Printed in U.S.A.
Vol. 106, No. 4

BEYOND ABSOLUTE IMMUNITY: ALTERNATIVE PROTECTIONS FOR PROSECUTORS AGAINST ULTIMATE LIABILITY FOR § 1983 SUITS

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ABSTRACT—Questions of whether prosecutors should be immune from liability for constitutional torts, and if so, whether that immunity should be qualified or absolute, have been the source of considerable controversy for the last half century. Some argue that absolute prosecutorial immunity is indispensable, a necessary tool to protect public servants who, without immunity, would be buried under a mountain of frivolous § 1983 suits. Others see absolute prosecutorial immunity as unjust because it prevents genuinely wronged individuals from rightfully collecting damages from constitutional tortfeasors. As the debate over the Supreme Court's prosecutorial immunity jurisprudence continues, the current scope of protections afforded to prosecutors outside of the judicially created immunity regimes has received decidedly less attention. This Note will argue that states and local municipalities have created a number of protections for public officials, including prosecutors—such as indemnification legislation, private insurance, and other alternative liability mechanisms—to cover losses from torts they commit in the line of duty. These protections prevent prosecutors from shouldering the burden of personal financial liability even in instances in which they cannot don the cloak of absolute immunity. Considering the breadth of the protections that are currently afforded prosecutors coupled with the opportunity for their expansion to additional jurisdictions, the Court's decades-old justifications for maintaining absolute prosecutorial immunity are no longer a concern. Therefore, the Court should abandon its confusing absolute prosecutorial immunity jurisprudence once and for all.

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INTRODUCTION

Several high-profile cases have recently thrust the issue of prosecutorial misconduct into the collective American consciousness. The botched prosecution of Senator Ted Stevens for failure to disclose gifts and the "rush to accuse" three former Duke University lacrosse players of rape both generated significant media attention.[1] They are prominent examples of the fallout that can result when prosecutors abuse their position. Though the charges against both Senator Stevens and the Duke lacrosse players were eventually dropped,[2] many other less publicized incidents have featured frivolous litigation, unjust convictions, and imprisonment of the innocent. Statutory recourse is available for the victims of such wrongs, but under the current judicially invented system of prosecutorial immunity, few can collect damages.

42 U.S.C. § 1983 creates a cause of action for damages against "[e]very person who, under color of" state or local law, subjects "any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States.[3] But questions

[1] *See* Jeffrey Toobin, *Casualties of Justice*, NEW YORKER, Jan. 3, 2011, at 39 (analyzing the reaction of the Department of Justice to the failed prosecution of Sen. Stevens); Katherine MacIlwaine, *'Innocent,'* CHRON. (Apr. 12, 2007), http://dukechronicle.com/article/innocent (reporting North Carolina Attorney General Roy Cooper's decision to drop all charges against the indicted players).

[2] *See* Toobin, *supra* note 1; MacIlwaine, *supra* note 1.

[3] 42 U.S.C. § 1983 (2006).

of whether prosecutors should be immune from suit under § 1983, and if so, whether that immunity should be qualified or absolute, have been the source of considerable controversy for the last half century.[4] Some argue that absolute prosecutorial immunity is indispensable, a necessary tool to protect public servants who, without immunity, would be buried under a mountain of frivolous § 1983 suits.[5] Others see absolute prosecutorial immunity as unjust because it prevents genuinely wronged individuals from rightfully collecting damages from constitutional tortfeasors.[6] Currently, most prosecutorial conduct is absolutely immune from § 1983 suits.[7]

The distinction between absolute and qualified immunity has both practical and legal significance. Absolute immunity from suit protects an individual from liability regardless of his state of mind at the time he commits an alleged constitutional violation.[8] Qualified immunity applies to a narrower range of conduct; it protects an individual from liability only for acts or omissions undertaken in good faith.[9] Generally, actions undertaken in good faith include "conduct [that] does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[10]

Though under current law prosecutors enjoy absolute immunity for many of their responsibilities, the Supreme Court has indicated that there are limits to this shield. A prosecutor wears many hats, and certain actions performed in the line of duty may not receive the highest level of immunity. Prosecutors enjoy absolute immunity from suit for conduct "intimately associated with the judicial phase of the criminal process."[11] This "phase"

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[4] *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 57 [hereinafter Johns, *Reconsidering*] (arguing that the Court should eliminate absolute prosecutorial immunity); Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape*, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 297–319 (1965) (analyzing the implications of the Court's decision to recognize a plaintiff's right to sue for civil rights violations under § 1983).

