Boston College Law Review

Volume 25
Issue 5 *Number 5*

Article 3

9-1-1984

Police Officer Witnesses Absolutely Immune from Section 1983 Liablity: Briscoe v. LaHue

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Police Officer Witnesses Absolutely Immune from Section 1983 Liability: *Briscoe v. LaHue*[1] — Congress phrased section 1983 of the Civil Rights Act of 1871[2] as broadly as a remedial statute may be written.[3] Declaring that "every person" who, acting under color of state law, deprives anyone of a constitutional right is liable in damages,[4] section 1983 does not expressly incorporate any immunities from civil suit.[5] In construing the statute, however, the United States Supreme Court has granted absolute immunity from liability under section 1983 to several categories of government officials.[6]

In the recent decision of *Briscoe v. LaHue*,[7] the United States Supreme Court ruled that police officer witnesses testifying within the scope of their duties are absolutely immune from liability under section 1983.[8] The *Briscoe* decision substantially expanded

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[1] 460 U.S. 325 (1983).

[2] Section 1983 reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

[3] *See* Maine v. Thiboutot, 448 U.S. 1, 4-5 (1980); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L. REV. 322, 322 (1969) [hereinafter cited as Note]. The Supreme Court, in Monroe v. Pape, 365 U.S. 167 (1961), identified three principal aims of section 1983. First, section 1983 was enacted to override unconstitutional laws. *Id.* at 173. Next, the statute was intended to provide a remedy where state laws were inadequate to protect constitutional rights. *Id.* at 173-74. Finally, section 1983 was enacted to provide a federal remedy where state law was adequate to guarantee federal rights but was not available in practice because of state officials failing to enforce those laws. *Id.* at 174-75.

[4] *See supra* note 2. The plaintiff in a section 1983 action must prove only two elements to state a claim for relief under the statute. First, the plaintiff must demonstrate that he suffered a deprivation of his constitutional rights (or rights under certain federal statutes), and second, that the deprivation was caused by a person acting under color of law. Adickes v. Kress, 398 U.S. 144, 150 (1970). Once the plaintiff has met his burden of proof, he is entitled to the remedies provided under section 1983 unless the defendant can establish his immunity from suit. Skehan v. Board of Trustees, 538 F.2d 53, 61 (3d Cir. 1976), *cert. denied*, 429 U.S. 979 (1976). *See generally* Kattan, *Knocking On Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 941, 986-989 (1977) [hereinafter cited as Kattan]. *But see* Bonner v. Coughlin, 545 F.2d 565, 568 (7th Cir. 1976) (plaintiff also must prove intent or recklessness on part of defendant). *See infra* note 208 (discussing defendant's burden of proof under absolute and qualified immunities).

[5] Monroe v. Pape, 365 U.S. 167, 187 (1961); Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953). In his concurring opinion in *Cobb*, Chief Justice Magruder asserted:

> The enactment in terms contains no recognition of possible defenses, by way of privilege, even where the defendants may have acted in good faith, in compliance with what they believed to be their official duty. Reading the language of [section 1983] in its broadest sweep, it would seem to make no difference that the conduct of the defendants might not have been tortious at common law; for the Act, if read literally, creates a new federal tort, where all that has to be proved is that the defendants . . . under color of state law . . . [deprived the plaintiff] of rights, etc., secured by the Constitution of the United States.

Id. at 706. *See also Monroe*, 365 U.S. at 187. In *Monroe*, the Court held that section 1983 should be read against the "background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.*

[6] *See infra* notes 132-97 and accompanying text (discussing three Supreme Court decisions where the Court granted absolute immunity under section 1983).

[7] 460 U.S. 325 (1983).

[8] *Id.* at 326. *See infra* notes 56-81 and accompanying text (discussing *Briscoe* holding).

existing immunity law under section 1983 by extending absolute immunity to a class of government officials who do not perform quasi-judicial functions.[9] With the *Briscoe* decision, therefore, the Supreme Court once again has diluted the strength of section 1983 as a means of protecting individual constitutional rights.[10]

In his original complaint alleging violation of section 1983 and seeking compensatory damages, petitioner Briscoe claimed that respondent, Police Officer LaHue, violated his constitutional right to due process by falsely testifying in a state prosecution against Briscoe.[11] Specifically, Briscoe alleged that, when LaHue testified about a partial fingerprint discovered at the scene of the crime which could be linked to Briscoe, LaHue knew that his testimony was false.[12] Briscoe contended that the testimony was perjurious because LaHue had received an FBI report which stated that the fingerprint was too incomplete to be of value.[13] The District Court for the Northern District of Indiana granted LaHue's motion for summary judgment on four separate grounds.[14] The district court held, first, the alleged facts did not support the contention that LaHue had testified falsely; second, allegations of perjury alone were insufficient to state a claim for violation of due process rights; third, LaHue was not acting under color of state law when he testified at the criminal proceedings; and fourth, Briscoe was collaterally estopped from asserting this claim as his conviction had been reversed.[15] Briscoe then appealed the district court decision to the United States Court of Appeals for the Seventh Circuit.[16] The appeals court consolidated the case with a pending unrelated case, *Vickers v. Hunley*,[17] for review and decision.

In *Vickers*, petitioners Vickers and Ballard alleged that respondent, Police Officer Hunley, had violated their constitutional rights to due process and a fair trial by testifying falsely as a witness at their criminal trial.[18] Petitioners alleged that Hunley gave perjured testimony when he suggested that Vickers and Ballard had harmonized their stories before making statements to the police.[19] Hunley gave this testimony, the petitioners asserted, despite being aware that the petitioners had had no opportunity to correlate

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[9] *See infra* notes 132-97 and accompanying text (discussing prior Supreme Court decisions emphasizing quasi-judicial functions as justification for extending absolute immunity under section 1983).

[10] *See* Imbler v. Pachtman, 424 U.S. 409, 434 (1976) (White, J., concurring) ("to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create") (citing Scheuer v. Rhodes, 416 U.S. 232 (1974)).

[11] Briscoe v. LaHue, 663 F.2d 713, 715 (7th Cir. 1981) (district court opinions unpublished). Briscoe had been charged with committing first-degree burglary and conspiracy to commit first-degree burglary and assault. *Id.* LaHue was called as a witness at two probable cause hearings and at Briscoe's criminal trial. *Id.* At the time of the arrest, LaHue was a member of the Bloomington, Indiana, police department. *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 715-16.

[15] *Id.*

[16] On appeal, the Indiana Court of Appeals had reversed Briscoe's conviction. Briscoe v. State, 180 Ind. App. 450, 388 N.E.2d 638, 643-47 (1979). The Court of Appeals held that, on the record, the evidence was insufficient to support Briscoe's conviction. *Id.* at 647.

[17] Briscoe v. LaHue, 663 F.2d 713, 715 (7th Cir. 1981) (district court opinions unpublished).

[18] *Briscoe*, 663 F.2d at 717. At the time he testified, James Hunley was an officer of the Cedar Lake police department. *Id.* The alleged action arose from circumstances surrounding the custodial interrogation of Vickers and Ballard by the Cedar Lake police shortly after their arrest. *Id.*

[19] *Id.* The petitioners alleged that Hunley knew that the statements were made two hours apart, and before Vickers and Ballard had any opportunity to collaborate. *Id.*

their versions of the facts.[20] Petitioners claimed that Hunley's testimony irreparably diminished the credibility of their statements in the eyes of the jury.[21] In ruling on petitioners' action under section 1983, a federal magistrate granted Hunley's motion to dismiss on the grounds that Hunley's testimony was not given under color of state law,[22] and that, as a witness, Hunley was entitled to absolute immunity from civil liability.[23] Subsequently, the District Court for the Northern District of Indiana affirmed the magistrate's decision.[24]

Pressing their claims of constitutional violations, Vickers and Ballard appealed to the United States Court of Appeals for the Seventh Circuit. After consolidating their case with *Briscoe*, the court of appeals affirmed both trial court decisions.[25] Addressing the numerous issues raised on appeal,[26] the appeals court held that all witnesses, including police officer witnesses, are absolutely immune from liability under section 1983 for testimony offered in criminal proceedings.[27]

After the appeals court decided the *Briscoe* and *Vickers* cases, the United States Supreme Court granted a writ of certiorari,[28] limited solely to the issue of whether section

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[20] *Id.*

[21] *Briscoe*, 460 U.S. at 327.

[22] *Briscoe*, 663 F.2d at 717.

[23] *Id.* Additionally, the magistrate found that the petitioners' complaint did not allege that their federal constitutional rights had been violated, because the false testimony of a witness at trial did not constitute a due process violation unless it was knowingly used by the prosecutor to obtain a conviction. *Id.*

[24] *Id.*

[25] *Id.* The court of appeals decision involved three cases consolidated on appeal. *Id.* Only two of those cases were decided by the Supreme Court on writs of certiorari. *Briscoe*, 460 U.S. at 326. The third case, *Talley v. Crosson*, involved a claim of deprivation of constitutional rights to due process, equal protection and effective assistance of counsel. *Briscoe*, 663 F.2d at 716. Defendant Talley was found guilty of rape and armed robbery. *Id.* Subsequently, Talley brought a pro se complaint against several government officials alleging that they used perjured testimony at the trial which resulted in Talley's conviction. *Id.* The District Court for the Northern District of Illinois granted some of the defendant's motions to dismiss on the ground that the complaint failed to state a cause of action against those parties. *Id.* at 717. The district court dismissed the remaining claims on the basis of absolute prosecutorial and judicial immunities. *Id.*

[26] The three consolidated cases presented several issues concerning the scope of 42 U.S.C. §§ 1983, 1985(3). The common thread running through the cases, however, was the question of police officer witness immunity in actions brought under section 1983. *Briscoe*, 663 F.2d at 715.

[27] *Id.* at 720-21. The court of appeals noted that granting police officer witnesses absolute immunity under section 1983 would override a fundamental purpose of the statute. *Id.* at 720. Further, the court recognized that the policy considerations justifying absolute immunity for private witnesses did not apply with equal force to police officer witnesses. *Id.* at 719. While recognizing these important considerations weighing against absolute witness immunity for police officers, however, the appeals court concluded that recent opinions of the Supreme Court indicated that the Court favored absolute witness immunity under section 1983. *Id.* at 720. Specifically, the appeals court relied on dicta in Butz v. Economou, 438 U.S. 478, 512-13 (1978), in which the Supreme Court stated that witnesses should be absolutely immune from civil liability so that they could perform their functions without intimidation. *Id.* at 512. Further, the court of appeals cited Imbler v. Pachtman, 424 U.S. 409 (1976), in which absolute immunity under section 1983 was discussed approvingly by Justice White in his concurring opinion. *Id.* at 439-40. *Briscoe*, 663 F.2d at 721 n.30.

[28] Briscoe v. LaHue, 455 U.S. 1016 (1982). The petition for writ of certiorari presented the following question: "Whether a police officer who commits perjury during a state court criminal trial should be granted absolute immunity from civil liability under 42 U.S.C. § 1983." *Briscoe*, 460 U.S. at 329 n.5. The petition did not raise the question of immunity for testimony at pretrial proceedings such as probable cause hearings, nor did the petition discuss whether the same immunity considerations that apply to trial testimony also apply to testimony at probable cause hearings. *Id.* The

1983 creates a damages remedy against police officers on the basis of their testimony as witnesses in state court proceedings.[29] First, the Court addressed principles of common law immunity[30] and concluded that, at least with respect to private witnesses, the enactment of section 1983 did not abrogate the absolute immunity existing at common law.[31] Next, the Court considered the intent of Congress in enacting section 1983[32] and stated that Congress clearly intended to include traditional common law witness immunities in actions brought under the statute.[33] Finally, after discussing present-day policy considerations,[34] the Court ruled that the justifications supporting common law witness immunity apply with equal force to police officer witnesses who testify in a judicial proceeding.[35] Consequently, the Court affirmed the decision of the appeals court,[36] holding that police officer witnesses are absolutely immune from civil liability under section 1983 for testimony offered in the scope of their official duties.[37]

In three separate opinions, the dissenting Justices argued that police officer witnesses should not have absolute immunity from civil liability under section 1983.[38] In his dissenting opinion, Justice Marshall contended that the doctrine of absolute witness immunity was not a settled proposition when section 1983 was enacted in 1871.[39] Even if it were, Justice Marshall argued, Congress intended to abrogate the doctrine with respect to actions brought under the statute.[40] Justice Marshall suggested further that the policy considerations underlying both section 1983 and common law witness immunity, as applied to police officer witnesses, do not justify absolute immunity for perjurious testimony.[41] While expressing some reservations regarding Justice Marshall's analysis, Justices Brennan and Blackmun briefly concurred with the result Justice Marshall reached in his dissenting opinion.[42]

As a result of *Briscoe*, police officer witnesses are absolutely immune from liability under section 1983 for testimony offered in judicial proceedings.[43] The *Briscoe* decision

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Court, therefore, did not decide whether LaHue was entitled to absolute immunity for allegedly false testimony at two probable cause hearings regarding Briscoe. *Id.*

[29] *Id.*

[30] *Id.* at 329-36.

