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## Section 1983: Absolute Immunity for Pretrial Police Testimony

Jack Kaufman

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## SECTION 1983: ABSOLUTE IMMUNITY FOR PRETRIAL POLICE TESTIMONY

### I. Introduction

Suppose that a police officer suspects you of committing a crime. He applies to a magistrate for a warrant for your arrest. In his arrest warrant affidavit, the officer falsely states that probable cause for your arrest exists based on information gathered by police informants. After you are taken into custody, the prosecution relies on the same false testimony at your probable cause and preliminary hearings, and you are detained without bail pending a grand jury hearing. The grand jury subsequently hands down an indictment, and you are bound over to trial based largely on the testimony of the arresting police officer. At trial, your attorney impeaches the credibility of the police officer by presenting evidence that no such informants existed. You are acquitted. What recourse, aside from pressing criminal charges, do you have against the lying officer?

Section 1983 of title 42 of the United States Code grants a federal civil remedy to individuals whose constitutional rights are violated by any person acting "under color of" state law.<sup>1</sup> This remedy, if used against a police officer who testifies falsely at a criminal trial,<sup>2</sup>

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1. 42 U.S.C. § 1983 (1979). Section 1983 contains the following provision: Every person who, under color of any statute, ordinance, regulation, custom or usage, of any [s]tate or [t]erritory 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.

*Id.*

To bring a § 1983 action a plaintiff must prove that he was deprived of a constitutional right by an individual acting "under color of" state law. 42 U.S.C. § 1983 (1979); *see* *Briscoe v. LaHue*, 460 U.S. 325, 329 (1983); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930 (1982). An individual acts "under color of" state law when his actions are "committed in the fulfillment of the tasks and obligations assigned to [him], or made possible by the power conferred upon [him] by the government." 1 C. ANTEAU, *FEDERAL CIVIL RIGHTS ACTS* § 57, at 103 (2d ed. 1980).

2. Plaintiffs who file a § 1983 action against police officers for allegedly false testimony offered at a pretrial proceeding face at least two legal pitfalls. They must show that: (1) the officer's testimony caused them to be deprived of a constitutional

would conflict with the common-law rule that trial witnesses are

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right; and (2) the officer acted "under color of" state law while testifying. See *supra* note 1 and accompanying text.

While "[i]t is beyond question that, when a private party gives testimony in open court in a criminal trial, that act is not performed 'under color of law,'" *Briscoe*, 460 U.S. at 329-30, it is not certain that a police officer who testifies at a criminal proceeding acts "under color of" law for the purpose of § 1983 litigation. Cf. *id.* at 328 n.3 (Supreme Court in *Briscoe* noted that issue of whether Officer Briscoe had acted "under color of" law while testifying at trial was not decided by lower court). A majority of United States circuit courts that have addressed this issue have held that certain government witnesses do not act "under color of" law when testifying at such proceedings. See *Myers v. Bull*, 599 F.2d 863, 865 (8th Cir. 1979) (police officers); *Blevins v. Ford*, 572 F.2d 1336, 1338 (9th Cir. 1978) (government witnesses); *Bennet v. Passic*, 545 F.2d 1260, 1263-64 (10th Cir. 1976) (police officers). The reasoning underlying this position is that police officers do not act under authority granted by the state when they testify at trial and thus, do not act "under color of" state law. See *Edwards v. Vassel*, 349 F. Supp. 164, 166 (E.D. Mo.), *aff'd*, 469 F.2d 338 (8th Cir. 1972).

In *Briscoe v. LaHue*, 663 F.2d 713 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983), the Seventh Circuit suggested that police officers who testify at judicial proceedings act "under color of" law, although this statement was dictum. See *Briscoe*, 663 F.2d at 721 n.4; *Briscoe*, 460 U.S. at 328 n.3.

The Supreme Court recently addressed the "under color of" state law issue in a case involving a private physician who contracted with a state prison to perform medical services for prison inmates. *West v. Atkins*, 108 S. Ct. 2250, 2252 (1988). The Court stated that "a public official acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *Id.* at 2256. The Court then pointed out its own exception to this rule: state employees do not act "under color of" law when they "act in a role independent of and in opposition to the state." *Id.* In holding that the physician had acted "under color of" state law, the Court reasoned that "his professional and ethical obligation to make independent medical judgments, did not set him in conflict with the [s]tate . . . ." *Id.* In addition, the Court stated that "the fact that a state employee's role parallels one in the private sector is not, by itself, reason to conclude that the former is not acting "under color of" state law in performing his duties." *Id.* at 2259 n.15. Given the Court's reasoning in *West*, it is likely that police officer witnesses do act "under color of" state law for the purpose of § 1983 actions. Although it is not clear that they are acting in their "official capacity" while testifying, police officers are employed by the state while they serve as witnesses at criminal trials and do not act "in opposition to the state" while they perform this function.

Although a private witness normally does not act "under color of" state law, he may nevertheless fulfill this element of a § 1983 action if he conspires with a state official to deprive an individual of another's constitutional rights. See *Tower v. Glover*, 467 U.S. 914, 920 (1984); *Briscoe*, 460 U.S. at 330 n.7.

In addition to the "color of law" requirement of § 1983 actions, it is also not clear when a police officer's perjured testimony causes the deprivation of an individual's constitutional rights. See generally Comment, *When Police Lie: Federal Civil Rights Liability For Wrongful Arrest*, 10 OHIO NORTHERN UNIV. L. REV. 493 (1983) [hereinafter *When Police Lie*]. In *Briscoe*, for instance, the Supreme Court, without deciding the issue, "assumed [for purposes of deciding this case] that petitioners had alleged a constitutional violation—that they had been deprived of their liberty without due process of law by [police officers'] perjury in the judicial proceedings that resulted

absolutely immune<sup>3</sup> from civil actions that are based on their perjured testimony.<sup>4</sup> In other words, the police officer would be immune from civil suit at common law,<sup>5</sup> but could be sued under section 1983.<sup>6</sup>

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in their convictions." *Briscoe*, 460 U.S. at 328 n.3. Thus, when a police officer perjures himself at a judicial proceeding, he may deprive the defendant of a fourteenth amendment due process right. See *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254, 260 (5th Cir. 1984), modified, 744 F.2d 1131 (5th Cir. 1984) (pretrial probable cause proceeding); *When Police Lie*, *supra*, at 515-16. In addition to fourteenth amendment violations, when an officer testifies falsely at a pretrial probable cause proceeding, he may deprive a suspect of his fourth amendment right to arrest based on probable cause. See *Wheeler*, 734 F.2d at 260.

The issue of whether a constitutional violation exists is, at least partly, one of proximate cause. Many factors may contribute to the arrest or detention of a suspect. In the context of the judicial process, it is not clear when the testimony of a single police officer at a pretrial proceeding, or at trial, is the proximate cause of harm to a defendant. In the case of pretrial proceedings, intervening acts, such as the act of a prosecutor in initiating a grand jury proceeding, or that of a magistrate in finding probable cause to arrest or detain a suspect, may break the causal link between an officer's perjured testimony and the deprivation of the accused's constitutional rights. See *Wheeler*, 744 F.2d at 1132. For a detailed discussion of the causation issue, see *When Police Lie*, *supra*, at 493-518.

For the purpose of analyzing the immunity issues discussed in this Note, it is assumed that a police officer acts "under color of" state law, and that he violates a criminal defendant's constitutional rights when he offers perjured testimony at a judicial proceeding.

3. The following is a general description of immunities:

An immunity avoids liability in tort under all circumstances, within the limits of the immunity itself; it is conferred, not because of the particular facts, but because of the status or position of the favored defendant; and it does not deny the tort, but the resulting liability. Such immunity does not mean that conduct which would amount to a tort on the part of other defendants is not still equally tortious in character, but merely that for the protection of the particular defendant, or of interests which he represents, he is given absolution from liability.

W.L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 970 (4th ed. 1971) [hereinafter PROSSER]. See generally L.H. ELDREDGE, *THE LAW OF DEFAMATION* §§ 72-77 (1978) [hereinafter ELDREDGE].

Sometimes referred to as "absolute privilege," absolute immunity is an affirmative defense to a suit in tort and bars the plaintiff's recovery "without regard to [the defendant's] purpose or motive, or the reasonableness of his conduct." PROSSER, *supra*, § 114, at 776. For a definition of qualified immunity, see *infra* note 14.

4. See *Briscoe*, 460 U.S. at 330-31; PROSSER, *supra* note 3, § 114, at 777-78; ELDREDGE, *supra* note 3, § 73, at 370-71.

For a discussion of the common-law roots and purpose of absolute witness immunity, see *infra* notes 66-74 and accompanying text.

5. While there is no clear evidence that absolute witness immunity applied specifically to government witnesses at common law, see *Briscoe*, 460 U.S. at 355-56 n.15 (Marshall, J., dissenting), at least one commentator has stated that the common law of witness immunity did not distinguish between public officials and private citizens. See Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*,

In *Briscoe v. LaHue*,<sup>7</sup> the Supreme Court, relying on common-law witness immunity, held that police officers, and all other government witnesses, are absolutely immune from section 1983 liability for testimony given at trial.<sup>8</sup> *Briscoe* was a continuation of a recent line of decisions in which the Court construed section 1983 to include certain traditional common-law immunities.<sup>9</sup> In footnote five of *Briscoe*,<sup>10</sup> however, the Court expressly reserved the question of whether absolute immunity extends to police testimony offered at "pretrial proceedings such as probable cause hearings."<sup>11</sup>

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9 COLUM. L. REV. 463, 468-69 (1909) [hereinafter Veeder]; *Briscoe*, 460 U.S. at 336 n.15.

6. Cf. Comment, *Section 1983 Liability: Absolute Immunity for Police Witnesses*—*Briscoe v. LaHue*, 19 WAKE FOREST L. REV. 1105-06 (1983) (common-law witness immunity conflicts with language of § 1983) [hereinafter *Absolute Immunity*].

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

8. See *id.* at 345-46. Several courts have applied *Briscoe* witness immunity to government witnesses other than police officers. See, e.g., *Flynn v. Dyzwilewsk*, 644 F. Supp. 769, 773-74 (N.D. Ill. 1986) (attorney absolutely immune from damages based on his testimony at hearing on inmate's motion to vacate sentence); *Buchanan v. Ford*, 638 F. Supp. 168, 171 (N.D.N.Y. 1986) (social worker absolutely immune for testimony at family court preliminary proceeding); *Meyers v. Contra Costa County Dep't of Social Servs.*, 812 F.2d 1154, 1156 (9th Cir.) (social worker absolutely immune for testimony at child dependency proceedings and custody hearing), *cert. denied*, 108 S. Ct. 98 (1987).

9. See, e.g., *Malley v. Briggs*, 475 U.S. 335 (1986) (qualified immunity for police officers who apply for arrest warrants); *Briscoe v. LaHue*, 460 U.S. 325 (1983) (absolute immunity for government witnesses); *Procunier v. Navarette*, 434 U.S. 555 (1978) (qualified immunity for prison officials); *Stump v. Sparkman*, 435 U.S. 349 (1978) (absolute immunity for judge who ordered sterilization of 15-year-old girl); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity for prosecutors); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (qualified immunity for superintendent of state hospital); *Wood v. Strickland*, 420 U.S. 308 (1975) (qualified immunity for state school officials); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (qualified immunity for state governor and other executive branch officials); *Pierson v. Ray*, 386 U.S. 547 (1967) (absolute immunity for judges and qualified immunity for arresting police officers); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (absolute legislative immunity).

10. *Briscoe*, 460 U.S. at 329. The text of footnote five reads as follows:

The petition for writ of certiorari presents 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.' Pet. for Cert. i. The petition does not raise the question of immunity for testimony at pretrial proceedings such as probable-cause hearings. . . . We therefore do not decide whether respondent LaHue is entitled to absolute immunity for allegedly false testimony at two probable-cause hearings regarding petitioner Briscoe.

*Id.*

11. Plaintiff Carlyle Briscoe's original § 1983 claim arose out of allegedly false testimony offered by police officer LaHue at Briscoe's criminal trial as well as two

The *Briscoe* Court's failure to resolve the issue of whether to extend section 1983 immunity to police witnesses at pretrial proceedings created a subsequent disagreement in the United States circuit courts.<sup>12</sup> The Supreme Court, in *Malley v. Briggs*,<sup>13</sup> resolved one issue involved in this dispute by holding that police officers have only qualified immunity<sup>14</sup> when they apply for an arrest

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pretrial probable cause hearings. See *id.* at 351 n.10 (Marshall, J., dissenting). The Supreme Court, however, granted certiorari only on the issue of immunity for defendant *Briscoe's* allegedly false trial testimony. See *id.* at 329 n.5.

The ambiguous language of footnote five makes uncertain precisely what type of pretrial proceedings the Court had in mind, or what it meant by "probable-cause hearings." See *supra* note 10 and accompanying text. For a further discussion of this ambiguity, see *infra* notes 150-56 and accompanying text.

12. See *Strength v. Hubert*, 670 F. Supp. 322, 326 (M.D. Ala. 1987), *aff'd in part, rev'd in part*, 854 F.2d 421 (11th Cir. 1988).

A majority of circuits have extended absolute immunity for police witnesses to certain pretrial proceedings. See *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988) (grand jury hearings); *White v. Frank*, 855 F.2d 956 (2d Cir. 1988) (grand jury proceedings, under certain circumstances); *Daloia v. Rose*, 849 F.2d 74 (2d Cir. 1988) (adversarial pretrial proceedings); *Williams v. Hepting*, 844 F.2d 138 (3d Cir. 1988) (adversarial pretrial proceedings); *Alioto v. City of Shively*, 835 F.2d 1173 (6th Cir. 1987) (grand jury); *Holt v. Castenada*, 832 F.2d 123 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1275 (1988) (preliminary and suppression hearings); *Macko v. Byron*, 760 F.2d 95 (6th Cir. 1985) (government witnesses have absolute immunity for grand jury testimony); *Kincaid v. Eberle*, 712 F.2d 1023 (7th Cir.), *cert. denied*, 464 U.S. 1018 (1983) (grand jury); *San Filippo v. United States Trust Co. of New York*, 737 F.2d 246 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985) (grand jury, in dictum); *Briggs v. Goodwin*, 712 F.2d 1444 (D.C. Cir. 1983) (absolute immunity extended to federal government witness at adversarial grand jury motion hearing). The action in *Briggs* was not brought under § 1983. Because the defendant in *Briggs* was a federal and not a state official, the plaintiff sued directly under the Constitution in a *Bivens* action. See *Briggs*, 712 F.2d at 1444; *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). The D.C. Circuit did not distinguish between § 1983 and *Bivens* actions in analyzing the immunity issue in *Briggs*. See *Briggs v. Goodwin*, 712 F.2d 1444 (D.C. Cir. 1983).

A minority of circuits have refused to extend absolute immunity to pretrial proceedings. See *Anthony v. Baker*, 767 F.2d 657 (10th Cir. 1985); *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254, *modified*, 744 F.2d 1131 (5th Cir. 1984); *Krohn v. United States*, 742 F.2d 24 (1st Cir. 1984). The plaintiff in *Krohn* brought a *Bivens* action against a federal agent who had procured a warrant for the plaintiff's arrest without probable cause. For a detailed discussion of some of these circuit court decisions, see *infra* notes 15-19, 150-69 and accompanying text.

13. 475 U.S. 335 (1986).

14. Unlike absolute immunity, qualified or "good faith" immunity shields an officer from liability only when he acts honestly and in good faith. See PROSSER, *supra* note 3, § 132, at 989. Under the old standard of qualified immunity, courts considered an officer's subjective intent along with an objective consideration of his alleged offense. Recently, however, the Supreme Court removed the subjective intent element of qualified immunity. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The current standard of qualified immunity is one that shields officers from liability

warrant before a magistrate.<sup>15</sup> The circuit split has continued, however, with respect to several other types of pretrial proceedings, including probable cause,<sup>16</sup> preliminary,<sup>17</sup> suppression<sup>18</sup> and grand jury hearings.<sup>19</sup>

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"insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* In doing away with the subjective element of qualified immunity, the Court was attempting to cut down on "insubstantial claims" against public officers, *id.* at 814-16, and to "avoid excessive disruption of government." *Id.* at 818.

15. See *Malley v. Briggs*, 475 U.S. 335, 344-46 (1986). Two circuit court decisions that refused to extend absolute immunity to pretrial proceedings may have involved factual scenarios covered by the Supreme Court's holding in *Malley*. See *Krohn*, 742 F.2d at 31; *Wheeler*, 734 F.2d at 261.

According to the court in *Krohn*, the specific issue it resolved was whether "*Briscoe* [absolute] immunity should extend to a police officer swearing out a warrant affidavit." *Krohn*, 742 F.2d at 31. This was the specific issue decided by the Supreme Court in *Malley*. See *Malley*, 475 U.S. at 344-45. The *Krohn* court, however, may have defined its issue too narrowly, since the officer's warrant affidavit in *Krohn* was also used as evidence in a subsequent probable cause hearing. See *Krohn*, 742 F.2d at 26. The issue of whether a police officer is absolutely immune for testimony used at probable cause hearings was not decided in *Malley*. In any event, the court in *Krohn* held generally that "[t]he witness immunity discussed in *Briscoe* . . . is necessarily limited to witnesses in judge-supervised trials." See *id.* at 31. The *Krohn* holding presumably excludes absolute witness immunity under § 1983 from probable cause, preliminary, suppression and grand jury hearings, which are pretrial proceedings.

*Wheeler* involved both grand jury testimony and, perhaps, an arrest warrant application. See *Wheeler*, 734 F.2d at 261 n.15. The text of the opinion, however, is not clear as to the nature of the proceedings involved. See *id.* For a further discussion of *Wheeler*, see *infra* notes 166-69 and accompanying text.

Most of the post-*Briscoe* circuit decisions were decided prior to the Supreme Court's holding in *Malley*. Of the five post-*Malley* decisions, only the Second Circuit considered the Supreme Court's holding and reasoning in *Malley*. See *White*, 855 F.2d at 958-61. For a further discussion of the *White* decision, see *infra* notes 158-59 and accompanying text.

One recent district court decision considered the issue of § 1983 pretrial police witness immunity in light of the Court's reasoning in *Malley*. See *Strength v. Hubert*, 670 F. Supp. 322, 326 (M.D. Ala. 1987). The *Strength* court found that *Malley* does not apply to police grand jury witnesses, who are absolutely immune from § 1983 suits. See *Strength*, 670 F. Supp. at 327-28. For a further discussion of the *Malley* decision, see *infra* notes 136-44 and accompanying text.

16. See *Wheeler*, 734 F.2d at 261. It is unclear whether *Wheeler* dealt with a "probable cause hearing" or an application for an arrest warrant. See *supra* note 15 and accompanying text; *infra* note 167 and accompanying text. For a definition of "probable cause hearing," see *infra* note 195 and accompanying text.

17. See *Holt v. Castaneda*, 832 F.2d 123, 124 (9th Cir. 1987). For a definition of "preliminary hearing," see *infra* note 210 and accompanying text.

18. See *Holt*, 832 F.2d at 124-27. For a definition of "suppression hearing," see *infra* note 215 and accompanying text.

19. For a list of circuit court cases concerning § 1983 witness immunity at grand jury hearings, see *supra* note 12 and accompanying text. For a definition and discussion of grand jury proceedings, see *infra* note 179 and accompanying text.

Over the past thirty-seven years, the Supreme Court has developed an historical analysis that incorporates common-law immunities into section 1983.<sup>20</sup> In its early section 1983 immunity decisions, the Court construed section 1983 to include those common-law immunities that existed in 1871, when the precursor of section 1983 was enacted.<sup>21</sup> While this approach met with well-founded criticism,<sup>22</sup> it had the advantage of providing a relatively clear legal standard for incorporating common-law immunities into section 1983. In recent years, the Court has confused its already questionable section 1983 analysis by adding a poorly defined "functional categories" test to its section 1983 immunity approach.<sup>23</sup>

This Note focuses on the difficulty courts encounter in attempting to apply the Supreme Court's current "functional categories" test to the issue of section 1983 immunity for pre-trial police testimony.