[5] *See* Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976) (holding that prosecutorial immunity protects "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system").

[6] *See, e.g.*, Johns, *Reconsidering*, *supra* note 4, at 55; Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 511 (2011) [hereinafter Johns, *Unsupportable*] (arguing for the application of qualified immunity in all cases); Douglas J. McNamara, Buckley*,* Imbler *and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 ALB. L. REV. 1135, 1138 (1996) ("Although prosecutors need some protection from suit, absolute immunity is too much.").

[7] Because absolute immunity applies when prosecutors are acting as advocates, which is their primary duty, most prosecutorial conduct is absolutely immune. *See* Johns, *Reconsidering*, *supra* note 4, at 55–56.

[8] Joy Rushing & Lynne Bratcher, *Section 1983 Defenses*, 14 URB. LAW. 149, 150 (1982).

[9] *Id.* at 150.

[10] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[11] Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

begins once there is probable cause to arrest a defendant.[12] For all other conduct that is not "intimately associated with the judicial phase," a prosecutor enjoys only qualified immunity.[13]

Over the past few years, the Court has reviewed a number of cases in which federal circuit courts attempted to chip away at the foundation of prosecutorial immunity by narrowing the scope of protected conduct.[14] Thus far, the Court has maintained the line between absolute and qualified immunity using the standard synthesized by *Imbler v. Pachtman*[15] and *Buckley v. Fitzsimmons*[16] to distinguish between prosecutorial and investigative conduct.[17]

A significant amount of commentary has been dedicated to finding ways to improve the doctrines of absolute and qualified immunity.[18] Some critics push for changes to the way in which the Supreme Court interprets how and why prosecutors should be immune from suit.[19] Others argue that

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[12] *See* Buckley v. Fitzsimmons, 509 U.S. 259, 274 (1993).

[13] *Imbler*, 424 U.S. at 430.

[14] *See, e.g.*, al-Kidd v. Ashcroft, 580 F.3d 949, 952 (9th Cir. 2009) (holding that former Attorney General John Ashcroft was not entitled to absolute or qualified immunity from suit for allegedly creating a practice under which the federal material witness statute was unlawfully employed to investigate or preemptively detain plaintiff for suspected terrorist activities), *rev'd*, 131 S. Ct. 2074, 2085 (2011); Thompson v. Connick, 578 F.3d 293, 293 (5th Cir. 2009) (en banc) (divided panel affirming trial court verdict that prosecutor's office was liable under § 1983 for failure to train its prosecutors to divulge certain exculpatory evidence during a criminal trial, resulting in plaintiff's wrongful conviction and incarceration), *rev'd*, 131 S. Ct. 1350, 1366 (2011); McGhee v. Pottawattamie Cnty., Iowa, 547 F.3d 922, 933 (8th Cir. 2008) (holding that prosecutor was not immune from suit for fabricating evidence prior to filing formal charges despite the fact that evidence was later used at trial), *cert. granted*, 129 S. Ct. 2002 (2009).

[15] 424 U.S. at 431 (holding that a prosecutor is absolutely immune from suit under § 1983 when he is found to have acted within the scope of his official duties as prosecutor).

[16] 509 U.S. at 274 (establishing that a prosecutor is not protected by absolute immunity until he has probable cause to arrest a defendant).

[17] *See* Ashcroft v. al-Kidd, 131 S. Ct. at 2085 (finding that then-Attorney General Ashcroft was entitled to immunity because he did not violate clearly established law); Connick v. Thompson, 131 S. Ct. at 1356 (holding that a district attorney's office cannot be held liable under § 1983 for a failure to train its prosecutors based on a single *Brady* violation).

[18] *See, e.g.*, McNamara, *supra* note 6, at 1137 ("[T]he reasons for extending prosecutors absolute immunity no longer exist."); Amanda K. Eaton, Note, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of* Hope v. Pelzer *on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 694–96 (2004) (discussing different scholars' suggestions for how to improve the qualified immunity doctrine).

[19] *See* Kalina v. Fletcher, 522 U.S. 118, 132 (1997) (Scalia, J., concurring) (arguing that the historical support for the *Imbler* rule, which is based on the notion that prosecutors were protected by absolute immunity under the common law in 1871, is inaccurate); *see, e.g.*, Johns, *Reconsidering*, *supra* note 4, at 53–59 (arguing that the Court's current immunity jurisprudence is unmanageable and that it should eliminate absolute prosecutorial immunity); Jonathan K. Van Patten, *Suing the Prosecutor*, 55 S.D. L. REV. 214, 250 (2010) ("[T]here is a serious question whether there is a principled basis on which to keep *Imbler*'s absolute immunity in balance with *Buckley*'s limited exception for qualified immunity based on function and probable cause.").

regardless of what the Supreme Court decides, states and local municipalities should independently move to better protect wronged defendants.[20]

However, as the debate over the *Imbler–Buckley* jurisprudence continues, the current scope of protections afforded to prosecutors outside of the judicially created immunity regimes has received decidedly less attention. This Note will argue that states and local municipalities have created a number of protections for public officials, including prosecutors—such as indemnification legislation, private insurance, and other alternative liability mechanisms—to cover losses from torts they commit in the line of duty. These protections prevent prosecutors from shouldering the burden of personal financial liability even in instances in which they cannot don the cloak of absolute immunity.

The driving force behind the Court's absolute prosecutorial immunity case law has long been a desire to prevent the chilling effect on zealous prosecution that would inevitably emanate from the specter of personal liability in tort suits.[21] The Court has embraced the concept that it is in the "broader public interest" that those who serve in this essential democratic function focus on their duties instead of their wallets.[22]

Contrary to the Court's concerns, a world without absolute prosecutorial immunity does not require the choice between financial security and zealous pursuit of duty. Considering the breadth of the protections mentioned above that are currently afforded prosecutors coupled with the opportunity for their expansion to additional jurisdictions, the justifications for maintaining the protective *Imbler–Buckley* standard are no longer a concern.[23] In light of the existing variety of alternative prosecutorial protections, the Court should abandon its confusing absolute prosecutorial immunity jurisprudence once and for all.

Part I of this Note will discuss the evolution of both qualified and absolute prosecutorial immunity in American law. It will detail the historical and public policy justifications the Supreme Court has advanced for prosecutorial immunity from § 1983 suits. It will also take into account criticisms of the Court's jurisprudence and analyze the impact the Court's

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[20] *See* Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 74 (1999) (arguing that "a legislative remedy is the only reliable and fair response to the inevitable mistakes that occur as a byproduct" of the American criminal justice system); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 914–15 (1997) (arguing that state law causes of action should be utilized to circumvent the existence of absolute immunity as a federal constitutional bar to damage suits against prosecutors).

[21] *See* Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976).

[22] *Id.* at 427.

[23] *See id.* at 424–25 ("The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.").

decisions have had on plaintiffs seeking damages under § 1983. Part II will argue that the scope of the protections afforded to prosecutors outside of absolute immunity is more expansive and effective than the Supreme Court has recognized. It will argue further that a system in which indemnification, insurance, and other protections are substituted for absolute immunity would be more consistent with the spirit of § 1983.[24] This Part will show why these alternatives minimize the concerns driving the Supreme Court's hesitancy to roll back the reach of absolute immunity. Finally, Part III will address the criticisms of these protections as alternatives for absolute immunity and conclude that detractors overstate the difficulties of developing an expansive insurance and indemnification regime.

I. THE *IMBLER–BUCKLEY* STANDARD AND ITS COSTS

Official immunity from § 1983 is founded on a tradition that dates back to the Reconstruction Era.[25] The Supreme Court's interpretations of when, where, and how immunity applies to public officials has had a tremendous impact on the ability of parties to pursue causes of action under § 1983. This Part will present an explanation of the historical development of § 1983 suits and the evolution of the Supreme Court's jurisprudence regarding immunity from suit under the statute. Using a variety of examples, this Part will analyze the harms of prosecutorial misconduct and focus on situations in which victims of constitutional torts faced inadequate remedies or were denied compensation because of absolute prosecutorial immunity. Following these examples is an analysis and critique of the policy rationales that drive the Court's current jurisprudence in the realm of absolute prosecutorial immunity.

A. Section 1983, the Imbler–Buckley *Rule, and the Current Standard for Prosecutorial Immunity*

Since the Supreme Court first gave 42 U.S.C. § 1983[26] teeth more than fifty years ago by holding that it provided for a federal right of action, the statute has grown into what is perhaps the most important tool through which victims who allege constitutional harms at the hands of state or local

[24] *See* Carey v. Piphus, 435 U.S. 247, 254 (1978) ("Insofar as petitioners contend that the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights, they have the better of the argument.").

[25] *See* Tenney v. Brandhove, 341 U.S. 367, 372–73 (1951) (discussing the common law tradition of official immunity from suits for constitutional harms).

[26] Section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

officials may seek redress.[27] It provides a cause of action to hold liable anyone who, under color of any state statute, deprives anyone of rights secured by the Constitution.[28] In *Monroe v. Pape*, in which a policeman broke into and ransacked the plaintiff's home, the Court first recognized the right to sue for civil rights violations under § 1983.[29] As a result of *Monroe*, civil rights litigation against state and local governmental officials flowed into the federal courts. "While only 270 federal civil rights actions were filed in 1961, today between 40,000 and 50,000 § 1983 actions are commenced in federal court each year."[30] Several subsequent Supreme Court decisions and congressional actions expanded the pool of state actors who could be sued under § 1983[31] and also provided a financial incentive to bring claims by permitting the award of attorney's fees.[32] These and other developments contributed to an explosion in § 1983 litigation over the past five decades.

The Supreme Court developed its § 1983 immunity jurisprudence by first finding immunity for legislative officials,[33] then for judges,[34] and

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[27] *See* Harrington v. Grayson, 764 F. Supp. 464, 466 (E.D. Mich. 1991) (stating that since *Monroe v. Pape*, 365 U.S. 167 (1961), § 1983 "has become one of the primary sources of relief for those individuals who seek redress for violations of their constitutional rights"); *see also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 73 (1989) (Brennan, J., dissenting) ("It would be difficult to imagine a statute more clearly designed 'for the public good,' and 'to prevent injury and wrong,' than § 1983.").

[28] § 1983.

[29] 365 U.S. at 168–69, 187; *see also* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 48 (1983) ("*Monroe v. Pape* was rightly perceived as a watershed decision, establishing § 1983 as a potent remedy that citizens could invoke affirmatively against official misconduct without the state's help or indeed in the face of its opposition. It swiftly became the legal bulwark of the ripening civil rights movement; only two years after the decision, § 1983 litigation had grown by over 60 percent."); Johns, *Reconsidering*, *supra* note 4, at 73–74.

[30] 1 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 1.01[B], at 1-5 (4th ed. Supp. 2007). In 1993, § 1983 cases accounted for 14% of the federal district court docket. Nasim v. Warden, Md. House of Corr., 64 F.3d 951, 957 (4th Cir. 1995) (Wilkinson, J., concurring) (citing Robert G. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21, 23 (1994)) (observing that prisoners filed 878 § 1983 claims in 1967 and 33,000 in 1993), *cert. denied*, 516 U.S. 1177 (1996).

[31] *See* Maine v. Thiboutot, 448 U.S. 1, 4–5 (1980) (holding that the § 1983 remedy is not limited to federal constitutional rights and may also be used to vindicate federal statutory rights, and that the federal statutes enforceable under § 1983 are not limited to those guaranteeing equal or civil rights); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978) (holding that municipal entities are subject to § 1983 liability when the violation of constitutional rights stems from the enforcement of a municipal policy or custom).

[32] *See* Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (2006) (authorizing awards of attorney's fees to parties who prevail in actions or proceedings brought pursuant to § 1983). The statute provides incentive for individuals to enforce their federal rights under § 1983 and for attorneys to represent claimants in § 1983 actions. *See* Hudson v. Michigan, 547 U.S. 586, 597 (2006); *see generally* 1 SCHWARTZ, *supra* note 30, at 1-9.

[33] *See* Tenney v. Brandhove, 341 U.S. 367, 379 (1951).

[34] *See* Pierson v. Ray, 386 U.S. 547, 553–54 (1967).

finally extending absolute immunity to prosecutors.[35] As § 1983 became more widely used,[36] the Court began to consider whether government officials deserved immunity against personal liability for their official actions. Because § 1983 contains no explicit immunity provisions for public officials,[37] it was up to the courts to decide whether and to what extent officials would be immune from § 1983 suits. The Court concluded that Congress intended to preserve the established common law immunities that existed when the statute was enacted.[38] The Supreme Court first turned to the historical common law for answers, examining the immunities that existed as a backdrop to the 1871 Ku Klux Klan Act,[39] the predecessor to § 1983.[40]

The Court focused on protections afforded to those performing legislative functions. By the time that *Monroe* established § 1983 as a remedy for constitutional harms caused by state and local government officials, the Court had already recognized absolute immunity for state legislative officials.[41] In *Tenney v. Brandhove*, the Court held that state legislators are absolutely immune from liability for damages when they act "in a field where legislators traditionally have power to act."[42] Justice Frankfurter, writing for the majority, relied on a historical common law immunity tradition reflected in English and early American history, as well as the Speech or Debate Clause of the United States Constitution.[43] Quoting a member of the constitutional Committee of Detail, Justice Frankfurter

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[35] *See* Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

[36] In 1971, the Supreme Court recognized a companion remedy for constitutional violations committed by federal officials in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971), opening up those officials to the specter of liability as well. This Note will focus on prosecutorial immunity from § 1983 liability—liability as against state and not federal actors—and will not directly address *Bivens* liability. It is notable, however, that the Supreme Court has held that in the course of analyzing the viability of an immunity defense, courts should examine the immunity question in actions brought under *Bivens* and § 1983 under the same standard. *See* Butz v. Economou, 438 U.S. 478, 504 (1978) ("[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.").

[37] *See* § 1983.

[38] *See Tenney*, 341 U.S. at 376–77. However, the Court has stressed that when "a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under § 1983." Burns v. Reed, 500 U.S. 478, 498 (1991) (Scalia, J., concurring in part and dissenting in part).

[39] *See* Buckley v. Fitzsimmons, 509 U.S. 259, 268–69 (1993); *Pierson*, 386 U.S. at 553–54; *Tenney*, 341 U.S. at 376–77.

[40] In 1871, Congress enacted the Ku Klux Klan Act in response to outbreaks of terrorism directed against recently emancipated African-Americans, which were often perpetrated with the support of state and local officials. *See* SCHUCK, *supra* note 29, at 47; *see also* Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13. Section I of the Act is currently codified as § 1983.

[41] *See Tenney*, 341 U.S. at 372–73, 376; *see also* 2 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 7:3, at 7-9 (4th ed. 1997).

[42] 341 U.S. at 379.

[43] *See id.* at 372–73.

reasoned that "[i]n order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech" and be protected from reprisals for exercising that liberty.[44]

Careful to maintain boundaries, however, the Court also limited the application of any legislative immunity from suit under § 1983 to conduct performed within the legislative function that the immunity was designed to protect.[45] Therefore, legislative officials were not immune from suit for actions conducted outside of the legislative function, such as private publication of government documents.[46] This functional approach to determining the scope of immunity for public officials—limiting immunity to conduct within the professional function the immunity was designed to protect—is the standard for analysis of judicial and prosecutorial immunity as well.[47]

In *Pierson v. Ray*, the Court addressed the issue of absolute judicial immunity in § 1983 actions.[48] Parallel to its analysis of legislative immunity in *Tenney v. Brandhove*, the Court found a rich common law tradition supporting absolute immunity for judges of general jurisdiction when they acted within the scope of their position.[49] In defining the scope of judicial immunity, the Court again used a functional approach. Finding it necessary to more clearly define the contours of the judicial position's scope, in *Stump v. Sparkman* the Court stated:

> [T]he factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity.[50]

Generally, the only circumstances where absolute immunity does not protect a judge are where the challenged conduct is accompanied by a clear absence of jurisdiction or where the challenged conduct is not a judicial act

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[44] *Id.* at 373 (quoting 2 WORKS OF JAMES WILSON 38 (James DeWitt Andrews ed., 1896)).

[45] Gravel v. United States, 408 U.S. 606, 625–26 (1972) (quoting United States v. Johnson, 383 U.S. 169, 172 (1966)) (holding that Sen. Mike Gravel's attempt to have the Pentagon Papers published by a private publisher was not protected by the Speech or Debate Clause because the action was not related to the "due functioning of the legislative process").

[46] *See id.*

[47] *See* Pierson v. Ray, 386 U.S. 547, 553–55 (1967) (extending § 1983 immunity to judges but limiting it to conduct related to the judicial role); *see also* Imbler v. Pachtman, 424 U.S. 409, 430–31 (1976) (extending § 1983 immunity to prosecutors but limiting it to conduct relating to the prosecutorial function).

[48] *See* 386 U.S. at 553–54.

[49] *See id.* ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . .").

[50] 435 U.S. 349, 362 (1978).

but is, for example, administrative in nature.[51] Otherwise, absolute judicial immunity applies.[52] By following this standard, courts have found that the inquiry into judicial immunity roughly parallels the inquiry into legislative immunity.[53]

The Supreme Court finally considered the extent of absolute prosecutorial immunity in *Imbler v. Pachtman*,[54] which is considered "the leading case on prosecutorial immunity."[55] In *Imbler*, the plaintiff sued a state prosecutor, alleging the prosecutor knowingly used perjured testimony and suppressed material evidence at trial, resulting in the defendant's murder conviction.[56] Justice Powell, writing for the majority, articulated the issue as "whether a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to suit under 42 U.S.C. § 1983 for alleged deprivations of the defendant's constitutional rights."[57] The Court held that the prosecutor was absolutely immune from suit.[58]

The Court's approach to establishing absolute prosecutorial immunity in *Imbler* was similar to its analyses in *Tenney* and *Pierson*. Justice Powell wrote that "*Tenney* established that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."[59] The Court then reasoned that *Tenney*, *Pierson*, and other cases that considered immunity to § 1983 suits were "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."[60] After again undertaking a historical analysis, this time exploring prosecutorial immunity at common law, the Court found that "[t]he common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties."[61] Finding the common law immunity of prosecutors "well settled," the Court then extended it to § 1983 suits,

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[51] *See* 2 NAHMOD, *supra* note 41, § 7:14, at 7-49. An example of an act that would be administrative but not judicial in nature would be disparaging a campaign opponent in flyers.

[52] *See id.*

[53] *See id.*

[54] 424 U.S. 409 (1976).

[55] 2 NAHMOD, *supra* note 41, § 7:42, at 7-108.

[56] *See* 424 U.S. at 412–14.

[57] *Id.* at 410.

[58] *Id.* at 431.

[59] *Id.* at 418.

[60] *Id.* at 421.

[61] *Id.* at 422–23. *But see* Kalina v. Fletcher, 522 U.S. 118, 132 (1997) (Scalia, J., concurring) (arguing that prosecutorial immunity did not exist at common law like judicial and legislative immunity); Johns, *Reconsidering*, *supra* note 4, at 75–77 (providing a deeper examination of the historical fallacy that Scalia points out in *Kalina*).

stating, "[T]he same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983."[62]

Just as it did with legislative and judicial immunity, the Court struggled to define how far to extend the scope of a prosecutor's duties.[63] Justice Powell noted that there are situations where a prosecutor "no doubt functions as an administrator rather than as an officer of the court."[64] The Court indicated, as it had for judicial and legislative immunity, that absolute prosecutorial immunity ceases when an official acts outside of his quasi-judicial function as an officer of the court.[65] However, the Court declined to establish a concrete standard by which to distinguish those official functions from other administrative duties a prosecutor may undertake, noting that "[d]rawing a proper line between these functions may present difficult questions."[66] It has.

In the wake of the Supreme Court's decision in *Imbler* to leave open the questions of whether and to what extent absolute immunity extends to a prosecutor's administrative and investigative actions, both the Court and lower federal courts have spent the past few decades attempting to draw a clearer line. Unfortunately, they have had only limited success.[67] For fifteen years, the Supreme Court allowed the lower courts to experiment with the reach of prosecutorial immunity before rendering its next opinion on the subject.[68] During that time, federal appellate courts attempted to define what types of prosecutorial conduct were immune from suit under *Imbler* and what might give rise to liability. Prosecutorial conduct that the circuit courts deemed deserving of absolute immunity included decisions about whether to prosecute,[69] suppressing exculpatory evidence (like in *Imbler*),[70] subpoenaing witnesses,[71] preparing witness testimony,[72] actions taken

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[62] *Imbler*, 424 U.S. at 424.

[63] *See id.* at 431 n.33.

[64] *Id.*

[65] *See id.* at 430.

[66] *Id.* at 431 n.33.

[67] *See infra* Part I.B (discussing the failure of the *Imbler–Buckley* line of cases in addressing constitutional harms committed by prosecutors).

[68] Following *Imbler* in 1976, the Court did not address issues surrounding prosecutorial immunity again until 1991. *See* Burns v. Reed, 500 U.S. 478 (1991); *see generally* McNamara, *supra* note 6, at 1145–46 (detailing post-*Imbler* developments).

[69] *See* Newcomb v. Ingle, 944 F.2d 1534, 1536 (10th Cir. 1991); Fields v. Soloff, 920 F.2d 1114, 1119 (2d Cir. 1990); *see also* Powers v. Coe, 728 F.2d 97, 103–04 (2d Cir. 1984) (holding prosecutor absolutely immune from suit for decision to proceed in a case after agreeing not to prosecute the defendant); Gray v. Bell, 712 F.2d 490, 502 (D.C. Cir. 1983) (holding prosecutors absolutely immune from suit for decision to present evidence to a grand jury).

[70] *See* Jones v. Shankland, 800 F.2d 77, 80 (6th Cir. 1986) (prosecutor absolutely immune for failing to disclose exculpatory witness statement the § 1983 plaintiff specifically requested during his murder trial); Fullman v. Graddick, 739 F.2d 553, 558–59 (11th Cir. 1984).

[71] *See* Betts v. Richard, 726 F.2d 79, 81 (2d Cir. 1984) (prosecutor immune from § 1983 liability for procuring a writ to secure plaintiff as a witness in a criminal proceeding).

during the plea bargaining process,[73] and decisions to freeze a suspect's assets.[74] On the other hand, federal courts considered prosecutors to be acting in an investigatory capacity, and therefore only entitled to qualified immunity, when they ordered police to arrest certain suspects[75] or organized raids.[76] These attempts to set definitive boundaries in discrete, highly fact-dependent scenarios may have led the Court to again consider the contours of prosecutorial immunity in 1991.[77]

In *Burns v. Reed*, the Court held that a prosecutor has absolute immunity for participating in a probable cause hearing but only qualified immunity when he gives advice to the police.[78] The core of the Court's rationale was based on historical analogy: the common law did not absolutely immunize the activity of advising law enforcement officers.[79] But the common law history was not the only factor that led the Court to reverse the Seventh Circuit's decision that both actions were protected by absolute immunity. Interestingly, the Court also relied in part on the strength of the protections that qualified immunity provides, stating, "[T]he qualified immunity standard is today more protective of officials than it was at the time that *Imbler* was decided. 'As the qualified immunity defense has

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[72] *See* Buckley v. Fitzsimmons, 919 F.2d 1230, 1243–45 (7th Cir. 1990) (holding that a prosecutor who obtained assessments of bootprint evidence from expert witnesses and prepared those witnesses for trial was absolutely immune), *vacated*, 502 U.S. 801 (1991), *and rev'd*, 509 U.S. 259 (1993).

[73] *See* Taylor v. Kavanagh, 640 F.2d 450, 453 (2d Cir. 1981); *see also* McGruder v. Necaise, 733 F.2d 1146, 1147–48 (5th Cir. 1984) (prosecutor absolutely immune when offering to drop criminal charges in exchange for defendant's agreement to drop civil suit).

[74] *See* Ehrlich v. Giuliani, 910 F.2d 1220, 1223–24 (4th Cir. 1990) (prosecutor's "preserv[ation of] the defendants' assets for forfeiture proceedings" went beyond his investigative function into the area of his advocacy responsibilities, warranting absolute immunity).

[75] *See* Day v. Morgenthau, 909 F.2d 75, 77–78 (2d Cir. 1990) ("Arrests and searches . . . 'are normally police functions, and they do not become prosecutorial functions merely because a prosecutor has chosen to participate.'" (quoting Robinson v. Via, 821 F.2d 913, 918 (2d Cir. 1987))).

[76] *See* Hampton v. Hanrahan, 600 F.2d 600, 632 (7th Cir. 1979) (noting that a prosecutor deserves only qualified immunity for "planning and execution of a raid" because such conduct is functionally equivalent to the "activities of police officers allegedly acting under [their] direction" (quoting Hampton v. City of Chicago, 484 F.2d 602, 609 (7th Cir. 1973))), *rev'd in part*, 446 U.S. 754 (1980). *See generally* McNamara, *supra* note 6, at 1146 (describing the development of immunity law post *Imbler*).

[77] Though not a suit involving § 1983, *Mitchell v. Forsyth* was a high-profile *Bivens* decision prior to 1991 that appeared to indicate the Court's willingness to set definitive boundaries for the exercise of prosecutorial power. *See* 472 U.S. 511 (1985). In *Mitchell*, a four Justice plurality found that President Nixon's former Attorney General John N. Mitchell was not entitled to absolute immunity for participating in wiretapping for alleged national security purposes. *See id.* at 521. The Court found that "[b]ecause Mitchell was not acting in a prosecutorial capacity," he was entitled only to qualified immunity. *Id.* However, subsequent cases have shown that the momentum from *Mitchell* has not meaningfully narrowed the scope of acts that are considered prosecutorial rather than administrative in nature. *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259 (1993).

[78] 500 U.S. 478, 492, 496 (1991).

[79] *Id.* at 492. The Court further rationalized its decision by declaring that it would be "incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice." *Id.* at 495.

evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'"[80] This rationale is particularly important because it shows that the Court was willing to consider factors outside of its traditional analysis, which has largely consisted of matching historical common law traditions to prosecutorial functions. It also displays a willingness to entertain pragmatic considerations in deciding whether absolute immunity should apply.[81]

Buckley v. Fitzsimmons[82] has perhaps done more than any other case to create a definitive test for the reach of absolute prosecutorial immunity. In that case, the Supreme Court placed generally applicable, discernable limitations on the doctrine. In *Buckley*, the plaintiff alleged that prosecutors shopped around for an expert to link him to a bootprint left at the scene of a murder, despite knowledge that he did not leave the print.[83] The Court found, by a five-to-four vote, that prosecutors do not receive absolute immunity when they fabricate evidence prior to an indictment.[84] The key question in *Buckley* was whether the prosecutors' alleged "manufacture [of] false evidence" was part of their traditional role as courtroom advocates or was a function of their investigatory role.[85] As the result indicates, the Court was sharply divided on the issue.

The majority reasoned that because the prosecutors searched for evidence of the plaintiff's involvement in the murder before there was probable cause to arrest him, they acted as investigators, outside the bounds of their protected quasi-judicial function.[86] The dissent, by contrast, considered the prosecutors' alleged fabrication of the evidence as "preparation for trial."[87] The dissent rejected the majority's probable cause line, arguing that it would create perverse incentives, such as encouraging prosecutors to avoid pretrial investigations.[88] Despite the dissenters' concerns, the *Buckley* probable cause rule has endured.

Buckley was particularly important because it created a bright-line rule establishing that absolute immunity cannot protect a prosecutor's conduct until probable cause to arrest a defendant exists.[89] However, the probable

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[80] *Id.* at 494–95 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

[81] See *infra* Part II for a discussion of the alternative means of prosecutorial protections that do not rely on absolute immunity.

[82] 509 U.S. 259 (1993).

[83] *Id.* at 272.

[84] *Id.* at 275–76. The Court also unanimously held that prosecutors are not absolutely immune from suit for making out-of-court statements about a defendant's culpability. *Id.* at 277; *id.* at 279–80 (Scalia, J., concurring); *id.* at 282 (Kennedy, J., concurring in part and dissenting in part).

[85] *Id.* at 272, 274 (majority opinion).

[86] *Id.* at 274–75.

[87] *Id.* at 284 (Kennedy, J., concurring in part and dissenting in part).

[88] *Id.* at 283.

[89] *See also* Van Patten, *supra* note 19, at 241. It is important to note that the Court stated that the "determination of probable cause" in a case does not render all of a prosecutor's conduct going forward

cause line itself has come under fire from academics, judges, and even Justices for being difficult to apply and potentially unworkable.[90] *Buckley* merely substitutes one difficult-to-administer standard for another.

This line of cases, from *Imbler* to *Buckley*, makes absolute prosecutorial immunity from liability for damages during a § 1983 suit available when the prosecutor acts within his role as an advocate. Under *Imbler*, as long as the prosecutor's activities are "intimately associated with the judicial phase of the criminal process" and are "functions to which the reasons for absolute immunity apply with full force," prosecutorial immunity will apply.[91] The practical challenge that endures, however, is how to determine which functions are, in fact, "intimately associated" with a prosecutor's quasi-judicial function and where the corresponding line between absolute and qualified immunity should lie. As this Note will address, the *Imbler–Buckley* test has proven to be both unworkable and unjust.[92]

B. Costs of the Imbler–Buckley *Rule*

Under a regime of absolute immunity, even intentional misconduct resulting in a constitutional injury to a defendant will go without the possibility of civil redress so long as the action is within the scope of the prosecutor's adversarial function.[93] The *Imbler* Court pointed out that a prosecutor is entitled to absolute immunity even if a plaintiff is able to show that the prosecutor acted wrongfully or even maliciously.[94] Therefore, under *Imbler*, immunity protects a prosecutor who conspires to bring false criminal charges against a plaintiff;[95] intentionally withholds evidence favorable to a plaintiff and instructs a witness to testify evasively, if not

absolutely immune. *Buckley*, 509 U.S. at 274 n.5. The majority envisioned instances where a prosecutor might do further investigative work at trial, for which he would receive only qualified immunity. *Id.*

[90] *See infra* Part I.D (discussing criticisms of the *Imbler–Buckley* rule).

[91] Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

[92] *See infra* Part I.D.

[93] *See* Reid v. New Hampshire, 56 F.3d 332, 337–38 (1st Cir. 1995) ("*Imbler* thus implicitly acknowledged that prosecutors retain *discretion* to determine what evidence is to be disclosed under *Brady* and that absolute immunity attaches to their exercise of discretion. . . . Nor was absolute immunity forfeited because the prosecutors continued to withhold the exculpatory evidence . . . ."); Johns, *Reconsidering*, *supra* note 4, at 53 ("[T]he victims of this [prosecutorial] misconduct are generally denied any civil remedy because of prosecutorial immunities.").

[94] *Imbler*, 424 U.S. at 427–29.

[95] *See* Siano v. