ct. at 1358.

⁴⁷ *Id.* at 1356.

⁴⁸ *Id.* at 1355.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1360.

⁵¹ *Id.* at 1361.

train.”⁵² Thomas stated that Thompson did not try to prove a pattern.⁵³ Yet Thompson did reference four convictions from Orleans Parish that were overturned by Louisiana courts in the ten years prior to his armed robbery trial due to the failure to disclose exculpatory evidence.⁵⁴ Those cases, however, were not “similar to the violation at issue” in Thompson’s case because the disputed evidence was not scientific, like Thompson’s blood evidence was.⁵⁵

The single *Brady* violation at issue in the case was also not enough on its own to establish liability.⁵⁶ In *Canton v. Harris*, the Court hypothesized a situation in which specific legal training was so clearly needed that the failure to give employees that training would necessarily lead to constitutional violations.⁵⁷ Here, Thomas reasoned, the assistant district attorneys already had the legal training that they needed.⁵⁸ They had all received a law license, graduated from law school, and passed the bar examination.⁵⁹ Continuing education classes were readily available,⁶⁰ and they had the opportunity to learn on the job from their superiors,⁶¹ who would circulate information about important cases and legal

⁵² *Id.* at 1360 (citing *Bd. of Cnty. Comm’rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997)).

⁵³ *Connick*, 131 S. Ct. at 1360.

⁵⁴ *Id.* The Supreme Court was well aware of the *Brady* violations occurring in the Orleans Parish District Attorney’s Office. The suppression of exculpatory statements by a codefendant in violation of *Brady*, which took place in a 1984 Orleans Parish case, also made it to the Supreme Court on appeal in 1995. *See Kyles v. Whitley*, 514 U.S. 419 (1995).

⁵⁵ *Connick*, 131 S. Ct. at 1360.

⁵⁶ *Id.* at 1361.

⁵⁷ *Id.* (citing *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989)). *Harris* envisions a scenario where police are given deadly weapons to use in the field, but are not trained in the constitutional use of deadly force. In that case, a single incident of deadly force by an officer would be sufficient to hold the municipality liable under 42 U.S.C. § 1983 for a violation of constitutional rights. *See Harris*, 489 U.S. at 390 n.10; *see also infra* Part II.B.

⁵⁸ *Connick*, 131 S. Ct. at 1361.

⁵⁹ *Id.* *But cf. id.* at 1385 (Ginsberg, J., dissenting) (citing multiple facts from the trial record and the Justice’s own research that would undermine this confidence in the presence of *Brady* in law schools and the Louisiana Bar Examination).

⁶⁰ *Id.* at 1362 (majority opinion). *But cf. id.* at 1381 (Ginsberg, J., dissenting) (“Louisiana did not require continuing legal education at the time of Thompson’s trials.” (citations omitted)).

⁶¹ *Id.* at 1362 (majority opinion). *But cf. id.* at 1380 (Ginsberg, J., dissenting) (“Dubelier and Williams, as senior prosecutors in the Office, were free to take cases to trial without [attending a pretrial conference with the Office’s chief of trials], and that is just how they proceeded in Thompson’s prosecutions.” (citations omitted)); *see also id.* at 1379–80 (Ginsberg, J., dissenting) (“By 1985, Dubelier and Williams were two of the highest ranking attorneys in the Office, yet neither man had even five years of experience as a prosecutor . . . [they] told the jury that they did not recall any *Brady* training in the Office.” (citations omitted)).

developments.⁶² Moreover, the attorneys were held to strict character and fitness standards and the ethical standards imposed by the legal community.⁶³ Simply put, “[a]ttorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits and exercise legal judgment.”⁶⁴ Given these factors, Connick had no reason to believe that his assistants needed any further training.⁶⁵

Additionally, Thomas pointed out, all of the assistant district attorneys working on Thompson’s case knew about the general rule of *Brady v. Maryland*.⁶⁶ Thompson’s arguments appeared to suggest that formal training was needed,⁶⁷ but a lack of formal training was not the equivalent of the complete lack of legal training hypothesized in *Harris*.⁶⁸ While additional training might have been helpful for the prosecutors, the Court held that a lack of such training was not enough to impose liability.⁶⁹

II. THE PRECEDENT THAT SHAPED *CONNICK*

Connick’s reasoning is so convoluted because it combines two prior lines of Supreme Court case law. The first line of cases present in *Connick* deals with prosecutorial immunity.⁷⁰ Those cases establish a functional test to determine whether prosecutors have absolute or qualified immunity for their actions. Prosecutors have absolute immunity for many of their actions, but when they have only qualified immunity, they may be liable under 42 U.S.C. § 1983. According to this statute:

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

⁶² *Id.* at 1362 (majority opinion). *But cf. id.* at 1381 (Ginsberg, J., dissenting) (“The [1987 Office policy] manual contained four sentences, nothing more, on *Brady*. This slim instruction, the jury learned, was notably inaccurate, incomplete, and dated.” (footnote omitted) (citations omitted)).

⁶³ *Id.* at 1362 (majority opinion). *But cf. id.* at 1382 (Ginsberg, J., dissenting) (“[Connick] never disciplined or fired a single prosecutor for violating *Brady*.” (citation omitted)).

⁶⁴ *Id.* at 1361 (majority opinion).

⁶⁵ *Id.* at 1363.

⁶⁶ *Id. But cf. id.* at 1378 (Ginsberg, J., dissenting) (“Connick was the Office’s sole policymaker, and his testimony exposed a flawed understanding of a prosecutor’s *Brady* obligations.”).

⁶⁷ *Id.* at 1363 (majority opinion). *But cf. id.* at 1378 (Ginsberg, J., dissenting) (“Thompson, it bears emphasis, is not complaining about the absence of formal training sessions. His complaint does not demand that *Brady* compliance be enforced in any particular way. He asks only that *Brady* obligations be communicated accurately and genuinely enforced.” (footnote omitted) (citations omitted)).

⁶⁸ *Id.* at 1363 (majority opinion).

⁶⁹ *Id.*

⁷⁰ *See infra* Part II.A.

of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress⁷¹

If a prosecutor with qualified immunity violates a defendant's constitutional rights (and thereby § 1983), the defendant may sue the municipality that employs the prosecutor for monetary damages to recompense the violation.⁷²

The second line of cases implicated in *Connick* deals with this municipal liability under § 1983.⁷³ Municipalities cannot be held liable under § 1983 under a *respondeat superior* theory.⁷⁴ For § 1983 to apply, the municipality's official policy must be the direct cause of the constitutional violation.⁷⁵ A policy failing to properly train employees and directly causing a recurring pattern of constitutional violations demonstrates deliberate indifference on the part of the municipality and results in § 1983 liability.⁷⁶ The plaintiff must show (1) that municipal policymakers chose a policy that failed to train the municipality's employees adequately, (2) the policy amounted to deliberate indifference to citizens' constitutional rights, and (3) the policy directly caused (4) a pattern of violations of constitutional rights. Alternatively, at least prior to *Connick*, a plaintiff could also show that a single action by a municipal employee was so egregious that it was obvious that the municipality was deliberately indifferent to the need to train that employee.⁷⁷

A. THE PROSECUTORIAL IMMUNITY CASES

The Supreme Court decided its first case on prosecutorial immunity, *Imbler v. Pachtman*, in 1976.⁷⁸ In *Imbler*, the Court established the

⁷¹ 42 U.S.C. § 1983 (2006).

⁷² See *Imbler v. Pachtman*, 424 U.S. 409 (1976). It is far more common to see § 1983 actions brought against police officers, particularly for the use of excessive force in contravention of an arrestee's constitutional rights. See, e.g., *Graham v. Connor*, 490 U.S. 386 (1989).

⁷³ See *infra* Part II.B.

⁷⁴ See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). In other words, one municipal employee's violation of a citizen's constitutional rights does not automatically confer damages liability on the municipality. See *id.*

⁷⁵ See *id.* at 694.

⁷⁶ See *City of Canton v. Harris*, 489 U.S. 378, 397 (1989) (O'Connor, J., concurring); see also *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 407–08 (1997).

⁷⁷ See *Harris*, 489 U.S. at 390 n.10 (1989).

⁷⁸ *Imbler*, 424 U.S. at 409. Paul Imbler was found guilty of first-degree murder and sentenced to death. *Id.* at 412. After the resolution of the case, Richard Pachtman, the prosecutor on the case, wrote to the Governor of California stating that he had uncovered

functional test to determine whether absolute or qualified immunity should apply to a prosecutor.⁷⁹ Section 1983 did not eliminate immunities “well grounded in history and reason”⁸⁰—including absolute immunity for prosecutors.⁸¹ The Court cited various public policy reasons why prosecutors had been given absolute immunity at common law, which were still important.⁸² Prosecutors were quasi-judicial officers who, like judges, required protection for actions that were “intimately associated with the judicial phase of the criminal process.”⁸³ Moreover, the possibility of professional discipline for ethical violations served as a check on their behavior.⁸⁴ However, the Court stated explicitly that it was not “consider[ing] whether like or similar reasons require immunity for those aspects of the prosecutor’s responsibility that cast him in the role of administrator or investigative officer rather than that of advocate.”⁸⁵ Determining whether a prosecutor was protected by absolute immunity thus depended on the nature of the role he was engaged in when the alleged violation took place. If the prosecutor was acting as an advocate—“initiating a prosecution and presenting the State’s case”—he received absolute immunity.⁸⁶ The Court reserved the question of what type of immunity applied when the prosecutor was functioning as an investigator or an administrator.⁸⁷

Burns v. Reed partially addressed this question by holding that prosecutors acting in an investigatory capacity were only entitled to qualified immunity.⁸⁸ The Supreme Court held that a prosecutor has

new evidence that corroborated Imbler’s alibi defense. *Id.* A key eyewitness also recanted his prior identification testimony. *Id.* at 413. After years of litigation on these issues, the Ninth Circuit granted Imbler’s habeas petition, and he filed a § 1983 action against Pachtman and others. *Id.* at 415.

⁷⁹ *Id.* at 430.

⁸⁰ *Id.* at 418 (citations omitted).

⁸¹ *Id.* at 424.

⁸² *Id.* at 424–27.

⁸³ *Id.* at 430.

⁸⁴ *Id.* at 429.

⁸⁵ *Id.* at 430–31.

⁸⁶ *Id.* at 431.

⁸⁷ *Id.* at 430–31.

⁸⁸ 500 U.S. 478 (1991). Petitioner Cathy Burns had called the police, claiming that an unknown intruder entered her home and shot her two young sons. *Id.* at 481. The officers assigned to the case treated Burns as the primary suspect. *Id.* Theorizing that she had multiple personality disorder, they wanted to question her under hypnosis. *Id.* at 482. They asked the Chief Deputy Prosecutor, Richard Reed, whether they could use hypnosis, and he advised them that they could. *Id.* Reed used the results of the interview under hypnosis at a probable cause hearing, and Burns was charged with the attempted murder of her sons. *Id.* at 482–83. A judge later granted her motion to suppress the evidence gained under hypnosis

absolute immunity for her actions during a probable cause hearing because she is acting in her role as “advocate for the State.”⁸⁹ When a prosecutor advises the police about what investigative techniques they are able to use to obtain evidence, however, only qualified immunity protects her.⁹⁰ The Court rejected the idea that under the common law this advice would have been protected too.⁹¹ Protected activity needed a sufficient link to the court proceeding, because “the concern with litigation in our immunity cases is not merely a generalized concern with interference with an official’s duties, but rather is a concern with interference with the conduct closely related to the judicial process.”⁹² While the Court acknowledged that almost any purely investigative activity could be linked to the decision to prosecute, the protection of absolute immunity only extended to actions intimately associated with the judicial process.⁹³

Buckley v. Fitzsimmons further clarified the limits of advocacy as opposed to investigation.⁹⁴ The Supreme Court found that the prosecutors were acting in an investigative capacity when they had expert after expert assess the evidence in the case until they found one whose testimony aligned with their theory of the case.⁹⁵ The Court appeared to establish a new bright-line rule: “A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.”⁹⁶ The majority appeared to be saying that the advocacy function—and thus

and upon her release from custody, she filed a § 1983 action against Reed, the police, and others. *Id.* at 483.

⁸⁹ *Id.* at 491.

⁹⁰ *Id.* at 496.

⁹¹ *Id.* at 493.

⁹² *Id.* at 494.

⁹³ *Id.* at 495.

⁹⁴ *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993). Stephen Buckley had been imprisoned for three years for the highly publicized murder of a young girl that took place in 1983. *Id.* at 261. He claimed liability under § 1983 for fabricated evidence and false statements made by Fitzsimmons, the DuPage County state’s attorney, at a press conference about the case. *Id.* at 262. The girl’s killer had kicked in the door of her home, leaving behind a footprint. *Id.* The prosecutors tried to match the print to petitioner’s boots. *Id.* Three respected and credible evidence labs found no match, but prosecutors located an anthropologist of questionable credibility who would testify that the print was made by Buckley’s boots. *Id.* A grand jury spent eight months investigating all of the evidence, including the footprint evidence, and was unable to return an indictment. *Id.* at 264. Fitzsimmons was running for reelection in a close race in early 1984. *Id.* Before that election, he brought an indictment against Buckley and held the press conference to announce it. *Id.* Buckley was not freed until 1987, when the anthropologist and star witness in his case died and could no longer testify at his retrial—even though his first trial had ended in a mistrial and another man had confessed to the crime. *Id.*

⁹⁵ *Id.* at 274.

⁹⁶ *Id.*

absolute immunity—does not take hold until after a finding of probable cause.⁹⁷ As to the press conference that was held in conjunction with the defendant’s indictment, the Court noted that at common law, prosecutors had immunity for defamation that occurred as a part of judicial proceedings, but not for out-of-court statements.⁹⁸ Moreover, the conduct of a press conference is unrelated to a prosecutor’s duties as an advocate—“a prosecutor is in no different position than other executive officials who deal with the press, and . . . qualified immunity is the norm for them.”⁹⁹

In *Kalina v. Fletcher*, a unanimous Supreme Court ruled that a prosecutor was entitled to only qualified immunity when she executed the certification required by local court rule that required that she essentially act as a complaining witness and swear to the facts alleged as the basis for probable cause and the issuance of an arrest warrant.¹⁰⁰ The preparation and filing of such a certification fell under the advocacy function,¹⁰¹ but the prosecutor was performing the function of a complaining witness when she made false statements of fact in the certification under penalty of perjury.¹⁰² The Court emphasized that “[t]estifying about facts is the function of the witness, not of the lawyer.”¹⁰³

In *Van de Kamp v. Goldstein*, the final case in this line prior to *Connick*, a unanimous Supreme Court described for the first time what a prosecutor’s “administrative” functions might look like.¹⁰⁴ The Court held

⁹⁷ See *id.* at 286 (Kennedy, J., concurring in part and dissenting in part).

⁹⁸ *Id.* at 277 (majority opinion).

⁹⁹ *Id.* at 278.

¹⁰⁰ 522 U.S. 118, 129–31 (1997). In *Kalina*, Lynne Kalina, a deputy prosecuting attorney for King County, Washington, filed three documents with the King County Superior Court to bring charges against respondent Rodney Fletcher. *Id.* at 120–121. One document was an information charging Fletcher with burglary, one was a motion for an arrest warrant, and the third was called a “Certification for Determination of Probable Cause.” *Id.* at 121. According to a local rule, an arrest warrant must be accompanied by an affidavit or “sworn testimony establishing the grounds for issuing the warrant.” *Id.* (quoting WASH. SUP. CT. CRIM. R. 2.2(a)). Typically, a complaining witness provides the affidavit, but here, Kalina swore to the affidavit herself. *Id.* at 129–30. It contained two inaccurate factual statements. *Id.* at 121. As a result of Kalina’s filing, Fletcher was arrested and spent a day in jail. *Id.* at 122. The prosecutor’s office later dropped charges against him. *Id.*

¹⁰¹ *Id.* at 129.

¹⁰² *Id.* at 131.

¹⁰³ *Id.* at 130.

¹⁰⁴ 555 U.S. 335, 338–39 (2009). Thomas Goldstein was convicted of murder in 1980, based largely on the testimony of a jailhouse informant. *Id.* at 339. In his federal habeas petition, the District Court found that if prosecutors had informed the defense that the informant was receiving a reward for his testimony, it might have made a difference in Goldstein’s case. *Id.* The habeas petition was granted, and the Ninth Circuit Court of Appeals affirmed. *Id.* Goldstein then filed a § 1983 action against former District Attorney Van de Kamp and his chief deputy district attorney, alleging that prosecutors violated his

that the training, supervision, and information system management at issue were administrative functions—but they were nonetheless directly related to the conduct of the trial, and therefore entitled to absolute immunity.¹⁰⁵ The functions at issue “necessarily require[d] legal knowledge and the exercise of related discretion.”¹⁰⁶ The Court cited *Imbler*’s public policy concerns, particularly the chilling effect that liability would have.¹⁰⁷ Since “[d]ecisions about indictment or trial prosecution will often involve more than one prosecutor within an office,”¹⁰⁸ multiple prosecutors could be liable under qualified immunity for the types of decisions at issue in *Van de Kamp*. If many prosecutors were liable for these decisions, then they would behave differently because the risk of § 1983 liability might lessen their willingness to prosecute.¹⁰⁹

The Supreme Court began in *Imbler* with a functional test that seemed clear and simple to apply. With each subsequent case, the Court chipped away at the advocatory, investigative, and administrative distinctions. After *Van de Kamp*, the Court had determined that so many prosecutorial functions were intimately associated with the conduct of the trial that the functional test had lost its meaning.

B. THE MUNICIPAL LIABILITY CASES

The failure-to-train concept of *Van de Kamp* came from the line of cases relating to municipal liability that was developing alongside the prosecutorial immunity cases. The first case in this line is *Monell v. Department of Social Services of the City of New York*.¹¹⁰ In *Monell*, the Court overruled an earlier case, *Monroe v. Pape*, which held that municipalities were wholly immune from liability under § 1983.¹¹¹ Delving

constitutional rights when they refused to turn over the information on the informant in violation of *Giglio v. United States*, 405 U.S. 150 (1972) (holding that the failure on the part of a United States Attorney to disclose the fact that the prosecution witness had been offered immunity for his testimony was a violation of due process), and that the violation occurred as a result of a failure by Van de Kamp to properly train and supervise his assistants. *Id.* at 340. He also alleged that Van de Kamp’s office should have had an information system about informants to prevent such an occurrence. *Id.*

¹⁰⁵ *Id.* at 344.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 345.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 346–47.

¹¹⁰ 436 U.S. 658 (1978). A group of female employees filed a § 1983 action against the Department of Social Services and the Board of Education of the City of New York for forcing them to take unnecessary, unpaid medical leave while they were pregnant. *Id.* at 660–61.

¹¹¹ *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

into the legislative history of § 1983,¹¹² the Court determined that municipalities could face liability if “official municipal policy of some nature caused a constitutional tort.”¹¹³ However, municipalities could not be held liable just because they employed someone who committed a constitutional tort—that is, *respondeat superior* did not apply.¹¹⁴ The municipality’s policy or custom had to be the “moving force,” or direct cause, of the violation.¹¹⁵

In the next three cases in this line—*Oklahoma City v. Tuttle*, *Pembaur v. Cincinnati*, and *City of St. Louis v. Praprotnik*—the Court was often badly divided on reasoning. These three cases failed to clarify the holding of *Monell* either by defining the terms “official policy” and “policymaker” for the purpose of determining liability or by explaining how to show that a particular policy directly caused constitutional violations. Instead, as the Second Circuit notes in *Walker v. City of New York*:

The combination of [*Tuttle*, *Pembaur*, and *Praprotnik*] necessarily molds many § 1983 claims against municipalities into “failure to train” or “failure to supervise” claims. It is only by casting claims in this way that plaintiffs can link an actual decision by a high level municipal official to the challenged incident.¹¹⁶

This is why prosecutorial liability cases like *Connick* and *Van de Kamp* eventually became framed as § 1983 cases alleging that a district attorney failed to train his subordinates properly. This group of cases required plaintiffs to plead their claims as constitutional violations resulting from a high-level municipal policymaker in order to succeed in a § 1983 action.

Justice Rehnquist’s opinion in *Oklahoma City v. Tuttle* found a single incident of the use of excessive force by a police officer insufficient to prove a failure to train.¹¹⁷ There had to be some additional evidence to show that “policymakers *deliberately* chose a training program which would prove inadequate.”¹¹⁸

Pembaur v. Cincinnati clarified that it was still possible for a single act to give rise to liability, but only if it resulted from the decision of a

¹¹² *Monell*, 436 U.S. at 665–89.

¹¹³ *Id.* at 691.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 694.

¹¹⁶ *Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir. 1992).

¹¹⁷ *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985). The widow of a man shot and killed by a police officer brought suit under § 1983, asserting that the city’s policy resulted in inadequate training for the officer who shot her husband, which in turn produced a deprivation of her husband’s constitutional rights. *Id.* at 811–12.

¹¹⁸ *Id.* at 823 (emphasis added).

municipal policymaker.¹¹⁹ A plurality of the Court found that the police had acted pursuant to the direction of the county prosecutor in executing an arrest warrant. The county prosecutor, who was acting as county policymaker, and the county could therefore be held liable.¹²⁰ The plurality suggested that the proper definition of a policymaker was “the decisionmaker [who] possesses final authority to establish municipal policy with respect to the action ordered.”¹²¹

Again in *City of St. Louis v. Praprotnik*, a plurality of the Court reaffirmed that state law decides who the policymaker is.¹²² Justice Brennan’s concurrence indicated that state law was a starting point, but that the fact-finder should determine where policymaking power actually lay.¹²³ Yet the plurality concluded that even when the policymaker delegated decisions to subordinates, the municipality could be held liable.¹²⁴

The following year, in *Canton v. Harris*, the Supreme Court specified that a municipal policymaker had to show “deliberate indifference” to the need to train his subordinates for the Court to find liability under § 1983.¹²⁵ The Court found the city’s overall policy regarding the medical treatment of persons in custody to be constitutional.¹²⁶ It determined that the city could not be liable for an unconstitutional *application* of the policy that was caused by a failure to train.¹²⁷ The Court held that “the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.”¹²⁸ Additionally, only where deliberate indifference to the need to train was the “moving force” behind

¹¹⁹ *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). In *Pembaur*, a doctor brought a § 1983 action against the city of Cincinnati, the county of Hamilton, and others based on police action taken in the execution of arrest warrants in his office. *Id.* at 473–74.

¹²⁰ *Id.* at 474.

¹²¹ *Id.* at 481. *But cf. id.* at 498 (Powell, J., dissenting). “[The Court’s] reasoning is circular: it contends that policy is what policymakers make, and policymakers are those who have the authority to make policy.” *Id.*

¹²² *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988). An architect employed by the city of St. Louis filed suit against the city alleging a violation of his constitutional rights during the course of his work for the city and in his eventual firing. *Id.* at 114–17.

¹²³ *Id.* at 143 (Brennan, J., concurring).

¹²⁴ *Id.* at 127.

¹²⁵ 489 U.S. 378, 388 (1989). Geraldine Harris alleged that Canton, Ohio’s policy regarding medical treatment in police custody was unconstitutional and had resulted in inadequate treatment for her while she was in police custody in violation of § 1983. *Id.* at 381.

¹²⁶ *Id.* at 386.

¹²⁷ *Id.* at 387.

¹²⁸ *Id.* at 388.

the constitutional violation is the municipality liable.¹²⁹ One officer's unsatisfactory response to a situation is not necessarily a failure to train.¹³⁰

However, in dicta, the Court explored the possibility of a situation where "the need for more or different training [was] *so obvious* . . . that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."¹³¹ The obvious need for training plus a single incident of misconduct by a municipal actor could result in a constitutional violation that would be actionable under § 1983 in at least one instance:

[C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.¹³²

In other words, if one police officer untrained in the constitutional limits of deadly force were to shoot a fleeing suspect, in contravention of *Tennessee v. Garner*,¹³³ that single incident would be enough to give rise to municipal liability under § 1983.

Justice O'Connor's concurrence in *Harris* also introduced the idea of a "pattern of constitutional violations" for the first time in Supreme Court jurisprudence.¹³⁴ She argued that repeated constitutional violations by a municipality's employees would put the municipality "on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements."¹³⁵ She noted that lower courts that had adopted the "deliberate indifference" requirement often used a pattern of violations to infer that deliberate indifference was present.¹³⁶ The pattern requirement advocated by O'Connor and the lower courts eventually became an official requirement for proving deliberate indifference in *Board of County Commissioners of Bryan County v. Brown*.¹³⁷

Bryan County considered a § 1983 claim resulting from a traffic stop where a police officer forcibly removed a passenger from a vehicle,

¹²⁹ *Id.* at 389.

¹³⁰ *Id.* at 390–91.

¹³¹ *Id.* at 390 (emphasis added).

¹³² *Id.* at 390 n.10 (citations omitted).

¹³³ 471 U.S. 1, 21 (1985) (holding that the use of deadly force by an officer to apprehend a suspect is subject to the Fourth Amendment's reasonableness requirement).

¹³⁴ *Harris*, 489 U.S. at 397 (O'Connor, J., concurring).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 407–08 (1997).

resulting in injuries.¹³⁸ The Court held that the county was not liable under § 1983 for the sheriff's single decision to hire the officer who injured the respondent, despite the officer's violent history.¹³⁹ The hiring decision, which was legal and constitutional, was not the "moving force," or direct cause, of the injuries.¹⁴⁰ To find deliberate indifference and hold the sheriff liable under § 1983, the respondent could not just show that there was some probability that an improperly reviewed hire would inflict an injury—she had to show "that *this* officer was highly likely to inflict the *particular* injury suffered by the plaintiff."¹⁴¹ Despite this officer's allegedly violent background, it was not "plainly obvious" to the sheriff when he hired the officer that this history would result in constitutional violations.¹⁴² Deliberate indifference by the sheriff could have been proved by either a "continued adherence to an approach that [he knew] or should [have known] has failed to prevent tortious conduct by employees" or "the existence of a pattern of tortious conduct by inadequately trained employees [that] . . . is the 'moving force' behind the plaintiff's injury."¹⁴³ The Court showed that it would be very reluctant to use a single-incident analysis to hold municipalities liable under § 1983 without a very explicit causal connection between the single incident (or single bad decision) and the constitutional violation.

Tuttle, Pembaur, and Praprotnik framed municipal liability in terms of "failure-to-train" claims. O'Connor's concurrence in *Harris* and the opinion in *Bryan County* established the necessity of a pattern of constitutional violations in order to prove a failure to train, but *Harris* raised the possibility of single-incident liability in cases of truly egregious constitutional violations. These two alternatives for establishing municipal liability under § 1983 set the stage for *Connick v. Thompson*.

¹³⁸ *Id.* at 400–01. Respondent Jill Brown was the passenger in the car that her husband was driving. *Id.* When he turned around to avoid a police checkpoint, he was pursued in a high-speed chase by Deputy Sheriff Robert Morrison and Reserve Deputy Stacy Burns. *Id.* Burns approached on Jill Brown's side of the vehicle, and when she would not exit, he forcibly pulled her out of the vehicle, resulting in severe knee injuries. *Id.* at 400–01. Burns was the son of the nephew of the county sheriff. *Id.* at 401. He had a criminal record that included several driving infractions and misdemeanors, including assault and battery. *Id.* While that did not prevent him from being hired as a peace officer under Oklahoma law, Brown argued that the sheriff had not adequately reviewed this background in making his decision to hire Burns. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 405.

¹⁴¹ *Id.* at 412.

¹⁴² *Id.*

¹⁴³ *Id.* at 407–08.

III. PROBLEMS WITH THE COURT'S APPROACH IN *CONNICK*

After reviewing both the prosecutorial immunity and municipal liability precedent, the Supreme Court concluded in *Connick* that a district attorney's office could not be held liable under § 1983 for a *Brady* violation by one of its assistant district attorneys. There are numerous problems with how the Court arrived at this rule. First, the functional approach has proven weak as a mechanism for determining when prosecutors should be given qualified, rather than absolute, immunity. Second, the Court's decisions have yet to satisfactorily answer what a "pattern" of constitutional violations giving rise to liability would look like. Third, the Court's alleged common law foundation for prosecutorial immunity is tenuous at best. Ultimately, poorly reasoned decisions have granted prosecutors—and their municipalities—de facto absolute immunity for their actions.

A. THE FAILINGS OF THE FUNCTIONAL TEST

The Supreme Court's functional test for determining what type of immunity applies to a prosecutor has been plagued with problems since *Imbler v. Pachtman*.¹⁴⁴ As the Court applies the test to different factual scenarios, its failings are readily clear. The federal circuits are specifically struggling with the implications of the functional test in situations where prosecutors not only hide exculpatory evidence, but also actively falsify evidence. Falsification of evidence would likely take place during the investigatory phase of a prosecution, when the prosecutor is only protected by qualified immunity. However, the false evidence cannot actually be used in violation of a defendant's constitutional rights until trial, when the prosecutor is protected by absolute immunity. When the functional divide is taken to its logical extent, it means that prosecutors are protected by absolute immunity for falsifying evidence.

1. *Practical Problems with the Functional Test*

The functional test for determining liability has been criticized since the days of *Imbler*.¹⁴⁵ The administrative, investigatory, and advocacy lines cannot be drawn as clearly in the real world as the Supreme Court has assumed.¹⁴⁶ As one author phrased it, "[t]he existence of cases defying easy categorization reveals an inherent weakness in the functional approach—the approach implicitly assumes that every prosecutorial act fits

¹⁴⁴ 424 U.S. 409 (1976).

¹⁴⁵ See Anthony J. Luppino, *Supplementing the Functional Test of Prosecutorial Immunity*, 34 STAN. L. REV. 487 (1982).

¹⁴⁶ *Id.* at 504.

in one, and only one, category.”¹⁴⁷

Additionally, the functional test creates an incentive for prosecutors to claim that almost everything they do is a part of their function as advocates, thus ensuring absolute immunity for their acts. *Buckley v. Fitzsimmons*¹⁴⁸ helps make this easy for prosecutors. It stated the bright-line rule that “[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.”¹⁴⁹ But there is “no useful indication of at what point probable cause will be ‘had’ or who is to determine its existence.”¹⁵⁰

The functional test gives criminal defendants-turned-claimants bad incentives too. As Justice Kennedy noted in his dissent in *Buckley*, the Court weakened its stance against the tort of malicious prosecution by introducing this bright-line rule.¹⁵¹ In *Imbler*, the Court had made it clear that it wanted to preserve the common law absolute immunity for prosecutors accused of malicious prosecution.¹⁵² *Buckley*’s bright-line rule ends up functioning as a pleading rule for claimants; as long as they include at least some of a prosecutor’s pre-probable cause conduct in their pleadings, malicious prosecution claims are no longer easily dismissed.¹⁵³ Instead, frivolous malicious prosecution claims survive longer in the courts disguised as § 1983 claims.

Moreover, the distinction between advocatory acts and investigatory acts is not principled—it has been described as “inherently elusive and highly questionable.”¹⁵⁴ Kennedy’s dissent in *Buckley* points out that what the Court labels “investigation” could easily be termed “preparation for trial.”¹⁵⁵ Preparatory actions should be protected. They “must be free of

¹⁴⁷ *Id.* at 493.

¹⁴⁸ *Buckley v. Fitzsimmons*, 509 U.S. 259, 286–87 (1993); *see also supra* notes 94–99 and accompanying text (discussing *Buckley*).

¹⁴⁹ *Id.* at 274; *see also* Megan M. Rose, Note, *The Endurance of Prosecutorial Immunity—How the Federal Courts Vitiating Buckley v. Fitzsimmons*, 37 B.C. L. REV. 1019, 1044 (1996).

¹⁵⁰ Rose, *supra* note 149, at 1044.

¹⁵¹ *Buckley*, 509 U.S. at 286–87 (Kennedy, J., dissenting).

¹⁵² *Imbler v. Pachtman*, 424 U.S. 409, 421–28 (1976).

¹⁵³ *See Buckley*, 509 U.S. at 286–87 (Kennedy, J., dissenting); James P. Kenner, Note, *Prosecutorial Immunity: Removal of the Shield Destroys the Effectiveness of the Sword*, 33 WASHBURN L.J. 402, 426 (1994). *But see* *Hartman v. Moore*, 547 U.S. 250, 265 (2006) (finding that the “presumption of regularity behind the charging decision” may be overcome by showing a lack of probable cause in addition to a retaliatory motive of the prosecutor bringing the charges).

¹⁵⁴ Erwin Chemerinsky, *Prosecutorial Immunity—The Interpretation Continues*, TRIAL, Mar. 1998, at 80, 80.

¹⁵⁵ *Buckley*, 509 U.S. at 284 (Kennedy, J., dissenting).

the distortive effects of potential liability.”¹⁵⁶ Otherwise, preparation is punished. A prosecutor who has properly and extensively investigated his case prior to a probable cause determination may find himself civilly liable for his decisions and actions, which have all taken place in the “investigatory” phase. Meanwhile, a prosecutor who does not open the case file until after the probable cause determination is protected because all of his decisions and actions are taking place in the “advocatory” phase.¹⁵⁷

The Court justifies its investigatory/advocatory distinction by claiming that it would be unfair to offer police officers only qualified immunity for their investigative acts, while protecting prosecutors with absolute immunity for the same acts.¹⁵⁸ However, that assumes that police and prosecutors are engaging in the same function while engaged in the same activity.¹⁵⁹ This may not be the case.¹⁶⁰ The way that police officers and prosecutors assess evidence is very different, because they are driven by different goals. A police officer wants to establish probable cause to arrest a suspect.¹⁶¹ By contrast, a prosecutor has to look at the long-term picture and assess how to turn evidence showing probable cause into a conviction beyond a reasonable doubt.¹⁶² Moreover, in an ideal world, a prosecutor is not simply seeking another conviction; he is seeking to do justice.¹⁶³ The prosecutor has an ethical responsibility to seek out the truth of what happened in the case and should not seek a conviction against a defendant whom the prosecutor believes to be innocent.¹⁶⁴

The distinction between advocatory acts and administrative acts is not principled either. As long as a prosecutor can somehow link an administrative act to the “conduct of a trial,” the utilization of “legal knowledge,” or the “exercise of related discretion,” he or she is in the clear.¹⁶⁵ This is not difficult to do. The *Van de Kamp* Court states:

Here, unlike 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

¹⁵⁶ *Id.*

¹⁵⁷ See Kenner, *supra* note 153, at 426.

¹⁵⁸ *Buckley*, 509 U.S. at 275.

¹⁵⁹ *Id.* at 289 (Kennedy, J., dissenting).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION (3d ed. 1993).

¹⁶⁴ *Id.*

¹⁶⁵ Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 7 (2009) (citing *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862 (2009)).

unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like.¹⁶⁶

It would indeed be striking to see the case where a criminal defendant brings a § 1983 action against a prosecutor's office claiming that payroll administration led to the violation of his constitutional rights. By narrowly equating administrative functions with actions that will rarely, if ever, impact a defendant, *Van de Kamp* has effectively closed off claims of liability against prosecutors under a theory of qualified immunity for administrative acts.

2. *The Functional Test and the Falsification of Evidence*

Beyond the problems noted above, perhaps the most egregious practical problem with the functional test is that the test makes it unclear whether prosecutors are liable under § 1983 for falsifying evidence and presenting it at trial. It seems absurd that actions analogous to perjury should be allowed to go unpunished.¹⁶⁷ But the Court's functional approach to prosecutorial immunity has led to some bizarre circular reasoning in this area, best exemplified by Justice Scalia's concurrence in *Buckley*.¹⁶⁸ Falsified evidence cannot produce harm to a defendant until it is used.¹⁶⁹ When prosecutors are preparing false evidence during their pretrial, pre-probable cause investigatory function, they are protected only by qualified immunity.¹⁷⁰ But the harm from the false evidence does not occur while it is being prepared—it occurs at trial, when the evidence is used. Yet by the time the prosecutor is using the false evidence at trial, he is protected by absolute immunity.¹⁷¹

The circuits have split on how to approach this issue. The Second, Eighth, and Ninth Circuits hold a prosecutor liable for producing false evidence under a qualified immunity theory.¹⁷² The Third and Seventh

¹⁶⁶ *Van de Kamp v. Goldstein*, 555 U.S. 335, 344 (2009).

¹⁶⁷ There are many ways that prosecutors can falsify and present evidence at trial, but for particular treatment of prosecutors' knowing use of perjured testimony, see Charlie DeVore, Comment, *A Lie Is a Lie: An Argument for Strict Protection Against a Prosecutor's Knowing Use of Perjured Testimony*, 101 J. CRIM. L. & CRIMINOLOGY 667 (2011).

¹⁶⁸ *Buckley v. Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring); see also Jeffrey J. McKenna, Note, *Prosecutorial Immunity: Imbler, Burns, and Now Buckley v. Fitzsimmons—The Supreme Court's Attempt to Provide Guidance in a Difficult Area*, 1994 BYU L. REV. 663, 692–93 (reading Justice Scalia's concurrence as saying that claims of false evidence should be dismissed for failure to state a claim).

¹⁶⁹ *Buckley*, 509 U.S. at 281.

¹⁷⁰ *Id.*

¹⁷¹ Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 92.

¹⁷² See *McGhee v. Pottawattamie Cnty.*, 547 F.3d 922 (8th Cir. 2008); *Milstein v.*

Circuits have held that a prosecutor is absolutely immune from liability for presenting false evidence at trial.¹⁷³

Because of a fairly arbitrary test created by the Supreme Court, a prosecutor can actually make up evidence, present it at trial, and not be held civilly liable for his actions. The criminal defendant against whom the evidence is presented is left without recourse. If he is wrongfully convicted on the basis of false evidence, he may sit in prison for years. If he has a dedicated legal team, perhaps he gets the conviction overturned and gets out of prison sooner. But typically a defendant with a dedicated legal team is not the type of defendant who has to worry about false evidence being used against him without objection in the first place. If and when he gets out, he may have no claim for civil damages for the prosecutor's wrong. Ultimately, the functional test leads to some defendants convicted on the basis of false evidence spending years in prison for crimes that they did not commit.¹⁷⁴

The Supreme Court could resolve the circuit split in two ways. First, the Court could rule that prosecutors are absolutely immune for presenting false evidence at trial.¹⁷⁵ On the other hand, the Court could grant prosecutors qualified immunity for their actions at all stages of a prosecution, including trial, which would expose them to liability for

Cooley, 257 F.3d 1004 (9th Cir. 2001); *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000); Ephraim Unell, *A Right Not to Be Framed: Preserving Civil Liability of Prosecutors in the Face of Absolute Immunity*, 23 GEO. J. LEGAL ETHICS 955, 966 (2010); see also Johns, *supra* note 171, at 90. *Zahrey* set the tone for this group of circuits. It concluded that the falsification of evidence is itself the harm because the harm at trial is the “legally cognizable result” of the falsification. *Zahrey*, 221 F.3d at 349–54; see also Unell, *supra*, at 964. *McGhee* utilizes similar reasoning. *McGhee*, 547 F.3d at 932. *Milstein* cites heavily to *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), but arrives at the same conclusion. *Milstein*, 257 F.3d at 1011; see also Johns, *supra* note 171, at 95.

¹⁷³ *Michaels v. New Jersey*, 222 F.3d 118 (3d Cir. 2000); *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994); see also Unell, *supra* note 172, at 966–67. The Seventh Circuit addressed the issue of prosecutors presenting false evidence at trial in *Buckley* after it was remanded from the Supreme Court. Unell, *supra* note 172, at 964. It basically followed Justice Scalia's reasoning in *Buckley*, and added in the *Buckley* majority's bright-line probable cause rule. *Id.* The prosecutors in *Buckley* elicited false evidence prior to a finding of probable cause, and were not absolutely immune. *Id.* But there was no harm at that point—the harm occurred at trial, when absolute immunity applied. *Id.* The Supreme Court declined to grant certiorari to *Buckley* a second time to resolve this. See *Buckley v. Fitzsimmons*, 513 U.S. 1085 (1995). The Third Circuit later adopted similar reasoning in *Michaels*. See *Michaels*, 222 F.3d at 122.

¹⁷⁴ See, e.g., *Buckley*, 509 U.S. at 261 (Stephen Buckley spent three years in jail); *McGhee*, 547 F.3d at 925 (Curtis McGhee and his codefendant Terry Harrington each spent twenty-four years in prison); *Michaels*, 222 F.3d at 120 (Margaret Michaels spent six years in prison).

¹⁷⁵ See *infra* Part V.B for a discussion of some additional implications of this course of action for prosecutors.

falsifying evidence in violation of a defendant's constitutional rights.¹⁷⁶ Considering how recently the Court upheld the functional test in *Connick*, it is unlikely to resolve the circuit split over the falsification of evidence any time soon.

B. WHAT IS A "PATTERN"?

Thirty-six years after *Imbler*, the Court has yet to articulate fully the scope of qualified immunity for prosecutors. The discussion of the *Connick* case at the appellate level demonstrates this.¹⁷⁷ No one, including no Justice on the Court, seems to know exactly what constitutes a "pattern" of violations that shows deliberate indifference and leads to qualified immunity and liability under § 1983. *Connick v. Thompson* evaluates multiple scenarios that might establish a pattern, and the majority and dissent appear to disagree on whether liability exists for every single one. Unfortunately, the dissent itself is unclear on whether it is arguing for liability based on a single incident or a pattern. The dissent spends a great deal of time and space laying out the facts that the jury had available to it¹⁷⁸—including other potential *Brady* violations that occurred in Thompson's case¹⁷⁹ and other cases in which Connick's office was held liable in civil suits for *Brady* violations.¹⁸⁰ Yet it summarily concludes that the jury could have been holding Connick's office liable based on a single

¹⁷⁶ See *infra* Part V.A for a discussion of some additional implications of this course of action for prosecutors.

¹⁷⁷ See *Thompson v. Connick*, 578 F.3d 293 (5th Cir. 2009), *rev'd*, 131 S. Ct. 1350 (2011); see also Sophia Juliana Johnson, *Thompson v. Connick: The Fifth Circuit Tiptoes Around the Issue of Qualified Prosecutorial Immunity and Collapses Municipal and Vicarious Liability Under § 1983*, 84 TUL. L. REV. 1403 (2010) (describing how sixteen appellate judges joined three separate opinions—one finding absolute immunity under *Van de Kamp*, one finding that Thompson had failed to show evidence giving rise to single-incident liability, and one finding that the jury had sufficient evidence, in the form of a pattern of violations, to reasonably infer that there was deliberate indifference).

¹⁷⁸ See *Connick*, 131 S. Ct. at 1370–77 (Ginsburg, J., dissenting). The facts that Ginsburg's dissent selects from the trial record certainly appear, at first blush, to indicate that there was other evidence concealed from Thompson's defense team besides the lab report at the center of the case. However, the majority is ultimately correct that if the dissent was truly pursuing a single-incident theory of liability, these other concealed bits of evidence would not matter. The hidden lab report alone would be enough for the liability analysis to take place.

¹⁷⁹ *Id.* at 1376 n.10.

¹⁸⁰ *Id.* at 1370 ("As the trial record in the § 1983 action reveals, the conceded, long-concealed transgressions were neither isolated nor atypical."); see also *id.* at 1382 (discussing the Supreme Court's decision in *Kyles v. Whitley*, 514 U.S. 419 (1995), which reversed a capital conviction from Orleans Parish based on the withholding of exculpatory evidence).

incident.¹⁸¹ The dissent never argues the obvious alternative—that the jury clearly had enough additional information to find a pattern from the multiple *Brady* violations occurring in Thompson’s case. This is particularly frustrating because each time the majority dismisses a definition of a pattern, the dissent’s factual evidence would seem to support such a definition, but the dissent stops short of actually calling anything a pattern.

The *Connick* majority takes the view that the actions of multiple prosecutors in one case resulting in a single *Brady* violation, like in Thompson’s case, do not constitute a pattern.¹⁸² What if multiple prosecutors violate *Brady* multiple times in one case? The majority swiftly dismisses in a footnote the idea that such behavior constitutes a pattern.¹⁸³ Could multiple prosecutors violating *Brady* multiple times across multiple cases prove a pattern? The majority indicates that this too is insufficient to put a district attorney on notice of the need to train—at least in the case of the Orleans Parish District Attorney’s Office. Thompson argued that *Connick*’s office had been reversed on appeal for *Brady* violations four times in the ten years prior to his armed robbery prosecution.¹⁸⁴ Thomas’s opinion discounts this because the reversed decisions did not involve the hiding of scientific evidence, like the blood-type report in Thompson’s case, but rather other forms of evidence.¹⁸⁵ Thomas declines to state whether, if the other four cases had involved scientific evidence, he would have altered his opinion.

What does clearly emerge from the analysis of both opinions is that what constitutes a pattern of constitutional violations is highly fact-bound. The application of this precedent regarding pattern will be difficult to apply to future cases. It is unclear that even the five Justices of the majority are all in agreement as to what a pattern is; they just all happened to agree that Thompson’s case did not prove it.¹⁸⁶

¹⁸¹ *See id.* at 1377.

¹⁸² *Id.* at 1360 n.7.

¹⁸³ *Id.* (stating that “contemporaneous or subsequent conduct cannot establish a pattern of violations”).

¹⁸⁴ *Id.* at 1360.

¹⁸⁵ *Id.*

¹⁸⁶ Moreover, in this analysis I have been using the idea of a *Brady* violation because that is what was at issue in *Connick*. In reality, of course, prosecutors can violate a defendant’s constitutional rights in other ways as a result of a lack of training. When you add additional types of constitutional violations into the mix, the fact-bound nature of this analysis becomes even more complicated. For example, Prosecutor A and Prosecutor B try a case together. In the first case, Prosecutor A withholds exculpatory blood evidence in violation of *Brady* and, more generally, the defendant’s due process rights. At the same time, Prosecutor B prepares a witness and withholds from the defense attorney the fact that he gave the witness immunity

Both the majority and dissent fail to address two additional situations that may reasonably constitute a pattern. First, one prosecutor could take actions across multiple cases, resulting in multiple *Brady* violations. Second, one prosecutor could take multiple actions in a single case that result in multiple *Brady* violations. While there may be a “pattern” of violations in both instances, they stem from the actions of a single person, rather than a group. That single prosecutor probably fits within Justice Scalia’s definition of the “miscreant prosecutor,”¹⁸⁷ who may have some form of personal responsibility for his actions, but whose actions would not establish liability under § 1983 for the office generally.

Neither side is particularly clear on what a single incident that gives rise to liability looks like either. It appears that a single incident could produce liability in two ways. First, there is the hypothetical in footnote 10 of *Harris*.¹⁸⁸ Both sides agree that this is still good law. Second, the majority in *Connick* seems to say that something other than a pattern could give the district attorney a “specific reason” to know that additional training was necessary.¹⁸⁹ The Court may have added this language to leave the

for his testimony. He does this in violation of *Giglio v. United States*, 405 U.S. 150 (1972), and the defendant’s due process rights. Neither prosecutor takes these actions in bad faith; they simply did not receive the training they needed to know what to turn over. Is this a pattern of constitutional violations? What if in the next case, A is paired with Prosecutor C, and A makes the same *Brady* violation. B is paired with Prosecutor D on his next case, and he too makes the same mistake with *Giglio*. Is this a pattern? Does that answer change if C and D also make *Brady* and *Giglio* violations? How many times does a particular type of violation have to occur in order to be a pattern? How does a defendant seeking to hold an office liable even plead a failure to train in this situation? It is far easier to allege that training is flawed in just one area of the law—either *Brady* or *Giglio* alone. Can a defendant allege that all of an office’s training on constitutional rights is flawed? Is it even possible to prove such a thing? Nothing in any of the two lines of cases leading up to *Connick*, or *Connick* itself, suggests any answers to these questions. I suggest that is because the pattern test is so heavily fact-bound as to be practically unworkable.

¹⁸⁷ *Connick*, 131 S. Ct. at 1368 (Scalia, J., concurring).

¹⁸⁸ *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989). This is the only explicit example of liability arising from a single incident in Supreme Court jurisprudence. The idea expressed in footnote 10 is that a single incidence of misconduct by a municipal employee resulting from an obvious failure in his training may be such a gross violation of a citizen’s constitutional rights that the municipality can be found deliberately indifferent to the need to train and can therefore be held liable under § 1983. *Id.* A municipality would be liable if it gave its police officers weapons without training them to know when the use of deadly force was acceptable, and an officer shot and killed someone when deadly force was not needed. *Id.*

¹⁸⁹ *Connick*, 131 S. Ct. at 1363 (“A district attorney is entitled to rely on prosecutors’ professional training and ethical obligations in the absence of specific reason, *such as* a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations” (emphasis added)); *see also id.* at 1386 n.26 (Ginsburg, J., dissenting).

door open for prosecutorial liability—since its reasoning basically eviscerated *Harris*'s single-incident theory as applied to prosecutors. This is because assistant district attorneys will always have attended law school and passed the bar,¹⁹⁰ so the district attorney will always be free to presume, under *Connick*, that they have adequate legal training to deal with *Brady* issues. So the “specific reason” that tips off the district attorney that more training is needed must be something other than inadequate training.¹⁹¹ The dissent argues that footnote 10 in *Harris* is directly applicable to Thompson's case because, although young lawyers have been to law school and passed the bar, they do not necessarily know everything about the law that is required to do their jobs.¹⁹²

C. RECONSIDERING THE COMMON LAW FOUNDATION OF THE RULE

The practical effect of all of this confusion is that prosecutors have absolute immunity. Is that such a bad thing? After all, the Court has repeatedly stated that in American common law, prosecutors always had absolute immunity. *Imbler* relied heavily on common law reasoning to establish the functional test.¹⁹³

Section 1983 does not list any immunities at all,¹⁹⁴ but the Court has simply read the immunities available under the common law of 1871 (when § 1983 was passed) into the statute.¹⁹⁵ While this approach is certainly artificial, it is something the Court has done in the past to reach a desired result.¹⁹⁶ Unfortunately, in the prosecutorial immunity context, this approach makes no sense. In *Imbler*, after stating that prosecutors were absolutely immune under the common law of 1871, the Court cites as evidence *Griffith v. Slinkard*, a case of malicious prosecution from 1896.¹⁹⁷

¹⁹⁰ See *supra* notes 58–62 and accompanying text.

¹⁹¹ See *Connick*, 131 S. Ct. at 1386 n.26 (Ginsburg, J., dissenting) (“In the end, the majority leaves open the possibility that something other than ‘a pattern of violations’ could also give the district attorney ‘specific reason’ to know that additional training is necessary. *Connick*, by his own admission, had such a reason.” (citations omitted)).

¹⁹² See *id.* at 1386; *supra* notes 58–62 and accompanying text.

¹⁹³ *Imbler v. Pachtman*, 424 U.S. 409, 422–27 (1976).

¹⁹⁴ See *id.* at 417.

¹⁹⁵ See *id.* at 418.

¹⁹⁶ See, e.g., *Pierson v. Ray* 386 U.S. 547 (1967) (reading common law absolute immunity for judges into § 1983); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (reading common law absolute immunity for legislators into § 1983). In *Tenney*, the Court concluded that immunities “well grounded in history and reason” had not been abrogated “by covert inclusion in the general language” of § 1983. *Imbler*, 424 U.S. at 418 (quoting *Tenney*, 341 U.S. at 376).

¹⁹⁷ *Imbler*, 424 U.S. at 421 (citing *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896)).

Moreover, the Court concedes that *Griffith* was the first recorded case where absolute prosecutorial immunity is mentioned in American law.¹⁹⁸

Justice Scalia's concurrence in *Burns* is more effective at describing the common law immunities than the majority in *Imbler*, but his argument still lacks persuasiveness as to why prosecutorial immunity should be read into § 1983. In American common law, there was absolute immunity for judges acting in their official judicial capacities.¹⁹⁹ There was also absolute immunity for government servants acting in a "quasi-judicial" capacity.²⁰⁰ Finally, all statements made as part of a court proceeding were given absolute immunity from defamation suits.²⁰¹

The *Imbler* Court argued that absolute immunity should apply to prosecutors for the same policy reasons that absolute immunity is given to judges and jurors.²⁰² In short, the immunity is designed to prevent the harassment of all parties to the prosecution and avoid any chilling effects that litigation might have.²⁰³ The Court seemed to endorse the idea that prosecutors share absolute immunity protection under a quasi-judicial theory.²⁰⁴ However, that is not the same thing as a grant of absolute immunity at common law for prosecutors in their own right. Yet the Court's jurisprudence has simplified the common law reasoning to this end. If the Court were to acknowledge the tenuousness of its common law arguments, the justification for absolute immunity and the functional test weakens considerably.

Even assuming that the Court's suppositions about absolute immunity in 1871 are correct, do we want modern prosecutors subjected to a rule

¹⁹⁸ See *id.* at 420–21.

¹⁹⁹ *Burns v. Reed*, 500 U.S. 478, 499 (1991) (Scalia, J., concurring in part and dissenting in part) (citing THOMAS COOLEY, *THE LAW OF TORTS* (1880)). From its earliest days, English common law protected judges acting within their jurisdiction with absolute immunity. See *Imbler*, 424 U.S. at 423 n.20 (citing *Floyd v. Barker*, (1608) 77 Eng. Rep. 1305). The United States Supreme Court first recognized judicial absolute immunity in *Bradley v. Fisher*, 80 U.S. 335 (1871), but it was not until *Pierson v. Ray*, 386 U.S. 547 (1967), that judicial absolute immunity was applied to the states via § 1983. *Pierson*, 386 U.S. at 554–55.

²⁰⁰ *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part). The Court in *Imbler* also noted that grand jurors received absolute immunity at both English and American common law under a quasi-judicial theory. See *Imbler*, 424 U.S. at 423 n.20 (citing *Turpen v. Booth*, 56 Cal. 65 (1880); *Hunter v. Mathis*, 40 Ind. 356 (1872); *Floyd v. Barker*, (1608) 77 Eng. Rep. 1305).

²⁰¹ *Burns*, 500 U.S. at 501 (Scalia, J., concurring in part and dissenting in part). However, a complaining witness could be subject to liability for malicious prosecution (which, unlike defamation, was an intentional tort). *Id.* Indeed, the absolute immunity applied only to defamation suits. *Id.*

²⁰² *Imbler*, 424 U.S. at 422–23.

²⁰³ *Id.*

²⁰⁴ *Id.*

created at a time when prosecution looked very different than it does today? First, with the rise of DNA and other scientific technology, there have been major advances in the collection of evidence since the common law rules regarding prosecutors were developed. Because there are so many more types of forensic evidence available to prosecutors today, there are also more opportunities for them to hide or tamper with that evidence. Additionally, prosecutors today are saddled with enormous caseloads that simply did not exist when the common law was developing.²⁰⁵ There are more incentives now than ever before to cut corners in order to obtain convictions and speed up the trial process.²⁰⁶ Prosecutors' offices do not have the resources to handle the extraordinary number of cases.²⁰⁷ To maintain conviction rates, the temptation to conceal exculpatory evidence in violation of a defendant's constitutional rights is strong.²⁰⁸ However, despite the drastic differences between early and modern American prosecution, there are compelling reasons for the Court to institute an absolute immunity rule today.

IV. ALTERNATIVE PROPOSALS

There are plenty of ways to regulate prosecutors without overhauling Supreme Court precedent. But having the Court impose a new immunity rule will be more efficient, while also avoiding the significant disadvantages of the common reform proposals. While they intuitively seem sound, the proposed reforms have severe practical disadvantages that prevent them from being viable alternatives to a new rule from the Court. The most common proposals for regulation are more stringent or better

²⁰⁵ STEVEN W. PERRY & DUREN BANKS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2007 (2011). State prosecutors closed 2.9 million felony cases in 2007, approximately ninety-four felony cases for every prosecuting attorney on staff. *Id.*; see also Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261 (2011) (discussing the number of cases assigned to prosecutors in the largest prosecutors' offices in the country, and the broad negative impact that such caseloads have on the criminal justice system).

²⁰⁶ See Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 560 (2007) (“[P]rosecutors are well aware that continuing to withhold favorable evidence may enhance the opportunity for a guilty plea and may also impair a defendant’s pretrial preparation.”); Gershowitz & Killinger, *supra* note 205, at 282–85 (describing specifically how excessive caseloads prevent prosecutors from turning over *Brady* material to criminal defendants).

²⁰⁷ See Gershowitz & Killinger, *supra* note 205, at 275–76.

²⁰⁸ See Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 390 (2001) (“The desire to win inevitably wins out over matters of procedural fairness, such as disclosure.”).

enforced ethical sanctions²⁰⁹ and internal office reforms,²¹⁰ although multiple other mechanisms have been suggested.²¹¹

²⁰⁹ See Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275 (2007); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399; Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965 (1984); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009); Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441 (1999).

²¹⁰ See Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2105–12 (2010) (advocating a corporate compliance model for structuring prosecutors' offices); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 996–1016 (2009) (advocating internal restructuring of prosecutors' offices); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 460–64 (2001) (advocating public information departments and prosecution review boards); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 448–58 (1992) (advocating expanded discovery, prosecutor misconduct commissions, and movement toward the British model, which relies partly on private lawyers drafted by the government to handle cases on a piecemeal basis); Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2182–86 (2010) (advocating greater auditing of prosecutors' files, more extensive internal review, and establishing review processes that make it possible to admit that wrongdoing occurred so that it can be addressed before the case goes too far in the appeals process); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 169–81 (2004) [hereinafter *The Zeal Deal*] (advocating better training, incentives, independent internal innocence units to review claims, restructuring elections, and abandoning the public prosecutor model altogether in favor of the British model, which has some public prosecution but relies partly on private lawyers drafted by the government to handle cases on a piecemeal basis); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 58–65 (2009) [hereinafter *Minister of Justice*] (advocating independent internal innocence units); Scott J. Krischke, Note, *Absent Accountability: How Prosecutorial Impunity Hinders the Fair Administration of Justice in America*, 19 J.L. & POL'Y 395, 432–34 (2010) (advocating federal- and state-level legislation to regulate prosecutors, independent review boards attached to all prosecutors' offices, and criminal sanctions for misbehaving prosecutors); Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1114–15 (1994) (advocating a prosecutorial conduct commission— analogous to a state inspector general—that would investigate misconduct); Andrew Smith, Note, *Brady Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1960–72 (2008) (advocating open-file policies, better enforcement of criminal sanctions against prosecutors, greater internal regulation, and increased media transparency).

²¹¹ See Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 448–51 (2009) (paying monetary incentives to prosecutors based on ethical performance); Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising*

If prosecutorial immunity continues to have a wide scope under § 1983, ethical sanctions may be the only way to address prosecutorial misbehavior and mete out punishment. Part of the *Imbler* Court's reasoning for broadly allowing absolute immunity was that the profession would sanction prosecutors who crossed ethical lines, even if they could not be held civilly liable.²¹² Unfortunately, in the thirty-six years since *Imbler*, prosecution of prosecutors for ethical violations has been rare in comparison with the number of ethical violations that occur.²¹³ Self-regulation has not changed behavior because prosecutors are well aware that, in practice, they are unlikely to face any professional consequences for skirting ethical rules.²¹⁴

Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct, 14 BERKELEY J. CRIM. L. 395, 426–30 (2009) (advocating holding supervisors responsible for subordinates' misconduct that they knew or should have known occurred); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1088–93 (2009) (naming prosecutors who engage in misconduct in appeals decisions overturning those cases); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN ST. L. REV. 1133, 1151–54 (2005) (suggesting abolishing the public prosecutor and moving to the English system); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 901–11 (1995) (advocating financial awards for prosecutors whose cases make it through appeals without error); Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1532–48 (2009) (reducing the defendant's sentence in cases where misconduct has occurred); Abby L. Dennis, Note, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 155–61 (2007) (using the superseder power, in which a district attorney, judge, or state executive appoints a special prosecutor to "supersede" local prosecuting attorneys when misconduct has been discovered); Kelly Gier, Note, *Prosecuting Injustice: Consequences of Misconduct*, 33 AM. J. CRIM. L. 191, 205–12 (2006) (proposing a mixture of increased ethical scrutiny and internal office reforms, including keeping repeat offenders off of death penalty cases, protecting whistleblowers more effectively, and preventing offenders from entering top positions within the prosecutor's office); Moshe Zvi Marvit, Note, *Who's Afraid of Municipal Liability? The Supreme Court's Strange Exclusion of § 1983 Respondeat Superior Municipal Liability*, 37 OHIO N.U. L. REV. 461, 477–90 (2011) (interpreting § 1983 as allowing municipalities to be held liable under a theory of respondeat superior).

²¹² *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

²¹³ See KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 (2010), available at http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online%20version.pdf; Rosen, *supra* note 209; Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997); Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10, 1999, at 1.

²¹⁴ Ellen Yaroshesky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 294 (2004) (noting that there is a "human tendency to push margins when there are no sufficiently demanding external controls"); see also Joy, *supra* note 209, at 426–27.

If courts and the profession will not address misconduct, the next step may be to force prosecutors' offices to self-regulate internally. A common suggestion is that prosecutors' offices move to an open-file system, in which any and all discovery is handed over to defense counsel.²¹⁵ At least one author has suggested that offices move to a corporate compliance-style model to ensure greater accountability by assistant district attorneys.²¹⁶ Several authors have advocated for internal review boards that would investigate wrongful convictions and address prosecutors' ethical failings.²¹⁷ These suggestions are severely limited by the fact that district attorneys have little incentive to implement complex and costly internal reforms without substantive data indicating that the reforms produce results.²¹⁸ The overwhelming number of cases that the typical prosecutor's office charges in a year, without an accompanying increase in funding, leaves neither money nor time to deal with an overhaul of internal processes.²¹⁹

Moreover, a problem inherent across these proposals is that the institutions that would have to implement the reforms—whether the prosecutors' offices themselves or legislatures—are resistant to change.²²⁰ Prosecutors dealing with massive caseloads and politicians deadlocked over state budget concerns in a stagnant economy are not going to expend time, energy, and political capital dealing with violations of criminal defendants' constitutional rights.²²¹ Whether right or wrong, the political will to

²¹⁵ See, e.g., Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010); Gershman, *supra* note 206, at 449–51; Smith, *supra* note 210, at 1960–66.

²¹⁶ See Barkow, *supra* note 210, at 2105–12 (advocating that prosecutors' offices utilize training, supervision, transparency, and reporting in the way that a corporation would in order to avoid wrongdoing).

²¹⁷ See Bibas, *supra* note 210; Davis, *supra* note 210; Gershman, *supra* note 210; Green, *supra* note 210; Medwed, *The Zeal Deal*, *supra* note 210; Medwed, *Minister of Justice*, *supra* note 210; Krischke, *supra* note 210; Morton, *supra* note 210; Smith, *supra* note 210.

²¹⁸ To my knowledge, there is no comprehensive study measuring a decrease in wrongful convictions in prosecutors' offices that have instituted some form of internal reform. For additional institutional characteristics that inhibit reform, see Green, *supra* note 210, at 2171–73 (describing the general skepticism and conservatism that mark prosecutors' offices).

²¹⁹ See generally PERRY & BANKS, *supra* note 205 (finding that while the total operating budget of state prosecutors' offices had decreased by 5% from 2001 to 2007, there were approximately ninety-four felony cases charged per prosecuting attorney on staff).

²²⁰ See Green, *supra* note 210, at 2171–73.

²²¹ This is not to say that they do not care about these issues at all, just that other concerns tend to take precedence. District attorneys and legislators are elected officials, and convicted criminals cannot vote and criminal defendants do not make up a politically active constituency. Politicians have little incentive to champion major reforms to benefit criminal defendants. For a more thorough treatment of how political concerns can impact criminal

execute these reforms simply does not exist—making action by the Supreme Court all the more necessary.

V. THE SUPREME COURT MUST IMPOSE A NEW RULE IN THIS AREA

The unsuitability of these alternative potential reforms means that the Supreme Court must be responsible for implementing a coherent liability rule. If the Supreme Court is truly to simplify the issue of prosecutorial liability under § 1983 by eliminating the functional test, it has two options. First, it could grant prosecutors qualified immunity across the board. Alternatively, the Court could give prosecutors absolute immunity in all situations. The absolute immunity rule already exists in practice, and there are compelling reasons for the Court to make it official.

A. QUALIFIED IMMUNITY

Broad qualified immunity for prosecutors is another favored solution among academics for reducing constitutional violations during prosecution.²²² Protection from police misconduct under § 1983 is more rigorous than protection from prosecutorial misconduct under the same statute because the police may only invoke qualified immunity as a defense.²²³ If prosecutors were as carefully scrutinized as the police, so the argument goes, they might have less incentive to violate defendants' constitutional rights in the course of the trial. This would lower the rate of wrongful convictions and bring greater fairness to the criminal adjudicatory process.

The primary problem with qualified immunity for prosecutors is that it may have a chilling effect on how prosecutors choose to prosecute.²²⁴ If prosecutors worry about being held civilly liable for their actions during a

law, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–39 (2001).

²²² Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 527–35 (2011); Douglas J. McNamara, Buckley, Imbler, and *Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 ALB. L. REV. 1135, 1190–92 (1996); Williams, *supra* note 209, at 3479–80. Other authors, while not advocating qualified immunity for prosecutors in all situations, have argued that the current absolute immunity that is sometimes granted needs to be restricted. See Brink, *supra* note 165, at 31–36; Unell, *supra* note 172, at 967–69.

²²³ Compare *Imbler v. Pachtman*, 424 U.S. 409 (1976) (giving prosecutors absolute immunity for their activities as advocates and qualified immunity for investigative and administrative actions), with *Anderson v. Creighton*, 483 U.S. 635 (1987) (granting police officers qualified immunity based on whether they behaved reasonably in light of clearly established law and the circumstances).

²²⁴ See *Imbler*, 424 U.S. at 423–24.

prosecution, it may change their behavior in a way that leads to less zealous advocacy.²²⁵ This was a major concern of the *Imbler* Court, and has been reiterated throughout the Court's prosecutorial immunity jurisprudence since 1976.²²⁶

Moreover, another Supreme Court decision may lessen the desired impact of qualified immunity on prosecutors' behavior. In *Heck v. Humphrey*,²²⁷ the Court held that to recover damages under § 1983, a plaintiff must show that his conviction was reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's writ of habeas corpus.²²⁸ Even if misconduct occurred in a defendant's case, the defendant has to prove that it was so egregious that it affected the verdict.²²⁹ The subsequent retrial must then lead to a reversal of the verdict.²³⁰ This is a very high standard for defendants to meet, and their success is particularly dependent on the legal resources that are available to them. Instituting qualified immunity may just lead prosecutors to engage in balancing. They will weigh the chances that their behavior will lead to reversal on appeal, actually giving rise to liability for their actions. If the prosecutor finds the likelihood of reversal sufficiently low, or is willing to take the risk, a significant amount of misconduct will occur regardless of the qualified immunity rule.²³¹

B. ABSOLUTE IMMUNITY

Giving prosecutors absolute immunity for all of their actions has not been advocated by anyone—except perhaps the Supreme Court, whose decisions produce absolute immunity in effect if not in form.²³² The

²²⁵ *Id.*

²²⁶ *See id.*; *see also* Van de Kamp v. Goldstein, 555 U.S. 335, 346–47 (2009); Buckley v. Fitzsimmons, 509 U.S. 259, 270 n.4 (1993).

²²⁷ 512 U.S. 477 (1994).

²²⁸ *Id.* at 486–87.

²²⁹ *Id.* For the requirements to achieve a reversal based on the withholding of exculpatory evidence, *see United States v. Bagley*, 473 U.S. 667 (1985) (holding that a prosecutor's withholding of exculpatory evidence is “material” such that it affects the verdict and warrants reversal only if there is a reasonable probability that had the evidence been disclosed to the defense, the outcome of the trial would have been different).

²³⁰ *Heck*, 512 U.S. at 486–87.

²³¹ For an argument that prosecutors already engage in this type of balancing, *see* Gershman, *supra* note 206, at 548–50. *Bagley*'s materiality standard, “allow[s] prosecutors to play and frequently beat the odds that their suppression of evidence, even if discovered, will be found immaterial by a court.” *Id.* at 549.

²³² *But see* Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 152–61 (2010). While Rosenthal is highly critical of the impact that a broad qualified immunity rule would have, he stops short of actually advocating for straight absolute immunity.

obvious problem with an absolute immunity rule is that a criminal defendant wrongly convicted based on misconduct directly attributable to his prosecutor has no recourse for the violation of his constitutional rights. This would be less worrisome if prosecutors were routinely held accountable for their actions through professional disciplinary measures. However, prosecutors are very rarely called before disciplinary committees for their actions, and are even more rarely disbarred.²³³

In spite of this, the Supreme Court should scrap its prior jurisprudence and articulate a rule that provides absolute immunity for prosecutors in all situations. While not a perfect solution, absolute immunity has many advantages over the current rule of mixed absolute and qualified immunity, and is pragmatically more appropriate than a qualified immunity rule.

First, instituting absolute immunity in all instances would clear up the muddy waters of the law. Judges would have a rule that is simple to apply²³⁴: prosecutors' offices and municipalities have no liability, and therefore no exposure to multimillion-dollar judgments.²³⁵ Defense attorneys and defendants will not spend years engaged in additional litigation after the reversal of a conviction, only to lose a civil suit because both sides had difficulty interpreting and applying the standard.²³⁶ Finally, absolute immunity is in complete accord with the common law tradition.²³⁷

Second, the twenty-four-hour news cycle helps make an absolute immunity rule viable by providing a layer of accountability. The intense scrutiny that all elected officials, including district attorneys, are subject to today was completely unknown to the worlds of *Imbler* and the common law. It is much easier for citizens to track how their elected officials are behaving, make decisions about how to vote, and demand greater transparency in government.

Americans are taking greater notice of the criminal justice system's failings, and the media has played a major role in that. Various innocence projects across the country have taught the public what wrongful

²³³ See *supra* notes 212–214 and accompanying text.

²³⁴ For why this is both an important and needed development, see note 177 and accompanying text.

²³⁵ See *infra* notes 250–252 and accompanying text.

²³⁶ Note that John Thompson spent twenty-six years of his life engaged in litigation—criminal and civil—with the Orleans Parish District Attorney's Office. Eight of those years (and presumably the sort of hours on the part of his attorneys that would normally result in millions of dollars in fees) were spent on his § 1983 action, which the Supreme Court eventually threw out, along with his \$14 million in damages.

²³⁷ Although as I have suggested, *supra* Part III.C, the Court's interpretation of the common law of prosecutorial immunity is tenuous at best, and probably of little practical value given the complexity of the prosecutorial function today.

convictions are, how they happen, and how they destroy lives.²³⁸ Campaigns to save death row inmates from execution when the evidence against them is weak are becoming more prominent.²³⁹ In some states, the worry about wrongful convictions has become so great that the death penalty has been abolished or suspended altogether.²⁴⁰ Inevitably, this intense scrutiny leads to the prosecutors of wrongful convictions being publicly named by the media.²⁴¹ This makes it harder for their offices to either cover up their behavior or continue their employment. The public naming and subsequent shaming of prosecutors who engage in ethically questionable behavior will provide a deterrent to others considering such behavior.

But will this deterrent effect be enough?²⁴² Bad press affects an elected district attorney the most, but it is his subordinates who are really making the daily decisions that violate constitutional rights. For all of the talk about “policymakers” and supervisors in the case law, the decision to engage in unethical behavior is made by the one or two line prosecutors who try the defendant’s case. They are not elected, and so may not care much about bad press. They may see their jobs as engaging in a quest for justice, and they may believe that the ends justify the means in such a

²³⁸ See *About the Organization: Other Projects Around the World*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Other-Projects.php> (last visited Oct. 30, 2012).

²³⁹ The recent campaign to save Troy Davis, spearheaded by Amnesty International, is an excellent example of this phenomenon. Troy Davis was convicted of first-degree murder in Georgia and spent many years on death row while exhausting all of his appeals. See *Troy Davis*, WIKIPEDIA, http://en.wikipedia.org/wiki/Troy_Davis (last visited Oct. 30, 2012). During this process, nearly all of the prosecution’s witnesses against him recanted their original testimony. *Id.* Nonetheless, his conviction was upheld multiple times and he was not granted clemency. *Id.* Davis was executed by the State of Georgia on September 21, 2011. *Id.*

²⁴⁰ These include: Alaska, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin, in addition to the District of Columbia. See DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (Oct. 5, 2012), available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. New Mexico and Connecticut have abolished the death penalty, but since the legislation is not retroactive, some inmates remain on death row. *Id.*

²⁴¹ It will be the media doing the naming, too—even in appeals cases where judges take prosecutors to task for misbehavior, they rarely name the prosecutors. See Gershowitz, *supra* note 211, at 1062. But see David Lat, *Benchslap of the Day: Say My Name, Say My Name*, ABOVE THE LAW (Feb. 16, 2012, 6:18 PM), <http://abovethelaw.com/2012/02/benchslap-of-the-day-say-my-name-say-my-name/#more-136265>. Of course, judges are members of the same profession as prosecutors. Members of the news media are not constrained by such ties.

²⁴² Moreover, the media’s power can be a double-edged sword. Brink has noted that increased media attention may also pressure prosecutors “to bring charges quickly and to win convictions.” Brink, *supra* note 165, at 12. Such a situation may encourage misconduct, rather than eliminate it. See *id.* at 9.

pursuit.²⁴³ Moreover, criminal defendants are not a sympathetic group—those who share an office and a community with these prosecutors may support a conviction at any cost.²⁴⁴

But absolute immunity should be conferred on prosecutors not only for its advantages, but also because of the severe disadvantages of the current qualified immunity rule. Despite the tendency of the literature to bemoan even the current absolute immunity of prosecutors, which is limited to their advocacy functions, there are major drawbacks to making prosecutors liable for misconduct under a qualified immunity rule. First, there is substantial evidence that awarding money damages in § 1983 cases will have little or no impact on prosecutorial behavior.²⁴⁵ This is in part because the prosecutor who actually violated the defendant’s constitutional rights is not personally liable for paying the damages awarded to the plaintiff in subsequent litigation.²⁴⁶ It is strategically more sensible to go after an entire office rather than an individual prosecutor because the prosecutor will rarely have deep enough pockets to satisfy the type of judgment that a defendant-turned-civil-litigant will be seeking.²⁴⁷ Additionally, the combination of the *Imbler* and *Monell* lines of cases has made it easier for litigants to frame alleged § 1983 violations by prosecutors as “failure to train” claims, which implicate a policymaker and the office more broadly.²⁴⁸ So even under a qualified immunity rule, prosecutors’ personal wealth is not at stake in civil litigation, which makes the threat of litigation less likely to directly impact their behavior during criminal trials.²⁴⁹

Within municipalities, prosecutors’ offices are not moneymakers. They have to be allocated money for their operating costs every year out of the municipality’s budget. Municipalities typically raise money through a variety of taxes—property, sales, etc. Because prosecutors’ offices raise no money independently, the municipality is also going to be responsible for paying—with taxpayer money—any jury awards of civil damages against

²⁴³ See Medwed, *The Zeal Deal*, *supra* note 210, at 134–48, for a thorough description of the culture of prosecutors’ offices and how that leads prosecutors to engage in misconduct and prevents them from correcting their mistakes when they may have convicted an innocent person.

²⁴⁴ See also *infra* Conclusion.

²⁴⁵ See Rosenthal, *supra* note 232, at 152–61.

²⁴⁶ *Id.* at 152. The other thing a prosecutor might have to lose is his job. But the reality is that prosecutorial misconduct often takes years to be discovered. The subsequent civil litigation takes additional years. Many prosecutors will have moved on by the time a judgment is actually entered on a civil case awarding damages.

²⁴⁷ Compare John Thompson’s jury award of \$14 million with the average salary of a District Attorney in 2007, which was \$98,000. See PERRY & BANKS, *supra* note 205, at 2.

²⁴⁸ See *supra* Part II.

²⁴⁹ See Rosenthal, *supra* note 232, at 129–30.

prosecutors.²⁵⁰ When taxpayers see their money paying for prosecutors' mistakes, they may translate their outrage into votes against the elected district attorney and the district attorney will have greater incentive to punish misbehaving prosecutors. But this assumes that voters will make the necessary connections among events. Although subject to direct political pressure from the municipality about budget and spending, the district attorney is primarily concerned about getting enough votes to get reelected.²⁵¹ If voters are not making the connection between their tax dollars and prosecutorial misconduct, the district attorney is in the clear. Moreover, the average prosecutor making an in-the-moment call about whether to withhold exculpatory evidence, for example, is so far removed from municipal budget decisions that he or she is unlikely to feel pressured one way or another by a threat of civil liability.²⁵²

The cost of prosecution is only a fraction of a municipality's budget. Especially since the economic downturn began in 2008, many municipalities have experienced budget difficulties.²⁵³ When budgets are stretched so thin, it quickly becomes apparent that money spent paying civil damages is money that is not being spent on schools, roads, and other government services.²⁵⁴ But if someone's constitutional rights have been violated, how can the courts not give them redress? Well, a multimillion-dollar civil award to recompense one defendant for his violated rights means that millions of dollars are not getting spent on entities like public defenders' offices that help protect hundreds of defendants' constitutional rights every day.

But let us suppose for a moment that despite all of these concerns, the Supreme Court adopts a broad qualified immunity rule and prosecutors finally feel the pressure of impending punishment for misbehavior. The district attorney makes it clear to his subordinates that any future misconduct may result in large civil damages against the office. The unspoken implication is that the line prosecutor who engages in this misconduct will be placing her job and reputation in jeopardy. What are the prosecutor's incentives going forward? Obviously, she will want to avoid having a conviction overturned because of misconduct at all costs. Intuitively that seems like a good thing. But at least some prosecutors will engage in misconduct anyway—whether by accident, because they think

²⁵⁰ See *id.* at 134–35.

²⁵¹ See *id.* at 153–54; see also Stuntz, *supra* note 221, at 533–34.

²⁵² See Rosenthal, *supra* note 232, at 158–59.

²⁵³ See Richard W. Trotter, *Running on Empty: Municipal Insolvency and Rejection of Collective Bargaining Agreements in Chapter 9 Bankruptcy*, 36 S. ILL. U. L.J. 45, 45–46 (2011).

²⁵⁴ See *id.* at 135.

they can get away with it, or for any number of other reasons. If confronted, then they have an incentive to cover up their mistakes to avoid the harmful consequences.²⁵⁵ This will make it even more difficult for a defendant to prove either his innocence or the prosecutor's wrongdoing postconviction.²⁵⁶

Granting absolute immunity for prosecutors should not be mistaken as granting prosecutors permission to engage in a free-for-all. Absolute immunity will undoubtedly protect some miscreant prosecutors who will trample defendants' constitutional rights with impunity. But the current mixture of qualified and absolute immunity has not solved this problem either. It has led to a law that encourages defendants who have genuinely suffered wrongs into endless litigation with elements that are nearly impossible to prove. A clearly articulated absolute immunity rule would at least prevent this more insidious form of unfairness against criminal defendants. Additionally, absolute immunity for prosecutors does not alter the current ethical and criminal sanctions for prosecutorial misconduct. It may even increase enforcement of those ethical and criminal sanctions since when money damages are removed from the equation, those sanctions will among the few avenues left to defendants seeking to right the wrongs done to them.

VI. CONCLUSION

The most common sense and expedient way of dealing with the pervasive issue of prosecutorial misconduct is for the Supreme Court to articulate a rule that grants prosecutors absolute immunity in all cases. The functional test initially proposed in *Imbler* has proven difficult to apply and is practically unworkable as currently formulated. The combination of *Imbler's* progeny and the municipal liability cases has forced litigants to frame the issue of prosecutorial misconduct in a highly specific and artificial way. Criminal defendants claiming a violation of their constitutional rights must allege that the district attorney was deliberately indifferent to the need to train his subordinates. Only showing a pattern of constitutional violations by prosecutors can prove this. Yet there is no clear standard in the case law for how to prove a pattern. The *Connick* opinion even seems to prevent defendants from ever proving a pattern, because all prosecutors have passed the bar and attended law school, so their district attorney will always be justified in believing that they know how to avoid

²⁵⁵ Zacharias and Green have noted the incentive that strict ethical sanctions create to cover up misconduct, but it has not been considered in the context of qualified immunity. See Zacharias & Green, *supra* note 209, at 41–42.

²⁵⁶ See *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976).

constitutional violations.

In certain exceptional cases, a defendant may be allowed to show that a prosecutor's behavior was so obviously in violation of the Constitution that a single violation amounts to deliberate indifference. The Court has never found a municipality liable on the basis of a single incident, despite the availability of this alternative method of proof since the *Harris* decision in 1989. The majority in *Connick* rejected Thompson's case under this standard. Ginsburg's dissent complicated the matter by claiming Thompson had proved single-incident liability, but then articulating all of the incidents that may have proven a pattern of constitutional violations in Thompson's case.

Connick has left the state of prosecutorial liability hopelessly confused—not that it was a shining example of clarity prior to *Connick*. In addition to the weak functional test, the Court's analysis of the common law foundations of prosecutorial absolute immunity reads like fiction. Even if there was common law precedent for an absolute immunity rule, prosecution has changed so drastically since early American common law that the justifications for the rule are moot today.

Most of the commentators following these trends in the Court are convinced that more oversight is the answer to the problem of prosecutorial misconduct. The suggestions put forth regarding ethical reform and internal restructuring of prosecutors' offices are completely out of touch with reality. Prosecutors' offices lack both the resources and the institutional will to implement even some of the simplest reforms proposed. Additionally, prosecutors as a group have proven remarkably resilient to efforts to alter—even slightly—how they do their jobs. The culture of prosecutors' offices has much to do with this mindset, but it is reinforced by the reluctance of other attorneys, judges, legislatures, and voters to interfere with the work of those who keep criminals in prison.

Absolute immunity for prosecutors already exists in practice, now the Court needs to make it official and overrule the *Imbler* line of cases to the extent that they articulate a mixed qualified and absolute regime. The violation of criminal defendants' constitutional rights by the people who prosecute them is grossly unfair. But it is even more grossly unfair that those defendants who successfully overcome a wrongful conviction on the basis of prosecutorial misconduct are led to believe that the law will provide them some recompense under § 1983. It almost never has, and after *Connick*, the chances that it ever will have decreased dramatically.

An absolute immunity rule will almost certainly allow some prosecutors to get away with malicious, egregious, and flagrantly unconstitutional behavior. But the reality is that American society is unwilling to pay the costs that would be associated with having only

qualified immunity for prosecutors. Part of this mindset is the very legitimate concern that the award of damages under a qualified immunity regime detracts from other valuable societal objectives. But another part of this attitude is the general lack of empathy that Americans have for criminal defendants, even those who have eventually been proven innocent. Justice Thomas's opinion in *Connick* exemplifies this—his reasoning is dismissive, and at points almost facile, in spite of the fact that he was deciding a case in which an innocent man had spent twenty-six years of his life fighting the system that should have protected him. Changes in this attitude must come from the citizens themselves, because they will not come from changing the rules governing prosecutors. Somebody will have to help them understand that, but that is the subject of another work.