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20. See Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 746-47 (1987) [hereinafter Matasar].

The first § 1983 immunity decision in this line of cases was *Tenny v. Brandhove*, 341 U.S. 367 (1951). See Matasar, *supra*, at 749. The most recent decision is *Forrester v. White*, 108 S. Ct. 538 (1988).

21. See *infra* notes 75-76, 106-07 and accompanying text.

22. Some critics of past Supreme Court § 1983 immunity decisions have disagreed with the Court's specific historical conclusions concerning § 1983 and the common law. See Zagrens, *Under Color of What Law?*, 71 VA. L. REV. 499 (1985); see also *Briscoe v. LaHue*, 460 U.S. 325, 350-64 (1983) (Marshall, J., dissenting); *Pierson v. Ray*, 386 U.S. 547, 558-64 (1967) (Douglas, J., dissenting); *Absolute Immunity*, *supra* note 6, at 1128-30.

Other critics have found the Court's historical approach inherently uncertain, and, therefore, invalid as the sole method of construing § 1983. See Matasar, *supra* note 20, at 794-96. Professor Matasar criticizes the Court's use of history, rather than its specific historical conclusions:

My intention is not to demonstrate that the Court's history is *wrong*. Even if the Court did not correctly perceive the strength of common law immunities, even if the Court ignored the statements of some of the drafters of [§] 1983 who felt that common law immunities had been eliminated [by § 1983], and even if the Court might have inadequately dealt with the history of Reconstruction, I do not think that the Court can be shown to be wrong. It is rather that the Court can not be shown to be *right* either. Its inquiry about [§] 1983's framers' hypothetical intentions about hypothetical questions that they did not resolve is unanswerable.

*Id.* at 758 n.75 (emphasis in original). In any event, Professor Matasar finds that "the Court's history in its immunity decisions is flawed at best." *Id.* at 758.

Both types of criticism imply a lack of credibility underlying the Court's historical analysis. In those cases where the Court's historical analysis has been weakest, it appears to be a "mask for . . . policymaking," rather than one of true statutory construction. *Id.* at 744. For a more detailed discussion of these criticisms, see *infra* notes 102-05 and accompanying text.

23. See *infra* notes 109-19 and accompanying text.



This Note concludes that a proper resolution of this issue will not result from a strict application of the "functional categories" test, but rather from an analysis of the policies underlying common-law immunity for pretrial witness testimony.

Part II of the Note discusses the development of the Supreme Court's approach to section 1983 immunity.<sup>24</sup> Central to this discussion is an overview of the history of common-law immunities for government officials,<sup>25</sup> the history and purpose of section 1983,<sup>26</sup> and the history of the Supreme Court's section 1983 immunity decisions.<sup>27</sup> Part III of the Note discusses the current disagreement in the circuits over extending section 1983 immunity to pretrial police testimony.<sup>28</sup> Part III also analyzes various possible answers to the question of whether to extend witness immunity under section 1983 to specific pretrial proceedings by applying the current Supreme Court "functional categories" immunity analysis.<sup>29</sup> Part IV outlines the policies for and against extension of absolute immunity to pre-trial police testimony.<sup>30</sup> Part V draws on these policy considerations and offers a solution to resolve the issue of immunity for pretrial police testimony. Part V concludes that police officers should enjoy absolute immunity from section 1983 suits that are based solely on their perjured pretrial testimony. Part V suggests, however, that a section 1983 plaintiff should be allowed to introduce such testimony as evidence that a police officer initiated a baseless or malicious prosecution against the plaintiff.<sup>31</sup>

## II. Supreme Court Approach to Section 1983 Immunities

The Supreme Court's current approach to section 1983 immunity draws on the history of common-law immunities, as well as the history of section 1983.<sup>32</sup> Background in each area is crucial to an understanding of the Court's analysis.

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24. See *infra* notes 32-149 and accompanying text.

25. See *infra* notes 33-74 and accompanying text.

26. See *infra* notes 75-99 and accompanying text.

27. See *infra* notes 100-49 and accompanying text.

28. See *infra* notes 150-69 and accompanying text.

29. See *infra* notes 170-218 and accompanying text.

30. See *infra* notes 219-32 and accompanying text.

31. See *infra* notes 233-51 and accompanying text.

32. See, e.g., *Briscoe v. LaHue*, 460 U.S. 325, 330-34, 336-41 (1983); *Malley v. Briggs*, 475 U.S. 335, 340 (1986); see *infra* note 33 and accompanying text.

### A. Common-Law Immunities.

The Supreme Court succinctly stated its section 1983 immunity analysis in *Malley v. Briggs*:

Our general approach to questions of immunity under section 1983 is by now well established. . . . Our initial inquiry is whether an official claiming immunity under [section] 1983 can point to a common-law counterpart to the privilege he asserts. . . . If 'an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether [section] 1983's history or purposes nonetheless counsel against recognizing the same immunity in section 1983 actions.'<sup>33</sup>

Before granting immunity under this analysis, the Court must first determine whether a common-law immunity existed in 1871. At common law, immunities were tied to specific causes of action and specific actors.<sup>34</sup> Therefore, the merits of a police officer's claim of immunity under section 1983 for pretrial testimony will turn on how he characterizes the action against him, as well as his role in the judicial process.<sup>35</sup>

Historically, common-law tort immunity comprised various classes of defendants, including federal and state governments,<sup>36</sup> public officers,<sup>37</sup> charities,<sup>38</sup> infants<sup>39</sup> and incompetents.<sup>40</sup> In the United

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33. *Malley*, 475 U.S. at 339-40. It is important to note that the Court relies on the common law as an indication of the legislative intent of the 42d Congress. The Court has determined that "members of the [42d] Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); see *Pierson v. Ray*, 386 U.S. 547, 554 (1967). For a more detailed discussion of the Court's § 1983 immunity analysis, see *infra* notes 100-49 and accompanying text.

34. See *infra* notes 36-74 and accompanying text.

35. See *infra* notes 158-59 and accompanying text.

36. See PROSSER, *supra* note 3, § 131, at 971-77.

37. See *id.* § 132, at 987. This Note is concerned with the immunity of public officers, whose functions are analogous to those of persons acting "under color of" law. Immunity applies to a public officer not "merely because he is an officer," but "where he performs, or purports to perform, his official functions." See *id.* This description is similar to that of an individual acting "under color of" law. See *supra* notes 1-2 and accompanying text.

38. See PROSSER, *supra* note 3, § 133, at 992.

39. See *id.* § 134, at 996.

40. See *id.* § 135, at 1000.

States, absolute immunity<sup>41</sup> from civil suit is reserved for a narrow class of public officers who are said to perform judicial, and "discretionary" functions.<sup>42</sup> This class of defendants includes judicial officers,<sup>43</sup> certain high-level executive officials,<sup>44</sup> and "members of state and national legislatures."<sup>45</sup>

Lower level administrative officials, except those involved in the judicial process, who perform "ministerial," as opposed to "discretionary," functions have no immunity against civil suit.<sup>46</sup> Lower level executive and legislative officers who perform "discretionary"

41. For a definition of absolute immunity, see *supra* note 3 and accompanying text. The theory of absolute immunity for government officials has met with some criticism in the United States. See F. V. HARPER, F. JAMES & O. S. GRAY, *THE LAW OF TORTS* § 29.9, at 662-63 (2d ed. 1986) [hereinafter HARPER]. The original theory behind tort immunity for public officers may have less validity today than it had centuries ago:

The liability of the individual official for wrongdoing committed in the course of his duty on which so much praise has been bestowed by English writers, is essentially a relic from past centuries when government was in the hands of a few prominent, independent and substantial persons, so-called [p]ublic [o]fficers, who were in no way responsible to ministers or elected legislatures or councils . . . . Such a doctrine is utterly unsuited to the twentieth-century state, in which the [p]ublic [o]fficer has been superseded by armies of anonymous and obscure civil servants, acting directly under the orders of their superiors, who are ultimately responsible to an elected body. The exclusive liability of the individual officer is a doctrine typical of a highly individual common law. It is of decreasing value today.

*Id.*

42. See HARPER, *supra* note 41, § 29.10, at 668-71. For a discussion of the distinction between "discretionary" and "ministerial" functions, see *infra* note 46.

43. See HARPER, *supra* note 41, § 29.10, at 671 n.5; see also *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Certain judicial officials, as well as private citizens involved in the judicial process, are also absolutely immune from civil suit for words spoken in the judicial process under the doctrine of absolute privilege in the common-law action of defamation. See *infra* notes 57-72 and accompanying text.

44. See PROSSER, *supra* note 3, § 132, at 988; HARPER, *supra* note 41, § 29.10, at 674 n.7. Although "[h]igh [executive] officials require greater protection than those with less complex discretionary responsibilities . . . a governor and his aides could receive the requisite protection from qualified or good-faith immunity." *Harlow*, 457 U.S. at 807. Executive officials who receive absolute immunity include federal cabinet officers such as the Postmaster General, Secretaries of the Treasury and Interior, the President and former Presidents. See HARPER, *supra* note 41, at 674 n.7.

45. See PROSSER, *supra* note 3, § 132, at 988; *Harlow*, 457 U.S. at 807.

46. See PROSSER, *supra* note 3, § 132, at 988-89; HARPER, *supra* note 41, § 29.10, at 668-88. "Discretionary" functions require "personal deliberation, decision and judgment," while "ministerial" ones involve the "performance of a duty in which the officer is left no choice of his own," PROSSER, *supra* note 3, § 132, at 988-89, or "one that has been positively imposed by law." See *First National Bank v. Filler*, 107 Fla. 526, 534, 145 So. 204, 207 (1933), quoted in PROSSER, *supra* note 3, § 132, at 989 n.98.

functions have either qualified<sup>47</sup> or absolute<sup>48</sup> immunity, depending on the jurisdiction.<sup>49</sup> Police officers generally have qualified immunity for "discretionary" acts, such as arresting an individual suspected of a crime.<sup>50</sup>

Certain judges have enjoyed absolute immunity for acts done in their "judicial capacity" since the earliest days of English common law.<sup>51</sup> Today, all judges receive some form of absolute immunity because of their need to administer the law free from the fear of civil liability.<sup>52</sup>

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47. See *supra* note 14 and accompanying text.

48. See *supra* note 3 and accompanying text.

49. See PROSSER, *supra* note 3, § 132, at 989; HARPER, *supra* note 41, § 29.10, at 669 n.4.

50. See *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

51. See *id.* at 553-54; PROSSER, *supra* note 3, § 132, at 987; *Absolute Immunity*, *supra* note 6, at 1110-12; see also *Floyd v. Baker*, 77 Eng. Rep. 1305, 1306-07 (1607). Absolute immunity for judges was recognized by the Supreme Court in 1872. See *Bradley v. Fisher*, 13 U.S. 335 (1872).

Absolute immunity for judges, however, was "not universally accepted at common law in England." Matasar, *supra* note 20, at 758. Such immunity applied only to superior court judges, while "justices of the peace and other lower judicial officials were subject to liability for damages." *Id.* at 758. In addition, under English common law, "judges were not immune from injunctive suits." *Id.*; see *Pulliam v. Allen*, 466 U.S. 522, 529 (1984).

In the United States, prior to 1871, absolute immunity did not apply to acts performed by a judge "in excess of jurisdiction . . . done maliciously or corruptly." Matasar, *supra* note 20, at 759 (quoting *Randall v. Brigham*, 74 U.S. 523 (1868)). Although the same standard applies today, the current definition of acts "in excess of jurisdiction" is narrower than it was in 1871, and thus affords the modern judge greater protection from liability than his 19th century counterpart enjoyed. See Matasar, *supra* note 20, at 759. Under today's standard, a judge is liable only when he acts "in clear absence of all jurisdiction." See *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978).

In addition, absolute immunity in the United States was not uniformly accepted under state law. In 1871, only 13 of the 37 states then in the Union recognized absolute immunity for judges. See Matasar, *supra* note 20, at 760. Six states recognized qualified immunity for judges, nine states had not decided the issue, and nine states had not considered it. See *id.* at 760 n.87.

52. See PROSSER, *supra* note 3, § 114, at 777. Judges, along with other government officials who perform discretionary functions, "would be unduly hampered and intimidated in the discharge of their duties," if absolute immunity from civil suit did not extend to such acts. See *id.* § 132, at 987. The policy behind judicial immunity has been described as follows:

[T]he reason [for judicial immunity] is of course not a desire to protect the corrupt, malicious or misbehaving official, but rather the necessity of preserving an independent judiciary, who will not be deterred by the fear of vexatious suits and personal liability, together with the manifest unfairness of placing any man in a position where his judgment is required, and at the same time holding him responsible according to the judgment

Prosecutors are an example of lower level executive officials who are given the same absolute protection as judges for acts done in their quasi-judicial capacity.<sup>53</sup> When they function in a quasi-judicial capacity, prosecutors, like judges, are public officers closely associated with the judicial process,<sup>54</sup> whose effective performance requires immunity from civil liability.<sup>55</sup> Prosecutorial immunity does

of others.

*Id.* § 132, at 987-88.

Procedural safeguards that act as policy justifications for judges' absolute immunity include "[t]he insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the [judicial] process, and the correctability of error on appeal . . . ." *Butz v. Economou*, 438 U.S. 478, 512 (1978).

53. See HARPER, *supra* note 41, § 29.10, at 672 n.5.; *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976). Prosecutors, however, may be absolutely immune only for quasi-judicial acts, as opposed to investigative or administrative functions. See *Briscoe v. LaHue*, 460 U.S. 325, 342 n.28 (1983); HARPER, *supra* note 41, § 29.10, at 672 n.5. In *Forsyth v. Kleindeinst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied*, *Mitchell v. Forsyth*, 453 U.S. 951 (1981), the Third Circuit held that an attorney general was absolutely immune for his decision to authorize a warrantless wiretap, if the decision was made "in the context of a quasi-judicial function," as distinguished from a purely investigative or administrative function. See *Forsyth*, 599 F.2d at 1215.

Prosecutorial immunity for the act of procuring a conviction or indictment derives from common-law malicious prosecution. See *Imbler*, 424 U.S. at 432, 438 (White, J., concurring).

Other lower level executive officials and private citizens who have received absolute immunity for acts done in their quasi-judicial capacity include bankruptcy trustees, probation officers, state bar and committee of bar examiners and their officials, and court-appointed defense counsel. See HARPER, *supra* note 41, § 29.10, at 672 n.5.

54. *Imbler*, 424 U.S. at 423 n.20. "It is the functional comparability of their judgments to those of the judge that has resulted in . . . prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well." *Id.* Like judges, prosecutors who seek indictments or convictions "exercise a discretionary judgment on the basis of evidence presented to them." *Id.*

55. See *Imbler*, 424 U.S. at 423. The *Imbler* Court stated the following:

The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement.

*Id.* at 423-24 (quoting *Pearson v. Reed*, 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597

not, however, date as far back in the common law of the United States as does immunity for judges.<sup>56</sup>

In addition to the common-law rules of immunity for acts performed by certain public officials, there was a related but distinct rule at common law that certain public officials, and private persons involved in public proceedings, enjoyed absolute immunity from suit in defamation for statements made in the course of certain government proceedings.<sup>57</sup> This rule had its origin in the common-law tort of defamation and was referred to as "absolute privilege."<sup>58</sup> Absolute immunity from defamation actions extended to legislative proceedings,<sup>59</sup> judicial proceedings<sup>60</sup> and to high-level executive of-

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(1935)).

Safeguards against prosecutors' abuse of absolute immunity include "their [prosecutors'] professional obligations," and "knowledge that their assertions will be contested by their adversaries in open court." *Butz*, 438 U.S. at 512. In addition, "[t]he organized bar's development and enforcement of professional standards for prosecutors . . . lessens the danger that absolute immunity will become a shield for prosecutorial misconduct." *Malley v. Briggs*, 475 U.S. 335, 343 n.5 (1986).

56. See *Matasar*, *supra* note 20, at 753; *Imbler*, 424 U.S. at 421. The *Imbler* Court made it clear that prosecutorial immunity was not firmly established in the United States in 1871. "The first American case to address the question of a prosecutor's amenability to [an action for malicious prosecution] was *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001 (1896)." *Imbler*, 424 U.S. at 421. In his concurring opinion in *Imbler*, Justice White noted that "[t]he public prosecutor's absolute immunity from suit at common law is not so firmly entrenched as a judge's." *Id.* at 437 (White, J., concurring).

57. See generally *Veeder*, *supra* note 5; PROSSER, *supra* note 3, § 114, at 776-85; ELDREDGE, *supra* note 3, §§ 72-76, at 339-417. Although modern common-law rules of tort immunity for words spoken by public officials often overlap with the rule of immunity for the acts of the same officials, they are derived from a separate area of tort law and are treated as a separate type of immunity by the commentators listed above. See *infra* notes 58-74 and accompanying text.

58. See PROSSER, *supra* note 3, § 114, at 776. "Absolute immunity" is the more accurate term, as it implies conduct that is tortious but protected, see *id.* § 114, at 776 n.66, while "privilege" implies an act that is not tortious because it is privileged. See *Veeder*, *supra* note 5, at 464.

59. See PROSSER, *supra* note 3, § 114, at 781; ELDREDGE, *supra* note 3, § 74, at 374-92. Legislative immunity had its origin in the English parliamentary struggles of the 16th and 17th centuries. See PROSSER, *supra* note 3, § 114, at 781-82; *Absolute Immunity*, *supra* note 6, at 1109. The English Bill of Rights stated that "the freedom and debates on proceedings in Parliament ought not to be impeached or questioned in any [c]ourt or place out of Parliament." *Veeder*, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131, 134 (1910).

In the United States, legislative immunity also applied to acts as well as to statements made during the course of legislative proceedings. See *Kilbourn v. Thompson*, 103 U.S. 168, 201 (1880). The United States Constitution states that Senators and Representatives "shall in all [c]ases, except [t]reason, [f]elony, and [b]reach of [p]eace, be privileged from [a]rrest during their [a]ttendance at the [s]ession of their respective Houses, and in going to and returning from the same; and for any [s]peech or

ficials.<sup>61</sup> Absolute immunity from suit in defamation for words spoken in judicial proceedings applied specifically to judges,<sup>62</sup> counsel,<sup>63</sup>

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[d]ebate in either House, they shall not be questioned in any other [p]lace." U.S. CONST. art. I, § 6.

Legislative immunity extends to all legislative functions, including debate, voting, reports or work in committee, as well as official publications of legislative proceedings. PROSSER, *supra* note 3, § 114, at 781; ELDREDGE, *supra* note 3, § 73, at 371. Witnesses at such proceedings also enjoy absolute immunity for words spoken. See ELDREDGE, *supra* note 3, § 73, at 371.

At common law, absolute legislative immunity protected defamatory statements related to the business of the proceeding, but in the United States the federal and state constitutions have extended this rule to cover any statement made during the course of the proceeding. See *id.* State legislators also have absolute immunity, but state jurisdictions disagree as to whether absolute or qualified immunity should apply to municipal legislators. See PROSSER, *supra* note 3, § 114, at 782; ELDREDGE, *supra* note 3, § 74, at 388.

Legislative immunity was designed to insure freedom of speech in the legislative branch, free from intimidation by the executive branch of government. See *Gravel v. United States*, 408 U.S. 606, 616-17 (1971).

60. See PROSSER, *supra* note 3, § 114, at 777-81; ELDREDGE, *supra* note 3, § 73, at 340-74. See generally *Veeder*, *supra* note 5. Under the English rule, absolute immunity applied to all statements made in the judicial proceeding, while the American rule protected only those statements relevant to the proceeding. See PROSSER, *supra* note 3, § 114, at 778; *Briscoe v. LaHue*, 460 U.S. 325, 330-31 (1983). The term "judicial proceeding" has not been clearly defined. See PROSSER, *supra* note 3, § 114, at 779 nn.98-99 & 1. It has come to include trial, lunacy, bankruptcy, naturalization, search warrant and grand jury proceedings. See *id.* Also included within this term are administrative proceedings, such as boards, and commissions, as long as they are exercising a judicial function. See *id.* § 114, at 779-80.

There is some 20th century American authority in support of the proposition that absolute judicial immunity in defamation extended to an informal complaint before a magistrate. See *id.* § 114, at 780-81. For a detailed discussion of the immunity of "complaining witnesses," see *infra* note 68 and accompanying text.

61. See PROSSER, *supra* note 3, § 114, at 782. This immunity parallels executive immunity for actions taken in office. Both of these immunities were firmly established in the United States by the end of the 19th Century. See *Spalding v. Vilas*, 161 U.S. 483, 498-99 (1896); ELDREDGE, *supra* note 3, § 75, at 394-95.

62. See PROSSER, *supra* note 3, § 114, at 777. "The privilege extends to the official publication of his judicial opinions." *Id.*

The differing 19th century common-law versions of immunity for judicial acts is discussed above. See *supra* note 51 and accompanying text. Presumably the same differences existed as to liability for words spoken by a judge, as "the immunity of judges for defamatory words follows necessarily from their undoubted freedom from civil action for their judicial acts." *Veeder*, *supra* note 5, at 475.

63. See *Veeder*, *supra* note 5, at 482. This immunity is supported by the notion that "[t]o subject [counsel] to actions for defamation would fetter and restrain him in the fearless discharge of the duty which he owes to his client, and which the successful administration of justice demands." *Id.* A private attorney, however, did not enjoy absolute immunity for intentional misconduct such as conspiracy or malicious prosecution. See *Tower v. Glover*, 467 U.S. 914, 922 (1984).

parties,<sup>64</sup> grand and petit jurors,<sup>65</sup> trial witnesses,<sup>66</sup> grand jury witnesses<sup>67</sup> and complaining witnesses.<sup>68</sup> Today witness immunity

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64. See PROSSER, *supra* note 3, § 114, at 778; Veeder, *supra* note 5, at 477-80. This immunity applies mainly to pleadings, and "rests upon the public policy which deems it desirable that all suitors, whether malicious and bold, or conscientious and timid, should have free access to the conscience of the [s]tate with whatever complaint they choose to make." *Id.* at 477. As is true of judicial immunity in general, the policy of a "thorough and searching investigation of the truth" supports party immunity. *Id.* Abuse of this freedom is prevented by "the proper exercise of the powers of the presiding judge." *Id.* at 478. Party immunity dates from at least as far back as the end of the 19th century. See *id.* at 477 n.42.

65. PROSSER, *supra* note 3, § 114, at 777; Veeder, *supra* note 5, at 474. Jurors "participate in judicial proceedings as a public duty, in obedience to the requirement of the law. Within the limits of their functions they possess powers which require the exercise of deliberation and judgment, and while so acting, they are entitled to absolute immunity." *Id.* at 475; ELDREDGE, *supra* note 3, § 73, at 360. Grand jurors also have absolute protection from civil suit for the act of returning an indictment. See *id.* § 73, at 358. A defamatory grand jury report, however, receives only a qualified immunity. See Veeder, *supra* note 5, at 475 n.39.

66. See PROSSER, *supra* note 3, § 114, at 777-78. In *Briscoe*, the Supreme Court found that absolute immunity for trial witnesses was well established at common law in the United States by 1871. See *Briscoe v. LaHue*, 460 U.S. 325, 330-34 (1983). The only pre-1871 federal court to address the issue of witness immunity was *White v. Nicholls*, 3 U.S. (How.) 266, 287 (1845). The *White* Court stated in dictum that the entire doctrine of immunity for words spoken in judicial proceedings was, and should be, one of qualified, not absolute, immunity. See *id.*; Veeder, *supra* note 5, at 465-66 (*White* was merely "obiter"); *Briscoe*, 460 U.S. at 353 (Marshall, J., dissenting). In addition, there was some disagreement among state jurisdictions, both before and after 1871, as to the merit of absolute immunity for trial witnesses. See *Briscoe*, 460 U.S. at 355 n.15.

67. See ELDREDGE, *supra* note 3, § 73, at 371. The origins of grand jury witness immunity are less certain than those of trial witness immunity. The Seventh Circuit has asserted that such immunity was well established at "common law." See *Kincaid v. Eberle*, 712 F.2d 1023, 1023 (7th Cir.), *cert. denied*, 464 U.S. 1018 (1983). The *Kincaid* court cites four cases to support this proposition. See *id.* Only three of these cases were decided prior to 1871, and only one of these was a United States court decision. See *Kidder v. Parkhurst*, 3 Allen 393, 396 (Mass. 1862), *cited in Kincaid*, 712 F.2d at 1023. The other two pre-1871 decisions are English. See *Lake v. King*, 1 Wms. Saund. 131, 132, 85 Eng. Rep. 137, 139 (K.B. 1679); *The King v. Skinner*, 1 Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772). This author has been unable to discover any other pre-1871 American decisions that hold for or against absolute immunity for words spoken by grand jury witnesses.

The only other support for the doctrine of absolute immunity for grand jury witnesses in pre-1871 common law was the generally accepted rule that "no proceeding in a regular course of justice is to be deemed an actionable libel." *Kidder*, 3 Allen at 396. Thus, the question of the origin of common-law grand jury witness immunity may turn on whether grand jury proceedings were considered "judicial proceedings" at common law. See *infra* notes 191-94 and accompanying text.

In addition to the issue of grand jury witness immunity from suit in defamation, it is unclear whether such witnesses had immunity from suit for malicious prosecution. See *infra* note 74 and accompanying text.

Twentieth century United States courts clearly have accepted the rule of absolute



extends to statements made by prospective witnesses to attorneys, and covers oral as well as written testimony by affidavit or deposition.<sup>69</sup>

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immunity for grand jury witnesses. See *Commonwealth v. Duncan*, 127 Ky. 47, 104 S.W. 997 (1907) (dictum); *Schultz v. Strauss*, 127 Wis. 325, 328-29, 106 N.W. 1066, 1067 (1906). Some commentators cite two later cases as standing for the same proposition. See, e.g., ELDREDGE, *supra* note 3, § 73, at 371 n.50 (citing *Taplin-Rice-Clerkin Co. v. Hower*, 124 Ohio St. 123, 177 N.E. 203 (1931) (malicious prosecution) and *State v. Tillett*, 111 So. 2d 716 (Fla. App. 1959)).

The later cases, however, seem to stand for the proposition that confidential communications cannot be introduced at trial as *evidence* of libel, or malicious prosecution, rather than that of absolute immunity for grand jury witness testimony. The first proposition concerns an evidentiary issue, while the latter concerns the threshold issue of immunity. This legal distinction was clearly explained in *Schultz v. Strauss*, 127 Wis. 325, 329, 106 N.W. 1066, 1067 (1906):

The exemption from liability for words spoken on a privileged occasion is not the same privilege recognized in the law as pertaining to confidential communications, as between attorney and client and other like confidential relations, but they are privileged upon the ground that they furnish no ground of action for the alleged injury.

*Id.* This legal distinction may be unimportant in a jurisdiction that does not allow grand jury testimony to be introduced at trial as evidence of malicious prosecution under any circumstances: the practical effect of such a rule is to render grand jury witnesses absolutely immune from suits that are based solely on their grand jury testimony. The distinction may be important, however, in a jurisdiction that admits such evidence if a plaintiff also provides evidence of malicious acts outside of the grand jury proceeding. Such a jurisdiction would provide absolute immunity from civil suits that are based solely on grand jury witness testimony but not from suits that are based on a grand juror's out of court actions in addition to his testimony. The latter evidentiary rule may provide part of the answer to the question of whether to extend absolute immunity to pretrial police testimony. See *infra* notes 246-51 and accompanying text.

68. See Veeder, *supra* note 5, at 480 n.51. The role of the complaining or "prosecuting" witness has been defined in the following manner:

The private person upon whose complaint or information a criminal accusation is founded and whose testimony is mainly relied on to secure a conviction at the trial. In a more particular sense, the person who was chiefly injured, in person or property, by the act constituting the alleged crime (as in case of robbery, assault, criminal negligence, bastardy and the like), and who instigates the prosecution and gives evidence.

BLACK'S LAW DICTIONARY 1099 (5th ed. 1979).

Absolute immunity in defamation for complaining witnesses applied only to "formal complaints," while "informal complaints" enjoyed only a qualified privilege in some jurisdictions. See Veeder, *supra* note 5, at 480 n.51.

The Supreme Court held in *Malley* that complaining witnesses were not absolutely immune from civil suit at common law. See *Malley v. Briggs*, 475 U.S. 335, 340 (1986). The cases cited by the Court in support of this proposition, however, pertain to malicious prosecution, rather than defamation. See *id.* at 340-41 n.3. For a discussion of witness immunity from malicious prosecution, see *infra* notes 73-74 and accompanying text.

69. See PROSSER, *supra* note 3, § 114, at 777-78, 781; ELDREDGE, *supra* note 3, § 73, at 369.

Commentators have suggested that absolute immunity for trial witnesses was not designed to protect slanderers or perjurers, but was established because "it is essential to the ends of justice" that those who are honest be protected from "vexatious litigation."<sup>70</sup> Witness immunity has been described as the lesser of two evils: the increased likelihood of perjury is balanced against the likelihood that honest witnesses will not reveal the whole truth at trial if they fear civil liability stemming from their testimony.<sup>71</sup> Judicial safeguards, such as criminal sanctions, liability for malicious prosecution, the appeal process and the adversarial nature of most judicial proceedings help to compensate for the ill-effects of absolute witness immunity.<sup>72</sup>

Notwithstanding the immunities listed above, complaining witnesses did not have absolute immunity from suit for malicious prosecution at common law.<sup>73</sup> Although it is far from certain, the same may

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70. Veeder, *supra* note 5, at 469. Absolute witness immunity is necessary to protect the truth-seeking function of trial courts. See *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983). Without such immunity, witnesses might be reluctant to divulge the truth: "A witness's apprehension of subsequent damages liability might induce two forms of self-censorship. First, witnesses might be reluctant to come forward to testify. . . . And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability." *Id.* at 333; see *Briggs v. Goodwin*, 712 F.2d 1444, 1447 (D.C. Cir. 1983).

71. See *Briscoe*, 460 U.S. at 345. Judge Learned Hand reasoned in the following manner:

As is so often the case, the answer [to official immunity] must be found in a balance between the evils inevitable in either alternative . . . [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), *quoted in Briscoe*, 460 U.S. at 345.

72. See Veeder, *supra* note 5, at 470-71; *When Police Lie*, *supra* note 2, at 516. Other procedural safeguards that apply specifically to trial proceedings include "an impartial judge, a jury . . . the rules of evidence as applied by the judge" and "the right to present contrary evidence." *White v. Frank*, 680 F. Supp. 629, 633 (S.D.N.Y.), *appeal dismissed*, 855 F.2d 956 (2d Cir. 1988).

73. See *supra* note 68 and accompanying text. Malicious prosecution is clearly a separate cause of action from defamation. See PROSSER, *supra* note 3, § 119, at 834-35. The two torts have separate historical roots, enjoy different immunities, and protect different interests. See *id.* § 119, at 834. Prosser adds the following explanation:

Malicious prosecution covers a somewhat broader field than mere harm to reputation. It may involve an interference with personal integrity, by arrest or confinement of the plaintiff, or financial damage in the form of expense to which he is put in defending himself against the criminal charge.

*Id.* § 119, at 834-35.

A defendant will be held liable for malicious prosecution if he acts in the following

have been true of grand jury witnesses under certain circumstances.<sup>74</sup>

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manner:

The defendant may be liable either for initiating or continuing a criminal prosecution without probable cause. But he cannot be held responsible unless he takes some active part in instigating or encouraging the prosecution. He is not liable merely because of his approval or silent acquiescence in the acts of another, nor for appearing as a witness against the accused, even though his testimony is perjured, since the necessities of a free trial demand that witnesses are not to be deterred by fear of tort suits, and shall be immune from liability.

*See id.* § 119, at 836-37. Thus, a cause of action for malicious prosecution, as with one in defamation, will not lie where a witness has simply perjured himself at a judicial proceeding. Evidence of such perjury, however, would be "admissible with other acts and circumstances to show instigation or active encouragement of the prosecution or an improper motive." *Id.* § 119, at 836 n.28.

In addition, a defendant may be liable for malicious prosecution where he assists in such a prosecution:

[If the defendant] advises or assists another person to begin the proceeding, ratifies it when it is begun in his behalf, or takes any active part in directing or aiding the conduct of the case, he will be responsible. The question of information laid before prosecuting authorities has arisen in many cases. If the defendant merely states what he believes, leaving the decision to prosecute entirely to the uncontrolled discretion of the [prosecutor], or if the [prosecutor] makes an independent investigation, or prosecutes for an offense other than the one charged by the defendant, the latter is not regarded as having instigated the proceeding; but if it is found that his persuasion was the determining factor in inducing the [prosecutor's] decision, or that he gave information which he knew to be false and so unduly influenced the authorities, he may be held liable.

*Id.* § 119, at 837. Thus, a witness who simply provides the prosecution with evidence, or a complaining witness, may be deemed to have initiated a malicious prosecution. In such a case, although he would be immune from suit in defamation, he would not have the same immunity for suit in malicious prosecution.

In addition, there is some post-1871 authority suggesting that where a police officer concocts false evidence, he may be liable for malicious prosecution, if the other elements of the tort are met, even though he is a public officer. *See id.* § 119, at 838; *Carpenter v. Sibley*, 153 Cal. 215, 94 P. 879 (1908). *Carpenter*, however, involved conspiratorial actions on the part of the police officer as well as use of false testimony at trial. *See id.*

74. *See HARPER, supra* note 41, § 4.3, at 412. "Whether one who procures an indictment by testifying before a grand jury can be subjected to an action for malicious prosecution raises delicate questions of social policy as to which the decisions appear to be in some confusion." *Id.* This "confusion" is more than a simple split among common-law courts. Even among courts that seem to allow for grand jury witness liability for malicious prosecution, it is unclear whether liability is based solely on the witness' testimony, or whether such testimony may merely be introduced as evidence of malicious prosecution. *See supra* notes 67, 73 and accompanying text. Prosser seems to indicate that witness testimony alone is never sufficient to form a cause of action for malicious prosecution. *See supra* note 73 and accompanying text. Cases that allow for such a cause of action against witnesses usually involve conspiratorial acts, which combine with perjured testimony to form a cause of action for malicious prosecution. *See supra* notes 67, 73 and accompanying text. Prosser

## B. Origins of Section 1983

Section 1983 of title 42 of the United States Code codified section 2 of the Civil Rights Act of 1866<sup>75</sup> (1866 Act) and section 1 of the 1871 Ku Klux Act (1871 Act).<sup>76</sup> Section 2 of the 1866 Act created

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does indicate that individuals may be liable in malicious prosecution for intentionally passing false information to prosecutors. Such cases, however, deal specifically with complaining witnesses, or with individuals who simply provide prosecutors with information, rather than grand jury or probable cause hearing witnesses. See *supra* note 73 and accompanying text.

It is important to note that *Briscoe* concerned only the *testimony* of police officers. The *Briscoe* Court did not rule on whether police officers could be sued under § 1983 for maliciously encouraging the prosecution outside the courtroom to initiate or continue a prosecution. In such a suit, conceivably, evidence of police perjury could be admissible as proof of such acts. This result would be consistent with common-law malicious prosecution. See *supra* note 67 and accompanying text.

75. See Comment, *Civil Rights: Absolute Immunity Extended to All Witnesses Under 42 U.S.C. § 1983*, 23 WASHBURN L.J. 160, 160-61 (1983) [hereinafter *Immunity Extended*]. The 1866 Civil Rights Act (the 1866 Act) was entitled "An Act to Protect All Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication," ch. 31, 14 Stat. 27 (1866). Section 2 of the 1866 Act provides:

That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any [s]tate or [t]erritory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine, not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

*Id.*

The rights "secured and protected by [the 1866 Act]," were described in § 1 of the 1866 Act. Section 1 granted citizenship to "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed," and provided the following:

[All citizens have the same right] in every [s]tate and [t]erritory in the United States, to make and enforce contracts, to convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 101 (1st ed. 1970) [hereinafter SCHWARTZ].

76. See *Immunity Extended*, *supra* note 75, at 161; Note, *Pendent Party Jurisdiction and Section 1983: When Has Congress "By Implication Negated" Jurisdiction?*, 14 FORDHAM URB. L.J. 873, 882 (1986) [hereinafter *Pendent Party*]. The Ku Klux Act of 1871 was formally titled "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes," ch.

a federal criminal penalty for any person acting "under color of" state law who deprived an individual of citizenship rights because of that individual's race, color or former condition of slavery.<sup>77</sup> Section 1 of the 1871 Act, using language similar to that of section 2 of the 1866 Act, added a federal civil remedy for all individuals deprived of their civil rights by persons acting "under color of" state law.<sup>78</sup>

On December 18, 1865, shortly after the end of the Civil War, Congress abolished slavery and involuntary servitude with its ratification of the thirteenth amendment to the United States Constitution.<sup>79</sup> Congress passed the Civil Rights Act of 1866 to enforce

22, 17 Stat. 13 (1871). Section 1 of the 1871 Act provided the following:

[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any [s]tate, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the [s]tate to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts . . . .

*Id.* Congress first codified the Ku Klux Act as § 1979 in the Revised Statutes of 1879. *See Immunity Extended, supra* note 75, at 161 n.8. When codified, the substantive portion of § 1 of the Ku Klux Act, now 42 U.S.C. § 1983, was separated from the procedural section, now 28 U.S.C. § 1343(3). *See Lynch v. Household Finance*, 405 U.S. 538, 543 n.7 (1971); *Pendent Party, supra*, at 879. In addition, the provision in the Revised Statutes broadened the scope of § 1 to protect rights secured by all federal laws, as well as the Constitution. *See Lynch*, 405 U.S. at 543 n.7.

77. *See supra* note 75 and accompanying text. The original bill before the House included a general prohibition of discrimination in civil rights on account of race. *See SCHWARTZ, supra* note 75, at 100-01. The final draft listed specifically those rights protected by the 1866 Act. *See supra* note 75 and accompanying text.

The Civil Rights Act of 1866 imposed a misdemeanor fine "not exceeding one thousand dollars, or imprisonment not exceeding one year, or both." *See supra* note 75 and accompanying text.

78. *See supra* note 76 and accompanying text. Section 1 of the Ku Klux Act provided that one who violated the provisions of the Act would "be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress." *Supra* note 76.

79. *See SCHWARTZ, supra* note 75, at 21. Section 1 of the 13th amendment provides the following:

Neither slavery nor involuntary servitude, except as a punishment for a crime whereof a party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

U.S. CONST. amend. XIII.

the thirteenth amendment<sup>80</sup> in the South, where vestiges of slavery continued to exist.<sup>81</sup> The relatively broad language of civil rights protection in the 1866 Act<sup>82</sup> led to debate as to Congress' authority to pass such an act.<sup>83</sup>

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80. See Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 895-96 (1986) [hereinafter Kaczorowski]; SCHWARTZ, *supra* note 75, at 99. Section 2 of the 13th amendment provides that "Congress shall have the power to enforce this article by appropriate legislation." CONST. amend. XIII. Senator Lyman Trumbull (R. Ill.), Chairman of the Senate Judiciary Committee, introduced the 1866 Act legislation and argued the following: [U]nder the [13th amendment] which we have now adopted, and which declares that slavery shall no longer exist, and which authorizes Congress by appropriate legislation to carry this provision into effect, I hold that we have a right to pass any law which, in our judgment, is deemed to appropriate, and which will accomplish the end in view, secure freedom to all people in the United States.

CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866), *reprinted in* SCHWARTZ, *supra* note 75, at 111. Thus, proponents of the act asserted that the enabling clause of the 13th amendment gave Congress the authority to enact the 1866 Act. For a discussion of the constitutional debate over the 1866 Act, see *infra* notes 83-87 and accompanying text.

81. See SCHWARTZ, *supra* note 75, at 106. Senator Trumbull described the conditions of state imposed inequality for blacks that continued to exist in the South even after the passage of the 13th amendment: "[O]f what avail will it now be that the Constitution of the United States has declared that slavery shall not exist, if in the late slaveholding [s]tates laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen?" CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866), *reprinted in* SCHWARTZ, *supra* note 75, at 106. Trumbull described certain Southern states' statutes that provided the following:

[I]f any colored person, any free negro or mulatto, shall come into that [s]tate for the purpose of residing there, he shall be sold into slavery for life. If any person of African descent residing in that [s]tate travels from one county to another without having a pass or certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in this [s]tate without authority.

*Id.*, *reprinted in* SCHWARTZ, *supra* note 75, at 106-07.

82. See *supra* note 75 and accompanying text.

83. See Kaczorowski, *supra* note 80, at 910; SCHWARTZ, *supra* note 75, at 99-100. Opponents of the 1866 Act asserted that Congress did not have the constitutional authority to enact legislation protecting individual civil rights from state infringement, and that this power remained with the states. See SCHWARTZ, *supra* note 75, at 99. The 1866 bill passed the Senate on February 2, 1866, and the House on March 13th, but President Andrew Johnson vetoed it on March 27. See *id.* at 100. President Johnson's objections to the bill were based largely on constitutional grounds. See *id.* The President stated in the opening paragraph of his veto message "that the [1866] bill, which has passed both Houses of Congress . . . contains provisions which I can not approve consistently with my sense of duty to the whole people and my obligations to the Constitution of the United States." See *id.* at 150. Regarding specifically § 2 of the 1866 Act, President Johnson made the following remark:

The remedy proposed by [§ 2] seems to be in this respect . . . unconstitutional; for the Constitution guarantees nothing with certainty if it does

Several congressmen urged adoption of the fourteenth amendment in order "to dispel any doubt about the constitutionality of the newly enacted Civil Rights Act [of 1866]."<sup>84</sup> The fourteenth amendment extended federal power in the civil rights area,<sup>85</sup> legitimizing the federal government's power to protect a former slave's civil rights from state infringement.<sup>86</sup> Congress reenacted the 1866 Act in the Enforcement Act of 1870, pursuant to the fourteenth amendment, to remove any lingering doubt as to the constitutionality of the 1866 Act.<sup>87</sup>

The Forty-second Congress subsequently passed the 1871 Ku Klux Act as a further means of enforcing the fourteenth and fifteenth<sup>88</sup>

not insure to the several [s]tates the right of making and executing laws in regard to all matters arising within their jurisdiction, subject only to the restriction that in cases of conflict with the Constitution and constitutional laws of the United States the latter should be held to be the supreme law of the land.

*Id.* at 154. The 1866 bill passed both Houses by a two-thirds majority in early April of 1866. *See id.* at 100.

84. Kaczorowski, *supra* note 80, at 910. Section 1 of the 14th amendment granted citizenship to "[a]ll persons born or naturalized in the United States . . . and of the [s]tate wherein they reside," and provided the following:

No [s]tate shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. CONST. amend. XIV, § 1. Section 5 of the amendment gave Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

The framers of the 14th amendment believed that the constitutionality of the 1866 Act was no longer at issue because they "defined United States citizenship as the status of freemen and congressionally enforceable rights of United States citizens as the natural rights of freemen. If the [13th] amendment did not delegate to Congress the authority to secure this status and these rights, the [14th] amendment clearly did." Kaczorowski, *supra* note 80, at 911.

85. *See* SCHWARTZ, *supra* note 75, at 182; *Pendent Party*, *supra* note 76, at 883. Passage of the 14th amendment was part of a general trend extending federal power over the states, which "included the passage of the [13th] . . . and [15th] amendments to the Constitution, as well as the enactment of several Civil Rights Acts in the 1860's and 1870's . . ." *Pendent Party*, *supra* note 76, at 883; *see* *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972).

86. *See supra* note 84 and accompanying text.

87. *See* SCHWARTZ, *supra* note 75, at 101.

88. The 15th amendment to the United States Constitution, enacted March 30, 1870, provides the following:

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any [s]tate on account of race, color, or previous condition of servitude.

2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

amendments in the South.<sup>89</sup> Terrorist activities and conspiracies of the Ku Klux Klan, which deprived individuals of their recently secured constitutional rights, were on the rise in Southern states.<sup>90</sup> The 1871 Act promised victims of "Southern lawlessness" a civil remedy in federal court, where it was thought that a black plaintiff would be free from the bias and anti-black conspiracies<sup>91</sup> of Southern state courts.<sup>92</sup>

In the decades immediately following the Civil War, federal courts seldom invoked section 1 of the 1871 Act.<sup>93</sup> Despite the intention of the framers of these Acts, the Supreme Court in subsequent years left administration of civil rights to state courts.<sup>94</sup> In contrast, the

89. See SCHWARTZ, *supra* note 75, at 591. In addition to § 1 of the 1871 Act, § 2 provided "criminal and civil remedies in federal court for the conspiratorial activities of the Klan." See *Briscoe v. LaHue*, 460 U.S. 325, 338 (1983). Section 3 gave the President the power to use the armed forces in response to domestic violence. Section 4 authorized the presidential suspension of habeas corpus, and § 5 required grand and petit jurors to take a test oath. See *id.* at 336 n.17.

90. See SCHWARTZ, *supra* note 75, at 591; *Briscoe*, 460 U.S. at 337-40. In his March 23, 1871 address to Congress, President Ulysses S. Grant asked Congress to pass legislation to remedy "[a] condition of affairs . . . in some of the [s]tates of the Union rendering life and property insecure, and the carrying of the mails and the collection of the revenue dangerous." *Immunity Extended*, *supra* note 75, at 161 n.11; see SCHWARTZ, *supra* note 75, at 591.

91. Section 2 of the Ku Klux Act dealt specifically with conspiracy. See SCHWARTZ, *supra* note 75, at 591. Section 2 provided in part:

[I]f any one or more persons engaged in any . . . conspiracy shall do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall be . . . deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages occasioned by such . . . deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy, such action to be prosecuted in the proper district or circuit court of the United States . . . .

*Id.* at 594 (quoting Ku Klux Act of 1871, ch. 22, 17 Stat. 13). Section 2 of the 1871 Act was codified as 42 U.S.C. § 1985(3) (1980), which applies to conspiracies by individuals acting "under color of" state law.

92. See *Immunity Extended*, *supra* note 75, at 162, 163 n.16. Although the 14th amendment secured an individual's constitutional right to due process in state court, "state courts could not be relied upon to impartially adjudicate complaints brought by ex-slaves because of the infiltration of the Ku Klux Klan." *Id.* at 162 n.16; see *Briscoe*, 460 U.S. at 337-38.

93. See *Absolute Immunity*, *supra* note 6, at 1116.

94. See *id.* In a series of decisions following the post-civil war constitutional amendments and federal civil rights acts, the Supreme Court limited the extent to which the 14th amendment protected an individual's civil rights from private and state infringements. See Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1336-43 (1952) [hereinafter Gressman]; see, e.g., *The Slaughterhouse Cases*, 83 U.S. 36 (1873) (Supreme Court limited 14th amendment's civil



Supreme Court has broadened the scope of section 1983 in the 1960's,<sup>95</sup> 1970's<sup>96</sup> and 1980's<sup>97</sup>, which has led to increased civil rights litigation in federal courts.<sup>98</sup> During the same period, however, the Supreme Court has checked this growth in section 1983 litigation by incorporating legal theories, such as the common-law immunity doctrines, into section 1983.<sup>99</sup>

### C. Evolution of the Supreme Court Section 1983 "Functional Categories" Test

The language of section 1983 does not expressly create any immunity defenses.<sup>100</sup> Nevertheless, beginning in 1951, the Supreme Court construed section 1983 to include certain traditional common-law immunities.<sup>101</sup> The Supreme Court's historical test for inclusion of such immunities has met with strong criticism.<sup>102</sup> Although the test has never been entirely clear, the Court has continued to assume that: (1) it is possible to determine the legislative intent of the Forty-second Congress regarding section 1983 immunities;<sup>103</sup> (2) the 1871

rights protection to cases involving state-sponsored infringements); *United States v. Cruikshank*, 92 U.S. 542 (1876) (14th amendment does not apply to private actors).

It was largely the private actions of the Ku Klux Klan that prompted Congress' enactment of the 1871 Ku Klux Act. *See Gressman, supra*, at 1340. Section 2 of the 1871 Act, the criminal conspiracy section, was declared void by the Court in *United States v. Harris*, 106 U.S. 629 (1882), *see id.*, because § 2 applied to any person, not just those who acted "under color of" state law, and thus did not meet the state action requirement of *Cruikshank*.

95. *See Absolute Immunity, supra* note 6, at 1116; *Monroe v. Pape*, 365 U.S. 167 (1961) (§ 1983 permits recovery despite existence of state civil remedies).

96. *See Absolute Immunity, supra* note 6, at 1116; *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978) (§ 1983 relief allowed against municipality).

97. *See Owen v. City of Independence*, 445 U.S. 622 (1980) (no immunity for municipalities against § 1983 suits); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (deprivation of rights under Social Security Act within scope of § 1983 protection).

98. *See Absolute Immunity, supra* note 6, at 1117.

99. *See id.*; *Matasar, supra* note 20, at 742. For a full discussion of Supreme Court § 1983 immunity decisions, *see infra* notes 100-49 and accompanying text.

Other legal theories that the Court has employed to limit § 1983 litigation include, abstention, standing, elements of § 1983 actions and *res judicata*. *See Absolute Immunity, supra* note 6, at 1117 n.93.

100. *See Malley v. Briggs*, 475 U.S. 335, 339 (1986); *Tower v. Glover*, 467 U.S. 914, 920 (1984); *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976); *Pierson v. Ray*, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting).

101. *See Matasar, supra* note 20, at 746; *supra* note 9 and accompanying text.

102. *See supra* note 22 and accompanying text; *infra* notes 103-05 and accompanying text.

103. *See Matasar, supra* note 20, at 743, 747. The Court often relies on the legislative intent of the 1871 Congress in arriving at its § 1983 immunity decisions.

legislators did not intend to abrogate existing common-law immunities with the all-encompassing language of section 1983;<sup>104</sup> and (3) the

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*See, e.g.,* *Briscoe v. LaHue*, 460 U.S. 325, 336-41 (1983); *Owen v. City of Independence*, 445 U.S. 622, 635-37 (1980); *Pierson*, 386 U.S. at 554-55; *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). In *Pierson*, the Court "presume[d] that Congress would have specifically so provided had it wished to abolish the doctrine" of judicial immunity. *Pierson*, 386 U.S. at 555.

Professor Matasar contends, however, that it is not possible to determine the legislative intent of the 1871 legislators. *See supra* note 22 and accompanying text; *infra* note 104 and accompanying text.

104. *See, e.g., Malley*, 475 U.S. at 340; *Briscoe*, 460 U.S. at 330; *Imbler*, 424 U.S. at 417-18; *Wood v. Strickland*, 420 U.S. 308, 316-17 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974); *Pierson*, 386 U.S. at 554; *Tenney*, 341 U.S. at 376.

The *Briscoe* Court concluded the following:

[T]he all-encompassing language of § 1983, referring to '[e]very person' who, under color of law, deprives another of federal constitutional or statutory rights, is not to be taken literally. 'It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum . . . . One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.'

*Briscoe*, 460 U.S. at 330 (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)).

In arriving at this conclusion, the Supreme Court assumed that the legislative debates of the 42d Congress were either inconclusive or silent on the issue of whether § 1 of the Ku Klux Act (now § 1983) abrogated common-law immunities. *See Matasar, supra* note 20, at 747. This assumption implies that the 1871 legislators "did not want courts to give the language of § 1983 its plain effect." *Id.* at 765.

Convincing evidence exists, however, that the 42d Congress wanted the courts to apply the plain meaning of § 1983, and, in so doing, abrogate existing common-law immunities. *See id.* at 766-81. Professor Matasar asserts that, although several methods of statutory interpretational methodology were explored by Reconstruction era courts, "there is absolutely no suggestion by [such courts] that congressional silence should be read to override either plain meaning or actual legislative statements . . . . The Court's assumptions about [c]ongressional silence fly in the face of the hermeneutical conventions of the Reconstruction Congress." *Id.* at 766.

In fact, the 1871 legislators were far from silent on the issue of whether the 1871 Ku Klux Act abrogated common-law immunities. Some writers have argued convincingly that the 1866 and 1871 Acts' legislative debates show that the framers of the 1871 Ku Klux Act desired the abrogation of existing common-law immunities. *See infra* note 125 and accompanying text; *Briscoe*, 460 U.S. at 356-63 (Marshall, J., dissenting); *Pierson*, 386 U.S. at 559 (Douglas, J., dissenting); *see also* Matasar, *supra* note 20, at 768-78.

In addition, Professor Matasar has asserted that the Reconstruction Congress intended to break with common-law traditions in general, including those of public officer immunities. *See Matasar, supra* note 20, at 778-81.

A credible interpretation of § 1983 could exclude all immunities from § 1983, and leave the explicit inclusion of such immunities up to Congress. This approach would recognize only the "plain meaning" of § 1983, and veto any exceptions to § 1983 based on common-law immunities. *See Briscoe v. LaHue*, 460 U.S. 325, 347-50 (1983)

Court can look to traditional common-law immunities to determine which immunities the 1871 legislators intended to include under section 1983.<sup>105</sup>

The Supreme Court's section 1983 immunity analysis can be divided into three developmental periods. In its earliest immunity decisions,<sup>106</sup>

(Marshall, J., dissenting). As Justice Marshall pointed out in his *Briscoe* dissent:

In all other matters of statutory construction, this Court begins by focusing on the language of the statute itself. 'Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' . . . The language of § 1983 provides unambiguous guidance in this case [against including common-law immunities in § 1983].

*Id.* at 347 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980)). *Contra* Note, *Liability of Judicial Officers Under Section 1983*, 79 *YALE L.J.* 322, 325 (1969) [hereinafter *Liability*].

*Tenney v. Brandhove*, 341 U.S. 367 (1951), is, arguably, the one Supreme Court § 1983 immunity decision that would survive Marshall's plain meaning approach. *Tenney* incorporated legislative immunity into § 1983. Legislative immunity derived from the United States Constitution, as well as from the common law, and, therefore, may be constitutionally protected from legislative acts such as § 1983. *See Briscoe*, 460 U.S. at 363 (Marshall, J., dissenting); *Liability*, *supra*, at 323; *supra* note 59 and accompanying text. In addition, there is evidence that the Senate sponsor of § 2 of the 1866 Civil Rights Act did not intend that the Act apply to legislators, because legislators would not meet the Act's "under color of" state law requirement. *See Briscoe*, 460 U.S. at 363-64 (Marshall, J., dissenting). Justice Marshall noted the following in his dissent:

[W]hen the specter of holding state legislators liable under § 2 of the 1866 Act was raised by President Johnson's veto message, the Senate sponsor of the Act was quick to disavow any such intention. Senator Trumbull argued at some length that legislators did not fall within the scope of the Act because they 'enact' laws rather than act 'under color of' state law . . . . It is entirely reasonable to conclude that Congress intended to make state legislators immune from civil liability under § 1 of the 1871 Act.

*Id.*

Professor Matasar believes that history alone is not an adequate guideline for the court to construe § 1983. *See supra* note 22 and accompanying text. As Justice Marshall indicates, however, the history and purpose of § 1983, along with the plain language of the statute, provide the Court with the information it needs to exclude common-law immunities from § 1983. In the words of Justice O'Connor, "[the Supreme Court does] not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate." *Tower*, 467 U.S. at 922-23.

105. *See Matasar, supra* note 20, at 757-58; *see, e.g., Malley*, 475 U.S. at 339-40; *Briscoe*, 460 U.S. at 330-36; *Imbler*, 424 U.S. at 421-27; *Pierson*, 386 U.S. at 553-55.

The Court's third assumption implies that it is possible for one to determine which common-law immunities were well settled in 1871. The disagreement among authorities as to the existence of certain pre-1871 common-law immunities calls this assumption into question. For a discussion of these authorities, *see supra* notes 51-74 and accompanying text.

106. The first two Supreme Court § 1983 immunity decisions were *Tenney v. Brandhove*, 341 U.S. 367 (1951), and *Pierson v. Ray*, 386 U.S. 547 (1967).

the Court relied almost exclusively upon doctrines of traditional common-law immunities to determine the scope of immunity available under section 1983.<sup>107</sup> Beginning in 1974, however, the Court placed less emphasis on common-law history as the critical determinant of section 1983 immunity, and, instead, stressed the role of public policy.<sup>108</sup>

Since 1983, the Court has returned to the more rigid historical approach embodied in its earliest decisions.<sup>109</sup> It has purported to view public policy as only incidental support for its fundamentally

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107. See Matasar, *supra* note 20, at 747. "The early decisions involving legislative and judicial immunities rest primarily on a strong, continuous, historical tradition of immunity." *Id.*

In its first § 1983 immunity decision, *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Court held that in passing the Ku Klux Act the 1871 legislators did not intend to abrogate legislative immunity. See *Tenney*, 341 U.S. at 376. The Court explained that it did "not have to wrestle with far-reaching questions of . . . construction [of § 1983]," *id.* at 372, because "[w]e cannot believe that [the 1871] Congress . . . would impinge on a tradition [of legislative immunity] so well grounded in history and reason." *Id.* at 376.

Similarly, in *Pierson v. Ray*, 386 U.S. 547 (1967) the Court extended absolute immunity to judges under § 1983. See *id.* at 554-55. Chief Justice Warren noted that "[t]he immunity of judges for acts within the judicial role is . . . well established, and we presume that [the 1871] Congress would have specifically so provided had it wished to abolish the doctrine" of judicial immunity. *Pierson*, 386 U.S. at 554-55.

108. Matasar, *supra* note 20, at 747-48. In a series of decisions from 1974-1980, the Court changed its § 1983 analysis to a two-part test. See Note, *Tort Immunity—Briscoe v. LaHue: Abandonment of the Balancing Approach in Immunity Cases Under Section 1983*, 62 N.C.L. Rev. 584, 591 (1984) [hereinafter *Abandonment*]. First, the Court determined whether a particular public official enjoyed immunity at common law. See *Imbler*, 424 U.S. at 421-24. Second, the Court considered whether the policies supporting the common-law immunity applied with equal force to § 1983 immunity. See *Imbler v. Pachtman*, 424 U.S. 409, 424-29 (1976); *Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980); *Wood v. Strickland*, 420 U.S. 308, 318 (1975). In *Wood*, for example, the Court granted qualified immunity to state school officials relying on "[c]ommon law tradition . . . and strong public policy reasons." *Id.*

During this period the Supreme Court also seemed to relax its common-law standard. The Court did not require a plaintiff to prove that a particular immunity existed prior to 1871. In *Imbler*, for example, the Court granted prosecutors absolute immunity under § 1983, despite the nonexistence of such immunity prior to 1871. The Court did not assert that prosecutorial immunity existed prior to 1871, relying instead on the public policy considerations underlying such immunity. See *Imbler*, 424 U.S. at 421-29. For a discussion of the history of prosecutorial immunity, see *supra* notes 53-56 and accompanying text. At times, the Court seemed to overlook the fact that a pre-1871 immunity existed. In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court held that municipalities enjoyed no immunity under § 1983. See *Owen*, 445 U.S. at 638. The majority found no pre-1871 immunity for municipalities at common law, despite a strong dissent to the contrary. See *id.* at 683 (Powell, J., dissenting).

109. See Matasar, *supra* note 20, at 748.

history-based rationale.<sup>110</sup> The Court's current section 1983 immunity analysis is based almost exclusively on the common law as it existed "when the Civil Rights Act was enacted."<sup>111</sup> Where a defendant: (1) cannot "point to a common-law counterpart to the privilege he asserts";<sup>112</sup> or where (2) his official function is analogous to that of an official who was not given absolute immunity at common law, the Court will not give him absolute immunity under section 1983.<sup>113</sup> The Court has reasoned that whether such an extension of section 1983 immunity is warranted, "is for Congress to determine."<sup>114</sup>

The second prong of the common-law test described above is part of the "functional categories" test recently developed by the Court.<sup>115</sup> Under this analysis, the Court grants immunity from section 1983 to government officials whose positions as such did not specifically exist at common law, but whose official responsibilities nevertheless closely resemble the duties of individuals who enjoyed such immunity

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110. See, e.g., *Briscoe v. LaHue*, 460 U.S. 325, 342-43 (1983). The *Briscoe* Court discussed policy considerations applicable to police witness immunity. The Court, however, refused to be influenced by these policy considerations in arriving at its holding. See *id.* at 342; *infra* notes 130-33 and accompanying text.

Similarly, in *Tower*, the Court stated that "[w]e do not have a license to establish immunities for § 1983 actions in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984). Again, in *Malley*, the Court emphasized that "our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

In fact, the Court has relied on policy considerations in its recent § 1983 immunity decisions. See *infra* note 119 and accompanying text.

111. *Malley*, 475 U.S. at 340 (quoting *Tower*, 467 U.S. at 920). The Court also considers the "history and purpose" of § 1983 in making its determination. See *infra* note 113 and accompanying text.

112. *Malley*, 475 U.S. at 340.

113. See *id.*; *infra* notes 136-39 and accompanying text. However, where a defendant can point to such a common-law immunity, "the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Tower*, 467 U.S. at 920. In this way, the Court has maintained the two-tiered analysis of its 1970's decisions. See *supra* note 108 and accompanying text. The Court has failed to explain, however, how the "history and purpose" consideration affects its § 1983 common-law immunity analysis. See, e.g., *Tower*, 467 U.S. at 920-23.

114. See *Tower*, 467 U.S. at 923.

115. See *Forrester v. White*, 108 S. Ct. 538, 542 (1988); *Cleavinger v. Saxner*, 474 U.S. 193, 205 (1985); *Briscoe*, 460 U.S. at 342; *Butz v. Economou*, 438 U.S. 478, 513 (1978). The "functional categories" approach seems to combine the approaches of the first two periods of Supreme Court § 1983 cases. This approach is based on a purportedly strict reading of the common law, combined with a flexible use of analogy that, in effect, accommodates the court's underlying policy concerns. See *infra* notes 116-19 and accompanying text.

at common law.<sup>116</sup> Similarly, the Court denies absolute immunity to officials whose responsibilities did not specifically exist at common law, but whose functions are analogous to officials who enjoyed only qualified immunity at common law.<sup>117</sup> In order to employ the "functional categories" test, the Court must compare the actions of modern officials and pre-1871 officials to a given defendant's actions, and decide which bear a closer "functional" resemblance to that defendant.<sup>118</sup> While the Court has purported to leave aside "policy" considerations in its "functional categories" analysis, recent section 1983 immunity decisions suggest that the Court has based its decisions, at least partly, on such considerations.<sup>119</sup>

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116. See, e.g., *Briscoe v. Lahue*, 460 U.S. 325 (1983); *Butz v. Economou*, 438 U.S. 478, 512-13 (1978) (administrative law judges are analogous to common-law judges for immunity purposes).

117. See, e.g., *Tower v. Glover*, 467 U.S. 914, 921-22 (1984) (public defenders do not get absolute immunity because they are analogous to English barristers, who did not have absolute immunity at common law); *Malley*, 475 U.S. at 340-41 (police officers applying for arrest or search warrant receive qualified immunity because they are analogous to complaining witnesses, who enjoyed qualified immunity at common law). For a more detailed discussion of the "functional categories" test, see *infra* note 119 and accompanying text.

118. See, e.g., *Malley v. Briggs*, 475 U.S. 335, 340-43 (1986); *Tower*, 467 U.S. at 920-23. The Court in *Malley* compared police officers applying for arrest warrants to both common-law complaining witnesses and modern prosecutors. See *Malley*, 475 U.S. at 340-43. Similarly, the Court in *Tower* compared public defenders to English barristers at common law, and to prosecutors and judges. See *Tower*, 467 U.S. at 920-23.

119. Under its current § 1983 immunity analysis, the Court purports to construe § 1983 in historical terms, leaving aside policy considerations. See *supra* note 110 and accompanying text. The Court, however, has defined its "functional categories" analysis so loosely that one is forced to wonder whether the Court based its recent § 1983 immunity decisions on its purported analysis, or whether it based these decisions on policy considerations. By employing the "functional categories" test in cases where no clear common-law immunity exists, the Court is able to analogize to existing or once-existing common-law immunities, depending on its desired outcome. The following Supreme Court § 1983 immunity cases illustrate this point.

In *Butz v. Economou*, 438 U.S. 478 (1978), the Court looked to common-law trial judge immunity, and held that "administrative law judges enjoy absolute judicial immunity even though they are in the [e]xecutive [b]ranch." *Briscoe v. LaHue*, 460 U.S. 325, 342 n.28 (1983). The *Butz* analysis made it clear that "[a]bsolute immunity flows not from rank or title of 'location within the [g]overnment' . . . but from the nature of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (quoting *Butz*, 438 U.S. at 511).

In *Cleavinger*, however, the Court refused to extend absolute immunity under § 1983 to members of a federal prison's Institution Discipline Committee. See *Cleavinger*, 474 U.S. at 203. The Court reasoned that although "[t]he committee members, in a sense, do perform an adjudicatory function," it was not "a 'classic' adjudicatory one," and thus was not sufficiently analogous to trial judge immunity to receive absolute immunity. *Id.* The *Cleavinger* Court seemed to base its decision on policy,

#### D. The *Briscoe and Malley* Decisions

During its most recent period of section 1983 analysis the Supreme Court has twice ruled on whether police officers are subject to

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rather than on a strict adherence to its "functional categories" approach. *See id.* The *Cleavinger* Court listed the following characteristics of the judicial process for determining absolute immunity:

- (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

*Id.* at 202. Many of these "characteristics" appear to be policy considerations, rather than a "functional" description of the judge's role in the judicial process.

At times the Court has used the "functional categories" test to analogize to common-law officials rather than modern judicial officials. Thus, in *Malley*, the Court likened a police officer applying to a magistrate for an arrest warrant to a common-law complaining witness (who did not enjoy absolute immunity at common law), rather than a modern-day prosecutor (who did enjoy such immunity). *See infra* notes 136-42 and accompanying text. The *Malley* Court did not explain precisely why a police officer's function in initiating a prosecution is closer to that of a complaining witness than that of a prosecutor; the Court simply dismissed the prosecutor analogy as based on a "freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 341-42 (1986).

Similarly, in *Tower v. Glover*, 467 U.S. 914 (1983), the Court refused to grant absolute immunity under § 1983 to public defenders in cases involving "conspiratorial action with state officials that deprives their clients of federal rights." *Id.* at 923. The *Tower* Court likened public defenders to both English barristers and American private attorneys, neither of whom enjoyed immunity for malicious acts at common law. *See id.* at 921-22. The Court refused to analogize public defenders to judges or prosecutors, officials who did enjoy absolute immunity for such acts, even though "public defenders have responsibilities similar to those of a judge or prosecutor . . . ." *Id.* at 922. As in *Malley*, the *Tower* Court reached its conclusion without a clear "functional categories" analysis, reasoning only that "[w]e [the Court] do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." *Id.* at 922-23.

Finally, the Supreme Court held that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer . . . acting in her judicial capacity." *Pulliam v. Allen*, 466 U.S. 522, 522 (1984). Prospective injunctive relief includes an award against a judge for attorney's fees. *See id.* at 522. The Court in *Pulliam* reached this conclusion despite the fact that prospective injunctive relief against judges did not exist at common law, and that judges enjoyed absolute immunity from suits for money damages at common law. *See id.* at 529, 544 (Powell, J., dissenting). In a five to four decision, the Court held that prospective injunctive relief against judges is analogous to "the collateral prospective relief available against judges through the use of the King's prerogative writs" at common law, and therefore warranted liability under § 1983. *Id.* at 529; *see id.* at 540. In this unusual decision, the Court seemed to analogize causes of actions, rather than judicial "functions," in arriving at its decision, thus evidencing the flexible nature of its "functional categories" test.

The above analysis is not intended to imply that these Supreme Court decisions are inconsistent. On the contrary, the Court often refers to similar *policy* considerations

section 1983 liability. In *Briscoe v. LaHue*, the Court granted absolute immunity under section 1983 to police trial witnesses.<sup>120</sup> In *Malley v. Briggs*,<sup>121</sup> the Court held that police officers enjoy only qualified immunity from section 1983 actions when they apply to a magistrate for an arrest warrant.<sup>122</sup> Because many of the Court's conclusions in *Briscoe* and *Malley* relate to the issue of pretrial police testimony and the Court's use of the "functional categories" test, it is important to scrutinize the analyses utilized in these two decisions.

In *Briscoe*, the Court asserted that in 1871 absolute immunity for trial witnesses was a well-settled common-law doctrine.<sup>123</sup> The Court also relied on the common-law principle that all persons "who were

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in arriving at its conclusions. For instance, the Court referred to the same list of "characteristics" to describe a judge's "functions" in both *Butz* and *Cleavinger*. See *Cleavinger*, 474 U.S. at 201-02; *Butz v. Economou*, 438 U.S. 478, 512 (1978). This discussion is intended to question the clarity of the Court's approach, and the way in which the common law and notions of "functional categories" may be manipulated by the Court in order to arrive at its desired legal conclusions.

In the end, the Court loses credibility as an interpreter of statutes such as § 1983 when it uses historical theories as a "mask for policymaking." Matasar, *supra* note 20, at 794-95. "The Court's failure to acknowledge the contingency of its decisions, and to label them as *the Court's* policy choices, undermines their power to convince us that they are rightly decided." *Id.* at 795 (emphasis in original).

In order to solve this problem, the Court could either: (1) narrowly define and employ the "functional categories" test in such a way as to clarify its decision-making in this area; or (2) openly incorporate policy considerations into its analysis.

The problem with narrowly defining the "functional categories" test is that a purely mechanical approach to § 1983 immunity may create unforeseeable and undesirable results. Such an approach, of course, does not take into account potentially important public policy considerations that underlie many of the Court's § 1983 immunity decisions.

Instead, in cases where no clear parallel immunity exists at common law, the Court could employ the "functional categories" approach and, at the same time, determine whether the policies underlying a particular 19th-century official immunity apply with equal force today.

The result of this analysis would not be a "freewheeling policy choice"—a result feared by the present Court. If the Court is going to base its immunity decisions on 19th-century common law, it should consider the policies underlying that body of law. In fact, the Court has considered such "policies" in past § 1983 immunity decisions, although it has refused to label them as such.

The open "policy" approach described above would not be new to the Court—it is similar to the approach taken by the Court in its § 1983 decisions from 1974 to 1980. See *supra* note 108 and accompanying text. This approach is also implied by the reasoning used by the Second and Third Circuits in their recent decisions involving questions of § 1983 immunity for police witnesses at pretrial proceedings. See *infra* notes 158-59, 165 and accompanying text.

120. See *Briscoe*, 460 U.S. at 345-46.

121. 475 U.S. 335 (1986).

122. See *id.* at 340-45.

123. See *Briscoe v. La Hue*, 460 U.S. 325, 330-34 (1983).



integral parts of the judicial process," enjoyed absolute immunity from civil suit.<sup>124</sup> After a detailed discussion of the legislative history of the Ku Klux Act,<sup>125</sup> the Court concluded that the drafters of the

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124. See *id.* at 335.

125. See *id.* at 336-41. The *Briscoe* Court considered whether the framers of § 1 of the 1871 Ku Klux Act had intended to abrogate traditional common-law witness immunity. See *id.* The Court addressed the following argument: because Klan perjury was "one of the specific evils with which Congress was concerned, recognizing an absolute immunity for witnesses would conflict with [c]ongressional intent." *Id.* at 336. The Court was not convinced by this argument, primarily because Klan perjury was the concern of § 2 of the 1871 Act, the conspiracy section, rather than § 1 (now known as § 1983). See *id.* at 340-41. Furthermore, the Court reasoned that § 2 was designed to protect against the use of perjury by one Klan member to *acquit* another Klan member, rather than to protect against the use of perjury by an individual acting "under color of" law to *convict* an innocent suspect. See *id.* at 339-40. The Court reasoned that in order to find congressional intent "to provide a § 1 damages remedy against police . . . witnesses," it would have "to extrapolate from pro-defendant perjury to pro-prosecution perjury, and if willing to make that step . . . to apply legislative history relating to § 2—a section specifically directed toward private conspiracies—to § 1—a section designed to provide remedies for abuses under color of law. We [the Court] decline the invitation." *Id.* at 340-41.

In his dissenting opinion in *Briscoe*, Justice Marshall argued that the majority had erroneously relied on the legislative history of § 2 of the 1871 Ku Klux Act in arriving at its conclusion that the 42d Congress did not intend to abrogate absolute witness immunity. See *Briscoe v. LaHue*, 460 U.S. 325, 356-57 (1983) (Marshall, J., dissenting). Marshall asserted that the proper source of the legislative intent of the 42d Congress was the legislative history of § 1 of the 1871 Act, and § 2 of the 1866 Act, the precursors of § 1983. See *id.* at 356-63. Justice Marshall made it clear that the 1866 and 1871 legislators were well aware of, and concerned with, the effect of imposing liability on judicial officers, and that these concerns were overridden by a majority of legislators in both cases:

Opponents of § 1 of the 1871 Act repeated the same arguments that had been made against § 2 of the 1866 Act. They warned of the liability for judicial officers that would result from enactment of § 1. Indeed, in portraying the inevitable consequences of the 1871 Act, Senator Thurman pointed to criminal prosecutions of state judicial officers that had already taken place under the 1866 Act. These statements can hardly be dismissed as exaggerated rhetoric from opponents of the 1871 Act. Instead, they simply reflect the fact that the battle over liability for those integral to the judicial process had already been fought in 1866 when Congress adopted the far more serious criminal sanction aimed at state judicial systems. Section 1 [of the 1871 Act], in contrast, provided for "the mild remedy of a civil action." CONG. GLOBE, 42d Cong., 1st Sess. 482 (1871) (statement of Rep. Wilson, member of the House Judiciary Committee). So it was not surprising that the argument of the opponents of the 1871 Act would fall on deaf ears. It is also noteworthy that Representative Shellabarger, [author of § 1,] who was hardly reluctant to interrupt speakers who were misconstruing his proposal, never disputed the opponents' characterizations with regard to the liability of state judicial officers.

To assume that Congress, which had enacted a criminal sanction (§ 2 of 1866 Act) directed against state judicial officials, intended *sub silentio* to

1871 Act did not intend to abrogate these common-law immunities.<sup>126</sup>

According to *Briscoe*, two types of immunity shield police officer witnesses from section 1983 liability.<sup>127</sup> Section 1983 does not authorize civil actions against police witnesses because such witnesses can claim an absolute immunity either as “any other witness sworn to tell the truth”<sup>128</sup> or “as an official performing a critical role in the judicial process.”<sup>129</sup>

The *Briscoe* Court also concluded that absolute immunity is not limited to police witnesses, but applies to all government witnesses.<sup>130</sup> Thus, the Court specifically refused to “carve out an exception to the general [common-law] rule of immunity in cases of alleged perjury by police officer witnesses.”<sup>131</sup> The Court rejected policy-based arguments that distinguished police witnesses from private witnesses, reasoning that “our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant.”<sup>132</sup>

exempt those same officials from the civil counterpart (§ 1 of 1871 Act) approaches the incredible.

*Id.* at 361-62. For a further critique of the Supreme Court’s analysis of the legislative history of § 1983, see *supra* notes 102-05 and accompanying text.

126. See *Briscoe*, 460 U.S. at 341.

127. See *id.* at 335-36.

128. *Id.* In footnote 15 of *Briscoe*, the Court pointed out that common-law absolute witness immunity did not distinguish between “public officials and private citizens.” *Id.* at 336 n.15. The Court, however, cited no case that specifically supports this proposition. See *id.* at 355 n.15 (Marshall, J., dissenting).

129. See *id.* at 336. The *Briscoe* Court supported this proposition with examples of common-law immunity for other officials who perform “functions in the judicial process,” see *id.* at 334, and with its past § 1983 immunity decisions. The Court stressed the traditional common-law policy of “protecting the judicial process,” which extends to protection of witnesses from civil suit. See *id.* at 334-35; *Imbler v. Pachtman*, 424 U.S. 409, 439 (1976); *Butz v. Economou*, 438 U.S. 478, 512 (1978).

130. See *Briscoe*, 460 U.S. at 342-43.

131. *Id.* at 341-46.

132. *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983); *Abandonment*, *supra* note 108, at 598. Although it rejected them, the *Briscoe* Court did discuss the policies favoring § 1983 police witness immunity at trial, which include: (1) the federal courts’ and state law enforcement agencies’ interest in avoiding excessive § 1983 litigation; (2) the negative effect such suits would have on a police officer’s performance; and (3) the traditional judicial interest of encouraging witnesses to testify freely at trial. See *Briscoe*, 460 U.S. at 341-45.

Justice Stevens, writing for the majority in *Briscoe* stressed the following:

[Section 1983 immunity suits against police officer witnesses] “could be expected with some frequency.” . . . Police officers testify in scores of cases every year, and defendants often will transform resentment at being convicted into allegations of perjury by the [s]tate’s official witnesses. As the files in this case show, even the processing of a complaint that is dismissed before trial consumes a considerable amount of time and re-

Thus, although there is no case law suggesting that police officer

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sources.

*Id.* at 343 (quoting *Imbler*, 424 U.S. at 425). The Court added in a footnote 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. This frequency of long-term § 1983 suits "might well impose significant burdens on the judicial system and on law enforcement resources . . . [I]f the defendant official 'could be made to answer in court each time [a disgruntled defendant] charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.'" *Id.* at 343-44 (quoting *Imbler*, 424 U.S. at 425).

The *Briscoe* Court admitted, however, that the traditional reasons for witness immunity, "the need to avoid intimidation and self-censorship, [may] apply with diminished force to police" witnesses. *Id.* at 341-42. The Court explained its position in the following manner:

Policemen often have a duty to testify about the products of their investigations, and they have a professional interest in obtaining convictions which would assertedly counterbalance any tendency to shade testimony in favor of potentially indictive defendants. In addition . . . their defense is generally undertaken by their governmental employers. Further . . . perjured testimony by police officers is likely to be more damaging to constitutional rights than such testimony by ordinary citizens, because the policeman in uniform carries special credibility in the eyes of jurors. And, in the case of police officers, who cooperate regularly with prosecutors in the enforcement of criminal law, prosecution for perjury is alleged to be so unlikely that it is not an effective substitute for civil damages.

*Id.* The Court then dismissed these arguments as irrelevant to its "functional categories" immunity analysis. *See id.* at 342.

In his dissent, Justice Marshall repeated some of these concerns in the following manner:

Police officers and other government officials differ significantly from private citizens, around whom common-law doctrines of witness immunity developed. A police officer comes to the witness stand clothed with the authority of the [s]tate. His official status gives him credibility and creates a far greater potential for harm than exists when the average citizen testifies. The situation is aggravated when the official draws on special expertise. A policeman testifying about a fingerprint identification or a medical examiner testifying as to the cause of a death can have a critical impact on a defendant's trial. At the same time, the threat of a criminal perjury prosecution, which serves as an important constraint on the average witness' testimony, is virtually nonexistent in the police-witness context. Despite the apparent prevalence of police perjury, prosecutors exhibit extreme reluctance in charging police officials with criminal conduct because of their need to maintain close working relationships with law enforcement agencies.

*Id.* at 365-66 (Marshall, J., dissenting).

Justice Marshall also rebutted the majority's "significant burden" argument by asserting the following:

As an empirical matter, this contention is unfounded. Both the Sixth Circuit and the District of Columbia Circuit have permitted such suits for over five years, . . . but there is no perceptible drain on legal resources in those [c]ircuits compared to other [c]ircuits that bar such lawsuits. Moreover, a comprehensive study of § 1983 suits filed in the Central

witnesses specifically enjoyed absolute witness immunity at common law, when they function as a trial witness they are entitled to such immunity under section 1983.<sup>133</sup>

The *Briscoe* Court used the term "function" to refer mainly to an officer's specific actions in the judicial proceeding, rather than the function of the proceeding itself: "A police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions on direct examination and cross-examination, and may be prosecuted subsequently for perjury."<sup>134</sup>

In describing a witness' function, however, the Court also referred to certain procedures that surround his actions. The witness' "function" included both the action of responding to questions, and certain procedures associated specifically with trials, such as "cross-examination." The Court did not resolve the question of whether the term "function" referred to an officer's *actions* as a witness, or to the *procedures* involved in a particular court proceeding, or to both. As different pretrial proceedings involve different witness examination procedures, this ambiguity leaves open the question of whether a police officer "functions" as a witness when he participates in such proceedings.<sup>135</sup>

In *Malley*, the Court extended only qualified immunity to a police officer who submitted a complaint and supporting affidavit to a magistrate in pursuit of an arrest warrant.<sup>136</sup> The Court reasoned

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District of California, which includes Los Angeles, indicates that only about 30 actions for false arrest were filed annually in that [d]istrict. Police officers arrest much more frequently than they testify, and an arrest will undoubtedly make many individuals disgruntled. Yet, lawsuits based on such allegations constituted only 0.5% of all cases filed in the [c]entral [d]istrict, or an average of only one for every 243 full-time police officers in the city of Los Angeles. This does not appear to be a "significant burden." The simple fact is that practical obstacles alone are enough to deter most individuals from suing the police for official misconduct.

*Id.* at 367-68 (Marshall, J., dissenting).

It is interesting to note that the "significant burden" of increased litigation against police did not seem to bother Justice Stevens in *Malley*, where he joined in Justice White's majority opinion, along with Justice Marshall. See *Malley*, 475 U.S. at 336. Justice White stated that "[i]n the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity." *Id.* at 343.

For a discussion of the policies for and against absolute immunity for witnesses at pretrial proceedings, see *infra* notes 219-32 and accompanying text.

133. See *Briscoe*, 460 U.S. at 342-43.

134. *Id.* at 342.

135. See *infra* notes 187, 200, 213-15 and accompanying text.

136. See *Malley v. Briggs*, 475 U.S. 335, 343-44 (1986).

that the act was analogous to that of a "complaining witness,"<sup>137</sup> who could be sued for malicious prosecution at common law.<sup>138</sup> In *Malley*, therefore, the common-law doctrine of absolute witness immunity in defamation was held inapplicable.<sup>139</sup>

The *Malley* Court refused to analogize the function of a police officer applying for an arrest warrant to that of a prosecutor in initiating a prosecution.<sup>140</sup> Prosecutors are absolutely immune from suit under section 1983 for initiating a prosecution.<sup>141</sup> Instead, the Court analogized the function of a police officer applying for an arrest warrant to that of a complaining witness, who did not enjoy absolute immunity at common law. The Court in *Malley* reasoned that "[w]e do not find a . . . [common-law] tradition of absolute immunity for one whose complaint causes a warrant to issue."<sup>142</sup>

The *Malley* Court also reasoned that a police officer who applies for an arrest warrant is not entitled to immunity because he is an official "intimately associated with the judicial phase of the criminal process."<sup>143</sup> *Malley* therefore narrowed the scope of the criminal judicial process for police immunity purposes.<sup>144</sup>

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137. *Id.* at 340.

138. *See supra* notes 68, 73 and accompanying text.

139. Complaining witnesses were absolutely immune at common law from suit in defamation. *See supra* note 68 and accompanying text. The Court in *Malley*, however, did not discuss absolute immunity for witnesses in defamation, nor did it make a distinction between suits in defamation and suits in malicious prosecution. All of the cases that the Court cited in support of qualified immunity for complaining witnesses at common law involved suits for malicious prosecution. *See id.*

140. *See Malley*, 475 U.S. at 342-43. The *Malley* Court, arguably, could have granted absolute immunity to police officers who apply for arrest warrants by analogizing them to prosecutors who seek arrest warrants at probable cause hearings. Although the Supreme Court has not specifically granted prosecutors absolute immunity for seeking an arrest warrant at a probable cause hearing, such immunity would follow from the Court's holding in *Imbler*. *Cf. Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (*Imbler* held that in initiating prosecution and in presenting state's case, prosecutor is immune from civil suit for damages under § 1983).

141. *See Imbler*, 424 U.S. at 431.

142. *Malley*, 475 U.S. at 342.

143. *Id.* The Court in *Malley* distinguished the function of a police officer applying for an arrest warrant from that of a prosecutor, who enjoys absolute immunity from § 1983 actions when seeking an indictment. *See id.* at 342-43. The *Malley* Court stated that: "[W]e intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." *Id.*

144. *See supra* note 143 and accompanying text. The *Malley* Court did not hold that warrant application procedures were not a part of the judicial process. The Court ruled simply that police officers at such proceedings were not "intimately associated" with the judicial process. *See id.*

The *Briscoe* and *Malley* decisions settled several issues relevant to section 1983 immunity for pretrial police testimony. First, the Forty-second Congress did not intend to abrogate common-law witness immunity.<sup>145</sup> Second, police officers who testify at criminal trials are equivalent either to common-law witnesses or to government officials "intimately associated" with the judicial process.<sup>146</sup>

*Briscoe* and *Malley* left unresolved the common-law immunity status of police officers who testify at pretrial proceedings,<sup>147</sup> the scope of the judicial process for the purpose of witness immunity<sup>148</sup> and the precise meaning of "functional categories" as applied to police officer witnesses.<sup>149</sup>

### III. Circuit Court Decisions and the Application of the "Functional Categories" Test to Specific Pretrial Proceedings

#### A. Circuit Cases

In footnote five of *Briscoe*,<sup>150</sup> the Supreme Court expressly left open the issue of immunity for police witnesses at "probable cause hearings."<sup>151</sup> It is unclear, however, whether footnote five applies to other pretrial proceedings, such as grand jury hearings.<sup>152</sup> As a result of this ambiguity, the circuit courts have approached the issue of immunity for pretrial testimony from three viewpoints: (1) *Briscoe*

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145. The *Briscoe* Court determined that Congress did not intend to abrogate trial witness immunity because Congress did not enact § 1 of the Ku Klux Act as a means of combatting perjury. See *supra* notes 125-26 and accompanying text. By the same reasoning, Congress could not have intended to abrogate pretrial witness immunity: any § 1983 action based solely on an officer's pretrial testimony would also have to allege that the officer had given perjured testimony.

146. The exact boundaries of the "judicial phase of the criminal process" were left open in *Malley* and *Briscoe*. See *supra* note 143 and accompanying text. Also, the precise function of a "witness" was not clearly defined in *Briscoe*. See *supra* notes 134-35 and accompanying text.

147. See *infra* notes 180-82, 195-96 and accompanying text.

148. See *supra* notes 60, 143 and accompanying text.

149. See *supra* notes 134-35 and accompanying text.

150. See *supra* note 10 and accompanying text.

151. See *supra* notes 10-11 and accompanying text; see also *infra* notes 152-56 and accompanying text.

152. The *Briscoe* Court simply stated that it would "not decide" the issue of "absolute immunity . . . at . . . probable-cause hearings," and that the "petition does not raise the question of immunity for testimony at pre-trial proceedings . . ." *Briscoe v. LaHue*, 460 U.S. 325, 329 n.5 (1983). The Court did not state, however, whether its holding covered other pretrial hearings, such as grand jury and preliminary hearings. For a discussion of circuit court interpretations of footnote 5, see *infra* notes 153-56 and accompanying text.

left open the immunity issue for all pretrial testimony, and absolute immunity does not apply to such testimony;<sup>153</sup> (2) *Briscoe* left open the immunity issue, but absolute immunity for grand jury testimony is implied by the reasoning of *Briscoe*;<sup>154</sup> and (3) *Briscoe* did not leave open the issue of pretrial testimony because footnote five referred only to probable cause hearings and because *Briscoe* granted absolute immunity to all witnesses in all judicial proceedings, including pretrial proceedings.<sup>155</sup> The second and third possibilities comprise the majority view, which has extended absolute immunity to certain pretrial proceedings.<sup>156</sup>

Those circuits that have extended absolute immunity for public officials to pretrial proceedings have dealt primarily with grand jury testimony.<sup>157</sup> Of these circuits, only the Second Circuit has incorporated the common-law distinction between defamation and malicious prosecution into its section 1983 witness immunity analysis.

In *White v. Frank*,<sup>158</sup> the Second Circuit held that a grand jury police witness is presumed not to have absolute immunity, unless

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153. See *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254, 261 (5th Cir.), *modified*, 744 F.2d 1131 (1984); *Anthony v. Baker*, 767 F.2d 657, 663 (10th Cir. 1985); *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984). For a discussion of *Krohn*, see *supra* note 15 and accompanying text.

154. See, e.g., *Strength v. Hubert*, 854 F.2d 421, 423-24 (11th Cir. 1988); *Alioto v. City of Shively*, 835 F.2d 1173, 1174 (6th Cir. 1987); *San Filippo v. United States Trust Co.*, 737 F.2d 246, 254 (2d Cir. 1984) (dictum), *cert. denied*, 470 U.S. 1035 (1985); *Kincaid v. Eberle*, 712 F.2d 1023, 1024 (7th Cir.) (Cudahy, J., concurring), *cert. denied*, 464 U.S. 1018 (1983). *San Filippo* involved a conspiracy to present false testimony. The Second Circuit held that the plaintiff's § 1983 claim was based "not on defendants' testimony, but on their alleged conspiracy with the D.A.'s office to present false testimony . . . in the course of criminal proceedings. . . . No court has yet held that absolute immunity from prosecution for false testimony extends to conspiracy with public officials to present false testimony." See *San Filippo*, 737 F.2d at 254. Presumably, such conspiracies are the concern of § 1985(3), rather than § 1983. See *White*, 680 F. Supp. at 639-40. The Sixth Circuit, however, has applied § 1983 to cases that involve conspiracy to perjure testimony at trial. See *Alioto*, 835 F.2d at 1174; *Macko v. Byron*, 760 F.2d 95, 97 (6th Cir. 1985).

155. See *Macko*, 760 F.2d at 97 (§ 1983 action against nonpolice government officials who allegedly perjured themselves at plaintiff's grand jury hearing); *Briggs v. Goodwin*, 712 F.2d 1444, 1448-49 (D.C. Cir. 1983) (*Bivens* action against federal prosecutor who allegedly falsely testified before grand jury motion hearing); *Holt v. Castenada*, 832 F.2d 123, 126 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1275 (1988).

Although *Macko* and *Briggs* did not involve state police witnesses, these cases stand for the proposition that public officer witnesses at grand jury hearings have absolute immunity from § 1983 suits.

In *Holt*, the Ninth Circuit read "the Supreme Court's language as reserving the question of immunity for witnesses at probable cause hearings in particular, rather than at all pretrial proceedings in general." See *Holt*, 832 F.2d at 126.

156. See *supra* note 12 and accompanying text.

157. See *id.*

158. 855 F.2d 956 (2d Cir. 1988).

he can show that he "did not play a sufficient role in initiating the prosecution to be liable for the constitutional tort of malicious prosecution."<sup>159</sup> This holding seems to imply that a police officer will have a type of qualified immunity when he testifies at a grand jury proceeding. Having given false testimony, he will have immunity from a section 1983 suit only if he can show that he did not help to initiate a malicious prosecution.

Several circuits have extended absolute immunity to adversarial pretrial proceedings.<sup>160</sup> In *Holt v. Castaneda*,<sup>161</sup> the Ninth Circuit ruled that preliminary examination and pretrial motion hearings were within the scope of witness immunity as defined by *Briscoe*.<sup>162</sup> Similarly, the D.C. Circuit, in *Briggs v. Goodwin*,<sup>163</sup> extended *Briscoe* immunity to testimony at an adversarial grand jury motion hearing.<sup>164</sup>

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159. *Id.* at 962. The *White* court relied on the Supreme Court's reasoning in *Malley*. The Court in *Malley* reasoned that when a witness initiated a prosecution at common law, he could be held liable for malicious prosecution. See *id.* at 958-59. The *White* court noted the following:

The common law made a subtle but crucial distinction between two categories of witnesses with respect to their immunity for false testimony. Those whose role was limited to providing testimony enjoyed immunity; those who played a role in initiating a prosecution—complaining witnesses—did not enjoy immunity. The distinction reflected the difference between the two causes of action by which those falsely accused sought to hold witnesses liable. In an action for defamation, the perjurious witness was sought to be held liable only for the defamatory effect of his testimony, and in such an action he enjoyed absolute immunity upon a threshold showing that the allegedly defamatory statements were relevant to the judicial proceeding . . . This immunity applied to grand jury as well as trial testimony . . . However, in an action for malicious prosecution, the complaining witness was sought to be held liable for his role in *initiating* a baseless prosecution, and 'complaining witnesses were not absolutely immune at common law.'

*Id.* (quoting *Malley*, 475 U.S. at 340) (emphasis in original).

160. See *Williams v. Hepting*, 844 F.2d 138, 142 (3d Cir. 1988); *Dalioia v. Rose*, 849 F.2d 74, 75-76 (2d Cir. 1988); *Holt*, 832 F.2d at 127. It is unclear, however, whether the *Holt* and *Williams* courts limited their holdings to "adversarial" pretrial proceedings. Judge Alarcon begins the *Holt* opinion by stating that "[o]ur reading of *Briscoe v. LaHue* . . . compels us to conclude that a person may not maintain an action for damages under 42 U.S.C. § 1983 (1982) against a police officer who gives perjured testimony during pretrial proceedings in a criminal case." *Id.* at 124. This statement would seem to apply to *ex parte* as well as adversarial pretrial proceedings. Such general language also appears in *Williams*. See *Williams*, 844 F.2d at 143.

161. 832 F.2d 123 (9th Cir. 1987).

162. See *id.* at 127.

163. 712 F.2d 1444 (D.C. Cir. 1983).

164. See *id.* at 1448; *White v. Frank*, 680 F. Supp. 629, 635 (S.D.N.Y.), *appeal dismissed*, 855 F.2d 956 (2d Cir. 1988). The court's reasoning in *Briggs* implies that



The Second and Third Circuits recently joined the Ninth Circuit in extending absolute immunity to adversarial pretrial proceedings.<sup>165</sup>

The Fifth Circuit, however, is one of several circuits that has refused to extend absolute immunity to any pretrial proceeding.<sup>166</sup> In reading this holding in *Wheeler v. Cosden Oil & Chem. Co.*,<sup>167</sup> the Fifth Circuit did not distinguish between grand jury and probable cause hearings, referring to both as "probable cause determinations."<sup>168</sup> In addition, the *Wheeler* court appears to be the only circuit court to have dealt with the type of probable cause hearing described in footnote five of *Briscoe*.<sup>169</sup>

the D.C. Circuit would extend absolute witness immunity to *ex parte* as well as adversarial pretrial proceedings:

The fact that *Briscoe* involved statements at a trial whereas this case involves statements at a hearing on a motion during the grand jury phase of an investigation is not a distinction that allows a different result. *Briscoe* emphasized the concern that the absence of immunity would interfere with the ability of "judicial proceedings" "to determine where the truth lies." That concern applies not only to trials, but to any judicial proceeding where the testimony of witnesses might be affected by the lack of immunity. Thus, the rationale of *Briscoe* applies with equal force whenever a witness testifies in a judicial proceeding the function of which is to ascertain factual information.

*Briggs*, 712 F.2d at 1448-49 (quoting *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)). But see *White*, 680 F. Supp. at 635 (asserting that *Briggs* holding is limited to adversarial pretrial proceedings).

165. See *supra* note 12 and accompanying text.

166. See *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254 (5th Cir.), *modified*, 744 F.2d 1131 (1984); *Anthony v. Baker*, 767 F.2d 657 (10th Cir. 1985); *Krohn v. United States*, 742 F.2d 24 (1st Cir. 1984). The court in *Wheeler* was unpersuaded by the reasoning of the Seventh and D.C. Circuits, which had already extended § 1983 absolute immunity witnesses at certain pretrial proceedings. The Fifth Circuit found these opinions "cursorily in the extreme . . . and in our view they inadvisedly extend *Briscoe* beyond the intrinsic limitations of its basis in the common law." See *id.* at 261 n.16.

167. 734 F.2d 254 (5th Cir.), *modified*, 744 F.2d 1131 (1984).

168. See *Wheeler*, 734 F.2d at 261. "We hold that *Briscoe* does not afford immunity from suit for knowingly false testimony submitted at probable cause determinations." *Id.* The term "probable cause determinations" could refer to a search warrant application before a magistrate, as well as a probable cause, or a preliminary and grand jury hearing. See *infra* note 195 and accompanying text.

169. See *Wheeler*, 734 F.2d at 261 n.15. It is not clear from the text of the *Wheeler* decision what sort of probable cause determination the defendants received. Footnote 15 of the opinion says that at least one defendant received a grand jury hearing, while the other was arrested pursuant to an arrest warrant. See *id.* The opinion, however, does not describe the type of hearing at which this arrest warrant was issued. The criminal proceedings referred to in *Wheeler* presumably took place in a Texas state court. See *id.* at 256. The Texas Code of Criminal Procedure does not provide for the type of probable cause hearing referred to in *Briscoe*. If the warrant in *Wheeler* was issued at an arrest warrant application proceeding, and not

## B. Application of the "Functional Categories" Test to Pretrial Proceedings

The Supreme Court has thus far considered three areas of section 1983 immunity for police officers.<sup>170</sup> Each area corresponds to a function that police officers perform as part of their regular duties. These areas include: (1) the application for an arrest warrant before a magistrate; (2) arrest of a suspect; and (3) testimony before a criminal trial court. The Court has granted police officers qualified immunity in the first two instances, and absolute immunity in the third.<sup>171</sup>

The Supreme Court has resolved the section 1983 police officer immunity issue on two extreme ends of the judicial process.<sup>172</sup> Submission of an application for an arrest warrant is one of the first steps a police officer takes in the judicial process, and testifying in court is one of the last.<sup>173</sup> When applying for an arrest warrant application, police officers do not have absolute immunity either as witnesses or as officials "intimately associated" with the judicial process.<sup>174</sup> Whereas at trial, they are included in both absolute immunity categories.<sup>175</sup>

These decisions leave open the question of how the Supreme Court would analyze section 1983 immunity for police officers who take part in probable cause, grand jury and preliminary hearings, judicial proceedings that occur between two extreme points in the judicial process. Whether a police officer witness is given absolute immunity specifically as a "witness" or more generally as an individual "intimately associated" with the judicial process at any one of these proceedings depends on several factors, including: (1) how such proceedings were treated at common law;<sup>176</sup> (2) at what point in the

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a probable cause hearing, the *Malley* decision would be controlling, and the officer would not enjoy absolute immunity from a § 1983 action based on the warrant application. See *supra* note 15 and accompanying text.

170. See *Malley v. Briggs*, 475 U.S. 335 (1986) (qualified immunity for police arrest warrant application without probable cause); *Briscoe v. LaHue*, 460 U.S. 325 (1983) (absolute immunity for perjured police trial testimony); *Pierson v. Ray*, 386 U.S. 547 (1967) (qualified immunity for false arrest).

171. See *supra* note 170 and accompanying text.

172. See *Malley*, 475 U.S. at 340-44.

173. See *White v. Frank*, 680 F. Supp. 629, 637 (S.D.N.Y.), *appeal dismissed*, 855 F.2d 956 (2d Cir. 1988).

174. See *supra* notes 136-44 and accompanying text.

175. See *Briscoe*, 460 U.S. at 335-36.

176. See *supra* notes 32-33 and accompanying text.

officer's duties the "judicial phase of the criminal process" begins;<sup>177</sup> and (3) how a police officer "functions" at such a proceeding.<sup>178</sup>

As different common-law rules and procedures apply to the various pretrial proceedings, this subsection examines the application of *Briscoe* and *Malley* to each type of proceeding separately. This analysis illustrates the difficulty of applying the Court's "functional categories" test to the issue of section 1983 immunity for pretrial police testimony.

### 1. Grand Jury Hearing

It is unclear whether grand jury<sup>179</sup> witnesses enjoyed complete immunity from civil suit at common law.<sup>180</sup> If the Supreme Court

177. See *Malley*, 475 U.S. at 342-43. A police officer's action in applying for an arrest warrant "is further removed from the judicial phase of the criminal proceedings than the act of a prosecutor in seeking an indictment." *Id.* While it is unclear whether this statement refers to the chronological order of these proceedings, timing may be a factor in the Court's § 1983 analysis. Cf. *Strength v. Hubert*, 854 F.2d 421, 421 (11th Cir. 1988) (because prosecutor seeking indictment is in "judicial phase" of criminal process, so is grand jury witness).

178. See *supra* notes 115-19 and accompanying text.

179. Grand jury has been defined in the following manner:

A jury of inquiry who are summoned and returned by the sheriff to each session of the criminal courts, and whose duty is to receive complaints and accusations in criminal cases, hear the evidence adduced on the part of the state, and find bills of indictment in cases where they are satisfied a trial ought to be had. . . . This is called a "grand jury" because it comprises a greater number of jurors than the ordinary trial jury or "petit jury." At common law, a grand jury consisted of not less than 12 nor more than 23 men. . . . If the grand jury determines that probable cause [to indict] does not exist, it returns a "no bill." It is an accusatory body and its function does not include a determination of guilt.

BLACK'S LAW DICTIONARY 768 (5th ed. 1979). In federal court, a "grand jury . . . shall consist of not less than 16 nor more than 23 persons." *Id.* (citing FED. R. CRIM. P. 6).

In state court, grand jury procedures differ depending on the jurisdiction. See Spain, *The Grand Jury, Past and Present: A Survey*, 2 AM. CRIM. L.Q. 119, 120-42 (1964) [hereinafter Spain]. Jurisdictions differ as to the qualifications for grand jurors, the manner of their selection, the length of the grand jury term, the number of grand jurors on a particular case, the number of grand jury votes necessary to indict, and the grand jury's inquiry power. See *id.* at 120-23. Grand jury hearings, however, are always *ex parte* proceedings. See C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 105, at 237 (1982) [hereinafter WRIGHT]; *When Police Lie, supra* note 2, at 516. The only persons present are jurors, attorneys for the prosecution, witnesses, a recorder and interpreters (if required). See WRIGHT, *supra*, § 105, at 237-39.

Grand jury witnesses do not have a right to counsel while testifying, and defendants have no right to attend their grand jury hearing. See *id.* § 104, at 219, 234. The veil of secrecy that normally surrounds such hearings has been lifted for certain

was convinced that witnesses did enjoy such immunity, it could grant absolute immunity to police grand jury witnesses on the basis of common-law grand jury witness immunity.<sup>181</sup> But if the Court found

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purposes, such as § 1983 litigation. In most jurisdictions a defendant has an automatic right to inspect the grand jury transcript. See W. R. LAFAVE & J. H. ISRAEL, *CRIMINAL PROCEDURE* § 15, at 365 (1985) [hereinafter LAFAVE & ISRAEL]. In federal court, "after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940).

The earliest form of the grand jury was created in 1166 under King Henry II and its function was to respond to inquiries from the King regarding wrongdoing within the county. See *Spain*, *supra*, at 119.

The modern grand jury serves this function by allowing a prosecutor to "indict persons accused of crime upon a finding of probable cause." *Id.* at 123. Indictment is the modern grand jury's main function, although in some jurisdictions, the grand jury is also used for purely investigative purposes. See *id.* at 123-25. In addition, where an arrest is made without an arrest warrant, an indictment can serve as probable cause to detain a suspect. See *infra* note 204 and accompanying text.

At the same time, the modern grand jury protects an accused's constitutional right against unfounded criminal prosecutions. See *WRIGHT*, *supra*, § 101, at 196. As Justice Powell has recently written: "Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions." *Id.* (quoting *United States v. Calandra*, 414 U.S. 338 (1974)).

Nevertheless, there is considerable debate as to the grand jury's effectiveness as a procedural safeguard. See *id.* § 101, at 198. Some observers believe that the grand jury has become a mere tool of the executive. See *United States v. Dionisio*, 410 U.S. 1, 23 (1973) (Douglas, J., dissenting). One commentator has described this problem in the following manner:

[I]t is the prosecutor and not the grand jury that provides the only potential protection that exists between a possible accused and the bringing of criminal charges. The prosecutor is the central figure in the grand jury investigative process and he will generally make prosecutive determinations and not the grand jury.

Proceedings of the Thirty-Sixth Annual Judicial Conference of the District of Columbia Circuit, 67 F.R.D. 513, 538 (1975) (Prof. Seymour Glanzer, speaking at panel on grand jury procedure). Another commentator went so far as to say that "[a]ny experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury." Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1973).

Other commentators assert, however, that "the grand jury continues to function as a barrier to reckless or unfounded charges." *United States v. Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion per Burger, C. J.).

Yet another view finds grand jury proceedings to be obsolete, since other procedural safeguards, such as probable cause and preliminary hearings, afford defendants sufficient protection from unfounded prosecutions. See *Spain*, *supra*, at 119-20. This view is weakened by the fact that grand jury hearings can take the place of probable cause or preliminary hearings. See *infra* notes 204, 210 and accompanying text.

180. See *supra* notes 67, 74 and accompanying text.

181. Many of the Court's recent § 1983 immunity decisions rely primarily on a determination of common-law immunities. See *supra* notes 33, 111-14 and accompanying text.

that grand jury witnesses were not absolutely immune at common law in 1871, it could refuse to extend absolute immunity on this ground.<sup>182</sup> The Court could also employ the "functional categories" test and analogize grand jury witnesses to trial witnesses, who did have absolute immunity at common law, or to complaining witnesses, who did not have absolute immunity at common law.<sup>183</sup> Finally, the Court could grant absolute immunity to police grand jury witnesses if it found that they were "intimately associated" with the criminal judicial process.<sup>184</sup>

A police officer testifying at a grand jury hearing "functions," in some respects, like a trial witness—he testifies orally, under oath, in response to questions posed by a prosecutor, and may be "prosecuted subsequently for perjury."<sup>185</sup> The only significant difference between the "functions" of these two witnesses is that a grand jury witness is not subject to cross-examination.<sup>186</sup> But in light of *Briscoe* and other recent Supreme Court immunity decisions, this "functional" difference may take on controlling significance.<sup>187</sup>

On the other hand, it is not clear that this "functional" difference exists; prosecutors do, in effect, "cross-examine" certain grand jury witnesses, such as accomplices, who are hostile to the prosecution's case. While police officer grand jury witnesses probably would not be hostile to the prosecution, this fact is not relevant under the Court's "functional categories" test: the Court's "immunity analysis rests on functional categories, not on the status of the defendant."<sup>188</sup> Under this analysis, therefore, the police grand jury witness would receive absolute immunity.

A grand jury witness, like a complaining witness, provides information that may serve as probable cause to arrest and detain a

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182. The Court has refused to grant immunity where none existed at common law. See *supra* notes 112-14 and accompanying text.

183. The Court has employed a functional analysis to extend immunity where none existed at common law. See *supra* notes 115-19 and accompanying text.

184. See *Strength v. Hubert*, 854 F.2d 421, 424 (11th Cir. 1988); *supra* note 143 and accompanying text.

185. See *supra* note 134 and accompanying text. Under Indiana criminal law, a perjurer is "a person who makes a false, material statement under oath or affirmation, knowing the statement to be false or not believing it to be true." IND. CODE ANN. § 35-2-1(a)(1) (Burns 1985). Presumably, this statute applies to probable cause hearing testimony, as well as trial testimony. See *Shell v. State*, 148 Ind. 50, 47 N.E. 144 (1897) (making out false information to institute prosecution could constitute perjury).

186. See *infra* note 223 and accompanying text.

187. See *Cleavinger v. Saxner*, 474 U.S. 193, 201, 204-07 (1985); *Butz v. Economou*, 438 U.S. 478, 512 (1978); *supra* notes 134-35 and accompanying text.

188. See *supra* note 132 and accompanying text.

defendant prior to trial.<sup>189</sup> In this sense, a police officer testifying before a grand jury may “function” in the same manner as he does when applying for an arrest warrant and thus should receive only qualified immunity. Unlike a complaining witness, however, a grand jury witness does not initiate the proceeding. He testifies orally, in response to questions posed by a prosecutor.<sup>190</sup> In this way, a grand jury witness does not “function” like a complaining witness.

A police officer who testifies at a grand jury hearing may acquire immunity as an official “intimately associated” with the judicial process.<sup>191</sup> The Supreme Court has not provided a clear guideline for deciding which individuals at grand jury hearings are “intimately associated with the judicial phase of the criminal process.”<sup>192</sup> The Court, however, has granted absolute immunity to prosecutors involved in grand jury proceedings and has recognized the existence of common-law absolute immunity for grand jurors.<sup>193</sup> Prosecutors, however, were granted absolute immunity for various policy reasons, some of which do not apply to police witnesses.<sup>194</sup>

## 2. Probable Cause Hearing

There was no specific immunity for probable cause hearing<sup>195</sup> witnesses at common law.<sup>196</sup> Therefore, it is necessary to determine

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189. See *infra* note 204 and accompanying text.

190. See *supra* note 179 and accompanying text.

191. See *supra* note 184 and accompanying text.

192. See *supra* notes 143-44 and accompanying text.

193. See *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976); *Cleavinger*, 474 U.S. at 199.

194. See *Imbler*, 424 U.S. at 422-23. At the time it decided *Imbler*, the Court explicitly relied on policy considerations in its § 1983 immunity analysis. See *supra* note 108 and accompanying text.

195. The term “probable cause hearing” refers to “[t]hat procedural step in the criminal process at which the judge or magistrate decides whether a complaint should issue or a person should be bound over to a grand jury on a showing of probable cause.” BLACK’S LAW DICTIONARY 1081 (5th ed. 1979).

The above definition could be read to include the adversarial “preliminary hearing.” See *infra* note 210 and accompanying text. The term “probable cause hearing,” however, typically refers to an *ex parte*, state pretrial proceeding, see *Briscoe v. LaHue*, 460 U.S. 325, 351 n.10 (1983) (Marshall, J., dissenting), and, for the purpose of this Note, will be distinguished from a “preliminary hearing.” There are two types of probable cause hearings: (1) those held prior to; and (2) those held subsequent to a suspect’s arrest.

The “probable cause hearing” referred to in footnote five of *Briscoe* was an *ex parte* hearing apparently held prior to Carlisle Briscoe’s arrest. Cf. United States Sup. Ct. Record at 17-22, *Briscoe* (No. 81-1404) (Briscoe’s probable cause hearing transcript was titled “In the Monroe Superior Court II, Probable Cause Nos. S76-

whether witnesses at probable cause hearings "function" in the same

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PC125(2) & S77-PC5(2): In the Matter of Finding Probable Cause for Issuance of a Warrant for the Arrest of Phillip Hartman and Carlisle Briscoe"). Carlisle Briscoe, Jr. was tried for the crime of burglary in an Indiana state court. *See id.*; *Briscoe*, 460 U.S. at 326. Indiana criminal procedure allows for a "non-adversary, recorded hearing before a judge," in lieu of a police arrest warrant application. IND. CODE ANN. § 35-33-5-2(c) (Burns 1985). Presumably, Briscoe's probable cause hearing was the "non-adversary" proceeding referred to in the Indiana criminal code. This probable cause hearing is conducted by a prosecutor, who questions witnesses before a judge. *Cf.* United States Sup. Ct. Record at 17-22, *Briscoe* (No. 81-1404) (Briscoe's probable cause hearing was conducted in this manner). The testimony offered at this hearing is "testimony of the same facts required for [arrest warrant] affidavits." IND. CODE ANN. § 35-33-5-2(c) (Burns 1985).

In most state court jurisdictions, regardless of whether a magistrate has previously issued an arrest warrant, an arrested suspect is entitled to a magistrate's *ex parte* review of whether probable cause to detain exists. *See* LAFAVE & ISRAEL, *supra* note 179, § 1.4, at 13. Two commentators, LaFave and Israel, describe this probable cause hearing as follows:

The magistrate's review may be based on the complaint itself, where the complaint alleges facts establishing probable cause (*e.g.*, that the complainant observed the offense). In other cases, it may be based on a police officer's affidavit setting forth available information establishing probable cause. In some jurisdictions, the magistrate may base his determination on a brief oral statement presented by the complainant. If the magistrate finds that probable cause has not been established, he will direct the prosecutor to promptly produce more information or release the arrested person.

*Id.* Thus, the magistrate's *ex parte* probable cause review provides "judicial authority for continuing to hold the arrestee in custody." *Id.* § 1.4, at 13 n.8.

The post-arrest hearing discussed above is the second type of probable cause hearing. *See* IND. CODE ANN. § 35-33-7-2 (Burns 1985). Indiana criminal procedure provides the following:

At or before the initial hearing of a person arrested without a warrant for a crime, the facts upon which the arrest was made shall be submitted to the judicial officer, *ex parte*, in a probable cause affidavit. In lieu of the affidavit or in addition to it, the facts may be submitted orally under oath to the judicial officer. If facts upon which the arrest was made are submitted orally, the proceeding shall be recorded by a court reporter, and, upon request of any party in the case or upon order of the court, the record of the proceeding shall be transcribed.

*Id.* This proceeding differs from a police officer's application for an arrest warrant in that it involves the presence and participation of a prosecutor, and may employ the use of oral testimony. *See* LAFAVE & ISRAEL, *supra* note 179, § 1.4, at 13.

The federal court equivalent of the state probable cause hearing is the preliminary hearing or examination. *See infra* note 210 and accompanying text. The term "probable cause hearing" is not to be confused with the term "probable cause determination," an undefined term that may refer to probable cause, preliminary or grand jury hearings. *Cf.* *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254, 261 n.15 (5th Cir.), *modified*, 744 F.2d 1131 (1984) (*Wheeler* court referred to *ex parte* pretrial proceedings generally as "probable cause determinations").

For a discussion of the probable cause standard used at these proceedings, see *infra* notes 227-28 and accompanying text. For a discussion of the constitutional

way as trial or grand jury witnesses, both of whom may have enjoyed absolute immunity at common law,<sup>197</sup> or whether they function in the same way as complaining witnesses, who did not enjoy such immunity.<sup>198</sup> Also, one must determine whether a police officer at a probable cause hearing is an official "intimately associated" with the criminal judicial process.<sup>199</sup>

Given the *Briscoe* Court's inclusion of cross-examination in its description of the "functions" of a trial witness,<sup>200</sup> it is not clear that police officers who testify at probable cause hearings would fit *Briscoe's* functional definition of witnesses. Since probable cause hearing witnesses, like grand jury witnesses, do not face cross-examination,<sup>201</sup> they can be distinguished from trial witnesses.

The Court could analogize the functions of probable cause hearing witnesses to those of grand jury witnesses: neither is subject to cross-examination, and both may testify orally in response to questions posed by a prosecutor.<sup>202</sup> The issue of probable cause hearing testimony immunity would then turn on whether a grand jury witness was absolutely immune at common law.

The Court would refuse to extend absolute immunity if it finds that the functions of a police officer at a probable cause hearing are analogous to those of a complaining witness, who did not enjoy absolute immunity at common law.<sup>203</sup> Both complaining witnesses and probable cause hearing witnesses offer information to a mag-

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requirement of a probable cause determination in order to detain an individual prior to trial, see *infra* note 204 and accompanying text.

196. The individual whose function most closely resembled that of a "probable cause hearing" witness at common law was either a complaining witness, who did not receive absolute immunity for malicious prosecution at common law, see *supra* notes 68, 73 and accompanying text, or a grand jury witness, whose pre-1871 immunity status is uncertain. See *supra* notes 67, 74 and accompanying text.

197. See *supra* notes 66-67, 74 and accompanying text. There is some disagreement among authorities as to whether grand jury and trial witnesses enjoyed absolute immunity in the United States prior to 1871. See *id.*

Even if the probable cause hearing witness "functions" like a grand jury witness, some authority suggests that he could be found liable in a suit for malicious prosecution if he gave "information which he knew to be false and so unduly influenced the authorities." *Supra* note 73 and accompanying text. Under this view of malicious prosecution, a police witness at a probable cause hearing who intentionally perjures himself and helps to initiate the prosecution would not enjoy absolute immunity from civil suit. See *id.*

198. See *supra* notes 68, 73 and accompanying text.

199. See *supra* note 143 and accompanying text.

200. See *supra* notes 134-35 and accompanying text.

201. See *supra* note 195 and accompanying text.

202. See *supra* notes 179, 195 and accompanying text.

203. See *supra* notes 68, 73 and accompanying text.



istrate that may provide probable cause to issue an arrest warrant, or to detain a suspect.<sup>204</sup> A complaining witness, however, submits a written affidavit on his own initiative, rather than testifying orally to questions posed by a prosecutor.<sup>205</sup> Thus, a probable cause hearing witness does not "function" in precisely the same way as a complaining witness.

The Supreme Court ruled in *Malley* that a police officer who submits an affidavit for an arrest warrant is not "intimately associated" with the judicial process.<sup>206</sup> A prosecutor, however, not a policeman, initiates the probable cause hearing, and the Court has implied that prosecutors who initiate criminal proceedings are immune from section 1983 because they are "intimately associated" with the judicial process. Thus, a police witness at a probable cause hearing, like a prosecutor, may be immune as an official "intimately associated" with the judicial process.<sup>207</sup> Under this analysis, two policemen would enjoy different immunity standards depending upon whether or not they initiated the criminal proceeding, even if they offered the same evidence in both cases, and even though both warrant applications and probable cause hearings result in the issuance of an arrest warrant.<sup>208</sup> This result, however, would be consistent with the policies underlying the common-law torts of malicious prosecution and defamation.<sup>209</sup>

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204. See *Gerstein v. Pugh*, 420 U.S. 103 (1975). According to the Fifth Circuit, the *Gerstein* Court held that "the [f]ourth [a]mendment requires of the states a judicial or neutral determination of probable cause to arrest as a prerequisite for extended restraint of liberty following arrest." *Wheeler v. Cosden Oil & Chem. Co.*, 734 F.2d 254, 258 (5th Cir.), *modified*, 744 F.2d 1131 (1984); *Gerstein*, 420 U.S. at 114. The *Gerstein* requirement can be fulfilled either by a grand jury indictment or by a magistrate's issuance of an arrest warrant. See *Wheeler*, 734 F.2d at 259. An arrest warrant is issued either at a probable cause hearing, or in response to a police officer's arrest warrant application before a magistrate. See *supra* note 195 and accompanying text.

205. See *White v. Frank*, 855 F.2d 956, 958-59 (2d Cir. 1988).

206. See *supra* note 143 and accompanying text.

207. See *Malley v. Briggs*, 475 U.S. 335, 342 (1986). In *Malley*, the Court called the grand jury stage the "prosecutor's . . . first step in the process of seeking a conviction." *Id.* at 343. This statement does not appear to take into account those cases where a prosecutor appears before a magistrate at a probable cause hearing. See *supra* note 195 and accompanying text. Presumably, the Court would grant prosecutors absolute immunity at probable cause hearings. If a prosecutor is an official "intimately associated" with the judicial process at probable cause hearings, there is no reason to treat differently a police officer who testifies at such a proceeding.

208. Cf. *White*, 855 F.2d 956, 962 (2d Cir. 1988) (police officers are immune for grand jury testimony if they did not play "sufficient role in initiating" malicious prosecution).

209. See *id.*; *supra* notes 66-68, 73-74 and accompanying text.

### 3. Preliminary Hearing

As was the case for probable cause hearing witnesses, there was no common-law rule of immunity specifically for preliminary hearing<sup>210</sup>

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210. The preliminary hearing is a "judicial proceeding held sometime following the defendant's initial appearance in court," LAFAVE & ISRAEL, *supra* note 179, § 14.1, at 595 and "prior to indictment during which the state is required to produce sufficient evidence to establish that there is probable cause to believe, (a) that a crime has been committed, and (b) that the defendant committed it." BLACK'S LAW DICTIONARY 1062 (5th ed. 1979). The preliminary hearing, unlike the probable cause hearing, is an "adversary proceeding in which both sides are represented by counsel." LAFAVE & ISRAEL, *supra* note 179, § 1.4, at 15. Parties at preliminary hearings rely primarily on live witnesses rather than affidavits, and may cross examine witnesses for either side. *See id.* Cross examinations at preliminary hearings, however, are often less thorough than they are at trial.

In federal court, a defendant has a right to a preliminary hearing within 10 days of his initial appearance in court if he is in custody, and within 20 days if he is not held in custody. *See* WRIGHT, *supra* note 179, § 85, at 179. A finding of probable cause at the preliminary hearing allows the court to bind the case over to the required grand jury hearing. *See* FED. R. CRIM. P. 5.1, *noted in* WRIGHT, *supra* note 179, § 85, at 172 n.8. A defendant does not have a right to a preliminary hearing, however, if a prosecutor files a grand jury indictment prior to the date set for the preliminary examination. *See id.* In addition, a defendant may waive his right to a preliminary proceeding. *See id.*

Federal courts permit review of a preliminary hearing finding of probable cause. *See id.* § 86, at 186. Nevertheless, review of such a determination prior to a grand jury hearing is unusual. *See id.* Although a detained defendant can challenge his preliminary hearing determination in a habeas corpus action, "a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

In state courts that require grand jury proceedings, a finding of probable cause at a preliminary hearing allows the magistrate to bind a case over to a grand jury. *See* LAFAVE & ISRAEL, *supra* note 179, § 1.4, at 15. In a jurisdiction that does not require a grand jury indictment, "the case is bound over directly to the general trial court." *Id.* Certain of these jurisdictions require extra procedural safeguards against unfounded prosecutions at probable cause hearings. *See id.* § 14.2, at 603. In some jurisdictions a prosecutor can choose to bypass a preliminary hearing, and most jurisdictions allow a defendant to waive his right to the hearing. *See id.* § 1.4, at 14.

The state preliminary examination is generally a screening device. *See id.* § 14.1, at 595. These proceedings vary in different jurisdictions with regard to qualifications of magistrates, evidentiary standards and caseloads. *See id.* § 14.1, at 596. As a result, the importance and quality of preliminary proceedings differ from state to state. *See id.*

The Supreme Court has ruled that a defendant has no constitutional right to a preliminary examination in state court. *See Gerstein*, 420 U.S. at 119-20. The Court, however, required state courts to make some finding of probable cause before ordering that a defendant be detained. *See id.* at 114. For a further discussion of the *Gerstein* decision, see *supra* note 204 and accompanying text.

The Court has also applied the sixth amendment right to counsel to preliminary hearings. *See Coleman v. Alabama*, 399 U.S. 1 (1969).

witnesses.<sup>211</sup> Consequently, one must again decide whether a police witness at a preliminary hearing functions as a trial witness or a grand jury witness, and whether he is "intimately associated" with the judicial process.<sup>212</sup>

A preliminary hearing witness functions in much the same way as a probable cause hearing witness.<sup>213</sup> A defense attorney, however, can cross-examine a police witness at a preliminary hearing in a manner similar to the cross-examination of a trial witness.<sup>214</sup> In this sense, a police officer may "function" in the same manner at a preliminary proceeding as he does at trial. This "functional" analysis would apply equally well to all adversarial pretrial hearings, including suppression hearings.<sup>215</sup>

Similarly, a police officer at a preliminary hearing may be more "intimately associated" with the criminal judicial process than at a probable cause hearing.<sup>216</sup> Again, the proceeding is not initiated by the police officer, it is adversarial, and it is closer chronologically to the trial than is a probable cause hearing.<sup>217</sup>

With the possible exception of adversarial pretrial proceedings, strict application of the current Supreme Court section 1983 immunity analysis to pretrial proceedings does not provide courts with a clear answer to the issue of police witness immunity. Thus, courts should resolve this issue by examining the policies underlying common-law witness immunity, and apply these policy considerations to the issue

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211. This author has been unable to locate any reference to common-law witness immunity other than that afforded to trial and grand jury witnesses.

212. See *supra* notes 115-19, 143 and accompanying text.

213. See *supra* notes 195, 210 and accompanying text.

214. See *supra* note 210 and accompanying text.

215. See *Holt v. Castenada*, 832 F.2d 124, 125 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1275 (1988). The court in *Holt* described the functional similarities between trial and preliminary hearing witnesses:

The functions of a witness are identical at an adversarial pretrial hearing and at the trial on the merits. In both types of proceedings, the witness assists the trier of fact in ascertaining the truth. In adversarial pretrial proceedings, as in trials, the witness testifies in court, under oath, under the supervision of a presiding judge and is subject to criminal prosecution for perjury. Moreover, in adversarial pretrial matters, the witness is available for cross-examination.

*Holt*, 832 F.2d at 125.

A suppression hearing is "[a] pretrial proceeding in criminal cases in which a defendant seeks to prevent the introduction of evidence alleged to have been seized illegally. The ruling of the court then prevails at the trial." BLACK'S LAW DICTIONARY 1291 (5th ed. 1979). The suppression hearing, like the preliminary hearing, is an adversarial proceeding. See *Holt*, 832 F.2d at 124-27.

216. See *supra* note 143 and accompanying text.

217. See *supra* notes 195, 210 and accompanying text.

of pretrial police testimony. This approach is similar to that taken by the Supreme Court in several of its recent section 1983 immunity decisions, although the Court has purported to employ a strict "functional categories" test in these decisions.<sup>218</sup>

#### IV. Policy Considerations

The policies favoring section 1983 absolute immunity for police trial witnesses apply with equal force to pretrial proceedings.<sup>219</sup> Other policy considerations, however, peculiar to witnesses at *ex parte* pretrial hearings, weigh against extension of immunity to such hearings.<sup>220</sup> Traditional common-law witness immunity was based at least partly on the notion that procedural safeguards employed at trial would help to offset the ill-effects of absolute witness immunity.<sup>221</sup> Such safeguards do not exist to the same extent at *ex parte* pretrial proceedings.

Both probable cause hearings and grand jury hearings are conducted *ex parte*.<sup>222</sup> Cross-examination by opposing counsel, perhaps the single greatest procedural tool used to combat perjury, is not

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218. See *supra* note 119 and accompanying text.

219. See *When Police Lie*, *supra* note 2, at 514. This contention, however, is not meant to imply that these policies are persuasive to begin with. See *id.*; *supra* note 132 and accompanying text.

220. See *When Police Lie*, *supra* note 2, at 515-17; *infra* notes 222-31 and accompanying text.

In addition, there are policy considerations that pertain solely to the status of *police officer* witnesses within the judicial system. Police trial witnesses are less likely to be affected by the threat of criminal penalties than private witnesses. See *supra* note 132 and accompanying text. This argument becomes even stronger when applied to pretrial proceedings, where police officer witnesses may work even more closely with prosecutors.

Also, a police officer's testimony at pretrial proceedings is more likely to be the single proximate cause of a defendant's subsequent incarceration than it is at trial. See *When Police Lie*, *supra* note 2, at 514-15. This is so because pretrial probable cause determinations are more likely to be made solely on the basis of an officer's testimony than are trial convictions. See *id.* Also, juries lend great weight to the credibility of police witnesses. See *supra* note 132 and accompanying text. Grand juries are more likely to rely on such testimony as it is not subject to cross-examination. See *supra* note 179 and accompanying text. For a full discussion of the problem of proximate cause of constitutional violations and police perjury, see generally *When Police Lie*, *supra* note 2.

While the arguments listed above may be persuasive, the Supreme Court in *Briscoe* stated explicitly that it would only consider the function of a government official, and not his particular "status" as a police officer in deciding whether to give him absolute immunity under § 1983. See *supra* note 132 and accompanying text.

221. See *supra* note 72 and accompanying text.

222. See *supra* notes 179, 195 and accompanying text.

utilized at these proceedings.<sup>223</sup> In addition, the defendant at trial "enjoys a panoply of procedural due process rights" not enjoyed by the defendant at *ex parte* pretrial proceedings.<sup>224</sup> Unlike the pretrial defendant at *ex parte* hearings, the trial defendant enjoys "the guidance of counsel, the right to pretrial discovery, and the opportunity to conduct an independent investigation of the facts supporting the charges."<sup>225</sup> These constitutional rights give the trial defendant an "ample opportunity to prepare a thorough cross-examination of the [police] officer's recall, motive, and prior statements."<sup>226</sup>

Another procedural disadvantage to the criminal suspect at pretrial proceedings is the standard of proof, which is lower than that invoked at trial. The standard of proof at probable cause hearings and preliminary hearings is probable cause to arrest, and to detain, respectively.<sup>227</sup> At federal grand jury hearings, the standard is probable cause to prosecute, while state jurisdictions vary between this standard and the "prima facie evidence standard."<sup>228</sup> All of these standards are lower than the "beyond a reasonable doubt" standard of criminal trials, and thus detract from the criminal suspect's ability to defend himself against baseless prosecutions.

In defense of absolute immunity for pretrial police testimony, one circuit court asserted that "the argument for absolute immunity is stronger in the grand jury setting than in the trial setting, because

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223. See *When Police Lie*, *supra* note 2, at 516; *Hoffa v. United States*, 385 U.S. 293, 311 (1966); see also *Briscoe v. LaHue*, 460 U.S. 325, 352 n.10 (1983) (Marshall, J., dissenting).

In addition to cross-examination, unlike a grand jury defendant, "the defendant at trial can impeach the police witness with documentary and circumstantial evidence of his innocence. He can compel the presence of friendly witnesses, and present his own testimony. He may seek a new trial or take an appeal." *When Police Lie*, *supra* note 2, at 516. Also, suspects who are the subject of grand jury hearings may not have the right to appear in person at the hearing. See *WRIGHT*, *supra* note 179, § 104, at 219, 234.

224. *When Police Lie*, *supra* note 2, at 516.

225. *Id.*

226. *Id.* One court summed up these procedural deficiencies by stating that "[t]he only regulators of truth before the grand jury are the testimonial oath and the possibility of a future criminal prosecution for perjury. A grand jury proceeding is almost totally devoid of any procedural check against false testimony." *White v. Frank*, 680 F. Supp. 629, 638 (S.D.N.Y.), *appeal dismissed*, 855 F.2d 956 (2d Cir. 1988).

227. See *WRIGHT*, *supra* note 179, § 101, at 185.

228. *LAFAVE & ISRAEL*, *supra* note 179, § 15.2, at 621; see *WRIGHT*, *supra* note 179, § 101, at 197.

In addition, the Federal Rules of Evidence do not apply to such proceedings. See *FED. R. EVID.* 1101(d)(2); *White*, 680 F. Supp. at 638.

false testimony before the grand jury is less harmful than false testimony at trial; the grand jury can indict, but cannot convict."<sup>229</sup> Implicit in this argument is the assumption that the defendant victim of perjured grand jury testimony still has an opportunity to have a trial on the merits, while the victim of perjured trial testimony has lost this opportunity. In this sense, the grand jury may be viewed as only a single step in the legal process, within which the defendant enjoys various procedural safeguards.

Probable cause hearings and preliminary hearings, however, can result in the detention of a defendant.<sup>230</sup> In addition, grand jury indictments provide sufficient probable cause grounds for issuing arrest warrants, and for detaining suspects prior to trial where no other probable cause determination has been made.<sup>231</sup> Thus, while false testimony at a grand jury hearing is, arguably, less harmful than it would be at a trial, it may still result in significant harm to criminal defendants. In any event, the Supreme Court's section 1983 immunity analysis does not turn on the degree of harm suffered by a plaintiff. It depends only on the existence of the claimed immunity in pre-1871 common law.

The policy considerations discussed above do not apply with the same force to adversarial pretrial proceedings, such as preliminary and suppression hearings, which more closely resemble trials:

Both parties [at adversarial pretrial proceedings] are represented by counsel, there is an opportunity to present contrary evidence, the proceeding is presided over by an impartial judge whose rulings are recorded, and witnesses are subject to cross-examination. Thus, the elements that make the trial a 'crucible' designed to ascertain truth are all present in an adversarial pretrial probable cause hearing.<sup>232</sup>

## V. Extension of Absolute Immunity to Pretrial Police Testimony

Given the Court's "functional categories" test, it is fairly clear that absolute immunity under section 1983 should apply to adversarial

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229. *Kincaid v. Eberle*, 712 F.2d 1023, 1024 (7th Cir.), *cert. denied*, 464 U.S. 1018 (1983).

230. *See supra* notes 195, 210 and accompanying text.

231. *See supra* note 204 and accompanying text. Also, grand jury hearings, if viewed merely as rubber stamps, do not afford defendants much protection from the start. *See supra* note 179 and accompanying text. This argument can work in two ways: (1) civil remedies are required to offset the ineffectual nature of grand jury proceedings; or (2) grand juries are unnecessary, and requiring a civil remedy for perjury at such hearings is equally unnecessary.

232. *See White*, 680 F. Supp. at 635.

pretrial proceedings. The "functions" of a police officer witness at adversarial pretrial proceedings are not significantly different from those of a trial witness.<sup>233</sup> In addition, the policies underlying witness immunity seem to apply with equal force to witnesses at adversarial pretrial proceedings.<sup>234</sup> Consequently, this author agrees with the circuit courts that have addressed this issue<sup>235</sup> and that have extended *Briscoe* immunity to adversarial pretrial proceedings.

The question of granting absolute immunity for police testimony at *ex parte* pretrial hearings is a more difficult one. The "function" of police officer witnesses at such proceedings,<sup>236</sup> as well as the pre-1871 common-law immunity status of such witnesses<sup>237</sup> is, at best, uncertain. In addition, the policies running counter to such immunity are stronger for *ex parte* than for adversarial pretrial proceedings.<sup>238</sup>

It is not clear whether grand jury witnesses enjoyed absolute immunity from defamation actions at common law.<sup>239</sup> In addition, there does not appear to be any pre-1871 support for the proposition that false testimony constituted sufficient evidence to make out a *prima facie* case of malicious prosecution against a grand jury witness.<sup>240</sup> As neither pre-1871 common law nor the "functional categories" test provides a clear answer to this issue, it is necessary to weigh the policies for and against pretrial witness immunity.

Common-law absolute witness immunity was designed to protect the truth finding process.<sup>241</sup> Thus, trial witnesses were protected from defamation suits that were based solely on their trial testimony.<sup>242</sup> Witness immunity, however, was not designed to protect individuals who initiated baseless or malicious prosecutions. Thus, complaining witnesses who knowingly submitted false affidavits for warrant applications did not enjoy immunity from suit for malicious prosecution at common law.<sup>243</sup> The police officer witness at grand jury and probable cause proceedings falls somewhere between these two types of witnesses; he does not have the authority to initiate these proceedings, but he may play a crucial role in the prosecutor's decision

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233. See *supra* notes 214-15 and accompanying text.

234. See *supra* note 232 and accompanying text.

235. See *supra* notes 160-65 and accompanying text.

236. See *supra* notes 185-90, 200-05 and accompanying text.

237. See *supra* notes 67-68, 73-74 and accompanying text.

238. See *supra* notes 220-31 and accompanying text.

239. See *supra* note 67 and accompanying text.

240. See *supra* notes 67, 73-74 and accompanying text.

241. See *supra* notes 70-71 and accompanying text.

242. See *supra* note 66 and accompanying text.

243. See *supra* note 68 and accompanying text.

to do so.<sup>244</sup> At the proceeding, however, his actual role or "function" may be closer to that of a trial witness than a complaining witness.<sup>245</sup>

A police officer witness should not be subject to suit solely for giving false testimony at a pretrial proceeding. Such a remedy would defeat the common-law policy underlying witness immunity by leaving the police officer in constant fear of civil suit. Thus, a qualified immunity for pretrial police testimony, which has been suggested by one court,<sup>246</sup> would not provide a sufficient safeguard to the truth-seeking function of the judicial process.<sup>247</sup>

Nevertheless, because the *ex parte* pretrial proceeding affords the criminal defendant few of the procedural safeguards that offset the ill effects of witness immunity,<sup>248</sup> the criminal defendant should enjoy some form of civil protection against pretrial police perjury. A reasonable compromise would allow the plaintiff to introduce a police officer's perjured testimony as evidence of that officer's malicious prosecution. Under this scenario, the plaintiff would have to introduce additional evidence that the police officer played a significant role in initiating the prosecution in order to make out a prima facie case of malicious prosecution under section 1983. A police officer's false testimony, standing alone, would be insufficient to make out a prima facie case of malicious prosecution. This approach is consistent with some post-1871 common-law authority, which allowed for the introduction of perjured grand jury testimony as evidence of malicious prosecution.<sup>249</sup>

The approach described above is similar to that adopted by the Second Circuit in *White v. Frank* and, in effect, is consistent with reasoning implied by recent Supreme Court section 1983 immunity decisions.<sup>250</sup> It differs from *White*, however, in that it places the burden of proof on the section 1983 plaintiff to show that the police officer helped to initiate the prosecution against him. The *White*

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244. Cf. *White*, 855 F.2d at 962 (perjurer-defendant who misled tribunal and caused it to indict plaintiff is liable, even though defendant did not purport to act as prosecutor).

245. See *supra* notes 185-88 and accompanying text.

246. See *White v. Frank*, 680 F. Supp. 629, 638 (S.D.N.Y.), *appeal dismissed*, 855 F.2d 956 (2d Cir. 1988).

247. For a discussion of the procedural safeguards against perjury at trial, see *supra* note 72 and accompanying text.

248. See *supra* notes 220-30.

249. See *supra* notes 67, 73-74 and accompanying text.

250. See *supra* notes 158-59 and accompanying text. Recent § 1983 immunity decisions by the Court, in effect, have considered policy along with a "functional categories" analysis. See *supra* note 119 and accompanying text.



opinion places the burden of proof on the police officer to show that he did not initiate the prosecution.<sup>251</sup> Although the Second Circuit's solution would afford a police officer some protection from civil suit, it would tend to disrupt the judicial process significantly by leaving the police officer open to civil suits, even though he does no more than testify at a pretrial proceeding.

## VI. Conclusion

Absolute immunity under section 1983 should be extended to protect police officers from civil suits that are based solely on their testimony given at probable cause, preliminary, suppression and grand jury proceedings. Section 1983 plaintiffs, however, should be allowed to introduce false testimony given by police officers at *ex parte* proceedings as evidence of malicious prosecution by a police officer. This approach would be consistent with the policies underlying common-law witness immunity: it would further the policy of protecting the truth-seeking function of the judicial process, while taking into account the lack of procedural safeguards afforded the criminal defendant at pretrial proceedings.

*Jack Kaufman*

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251. See *supra* notes 158-59 and accompanying text.