[31] *Id.* at 334.

[32] *Id.* at 336-41.

[33] *Id.* at 341.

[34] *Id.* at 341-46.

[35] *Id.* at 345-46.

[36] *Id.* at 346. On its review of the pretrial orders dismissing the petitioners' complaints, the court of appeals assumed that factual allegations of perjury in the complaints were true. *Id.* at 328 n.3. The court also assumed that the petitioners had alleged a constitutional violation in that they had been deprived of their liberty without due process of law by respondents' perjury in the judicial proceedings that resulted in the petitioners' convictions. *Id.* Because the Supreme Court granted certiorari to review the court of appeals' holding, the Court held that the same assumptions would hold, without determining whether such assumptions were valid. *Id.*

[37] *Id.* at 326. Justice Stevens delivered the opinion of the Court, in which Chief Justice Burger and Justices White, Powell, Rehnquist and O'Connor joined. *Id.*

[38] *Id.* at 346 (Brennan, J., dissenting); *id.* at 346 (Marshall, J., dissenting); *id.* at 369 (Blackmun, J., dissenting).

[39] *Id.* at 346 (Marshall, J., dissenting).

[40] *Id.* at 346-47 (Marshall, J., dissenting).

[41] *Id.* at 347 (Marshall, J., dissenting).

[42] *Id.* at 346 (Brennan, J., dissenting); *id.* at 369 (Blackmun, J., dissenting). For a discussion of these two dissenting opinions, *see infra* notes 82-116 and accompanying text.

[43] 460 U.S. at 326.

represents an extension of absolute immunity under section 1983 which, prior to *Briscoe*, had been granted only to legislators,[44] judges,[45] and prosecutors.[46] *Briscoe* reflects the Court's willingness to insulate officials from potential liability even at the expense of denying a remedy for violations of constitutional rights to individual criminal defendants.[47]

This casenote first will set forth the reasoning employed by the Court in *Briscoe*.[48] The casenote then will examine the precedential framework underlying the *Briscoe* decision,[49] as well as a series of cases in which the Court has rejected absolute immunity, and instead, has applied a qualified immunity.[50] After evaluating the merits of the Court's reasoning in *Briscoe*,[51] the casenote will test that reasoning against the alternative rationale of qualified immunity.[52] Finally, after examining the intentions of Congress in enacting section 1983[53] and the policies which support common law witness immunity,[54] this casenote will propose that a qualified, rather than an absolute, immunity for police officer witnesses best preserves the intent of the common law while advancing the policies of section 1983.[55]

I. *BRISCOE V. LAHUE*

A. *The Majority Opinion: Acceptance of Absolute Immunity for Police Officer Witnesses*

The *Briscoe* Court began its opinion by noting that English common law recognized absolute immunity for witnesses as early as 1772,[56] and that American courts have incorporated the doctrine with only slight modification.[57] The Court noted that under the

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[44] Tenney v. Brandhove, 341 U.S. 367, 379 (1951). *See infra* notes 132-49 and accompanying text.

[45] Pierson v. Ray, 386 U.S. 547, 554-55 (1967). *See infra* notes 150-80 and accompanying text.

[46] Imbler v. Pachtman, 424 U.S. 409 (1976). *See infra* notes 181-97 and accompanying text.

[47] A few lower courts faced with the issue of police officer witness immunity before *Briscoe* also favored absolute immunity. Those courts were more willing to adopt the common law immunity and to minimize the congressional policy underlying section 1983. The courts that upheld absolute immunity asserted that the threat of civil liability would prevent witnesses from disclosing valuable and pertinent testimony. *See, e.g.*, Charles v. Wade, 665 F.2d 661, 666 (5th Cir. 1982), *cert. denied*, 460 U.S. 1036 (1983); Myers v. Bull, 599 F.2d 863, 866 (8th Cir. 1979) (per curiam), *cert. denied*, 444 U.S. 901 (1979). Other lower courts faced with the issue of police officer immunity before *Briscoe*, however, rejected absolute immunity and permitted a cause of action. Those courts stressed as the critical factor the intended function of section 1983 to provide a remedy to individuals wronged by official misconduct. *See, e.g.*, Briggs v. Goodwin, 569 F.2d 10, 28 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978); Burke v. Miller, 580 F.2d 108, 112 (4th Cir. 1978) (Winter, J., concurring), *cert. denied*, 440 U.S. 930 (1979).

[48] *See infra* notes 56-119 and accompanying text.

[49] *See infra* notes 123-206 and accompanying text.

[50] *See infra* notes 207-33 and accompanying text.

[51] *See infra* notes 234-97 and accompanying text.

[52] *See infra* notes 298-322 and accompanying text.

[53] *See infra* notes 248-67 and accompanying text.

[54] *See infra* notes 268-96 and accompanying text.

[55] *See infra* notes 298-324 and accompanying text.

[56] Briscoe v. LaHue, 460 U.S. at 331.

[57] *Id.* Some American decisions required a showing that the witness' allegedly defamatory statements were relevant to the judicial proceedings, but once this threshold showing was made, the witness was granted an absolute privilege. *See, e.g.*, Myers v. Hodges, 53 Fla. 197, 208-10, 44 So. 357, 361 (1907).

common law doctrine of absolute witness immunity, a private party is immune from subsequent civil liability for testimony offered in a judicial proceeding.[58] This doctrine, the Court reasoned, rested on the perception that a witness' apprehension of subsequent liability might induce self-censorship,[59] and that public policy dictates that "the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible."[60]

Enactment of section 1983, the Court stated, did not abrogate the common law doctrine of absolute witness immunity as it applied to lay witnesses.[61] After analyzing the legislative history of the statute,[62] the Court concluded that the debates of the Forty-Second Congress did not support the petitioners' contention that Congress intended to provide a damages remedy under section 1983 against police officers, or any other, witnesses.[63] A civil action against a private witness would not lie under section 1983, the Court continued, because the statute was limited to actions taken "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory."[64] When a private witness gives testimony in the course of a criminal trial, the Court reasoned, that act is not performed "under color of law."[65] The Court concluded that the common law doctrine of absolute immunity continued to be available to witnesses,[66] and ruled that, because a police officer who testifies in a judicial proceeding reasonably may be viewed as acting in the capacity of a lay witness, the doctrine applied with equal force to police officer witnesses.[67]

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[58] *Briscoe*, 460 U.S. at 334. Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 476 (1909) [hereinafter cited as Veeder].

[59] *Briscoe*, 460 U.S. at 333. The Court noted two forms of potential self censorship. *Id.* First, a witness might be reluctant to come forward to testify. *Id.* (citing Henderson v. Broomhead, 157 Eng. Rep. 964, 968 (Ex. 1859)). Second, once a witness is on the stand, his or her testimony might be distorted by fear of subsequent liability. *Id.* (citing Barnes v. McCrate, 32 Me. 442, 446-47 (1895)). In addition, the Court in *Briscoe* noted that some courts have expressed concern that, in the absence of a privilege, honest witnesses might be subjected to liability erroneously because they would have difficulty in proving the truth of their statements. *Id.* at 333 n.13. (citing Calkins v. Sumner, 13 Wis. 193, 198, 80 Am. Dec. 738 (1860); Barnes v. McCrate, 32 Me. at 446)).

[60] *Briscoe*, 460 U.S. at 333 (citing *Calkins*, 13 Wis. at 197, 80 Am. Dec. at 741).

[61] *Id.* at 334.

[62] *Id.* at 336-41.

[63] *Id.* at 341. Specifically, after analyzing both sections of the 1871 Act, the Court concluded that section 1, now codified as section 1983, differed substantially from section 2, the civil and criminal conspiracy section of the statute. *Id.* at 337. Recognizing that the legislative history supported criminal punishment under section 2 for witnesses who conspired to give perjured testimony, the Court in *Briscoe* maintained that this evidence did not show that Congress intended to abrogate witness immunity in civil actions under section 1. *Id.* at 339. Further, the Court asserted that the legislative history of the 1871 Act did not speak to the question whether Congress intended witnesses to be civilly liable for false testimony. *Id.* at 341 n.26. Consequently, the Court concluded that Congress did not establish the requisite intent to override the clearly established common law immunity of witnesses from civil liability. *Id.* Justice Marshall reached a different conclusion about Congressional intent. *Id.* at 363 (Marshall, J., dissenting). *See infra* notes 92-94 and accompanying text.

[64] *Id.* at 329 (citing 42 U.S.C. § 1983 (1982)).

[65] *Id.* The Court did note, however, that it is conceivable that nongovernmental witnesses could act "under color of law" by conspiring with the prosecutor or other state officials. *Id.* at 329 n.7. *See, e.g.*, Dennis v. Sparks, 449 U.S. 24, 27-29 (1980) (private parties accused of conspiring with judge held liable under section 1983).

[66] *Briscoe*, 460 U.S. at 334.

[67] *Id.* at 336.

In its earlier decisions, the Court noted, certain officials who performed critical functions in the judicial process had been granted immunity from civil liability under section 1983.[68] The Court cited two of its previous decisions as examples of cases in which absolute immunity had been extended to government officials based on their highly discretionary functions.[69] The *Briscoe* Court concluded that the policy of extending to participants in the judicial process "every encouragement to make a full disclosure of all pertinent information" supported those earlier decisions.[70] Reasoning that this "cluster of immunities" applied to all persons integral to the judicial process,[71] the Court decided that absolute immunity must be extended to include police officer witnesses who, by offering testimony in criminal proceedings, perform a critical role in the fact-finding process.[72]

As additional justification for its holding, the *Briscoe* Court stated that the public policy considerations supporting absolute immunity for ordinary witnesses apply with even greater force to governmental witnesses.[73] The Court maintained that subjecting governmental officials, such as police officers, to civil liability under section 1983 as a result of their testimony could undermine both their contribution to the judicial proceedings and the effective performance of their other public duties.[74] Because a witness is always subject to criminal sanctions,[75] the Court observed that the risk of a witness imposing self-censorship greatly outweighed any deterrent effect gained by the creation of a civil remedy under section 1983.[76] Finally, the Court reasoned that section 1983 actions against police officer witnesses could be expected with some frequency.[77] Such litigation, the Court decided, could well impose significant burdens on the judicial system and on law-enforcement resources.[78]

Consequently, the Court in *Briscoe* determined that the policies underlying common law witness immunity and section 1983 supported its decision to grant absolute immunity under section 1983 to police officer witnesses.[79] A police officer testifying in a judicial proceeding is acting as a lay witness, the Court concluded, and therefore is deserving of

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[68] *Id.* at 334.

[69] *Id.* The Court cited Pierson v. Ray, 386 U.S. 547 (1967), and Imbler v. Pachtman, 424 U.S. 409 (1976), in support of its position.

[70] *Briscoe*, 460 U.S. at 335 (quoting Imbler v. Pachtman, 424 U.S. 409, 439 (1976) (White, J., concurring)).

[71] *Id.* (quoting Butz v. Economou, 439 U.S. 478, 512 (1978)).

[72] *Id.* at 336. In his dissenting opinion, Justice Marshall disagreed with the Court's decision in the *Pierson* and *Imbler* cases. *Id.* at 364 n.32 (Marshall, J., dissenting).

[73] *Id.* at 343.

[74] *Id.* The Court held that it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Id.* at 345 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

[75] *Id.* at 342. Specifically, a witness who intentionally offers false testimony may be prosecuted for perjury.

[76] *Id.* at 343. While the Court recognized that some defendants might be unjustly convicted on the basis of perjured testimony by police officers, the Court concluded that the alternative of limiting the police officers' immunity would disserve the broader public interest of protecting the judicial system. *Id.* at 345.

[77] *Id.* at 343. The Court stated that defendants often will transform their resentment at being convicted into allegations of perjury. *Id.*

[78] *Id.* The Court noted that lawsuits alleging perjury on the stand in violation of the defendant's due process rights often raise material questions of fact, inappropriate for disposition at the summary judgment stage. *Id.* at 343 n.29. Therefore, the case often must proceed to trial and must traverse much of the same ground as the original trial. *Id.*

[79] *Id.* at 345-46.

the absolute immunity accorded lay witnesses.[80] According to the Court, police officer witnesses perform a critical role in the judicial process and, for that reason as well, are absolutely immune from liability under section 1983.[81]

B. *The Dissenting Opinions*

Justices Marshall,[82] Brennan,[83] and Blackmun[84] filed separate dissenting opinions. All three Justices agreed that a police officer witness should not be granted absolute immunity from liability for damages under section 1983.[85] The Justices argued that Congress did not intend to incorporate common law immunities under section 1983, and that the policy considerations underlying common law immunities did not apply with equal force to situations involving police officer witnesses.[86]

In a lengthy dissenting opinion, Justice Marshall first stated that, contrary to the majority conclusion, the issue of whether absolute immunity was available to witnesses in 1871 had not been settled.[87] Justice Marshall relied on the Supreme Court's decision in *White v. Nicholls*[88] to support his contention. In *White*, Justice Marshall noted, the Court had rejected absolute immunity for a qualified immunity for statements made as part of judicial proceedings in defamation actions.[89] Citing *White* as the sole Supreme Court pronouncement on the subject of witness immunity before 1871,[90] Justice Marshall concluded that if, in 1871, Congress had examined the subject of common law immunities, it would have concluded that the principles set forth in *White* represented the settled law in the area.[91]

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[80] *Id.* at 336.

[81] *Id.* at 337.

[82] *Id.* at 346 (Marshall, J., dissenting).

[83] *Id.* (Brennan, J., dissenting).

[84] *Id.* at 369 (Blackmun, J., dissenting).

[85] *Id.* at 346 (Marshall, J., dissenting); *id.* at 346 (Brennan, J., dissenting); *id.* at 369 (Blackmun, J., dissenting).

[86] *Id.*

[87] *Id.* at 346. Moreover, Justice Marshall argued that, even if absolute witness immunity were accepted at common law, some of the petitioner's allegations would not have been barred by common law immunity principles. *Id.* at 350. Justice Marshall asserted that, in addition to alleging that LaHue had testified falsely at his trial, Briscoe had alleged that LaHue had made knowingly false charges at two probable cause hearings. *Id.* At common law, according to Justice Marshall, such allegations would have formed the basis of an action for malicious prosecution. *Id.* at 350-51 & n.7. Further, Justice Marshall asserted that both English and American courts permitted a plaintiff to bring an action for malicious prosecution at common law, holding that no immunities barred such suits. *Id.* at 351 n.9. Moreover, Justice Marshall contended that the majority erroneously concluded that the issue of immunity for testimony by a police officer at a probable cause hearing was not before the Court. *Id.* at 351 n.10. Citing Supreme Court Rule 23(1)(c), which reads "the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein," Justice Marshall concluded that the question of witness immunity in one state court proceeding fairly includes the issue of witness immunity in a related state court proceeding. *Id.*

[88] 44 U.S. (3 How.) 266 (1845).

[89] *Id.* at 291. The Court in *White* began its analysis by noting the existence of various exceptions to defamation liability, such as words used in a judicial proceeding. *Id.* at 286-87. The Court stated, however, that the "term 'exceptions', as applied to cases like those just enumerated, could never be interpreted to mean that a class of actors or transactions is placed above the cognizance of the law, absolved from the commands of justice." *Id.* at 287.

[90] *Briscoe*, 460 U.S. at 354 (Marshall, J., dissenting).

[91] *Id.* (Marshall, J., dissenting). The majority in *Briscoe* argued, however, that the *White* Court's discussion of privileged statements in judicial proceedings was only dictum, and that the *White* decision, therefore, could not be considered authoritative. *Id.* at 332 n.12.

After examining the language and purpose of section 1983 as well as the events leading up to its enactment,[92] Justice Marshall further concluded that, even if witness immunity had been a settled proposition in 1871, Congress intended to abrogate the doctrine in actions under section 1983 regarding participants in judicial proceedings.[93] Specifically, Justice Marshall noted that the members of the Forty-Second Congress did not include in section 1983 any immunities from the statute's provisions.[94] In addition, Justice Marshall pointed out that Congress explicitly stated that section 1983 should be read to further its broad remedial goals.[95] By enacting section 1983, Justice Marshall stated, Congress intended to provide a remedy for victims of constitutional violations committed by governmental officials.[96] To promote the policy of remedying all constitutional violations, Justice Marshall asserted, Congress drafted the statute without exceptions to reach all persons acting under color of state law.[97] Justice Marshall concluded, therefore, that granting absolute immunity to police officer witnesses not only conflicted with the language of section 1983 but directly contradicted the purpose for which the statute was enacted.[98]

Having concluded that legislative intent did not support the majority's position, Justice Marshall then addressed the policy considerations justifying common law witness immunity.[99] Justice Marshall maintained that those policies did not apply in an action brought under section 1983 against police officers who testify in criminal proceedings.[100] The common law extended absolute immunity to private witnesses, Justice Marshall reasoned, to prevent them from being intimidated by the threat of potential liability because of their testimony.[101] Police officials who testify within the scope of their duties, argued Justice Marshall, are less intimidated by the threat of liability under section 1983 than are private citizens.[102] According to Justice Marshall, a police officer who is normally represented by government counsel and indemnified by the state for conduct within the scope of his or her duties would be less likely to withhold incriminating testimony for fear of civil liability.[103] Further, Justice Marshall reasoned that, because the authoritative position occupied by a police officer lends his or her testimony greater credibility, the harm caused by intentional abuse of that authority is far greater.[104] Justice Marshall also

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[92] *Id.* at 347-50, 356-64 (Marshall, J., dissenting). Justice Marshall extensively examined the legislative history of sections 1 and 2 of the Ku Klux Klan Act and the Civil Rights Act of 1866. *Id.* at 356-64 (Marshall, J., dissenting). Concluding that Congress could have intended to make state legislators immune from civil liability under section 1 of the Act, *id.* at 364, Justice Marshall asserted that no similar evidence existed to support an immunity for police officer witnesses. *Id.* (Marshall, J., dissenting).

[93] *Id.* at 363 (Marshall, J., dissenting).

[94] *Id.* at 347 (Marshall, J., dissenting).

[95] *Id.* at 348-49 (Marshall, J., dissenting). Justice Marshall quoted Rep. Shellabarger, the sponsor of the 1871 Act, as saying, "the largest latitude consistent with the words employed is uniformly given in construing such statutes. . . ." CONG. GLOBE, 42nd Cong., 1st Sess. App. 68 (1871). *Briscoe*, 460 U.S. at 349 (Marshall, J., dissenting).

[96] *Id.* at 348 (Marshall, J., dissenting).

[97] *Id.* at 350 (Marshall, J., dissenting).

[98] *Id.* at 364 (Marshall, J., dissenting).

[99] *Id.* at 364-68 (Marshall, J., dissenting).

[100] *Id.* at 364 (Marshall, J., dissenting).

[101] *Id.* at 365 (Marshall, J., dissenting).

[102] *Id.* at 366 (Marshall, J., dissenting).

[103] *Id.* (Marshall, J., dissenting) (citing Monell v. Department of Social Services, 436 U.S. 658, 713 (1978) (Powell, J., concurring)).

[104] *Id.* (Marshall, J., dissenting).

asserted that prosecutors have exhibited extreme reluctance in the past to charge police officials with criminal perjury.[105] The potential for a criminal conviction which acts as a constraint on the average witness' testimony, Justice Marshall concluded, is therefore virtually non-existent when the witness is also a police officer.[106]

Finally, Justice Marshall distinguished the Court's earlier decisions which had upheld absolute immunity for certain government officials on the ground that the policy considerations supporting absolute immunity for judges and prosecutors were far more powerful than considerations supporting absolute immunity for police officer witnesses.[107] According to Justice Marshall, judges and prosecutors must exercise a substantial amount of discretion in performing their official functions, while witnesses sworn to tell the truth do not.[108] Consequently, Justice Marshall concluded that the policy considerations supporting absolute witness immunity under common law do not apply to police officer witnesses subject to an action under section 1983.[109]

Justices Brennan and Blackmun wrote separate dissenting opinions. Justice Brennan disagreed with that portion of Justice Marshall's opinion which stated that Congress, in enacting section 1983, did not intend to create any absolute immunity from civil liability for governmental officials.[110] This issue, Justice Brennan maintained, had been decided by the Court in *Pierson v. Ray*[111] and *Imbler v. Pachtman*.[112] Justice Brennan agreed, however, with Justice Marshall's position that the extension of absolute immunity to police officer witnesses did not conform to the policies supporting both section 1983 and common law witness immunity.[113]

Justice Blackmun criticized the methodology by which Justice Marshall had analyzed the question of immunity prior to the enactment of section 1983 in 1871.[114] The intent of Congress in enacting section 1983 should be determined, Justice Blackmun maintained, by considering whether absolute immunity was well-established in the common law in 1871 and whether the policies supporting absolute immunity are in accord with the

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[105] *Id.* at 365 (Marshall, J., dissenting) (citing Nugent v. Sheppard, 318 F. Supp. 314, 317 (N.D. Ind. 1970)).

[106] *Id.* (Marshall, J., dissenting) (citing Newman, *Suing the Law Breakers*, 87 YALE L.J. 447, 449-50 (1977) [hereinafter cited as Newman]).

[107] *Id.* at 364 n.32 (Marshall, J., dissenting).

[108] *Id.* (Marshall, J., dissenting). Justice Marshall asserted, however, that the legislative history of section 1983 cast doubt on the correctness of the *Pierson* and *Imbler* decisions. *Id.* Justice Marshall concluded that it may have been appropriate to import common law immunities into the statute if, in enacting section 1983, Congress had merely sought to federalize the law. Justice Marshall argued, however, that section 1983 was enacted to remedy deprivations of federally guaranteed rights and, therefore, different policy considerations applied. *Id.*

[109] *Id.* at 347 (Marshall, J., dissenting). Justice Marshall contended that the majority erroneously concluded that "immunity analysis rests on functional categories, not on the status of the defendant." *Id.* at 366 n.39 (quoting the majority opinion, *id.* at 342). Justice Marshall asserted that, although individuals within the government should be treated equally based on the functions they perform, this principle did not mean that witnesses within the government should be treated the same as private witnesses. *Id.* at 367 n.39 (Marshall, J., dissenting).

[110] *Id.* at 346 (Brennan, J., dissenting).

[111] 386 U.S. 547 (1967). *See infra* notes 150-80 and accompanying text.

[112] 424 U.S. 409 (1976). *See infra* notes 181-97 and accompanying text. Justice Brennan indicated, however, that he did not agree with the *Pierson* and *Imbler* decisions. 460 U.S. at 346 (Brennan, J., dissenting).

[113] *Id.* (Brennan, J., dissenting).

[114] *Id.* at 369 (Blackmun, J., dissenting).

overall purpose of section 1983.[115] Nevertheless, Justice Blackmun concurred in the result which Justice Marshall reached, and asserted that the majority had failed to establish sufficient basis for its decision in the language of section 1983, the history of the common law, or relevant policy considerations.[116]

Thus, the dissenting Justices in *Briscoe* asserted that neither the legislative intent underlying section 1983, nor the policy considerations justifying absolute immunity for private witnesses at common law, supported granting absolute immunity from section 1983 liability to police officer witnesses.[117] Conversely, the majority in *Briscoe* maintained that Congress intended to include traditional common law witness immunities in actions brought under section 1983.[118] In addition, the Court in *Briscoe* noted that, in cases before *Briscoe* it had granted absolute immunity to certain categories of government officials, and asserted that the policy considerations underlying those previous decisions supported granting absolute immunity from section 1983 liability to police officer witnesses as well.[119]

This casenote will examine those decisions relied upon by the *Briscoe* majority in which the Court had granted absolute immunity under section 1983 to certain government officials.[120] In addition, the article will consider the reasoning employed by the Court in those cases to support extending the doctrine of absolute immunity.[121] Finally, the casenote will address a series of different decisions rendered before *Briscoe* in which the Court granted only a qualified, good-faith immunity to certain other government officials.[122]

II. Absolute Immunity Under Section 1983: An Historical Perspective

Section 1983 was enacted as section 1 of the Civil Rights Act of 1871[123] and created the primary private remedy for deprivation of federal constitutional rights by state or local officials.[124] Congress initially enacted section 1983 as part of a legislative package designed to combat racial discrimination in the South.[125] The Act reaches further than equal protection violations, however, and includes all rights which spring from the Constitution and federal law.[126]

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[115] *Id.* (Blackmun, J., dissenting). Justice Blackmun asserted that the determination does not rest on statutory construction because the Court can assume that "members of the 42nd Congress were familiar with common law principles." *Id.* (citing Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-59 (1981)).

[116] *Id.* (Blackmun, J., dissenting).

[117] *Id.* at 346-47 (Marshall, J., dissenting); *id.* at 346 (Brennan, J., dissenting); *id.* at 369 (Blackmun, J., dissenting).

[118] *Id.* at 341.

[119] *Id.* at 335-36.

[120] *See infra* notes 132-97 and accompanying text.

[121] *Id.*

[122] *See infra* notes 207-33 and accompanying text.

[123] Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1982)).

[124] The statute provides a federal cause of action for damages and equitable relief against any person who, acting under color of state law, causes a deprivation of rights secured by the Constitution of the United States. *See supra* note 2.

[125] *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 171-86 (1961) (extensive discussion of section 1983's legislative history and purpose). *See also Developments in the Law — Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1137-56 (1977) (background of section 1983) [hereinafter cited as *Developments*].

[126] *See* Maine v. Thiboutot, 448 U.S. 1, 4-5 (1980). The following cases, while only a partial

Although the statutory language of section 1983 excepts no person from its reach,[127] the United States Supreme Court has held that the draftsmen of the Act intended to incorporate into the statute certain common law immunities "well grounded in history and reason."[128] In three decisions prior to *Briscoe*, the Court extended absolute immunity from civil liability under section 1983 to legislators,[129] judges,[130] and prosecutors.[131] This section will discuss the rationale used by the Court in each of these three decisions to justify extending absolute immunity to certain groups of governmental officials.

A. Tenney v. Brandhove: *Legislative Immunity*

In *Tenney v. Brandhove*,[132] the Supreme Court for the first time faced the issue of whether common law immunities should be extended to section 1983 actions.[133] Specifically, the Court in *Tenney* considered whether a plaintiff may recover damages under section 1983 against a state legislator acting within the scope of his or her official duties.[134] In an eight to one decision,[135] the Court held that a legislator is absolutely immune from liability under section 1983 for actions committed within the sphere of legitimate legislative activity.[136]

The plaintiff in *Tenney*, William Patrick Brandhove, was summoned as a witness before the Fact-Finding Committee on Un-American Activities of the California Senate to answer charges that his statements in a petition to the legislature and his previous

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listing, demonstrate the breadth of the spectrum of constitutional rights protected by section 1983: Monroe v. Pape, 365 U.S. 167, 168-72 (1961) (freedom from unlawful search); Hague v. CIO, 307 U.S. 496, 510-14 (1939) (freedom from cruel and unusual punishment); Lankford v. Gelston, 364 F.2d 197, 201-04 (4th Cir. 1966) (freedom from unwarranted mass searches); York v. Story, 324 F.2d 450, 453-56 (9th Cir. 1963) (right to privacy); Brazier v. Cherry, 293 F.2d 401, 404-06 (5th Cir. 1961) (freedom from police brutality). Section 1983 will not, however, support a cause of action to redress a violation of a federal statute by state officials where the statute does not create enforceable rights under section 1983 or where Congress intended to foreclose enforcement of the statute through section 1983. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981).

[127] *See supra* note 2. Rep. Shellabarger, the author and manager of the bill in the House, stated:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. . . . The largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

CONG. GLOBE, 42nd Cong., 1st Sess. App. 68 (1871) (quoted in Briscoe v. LaHue, 460 U.S. at 348-49 (Marshall, J., dissenting)).

[128] Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

[129] *Id.* at 372. *See infra* notes 132-49 and accompanying text.

[130] Pierson v. Ray, 386 U.S. 547, 553-54 (1967). *See infra* notes 150-80 and accompanying text.

[131] Imbler v. Pachtman, 424 U.S. 409, 424-27 (1976). *See infra* notes 181-97 and accompanying text.

[132] 341 U.S. 367 (1951).

[133] *Id.* at 372.

[134] *Id.* at 376.

[135] Justice Frankfurter wrote the majority opinion in which six Justices joined. *Id.* at 369. Justice Black wrote a separate concurring opinion, emphasizing that the Court's opinion did not hold that the validity of legislative action is co-extensive with the personal immunity of the legislator. *Id.* at 379 (Black, J., concurring). Justice Douglas wrote the sole dissenting opinion. *Id.* at 381 (Douglas, J., dissenting).

[136] *Id.* at 376.

testimony before the Committee were contradictory.[137] On the advice of counsel, Brandhove refused to give any testimony and was prosecuted for contempt.[138] The Chairman of the Committee read into the record a statement which related Brandhove's alleged criminal record and which attempted to demonstrate the falsity of the statements made by Brandhove in his petition to the legislature.[139] Brandhove commenced an action under section 1983 against the Committee and various other parties alleging deprivation of his constitutional rights.[140]

To support its holding, the *Tenney* Court relied on the well-established common law privilege of legislators to be free from civil liability for statements made, or actions committed, in the scope of their legislative duties.[141] The Court noted that the nation's founders considered freedom of speech and action in the Legislature so essential that the United States Constitution expressly provides that members of Congress "shall not be questioned . . . for any speech or debate in either House."[142] Examining the policies underlying common law legislative immunity, the Court extended absolute immunity to include state legislators as well.[143] The Court emphasized the necessity for legislative immunity in enabling the legislators to discharge their duties effectively without fear of incurring liability.[144] Accordingly, the *Tenney* Court decided that those representatives who execute their official duties without fear of civil prosecution can best serve the nation's voters.[145]

After considering the general language of section 1983, the Court in *Tenney* further concluded that Congress did not intend to abrogate the traditional common law immunity afforded to legislators.[146] Maintaining that Congress itself was "a staunch advocate of legislative freedom,"[147] the Court asserted that if Congress intended to abolish common law legislative immunity under section 1983, it would have stated that intent with specificity.[148] Consequently, the *Tenney* Court concluded that the common law legislative immunity applied with equal force in actions brought under section 1983.[149]

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[137] Brandhove v. Tenney, 183 F.2d 121, 122 (9th Cir. 1950), *aff'd*, 341 U.S. 367 (1951).

[138] *Id.* at 122-23.

[139] *Id.* at 123.

[140] Tenney v. Brandhove, 341 U.S. 367, 369 (1951).

[141] *Id.* at 372-75. The Court noted that in 1689 the Bill of Rights declared "that the Freedom of Speech, and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament." *Id.* at 372 (quoting 1 W. & M. Sess. 2, c. II).

[142] *Tenney*, 341 U.S. at 372-73 (citing U.S. CONST. art. I, § 6).

[143] *Tenney*, 341 U.S. at 372-75. Among the arguments that have been advanced in support of legislative immunity are: (1) the danger of influencing public officials by the threat of a suit; (2) the deterrent effect of potential liability on individuals who are considering entering public life; (3) the drain on the valuable time of the official caused by insubstantial suits; (4) the unfairness of subjecting officials to liability for the acts of their subordinates; (5) the theory that the official owes a duty to the public and not to the individual; and, (6) the feeling that the ballot and the formal removal proceeding are more appropriate ways to assure the honesty and efficiency of public officers. Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 271-72 (1937).

[144] *Tenney*, 341 U.S. at 373-74. The Court noted further that many of the states, in revising their constitutions, took care to preserve the principle that the legislature must be free to speak and act without fear of liability. *Id.* The Court stated that 41 of the 48 states existing in 1951 had specifically provided in their constitutions for the protection of the legislative privilege. *Id.* at 375 & n.5.

[145] *Id.* at 374.

[146] *Id.* at 376.

[147] *Id.*

[148] *Id.*

[149] *Id.* The Court then considered whether from the pleadings it appeared that the defendants

B. Pierson v. Ray: *Judicial Immunity*

Following the *Tenney* rationale, the Court granted absolute immunity from section 1983 liability to other governmental officials. The Court first extended the *Tenney* rationale to grant absolute immunity from section 1983 liability to state court judges in *Pierson v. Ray*.[150] In *Pierson*, the Court considered whether a local judge could be held liable for damages under section 1983 as a result of a conviction subsequently held unconstitutional.[151] The Court also considered whether police officers could assert the defenses of good faith and probable cause in an action under section 1983 for unconstitutional arrest.[152] In an opinion written by Chief Justice Warren, the Court held, first, that the judge was immune from liability under section 1983 for acts committed within his judicial jurisdiction,[153] and second, that the defenses of good faith and probable cause were available to the police officers in an action brought under section 1983.[154]

In *Pierson*, municipal police officers arrested the black plaintiffs for using segregated facilities, to which they were denied access by law, at an interstate bus terminal in Jackson, Mississippi.[155] A municipal police justice convicted the plaintiffs on charges of having violated the Mississippi breach-of-peace statute,[156] and sentenced each plaintiff to the maximum jail term.[157] On appeal, the County Court acquitted one of the plaintiffs and dropped the charges against the other plaintiffs.[158] The plaintiffs subsequently brought an action against the judge and the arresting officers based on the common law action of false arrest and under section 1983.[159] In reviewing the lower court decisions, the Supreme Court held that the privilege of absolute immunity protected the judge under both common law and section 1983 for acts committed within his official capacity.[160] The Court

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were acting within the sphere of legitimate legislative activity. *Id.* The Court concluded that investigative activities are as much a part of representative government as any other legislative function. *Id.* at 377.

In a dissenting opinion, Justice Douglas maintained that, while appropriate in some situations, legislative immunity did not apply to the abuses of legislative power charged in *Tenney*. *Id.* at 381-82. Noting that the Committee had deprived Brandhove of his constitutional right of free speech, *id.* at 382, Justice Douglas asserted that legislative immunity should apply only to those legislative functions concerning speech and debate. *Id.* Justice Douglas contended that when, however, the legislature "perverts its power . . . for an illegal or corrupt purpose," the rationale supporting absolute immunity no longer applies. *Id.* at 383.

[150] 386 U.S. 547 (1967). The absolute immunity granted in *Pierson* applies only to state court judges because section 1983 applies only to state or local officials, not to federal officials.

[151] *Id.* at 551.

[152] *Id.* at 551-52.

[153] *Id.* at 553.

[154] *Id.* at 557.

[155] Pierson v. Ray, 352 F.2d 213, 215-16 (5th Cir. 1965), *aff'd in part and rev'd in part*, 386 U.S. 547 (1967).

[156] *Id.* at 216.

[157] *Id.*

[158] *Id.*

[159] Pierson v. Ray, 386 U.S. 547, 550 (1967).

[160] *Id.* at 558. A jury returned a verdict for the defendants in the district court case on both counts. *Id.* at 550. Subsequently, the plaintiffs appealed the lower court decision to the United States Court of Appeals for the Fifth Circuit. The court of appeals held that the defendant-judge was immune from liability under both section 1983 and the common law of Mississippi for acts committed within his judicial jurisdiction. *Id.* Concerning the defendant-police officers, the court of appeals held that the officers would be liable under section 1983 for an unconstitutional arrest even if they acted in good faith and with probable cause in making an arrest under an invalid state statute. *Id.*

then remanded the case to the district court for a trial to determine whether the police officers had acted in good faith and with probable cause.[161]

As justification for its holding that judges are absolutely immune from civil liability, the *Pierson* Court cited its decision in *Bradley v. Fisher*.[162] In *Bradley*, the Supreme Court had held that the common law recognized the immunity of judges from liability for damages, and that the immunity applied even in suits alleging malicious or corrupt judicial actions.[163] The Court in *Pierson* reiterated the policy considerations underlying the *Bradley* decision, emphasizing the strong public interest in granting judges total independence to exercise their judicial discretion without fear of the consequences.[164] Observing that erroneous decisions should be corrected by appellate review,[165] the Court stated that to subject a judge to the threat of potential civil liability could so inhibit his or her decisionmaking capabilities as to render the judicial process inoperable.[166]

After discussing the policies underlying common law judicial immunity, the Court then considered whether the common law immunity applied under section 1983.[167] The Court held that the common law doctrine of absolute judicial immunity was not abrogated by section 1983.[168] Analyzing the legislative history of the statute,[169] the Court concluded that Congress did not intend to abolish "wholesale" all common law immunities,[170] as evidenced by the Court's decision in *Tenney v. Brandhove*.[171] The *Pierson* Court concluded that the policy justifications underlying the decision to extend absolute immunity from suit under section 1983 to legislators applied with equal force to judges.[172]

After deciding that the judges were absolutely immune from section 1983 liability, the Court turned next to the claim against the defendant police officers.[173] In determining the liability of the police officers, the Court looked first to the common law,[174] noting that at common law a police officer never was granted absolute immunity from liability but

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[161] *Id.* at 557-58.

[162] 80 U.S. (13 Wall.) 335 (1872). The date of the *Bradley* decision is sometimes stated to be 1871, apparently because the decision was rendered during the December, 1871 term of the Supreme Court. Note, *supra* note 3, at 323 n.7.

[163] *Id.* at 349.

[164] *Pierson*, 386 U.S. at 554. The *Pierson* Court asserted, it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Id.* at 554 (quoting Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868)).

[165] *Pierson*, 386 U.S. at 554.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id. But see id.* at 561-62 (Douglas, J., dissenting). Justice Douglas maintained that "the position that Congress did not intend to change the common law rule of judicial immunity ignores the fact that every member of Congress who spoke to the issue assumed that the words of the statute meant what they said. . . ." *Id.*

[171] 341 U.S. 367 (1951). *See supra* notes 132-49 and accompanying text. *See also* Note, *supra* note 3, at 326-29. The Note casts considerable doubt on the *Pierson* Court's basic assumption that judicial immunity was as well established in 1871 as legislative immunity. *Id.*

[172] *Pierson*, 386 U.S. at 554-55. The *Pierson* holding does not foreclose section 1983 actions for injunctive relief against state judges. *See* Koen v. Long, 302 F. Supp. 1383, 1389 (E.D. Mo. 1969) (city judges not immune from injunctive relief under section 1983). In a dissenting opinion, Justice Douglas contended that a judge should not be immune from liability because the term "every person" failed to except judges specifically. *Pierson*, 386 U.S. at 561-62.

[173] *Pierson*, 386 U.S. at 555.

[174] *Id.*

rather was accorded a qualified immunity for actions committed in good faith and with probable cause.[175] According to the Court, the good faith standard protected a police officer who arrested with probable cause even if the suspect's innocence was subsequently proven.[176] Concluding that the common law rationale applied as well to the situation presented in *Pierson*,[177] the Court held that a police officer who acted pursuant to a statute which he or she reasonably believed to be valid, but which subsequently was held to be unconstitutional, was immune from liability under section 1983.[178] Under this rationale, the Court maintained, the police officers could assert the defenses of good faith and probable cause to avoid liability under the statute.[179] Thus, the *Pierson* Court applied only a qualified immunity from section 1983 liability to police officers acting within the scope of their official duties.[180]

C. Imbler v. Pachtman: *Prosecutorial Immunity*

The Supreme Court significantly extended the coverage of the doctrine of absolute immunity under section 1983 first recognized in *Tenney v. Brandhove* in *Imbler v. Pachtman*.[181] In *Imbler*, the Court considered whether a plaintiff may maintain a section 1983 action against a state prosecuting attorney.[182] In a unanimous decision,[183] the Court held that a state prosecutor, acting within the scope of his duties in initiating and pursuing a criminal prosecution, was absolutely immune from civil liability under section 1983.[184] Moreover, the Court ruled that such absolute immunity from liability was applicable even where the prosecutor knowingly used perjured testimony or deliberately withheld exculpatory information.[185]

Following his conviction on a first-degree felony murder charge,[186] the plaintiff in *Imbler* obtained his release from a state prison through a federal habeas corpus proceeding.[187] Imbler then commenced an action against the prosecutor at Imbler's criminal trial,

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[175] *Id.* The court cited Ward v. Fidelity & Deposit Co., 179 F.2d 327, 331 (8th Cir. 1950) (action for false arrest).

[176] *Pierson*, 386 U.S. at 556-57.

[177] *Id.* at 557.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] 424 U.S. 409 (1976). For a discussion of *Tenney*, *see supra* notes 132-49 and accompanying text.

[182] *Id.* at 410.

[183] Justice Powell wrote the majority opinion expressing the view of five members of the Court. *Id.* at 410. Justice White wrote a separate opinion joined by Justices Brennan and Marshall, concurring in the judgment but expressing the view that prosecutorial immunity should not extend to suits charging unconstitutional suppression of evidence. *Id.* at 432. Justice Stevens did not participate in the decision of the case. *Id.*

[184] *Id.* at 431. The Court left open the possibility that the prosecutor might enjoy only a qualified immunity in his investigative or administrative capacity. *Id.* at 430-31. *Cf.* Brawer v. Horowitz, 535 F.2d 830, 834 (3d Cir. 1976) (federal prosecutor absolutely immune from liability in *Bivens*-type action) (*Brawer* involved an action against federal officials for constitutional violations; it is closely analogous, however, to an action under section 1983 against state officials.)

[185] *Id.* at 428.

[186] Imbler v. Pachtman, 500 F.2d 1301, 1302 (9th Cir. 1974). On appeal, the Supreme Court of California unanimously affirmed the lower court decision. People v. Imbler, 57 Cal.2d 711, 21 Cal. Rptr. 568, 371 P.2d 304 (1962).

[187] *Imbler*, 500 F.2d at 1302. Imbler had filed a writ in the Supreme Court of California in 1963 which was denied. *In re* Imbler, 60 Cal.2d 554, 35 Cal. Rptr. 375, 387 P.2d 6 (1963). Subsequently, in

and certain other government officials, seeking to recover damages under section 1983.[188] Imbler specifically alleged that the prosecutor, Pachtman, had knowingly or negligently used false evidence and had suppressed material evidence during Imbler's criminal trial.[189]

In its decision in *Imbler*, the Supreme Court refined its approach to the question of extending common law immunities to section 1983 actions.[190] Articulating a two-tiered analysis, the Court stated that a court first should identify the common law immunity, and then balance the interests served by that immunity against the plaintiff's interest in a civil remedy.[191] Concluding that the common law incorporated the doctrine of prosecutorial immunity, the Court identified preventing the harrassment of prosecutors by spurious litigation as the underlying policy of the immunity.[192] The Court maintained that a prosecutor might be impeded in his or her duties by the threat of liability resulting from the exercise of his or her independent judgment.[193] Moreover, the Court stated that, as suits against prosecutors could be expected with some frequency, a prosecutor's energies and attentions could be diverted from important public duties.[194] Further, for the criminal justice system to function properly, the Court asserted, the prosecution must possess unfettered discretion in conducting a trial.[195] Consequently, the Court concluded that to subject prosecutors to potential liability under section 1983 would jeopardize the fundamental basis of the criminal justice system.[196] Finally, the Court noted that a prosecutor always could be punished criminally for willful deprivations of constitutional rights.[197]

1968, Imbler filed a second habeas corpus petition in federal district court based on the same contentions previously urged upon and rejected by the Supreme Court of California. Imbler v. Craven, 298 F. Supp. 795 (C.D. Cal. 1969). Specifically, Imbler charged that the prosecution had knowingly used false testimony and suppressed material evidence in the trial in which Imbler was found guilty of first-degree felony murder. *Id.* at 797-99. The district court found eight instances of state misconduct at Imbler's trial and issued the writ. *Id.* at 799-812. Claiming that the district court had failed to give appropriate deference to the factual determinations of the Supreme Court of California as required under 28 U.S.C. § 2254(d), the state appealed to the United States Court of Appeals for the Ninth Circuit. Imbler v. California, 424 F.2d 631 (9th Cir. 1970), *cert. denied*, 400 U.S. 865 (1970). The court of appeals affirmed, finding that the district court had merely "reached different conclusions than the state court in applying federal constitutional standards to the facts." 424 F.2d at 632. The state chose not to retry Imbler, and he was released. *Imbler*, 424 U.S. at 415.

[188] *Imbler*, 500 F.2d at 1302. Imbler demanded actual and punitive damages from each defendant as well as attorney's fees. *Imbler*, 424 U.S. at 416.

[189] *Imbler*, 500 F.2d at 1302.

[190] *Id.*

[191] *Id.*

[192] *Id.* at 424-25.

[193] *Id.*

[194] *Id.* at 425.

[195] *Id.* at 426-27.

[196] *Id.* at 427.

[197] *Id.* The Court in *Imbler* stated that a prosecutor could be punished criminally for willful deprivations of constitutional rights under 18 U.S.C. § 242, the criminal counterpart of section 1983. *Id.* Section 242 reads as follows:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more

D. *Absolute Witness Immunity Under Section 1983*

Although the issue had not been addressed specifically by the Supreme Court before *Briscoe*, several of the Court's comments in recent decisions have indicated that a majority of the Court favored absolute immunity for witnesses under section 1983.[198] Dicta in *Butz v. Economou*,[199] a section 1983 action against officials in the Department of Agriculture, for example, stressed the necessity of absolute immunity for witnesses to protect participants in trials from retaliatory litigation.[200] Similarly, in a concurring opinion in *Imbler*,[201] Justice White stated that witnesses must be free from the threat of liability to ensure full disclosure of evidence.[202] With the *Tenney*,[203] *Pierson*,[204] and *Imbler*[205] decisions, moreover, the Court demonstrated its willingness to extend absolute immunity to actions under section 1983 where the discretionary nature of an official's conduct requires a high level of protection.[206]

E. *Qualified Immunity Under Section 1983*

While the Supreme Court has granted absolute immunity in section 1983 actions to three categories of government officials,[207] the Court has based several other decisions in cases decided before *Briscoe* on the theory of qualified immunity.[208] In each of these cases,

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than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.'

18 U.S.C. § 242 (1982). *See* Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299, 309-10 (1940) (discussing evolution of section 242).

[198] In *Briscoe*, the court of appeals determined that these Supreme Court comments were dispositive on the issue of immunity, and accordingly, based its conclusion that police officer witnesses were absolutely immune from liability under section 1983 on the weight of those statements. Briscoe v. LaHue, 663 F.2d 713, 720 (7th Cir. 1981). *See supra* note 27.

[199] 438 U.S. 478 (1978). In *Butz*, officials in the United States Department of Agriculture (the "Department") instituted proceedings against the respondent to revoke or suspend his commission to sell commodities futures. Economou v. U.S. Dept. of Agriculture, 535 F.2d 688, 689 (2d Cir. 1976). The respondent sued under section 1983 for deprivation of his constitutional rights, alleging that the action was in retaliation for his criticism of the Department. *Id.* at 690. The Court held that executive officials exercising discretion in their duties are generally entitled to only the qualified immunity outlined in Scheuer v. Rhodes, 416 U.S. 232, 241-49 (1974). Butz v. Economou, 438 U.S. at 507.

[200] *Id.* at 512. The Court stated that, "absolute immunity is thus necessary to assure that judges, advocates and *witnesses* can perform their respective functions without harrassment or intimidation." *Id.* (emphasis added).

[201] *Imbler*, 424 U.S. at 432 (White, J., concurring).

[202] *Id.* at 439.

[203] 341 U.S. 367, 372 (1951). *See supra* notes 132-49 and accompanying text.

[204] 386 U.S. 547, 553-54 (1967). *See supra* notes 150-80 and accompanying text.

[205] 424 U.S. 409, 424 (1976). *See supra* notes 181-97 and accompanying text.

[206] Moreover, the majority of courts of appeals, in decisions prior to *Briscoe*, also demonstrated their willingness to adopt absolute witness immunity. *See, e.g.*, Charles v. Wade, 665 F.2d 661, 666-67 (5th Cir. 1982) (police officer witness; section 1983 action); Myers v. Bull, 599 F.2d 863, 866 (8th Cir. 1979) (per curiam) (police officer witness; section 1983 action); Burke v. Miller, 580 F.2d 108, 109 (4th Cir. 1978) (state medical examiner witness; section 1983 action); Blevins v. Ford, 572 F.2d 1336, 1339 (9th Cir. 1978) (private witnesses and former assistant U.S. attorney; action under section 1983 and the fifth amendment); Brawer v. Horowitz, 535 F.2d 830, 836-37 (3d Cir. 1976) (lay witness in federal court; *Bivens* action). *But see* Briggs v. Goodwin, 569 F.2d 10, 27-28 (D.C. Cir. 1977) (dicta rejecting absolute immunity for government official; *Bivens* action).

[207] Tenney v. Brandhove, 341 U.S. 367 (1951) (judicial immunity); Pierson v. Ray, 386 U.S. 547 (1967) (prosecutorial immunity); Imbler v. Pachtman, 424 U.S. 409 (1976) (legislative immunity).

[208] The defense of absolute immunity will completely shield a defendant from liability, even if

the Court has been unwilling to extend absolute immunity where a particular official's need to exercise independent judgment has been tempered by the need to provide a remedy to an allegedly wronged party.[209] Rather, the Court has extended only a qualified immunity from liability for actions committed in good faith.[210]

In *Scheuer v. Rhodes*,[211] for example, the Court considered whether absolute immunity shielded certain state government officials from liability under section 1983.[212] The Court held in a unanimous decision[213] that the defendants enjoyed a qualified, not absolute, immunity from section 1983 liability.[214] Further, the Court stated that the degree of the immunity varied depending upon the scope of discretion exercised by the official in question.[215]

In *Scheuer*, representatives of the estates of students killed on the campus of Kent State University brought actions under section 1983, alleging violation of the decedents' constitutional rights.[216] The Supreme Court ruled that the defendants enjoyed only a qualified immunity from section 1983 liability,[217] and remanded the actions to determine whether the defendants had acted in good faith.[218]

In determining the liability of the defendant officials, the Court looked first to the policies and purposes of section 1983,[219] and then examined the functions and responsibilities of the defendants in their capacities as officers of the state government.[220] The Court noted that Congress enacted section 1983 to provide a civil remedy for violation of

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the court determines that the defendant's actions were unconstitutional or blameworthy or both. *See* Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976); Pierson v. Ray, 386 U.S. 547, 554 (1967). A qualified immunity, however, permits a defendant to avoid liability only when his actions, albeit unconstitutional, are not blameworthy. Gildin, *The Standard of Culpability in Section 1983 and Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 560 (1983). If a defendant is defending under a claim of qualified immunity, therefore, he must, in the majority of jurisdictions, demonstrate that his actions were not grossly negligent or performed with an intent to violate the plaintiff's constitutional rights. *See, e.g.*, Skehan v. Board of Trustees, 538 F.2d 53, 61 (3d Cir. 1976), *cert. denied*, 429 U.S. 979 (1976); Navarette v. Economou, 536 F.2d 277, 280 (9th Cir. 1976) (cases where burden placed on defendant). In a few jurisdictions, however, the plaintiff retains the burden of proving that the defendant acted with gross negligence, recklessness or intent. *See, e.g.*, Bonner v. Coughlin, 545 F.2d 565, 567 (7th Cir. 1976).

[209] Rather than focusing exclusively on protecting public officials from undue burdens, the Court in each of these cases emphasized the overriding concern of preserving an individual's constitutional rights. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 248 (1974).

[210] *Id.*

[211] 416 U.S. 232 (1974).

[212] *Id.* at 234. The Court also considered whether the actions were brought against the State of Ohio and hence barred by the eleventh amendment to the Constitution. *Id.*

[213] *Id.* at 233. Chief Justice Burger delivered the opinion of eight members of the Court; Justice Douglas did not participate in the decision.

[214] *Id.* at 247. The Court also determined that the plaintiffs' claims, as stated in the complaints, were not barred by the eleventh amendment, and that, consequently, the district court erred in dismissing the complaints for lack of jurisdiction. *Id.* at 238.

[215] *Id.* at 247.

[216] Krause v. Rhodes, 471 F.2d 430, 433 (6th Cir. 1972). Specifically, the plaintiffs brought the action against the Governor of Ohio, the Adjutant General and his assistant, various other named and unnamed officials and enlisted members of the Ohio National Guard and the President of Kent State University. *Id.*

[217] Scheuer v. Rhodes, 416 U.S. 232, 250 (1974).

[218] *Id.*

[219] *Id.* at 243.

[220] *Id.*

constitutional rights, and that the statute necessarily included within its scope violations caused by abuses of official power.[221] The Court determined, therefore, that government officials, as a class, could not be exempted from section 1983 liability by virtue of a blanket immunity because such an immunity would defeat the purpose of the statute.[222] Although certain highly discretionary duties, such as those performed by legislators and judges, required absolute immunity protection,[223] the Court decided other duties required only a qualified immunity.[224] Further, the Court held that the scope of the immunity should be determined by examining the level of independent judgment exercised by a particular official in performing those duties.[225]

In examining the duties performed by the defendants, the *Scheuer* Court determined that officials in the executive branch of government perform a broad range of duties and often must act swiftly and firmly because any deferral of action could constitute dereliction of duty.[226] While recognizing the broad discretion which executive officials possess, however, the Court concluded that a qualified immunity, while providing a means of redress for deprivation of rights, constituted a sufficient means of limiting the outside influences which might inhibit an executive official in the free exercise of his or her official powers.[227]

In several other decisions where the Court granted only a qualified immunity from section 1983 liability to governmental officials, the Court has applied the rationale of *Scheuer*.[228] The Court has extended only a qualified immunity, for example, to school board members,[229] police officers,[230] prison officials,[231] federal executive officials,[232] and a superintendent of a state mental hospital.[233] The Court has based the decisions in each of these cases on the conclusion that qualified immunity permits an official to exercise independent judgment and at the same time, fosters the purpose of section 1983 — providing a remedy to persons deprived of their federal rights by the malicious abuse of official power.

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[221] *Id.*

[222] *Id.*

[223] *Id.* at 244. The Court distinguished the *Tenney* and *Imbler* decisions on the basis of congressional intent. *Id.*

[224] *Id.* at 245. The Court compared the immunity granted to police officers in *Pierson* to the facts presented in *Scheuer*. *Id.* at 244-45. The Court noted that only a qualified immunity was "available to that segment of the executive branch of a state government that is most frequently and intimately involved in day-to-day contacts with the citizenry and, hence, most frequently exposed to situations which can give rise to claims under § 1983." *Id.* at 244. The Court reasoned that the same standard which applies to the police branch of executive government should apply to the defendant officials in *Scheuer*. *Id.* at 245-46.

[225] *Id.* at 247.

[226] *Id.* at 246-47.

[227] *Id.* at 247. The Court stated:

> Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have "the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government."

Id. at 248 (quoting Sterling v. Constantin, 287 U.S. 378, 397 (1932)).

[228] *See infra* notes 229-33 and accompanying text.

[229] Wood v. Strickland, 420 U.S. 308, 322 (1975).

[230] Pierson v. Ray, 386 U.S. 547, 557 (1967). While the *Pierson* decision was rendered prior to *Scheuer*, the Court applied the same rationale in *Pierson* as it would later articulate in *Scheuer*.

[231] Procunier v. Navarette, 434 U.S. 555, 561 (1978).

[232] Butz v. Economou, 438 U.S. 478, 507 (1978).

[233] O'Connor v. Donaldson, 422 U.S. 563, 577-78 (1975).

III. The *Briscoe* Decision: An Analysis

Because the Court's decisions prior to *Briscoe* had not addressed the specific issue of police officer witness immunity, two alternative rationales could have been employed by the Court in deciding *Briscoe*.[234] First, relying on the *Tenney*, *Pierson*, and *Imbler* decisions, the Court had sufficient precedential support for granting absolute immunity to police officer witnesses, based on the Court's conclusion that police officer witnesses require the same level of protection from liability as legislators, judges, and prosecutors.[235] Alternatively, *Scheuer* and its progeny could have provided the Court in *Briscoe* substantial justification for concluding that police officer witnesses are only entitled to a qualified immunity from liability for testimony offered in good faith.[236]

In evaluating whether certain groups of governmental officials should be absolutely protected from suit under section 1983, the Supreme Court generally has employed the two-step analysis set forth in *Imbler*.[237] Applying this analysis, the Court first seeks to determine the status of the common law immunity relating to the particular governmental official in question.[238] The Court then considers whether the public policies underlying the common law rule justify extending the same immunity to actions brought under section 1983.[239]

The Court in *Briscoe* employed the *Imbler* test to determine whether police officer witnesses should be absolutely immune from section 1983 liability.[240] The Court correctly concluded that, under common law, absolute immunity applied to all witnesses — including police officer witnesses in actions under section 1983.[241] This casenote submits, however, that when the common law rule is viewed in light of present-day policy considerations, the analysis dictates an entirely different result.[242]

This section of the casenote first will examine both the intent of Congress in enacting section 1983 and the policies which supported common law witness immunity.[243] Based on this examination, this casenote will assert that the policy considerations supporting absolute immunity for private witnesses at common law do not apply in the context of a section 1983 action against a police officer witness.[244] Further, this casenote will maintain that both the language of section 1983 and the purpose for which it was enacted suggest that police officer witnesses should not have the added and unneeded shield of absolute immunity.[245] Next, this casenote will examine present-day policy considerations, and will propose that no compelling justification exists for granting police officers greater immunity from liability when they testify at trial than when they engage in any of their other

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[234] *See infra* notes 298-324 and accompanying text (proposal that *Briscoe* Court should have adopted second alternative of qualified immunity).

[235] *See supra* notes 123-206 and accompanying text (discussing background of absolute immunity).

[236] *See supra* notes 207-33 and accompanying text (discussing background of qualified immunity under section 1983).

[237] Imbler v. Pachtman, 424 U.S. 409, 421, 435 (1976). *See supra* notes 181-97 and accompanying text.

[238] *Id.*

[239] *Id.*

[240] Briscoe v. LaHue, 460 U.S. 325, 341 (1983).

[241] *Id.* at 330.

[242] *See infra* notes 248-324 and accompanying text.

[243] *See infra* notes 248-67 and accompanying text.

[244] *Id.*

[245] *Id.*

official actions.[246] For these reasons, this casenote will suggest that police officer witnesses should be granted the same good-faith, qualified immunity from liability under section 1983 as they are afforded for other conduct within the scope of their duties.[247]

A. *Private Witnesses at Common Law Compared with Police Officer Witnesses Under Section 1983*

Contrary to the Court's assertions in *Briscoe*, the policies underlying common law witness immunity do not support absolute immunity from section 1983 liability for police officers who testify in the course of their official duties.[248] At common law, absolute immunity applied to lay witnesses to prevent them from being dissuaded from coming forward with important information or fully and freely testifying at trial because of possible civil liability.[249] In concluding that the policies underlying absolute witness immunity at common law support absolute immunity for police officer witnesses under section 1983,[250] the *Briscoe* Court failed to recognize the significant differences between police officer witnesses and private citizen witnesses.[251]

Police officers daily face the possibility of liability for many of their official acts.[252] As a result, police officers are less likely to be intimidated by the threat of civil liability than private citizens.[253] The likelihood that the fear of subsequent liability might induce self-censorship, therefore, appears less likely with a police officer witness than with a private witness.[254] Police officers, moreover, normally have a duty to testify to facts learned while acting in their official capacity.[255] An official with a professional interest in securing a criminal conviction, therefore, probably would not shade his or her testimony in favor of a defendant to avoid the risk of a civil suit.[256] In addition to having a strong

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[246] *See infra* notes 268-96 and accompanying text.

[247] *See infra* notes 298-324 and accompanying text.

[248] Charles v. Wade, 665 F.2d 661, 669 (5th Cir. 1982) (Kravitch, J., dissenting); Burke v. Miller, 580 F.2d 108, 112 (4th Cir. 1978) (Winter, J., concurring). *See also* Briggs v. Goodwin, 569 F.2d 10, 28 (D.C. Cir. 1977). In *Briggs*, the United States Court of Appeals for the District of Columbia Circuit stated, "[p]olicy considerations counselling the insulation of *private citizens* from civil liability arising from their performance as witnesses do not apply with equal force when a complaint charges that constitutional rights have been violated by a *public employee* operating from the witness stand." *Id.* (emphasis supplied by the court).

[249] Calkins v. Sumner, 13 Wis. 215, 220, 80 Am. Dec. 738 (1860); Barnes v. McCrate, 32 Me. 442, 446-47 (1851); Veeder, *supra* note 58, at 476.

[250] *Briscoe*, 460 U.S. at 345-46.

[251] Charles v. Wade, 665 F.2d 661, 668-69 (5th Cir. 1982) (Kravitch, J., dissenting).

[252] Littlejohn, *Civil Liability and the Police Officer: The Need for New Deterrents to Police Misconduct*, 58 U. DET. J. URB. L. 365 *passim* (1981) (extensive discussion of civil actions against police officers) [hereinafter cited as Littlejohn]. *See* Scheuer v. Rhodes, 416 U.S. 232, 245 (1974) (police officers are "frequently exposed to situations which can give rise to claims under § 1983"); *supra* note 224 (quoting from *Scheuer* decision).

[253] Littlejohn, *supra* note 252, at 366 ("police have developed an amazing resiliency against pressures to control their own abusive behavior").

[254] *Id.* at 426-31 (potential liability has little effect on police conduct).

[255] *Briscoe*, 460 U.S. at 366 (Marshall, J., dissenting).

[256] *Id. Cf.* FED. R. EVID. 803(8)(B) (excluding from evidence at criminal trials matters observed by police officers in course of duties). The Senate Report accompanying the Rule states the reason for the Rule as being that "observations by police officers at the scene of the crime . . . are not as reliable . . . because of the adversarial nature of the confrontation between the police and the defendant in criminal cases." S. REP. No. 1277, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051.

professional incentive to testify, police officers normally are represented by government counsel and indemnified for damages by the state for conduct within the scope of their employment.[257] The officers, therefore, are frequently insulated from any economic hardship associated with civil suits, and, as a result, are less likely to withhold incriminating testimony because of a fear of subsequent liability.[258]

Other differences between police officer witnesses and lay witnesses counsel against cloaking police officer witnesses with absolute immunity from section 1983 liability. For example, because a police officer comes to the witness stand cloaked in the authority of the state,[259] the authoritative position occupied by a police officer lends his or her testimony greater credibility.[260] Any harm caused by the intentional abuse of that authority, therefore, would be far greater than harm caused by a private witness.[261] At the same time, the threat of a criminal perjury prosecution, which serves as an important constraint on the testimony of the average witness, frequently lacks practical deterrent effect for the police officer witness.[262] Prosecutors, who may often feel the need to maintain close working relationships with law enforcement agencies, will be extremely reluctant to charge police officers with perjury based on testimony offered during judicial proceedings.[263]

The Court in *Briscoe* asserted that the reason for granting absolute immunity to lay witnesses — to encourage free and open testimony — applied with equal force to police officer witnesses.[264] The Court failed to appreciate, however, the vast differences between the two types of witnesses.[265] In addition, the Court did not recognize the substantial possibility for abuse stemming from the police officer's official position, which affords a police officer witness greater opportunities than a lay witness to act with malice in depriving an individual of constitutional rights.[266] Thus, by extending absolute immunity

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[257] Although a judgment is enforceable against the individual official, many state and local governments indemnify their employees against such liability. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-465 (West. Supp. 1982) (local officials); MD. ANN. CODE art. 78A, § 16C (Supp. 1982) (state officers); MISS. CODE ANN. § 25-1-47 (1972) (local officials); N.Y. PUB. OFF. LAW § 17 (McKinney Supp. 1982-83) (state officers). *See generally* Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere With the Performance of State and Local Government?*, 13 URB. LAW 1, 19-22 (1981) (discussing various state insurance and indemnification programs).

[258] Justice Marshall, in his dissenting opinion, emphasized that the defendants in *Briscoe* were provided free counsel under IND. CODE ANN. §§ 34-4-16.5-5(b) and 34-4-16.5-18 (Burns Cum. Supp. 1982). *Briscoe*, 460 U.S. at 366 n.38 (Marshall, J., dissenting).

[259] Project, *Suing the Police in Federal Court*, 88 YALE L. REV. 781, 783 (1979) (based on data compiled from 149 section 1983 suits) [hereinafter cited as Project].

[260] *Id.* at 800-02 (concluding substantial bias exists in favor of defendant police officer in section 1983 actions).

[261] *Id.* at 814 and *passim*.

[262] In his dissenting opinion, Justice Marshall described police perjury as prevalent. *Briscoe*, 460 U.S. at 365 (Marshall, J., dissenting). *See* Harris v. United States, 331 U.S. 145, 172 (1947) (Frankfurter, J., dissenting) (criticizing lack of credibility of American policemen); Younger, *Is Constitutional Protection in Search and Seizure Dead?*, 3 TRIAL 41, 41 (1967) ("police perjury is commonplace"); Grano, *A Dilemma for Defense Counsel:* Spinelli-Harris *Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L. F. 405, 409 (1971) (police not adverse to committing perjury).

[263] Newman, *supra* note 106, at 450. *See also* Project, *supra* note 259, at 812-15; Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 787 (1970) (concluding civil suits for police misconduct are rare because of formidable obstacles, especially reluctance of lawyers to bring suit).

[264] *Briscoe*, 460 U.S. at 345-46.

[265] *Id.* at 365 (Marshall, J., dissenting).

[266] *Id.* at 368 (Marshall, J., dissenting).

from section 1983 liability to police officer witnesses, the Court in *Briscoe* foreclosed the potential of a civil sanction in precisely the type of situation where the need is most pressing.[267]

B. *Common Law Witness Immunity Balanced Against Section 1983 Policy Considerations*

In addition to failing to recognize the significant differences between lay witnesses and police officer witnesses, the Court in *Briscoe* failed to appreciate that the policies supporting the extension of absolute immunity to certain categories of government officials did not justify granting absolute immunity to police officer witnesses. Because Congress did not express an intent either to abrogate or incorporate the common law immunities in suits brought under section 1983,[268] the Court has been justified in affording absolute immunity to certain government officials.[269] This extension of absolute immunity to governmental officials negates, however, the very remedy which Congress sought to create under section 1983,[270] and the Court, therefore, has extended absolute immunity only after a convincing showing that public policy supported the grant of immunity.[271]

By applying this test, the Court before *Briscoe* had afforded absolute immunity only to legislators,[272] judges,[273] and prosecutors.[274] The rationale for extending absolute immunity to these government officials was to protect the independence and impartiality of participants in judicial proceedings and the integrity of the judicial system.[275] This section

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[267] Butz v. Economou, 438 U.S. 478, 506 (1978) (in situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees).

[268] Presumably, Rep. Shellabarger, who introduced the bill to the House, would have taken exception to any assertions that the Act was not subject to immunities if those remarks had been at variance with the intent of the drafters of the Act. Rep. Shellabarger made no such statement to the congressmen who made such remarks. Kates, *Immunity of State Judges Under the Federal Civil Rights Acts:* Pierson v. Ray *Reconsidered*, 65 Nw. L. Rev. 615, 622-23 (1970). *See also Developments, supra* note 125, at 1154 & n.112.

[269] The Court has applied common law immunities to actions under section 1983 to legislators, Tenney v. Brandhove, 341 U.S. 367, 376 (1951); judges, Pierson v. Ray, 386 U.S. 547, 553-54 (1967); and prosecutors, Imbler v. Pachtman, 424 U.S. 409, 424-27 (1976). See *supra* notes 132-97 and accompanying text for a full discussion of these three cases.

[270] *See supra* notes 2-5, 123-27 and accompanying text (discussing intent of Congress in enacting section 1983).

[271] Briggs v. Goodwin, 569 F.2d 10, 28 (D.C. Cir. 1977) (Kravitch, J., dissenting). The dissent in *Briggs* stated:

> The unique importance of constitutional rights hardly needs restatement. Both Congress and the Supreme Court have created special causes of action to provide a remedy for official misconduct which infringes constitutionally protected interests. Given this notably solicitous attitude toward the effectuation of constitutional guarantees, it can be asserted with both reason and authority that absolute immunity is not to be extended to the constitutional tort context absent the most compelling justification.

Id.

[272] Tenney v. Brandhove, 341 U.S. 367, 376 (1951). *See supra* notes 132-49 and accompanying text.

[273] Pierson v. Ray, 386 U.S. 547, 553-54 (1967). *See supra* notes 150-80 and accompanying text.

[274] Imbler v. Pachtman, 424 U.S. 409, 424-27 (1976). *See supra* notes 181-97 and accompanying text.

[275] *See supra* note 47.

of the casenote will demonstrate that this rationale does not support an extension of absolute immunity to police officer witnesses in suits brought under section 1983.[276]

Legislators, judges, and prosecutors exercise substantial discretion in performing their official functions.[277] Judges must decide those disputes brought before them, including controversial and highly emotional cases.[278] In resolving these cases, judges often must reconcile widely divergent testimony, assess witness credibility, and decide closely contested issues.[279] Judges must have a vigorous and independent mind to perform such delicate tasks, especially when they are forced to decide these issues in the heat of a trial.[280] A judge should not be forced, as a defendant in a civil suit, to explain the mental processes which formed the basis of what is inherently a subjective decisionmaking process.[281]

Similar to judges, criminal prosecutors exercise a tremendous amount of discretion

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[276] *See Pierson*, 386 U.S. at 294-95 (granting judges absolute immunity but conferring upon police officers only a qualified immunity). *See* Barr v. Matteo, 360 U.S. 564 (1959). In *Barr*, Justice Harlan emphasized the need for discretion as an important factor in determining whether to grant immunity from liability. Justice Harlan stated:

> [T]he higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion. . . . It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted . . . which must provide the guide in delineating the scope of the rule which clothes the official acts . . . with immunity. . . .

Id. at 574.

[277] Recognizing the need to protect the highly discretionary functions of legislators, the nation's founders provided for legislative immunity under the Speech and Debate Clause of the United States Constitution. U.S. CONST. art. I, § 6. *See* Tenney v. Brandhove, 341 U.S. at 372-73. This casenote will not compare the legislative immunity (or the legislator's duties) to that of judges and prosecutors, therefore, because it is a constitutional principle. While legislative immunity is provided for in the Constitution, however, it appears not to have been universally accepted at common law. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, Chief Justice Marshall asserted, "[i]f one of the heads of the departments commits any illegal act . . . it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law." *Id.* at 170.

[278] *Pierson*, 386 U.S. at 554, 566.

[279] Rodgers, *Judges Face Hard Choices in Crisis Cases*, 66 A.B.A.J. 1053 (1980). *See Bradley*, 80 U.S. (13 Wall.) at 348 ("judges decide controversies . . . exciting deepest of feelings").

[280] In support of its decision, the *Pierson* Court also stated that a defendant always retained the right to appeal. Pierson v. Ray, 386 U.S. 547, 554 (1967). Appellate review is a method of correcting judicial error, however, not a remedy for judicial misconduct. Kates, *supra* note 268, at 638. Appellate review, therefore, provides no compensation for the financial, emotional and other harms suffered as a result of the trial court's impropriety. *Id.* Moreover, if the defendant lacks the funds to persevere to appeal, the lower court judge will never be punished for the constitutional deprivation. *Id.* at 638-39. *See also* Note, *supra* note 3, at 329 (appeal is not satisfactory remedy for constitutional violation).

[281] Even though judges do exercise considerable discretion in performing their duties, the *Pierson* decision has little support in the legislative history of section 1983. Those members of the Forty-Second Congress who addressed the issue of judicial immunity assumed that judges could be held liable under the statute. Pierson v. Ray, 386 U.S. 547, 561-63 (Douglas, J., dissenting) (extensive discussion of remarks made by various members of Forty-Second Congress). Further, the only Supreme Court pronouncement on the subject of judicial immunity before the enactment of section 1983 indicated that judges could be held liable for malicious or corrupt acts carried out in excess of their jurisdiction. Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1863). The Court had not recognized an absolute immunity for the judiciary until 1872 in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). *See supra* note 162. The *Pierson* Court relied on the *Bradley* decision, however, as support for its holding. *Pierson*, 386 U.S. at 554. *See* Kattan, *supra* note 4, at 958-59 (*Pierson* decision incorrectly decided). *See also* Note, *supra* note 3, at 334-37 (judges should be accorded only a qualified, good-faith immunity).

when acting in the scope of their official duties.[282] Prosecutors are granted a wide range of selectivity in determining whether to commence or recommend a prosecution or to take other action regarding a potential defendant.[283] Having decided to initiate a criminal proceeding, prosecutors must determine what particular charges are to be brought against the defendant, and must determine whether to accept a plea or to proceed to trial.[284] Finally, once trial has commenced, prosecutors must face difficult and often split-second decisions concerning which witnesses to call, which specific facts to elicit from each witness, and which other evidentiary matters to bring to the court's attention.[285]

When prosecutors exercise their discretion to perform their official duties effectively, they act in a "quasi-judicial" capacity.[286] Prosecutors make discretionary decisions performing an integral role in the judicial process,[287] and, therefore, should enjoy the same immunity from civil liability which protects judges.[288] Prosecutors should not be required to exercise independent judgment while subject to the threat of civil liability for having exercised that discretion.[289]

The policies which justify granting absolute immunity from section 1983 liability to judges, prosecutors, and legislators, however, do not apply in the context of police officer witnesses.[290] As a witness, the police officer exercises no discretion in performing his or her duties.[291] The police officer witness is required merely to answer truthfully all questions asked of him or her, and may refuse to answer only when the requested information would be self-incriminating.[292] Where an official is not called upon to exercise judicial or quasi-judicial discretion, the Supreme Court has refused in past cases to extend to that official the protection of absolute immunity, regardless of any apparent relationship of his or her role to the judicial system.[293]

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[282] Guimaraes, *The Evolution of the Prosecutorial Function in America: The View of a Civil Law Prosecutor*, 12 THE PROSECUTOR 248, 248 (1976); North, *Policy Guidelines: Exercise of Prosecutorial Discretion*, 15 THE PROSECUTOR 132, 132 (1979-80) [hereinafter cited as North].

[283] United States v. Batchelder, 442 U.S. 114, 125 (1979) (Court recognized prosecutor's broad discretion in both refusing to charge and selecting charge); North, *supra* note 282, at 133-34.

[284] North, *supra* note 282, at 135; Imbler v. Pachtman, 424 U.S. 409, 426 n.24 (1976).

[285] *See* Daniels v. Kieser, 586 F.2d 64 (7th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979) (prosecutor's swearing of warrants to insure attendance of witness); Lofland v. Meyers, 442 F. Supp. 955 (S.D.N.Y. 1977) (prosecutor's withholding of evidence).

[286] Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

[287] *Id.* at 406; Robichaud v. Ronan, 351 F.2d 533, 536-37 (9th Cir. 1965) (prosecuting attorneys acting as quasi-judicial officers should enjoy same immunity as judges). *See also* McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972).

[288] *Robichaud*, 351 F.2d at 536.

[289] *Contra* Note, *Immunizing the Investigating Prosecutor: Should the Dishonest Go Free or the Honest Defend?*, 48 FORDHAM L. REV. 1111 *passim* (1980) (absolute immunity fails to comport with purpose of section 1983); Note, *Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions*, 1976 DUKE L.J. 95, 106-07 (*Pierson* decision did not provide sufficient precedent for absolute prosecutorial immunity).

[290] *See* Butz v. Economou, 438 U.S. 478, 506 (1978). The *Butz* Court stated: "Indeed, the greater power of such officials affords a greater potential for a regime of lawless conduct. . . . In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees." *Id. See also* Hilliard v. Williams, 516 F.2d 1344, 1349 (6th Cir. 1975), *vacated on other grounds*, 424 U.S. 961 (1976), *aff'd after remand*, 540 F.2d 220 (6th Cir. 1976) (police officer liable under section 1983 for falsely testifying in criminal trial).

[291] Briscoe v. LaHue, 663 F.2d at 719; Charles v. Wade, 665 F.2d 661, 668 (5th Cir. 1982).

[292] *Charles*, 665 F.2d at 668.

[293] Yaselli v. Goff, 12 F.2d 396, 406 (2d Cir. 1926) (prosecutor not immune when acting in other than quasi-judicial capacity); Robichaud v. Ronan, 351 F.2d 533, 536 (9th Cir. 1965) (recognizing importance of quasi-judicial standard).

Thus, the Court has extended absolute immunity to government officials whose highly discretionary functions demand protection.[294] The Court in *Briscoe* failed to recognize, however, that police officers testifying as ordinary witnesses do not fall within this category of government official.[295] Police officer witnesses exercise no judicial or quasi-judicial discretion in the performance of their duty.[296] Consequently, the rationale which supported absolute immunity under section 1983 for judges, legislators and prosecutors does not support absolute immunity for police officer witnesses.[297]

C. *Qualified Immunity: A Sufficient Protection for Police Officer Witnesses*

While the Supreme Court has extended absolute immunity from section 1983 liability to legislators,[298] judges,[299] and prosecutors,[300] the Court has refused to provide other state officials with absolute immunity even though their duties involved some amount of discretion and, in certain circumstances, the officials would have received absolute immunity at common law.[301] The Court instead has extended only a good-faith, qualified immunity to school board members,[302] state executive officials,[303] prison officials,[304] police officers,[305] federal executive officials,[306] and a superintendent of a state mental hospital.[307] The Court has based these decisions on the rationale that qualified immunity permits officials to exercise their discretion and perform their official duties in good faith.[308] At the same time, qualified immunity fosters the purpose of section 1983, which is to provide a remedy to persons deprived of their federal rights by the malicious abuse of official power.[309]

In *Pierson*, the Court granted police officers a good-faith, qualified immunity from liability under section 1983 for actions, other than testimony at trial, within the scope of

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[294] *See supra* note 293 and accompanying text.

[295] *See supra* notes 291-92 and accompanying text.

[296] *Id.*

[297] *See* Comment, Charles v. Wade: *Section 1983 Witness Immunity for Public Officials*, 16 GA. L. REV. 721, 727 (1982) (stronger argument for holding public official witnesses liable under section 1983 than for private witnesses) [hereinafter cited as Comment].

[298] Tenney v. Brandhove, 341 U.S. 367, 376 (1951). *See supra* notes 132-49 and accompanying text.

[299] Pierson v. Ray, 386 U.S. 547, 553-54 (1967). *See supra* notes 150-80 and accompanying text.

[300] Imbler v. Pachtman, 424 U.S. 409, 424-27 (1976). *See supra* notes 181-97 and accompanying text.

[301] The Court has explicitly recognized that it is not bound by common law precedent in section 1983 actions. *See* Briggs v. Goodwin, 569 F.2d 10, 29 (D.C. Cir. 1979) (citing *Imbler*, 424 U.S. at 424; *Pierson*, 386 U.S. at 554). Accordingly, the Court has extended only a qualified immunity to administrative officials, although these officials enjoyed absolute immunity at common law. *Compare* Alza v. Johnson, 231 U.S. 106, 111 (1913) (absolute immunity under common law) *with* Scheuer v. Rhodes, 416 U.S. 232, 246 (1974) (qualified immunity under section 1983). The *Scheuer* Court based its decision on the conclusion that the policies supporting the common law immunity did not apply in the context of a section 1983 action. *Id.* at 248.

[302] Wood v. Strickland, 420 U.S. 308, 322 (1975).

[303] Scheuer v. Rhodes, 416 U.S. 232, 247 (1974).

[304] Procunier v. Navarette, 434 U.S. 555, 563 (1978).

[305] Pierson v. Ray, 386 U.S. 547, 557 (1967).

[306] Butz v. Economou, 439 U.S. 478, 507 (1978).

[307] O'Connor v. Donaldson, 422 U.S. 563, 577-78 (1975).

[308] *See supra* notes 208-33 and accompanying text (discussing rationale underlying qualified immunity).

[309] *See supra* notes 123-28 and accompanying text (discussing legislative history of section 1983).

their duties.[310] As long as police officers performed their duties in good faith and with a reasonable belief that their actions were lawful, under *Pierson* they were immune from liability under section 1983.[311] This good-faith standard held true whether the alleged violation arose during an investigation, arrest, or imprisonment.[312] The *Pierson* Court stated that the common law never granted police officers absolute and unqualified immunity, and held that the officers' need to exercise independent judgment was mitigated by the need for accountability to the public.[313]

The qualified immunity extended to police officers in *Pierson* should also apply to police officers who testify at a criminal trial as part of their official duties.[314] Police officers exercise far less discretion when they testify in court than when they are making an arrest or conducting a search.[315] Nevertheless, although police officers must act with good faith and probable cause in arresting or searching a suspect, police officer witnesses are not at all accountable to the defendant under the rationale of *Briscoe*.[316]

The Court in *Briscoe* contended that granting police officer witnesses a qualified immunity from section 1983 liability would result in a proliferation of spurious claims instituted to harass the officers and to collect money damages.[317] Permitting a cause of action for perjury against police officer witnesses, the Court stated, could result in an increase of litigation which could require police officers to spend more of their time testifying in court.[318] Granting police officer witnesses a qualified immunity from section 1983 liability, however, will not place an unduly heavy burden on the legal system because police officers will not be subject to suit under section 1983 if their testimony is rendered

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[310] Pierson v. Ray, 386 U.S. 547, 555 (1967).

[311] *Id. See* Kattan, *supra* note 4, at 978; Theis, *"Good Faith" as a Defense to Suits for Police Deprivations of Individual Rights*, 59 MINN. L. REV. 991 (1975) (discussing burden of proof and standards for defining good faith under qualified immunity) [hereinafter cited as Theis].

[312] *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967) (section 1983 suits arising from false arrest and imprisonment); Barker v. Norman, 651 F.2d 1107 (5th Cir. 1981) (section 1983 action based on illegal search, seizure and retention of property); Vasquez v. Snow, 616 F.2d 217 (5th Cir. 1980) (section 1983 suit premised on illegal search).

[313] *Pierson*, 386 U.S. at 555.

[314] *See generally* Theis, *supra* note 311 (arguing for objective standard of good faith in actions against police officers). The elements of the qualified immunity were described in *Scheuer v. Rhodes* as follows: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity. . . ." 416 U.S. 232, 247-48 (1974).

[315] Briscoe v. LaHue, 663 F.2d 713, 719 (7th Cir. 1981); Charles v. Wade, 665 F.2d 661, 668 (5th Cir. 1982).

[316] *See* Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975), *vacated on other grounds*, 424 U.S. 961 (1976), *aff'd after remand*, 540 F.2d 220 (6th Cir. 1976). The *Hilliard* court asserted, "we think it plain that a law enforcement officer who knowingly gives evasive, misleading, and deceptive testimony during a criminal trial cannot escape civil liability. . . ." *Hilliard*, 516 F.2d at 1349.

[317] Briscoe v. LaHue, 460 U.S. at 343. *See also* Barr v. Matteo, 360 U.S. 564, 588-89 (1959) (Brennan, J., dissenting). Justice Brennan contended:

> [T]he courts should be wary of any argument based on the fear that subjecting government officers to the nuisance of litigation and the uncertainties of its outcome may put an undue burden on the conduct of public business. Such a burden is hardly one peculiar to public officers; . . . but the way to minimizing the burdens of litigation does not generally lie through the abolition of a right of redress for an admitted wrong.

Id. at 588-89.

[318] Comment, *supra* note 297, at 738 (discussing potential increase in claims under qualified immunity).

in good faith.[319] Constraining police officer witnesses to testify in good faith is not a requirement that will over-burden the legal system.[320] Where a right as fundamental as the right to a fair trial is deprived, moreover, efficiency and time constraints should not be primary considerations.[321] The due process right to a fair trial is the cornerstone of the criminal justice system, and, therefore, greater deference should be given to remedies designed to protect that right.[322]

Conclusion

Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to the law.[323] In fact, the Supreme Court has stated that "no man . . . is above the law," including all officials in government.[324] In light of this principle, police officer witnesses should bear the burden of showing that the testimony offered during court proceedings was made in good faith and with a reasonable belief in the truthfulness of that testimony. With the *Briscoe* decision, however, a police officer witness who testifies falsely in a criminal proceeding cannot be held liable for unconstitutional conduct to the wronged party for damages under section 1983. Consequently, the Court in *Briscoe* eradicated the effectiveness of section 1983 as the principal means of protecting an individual's constitutional rights where false police officer testimony is concerned.

Rather than an absolute immunity, therefore, this casenote suggests that the *Briscoe* Court should have granted only a qualified immunity to police officer witnesses who testify in good faith and with a reasonable belief in the truthfulness of their statements. The extension of absolute immunity to police officer witnesses fundamentally conflicts with the language and purpose of section 1983. In addition, the policy considerations

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[319] *See* Butz v. Economou, 438 U.S. 478, 507 (1978) ("insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading"). In his dissenting opinion in *Briscoe*, Justice Marshall maintained that police officers arrest much more frequently than they testify. Briscoe v. LaHue, 460 U.S. at 367 (Marshall, J., dissenting). According to Justice Marshall, suits against police officers filed in the Central District of California under section 1983 included only thirty actions for false arrest. *Id.* (Marshall, J., dissenting) (citing Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 550-51 (1982)). Accordingly, Justice Marshall contended that the majority's fears of substantially increased litigation were unfounded. *Id.*

[320] *See supra* note 319 and accompanying text.

[321] Comment, *supra* note 297, at 738.

> The Twentieth century has witnessed a revolutionary expansion in the state's sphere of competence accompanied by a concomitant increase in its effective power. Permeating all areas of endeavor, its activities and spokesmen too frequently exalt the disideratum [sic] of efficiency at the expense of values which, at least in the constitutional order, ought to be of paramount and guiding influence.

Id. at 738 n.100 (quoting R. Walker, *The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty* 7 (1960)).

[322] U.S. Const. amends. VI, XIV. *See* Powell v. Alabama, 287 U.S. 45, 71-72 (1932) (rights guaranteed by the first eight amendments are fundamental and protected by the fourteenth amendment).

[323] Butz v. Economou, 438 U.S. 478, 506 (1978).

[324] *Id.* The *Butz* Court stated:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

Id. (quoting United States v. Lee, 106 U.S. 196, 220 (1882)).

which justified granting absolute immunity to lay witnesses at common law simply do not support an absolute immunity for police officers testifying in criminal proceedings. Absent such justification, the Court in *Briscoe* should have adopted the rationale employed in several earlier decisions in which it granted various groups of government officials only a qualified, good-faith immunity from section 1983 liability. In this way, the Court in *Briscoe* could have achieved an equitable balance between the need of a police officer witness to exercise independent judgment and the right of an allegedly wronged party to seek restitution.

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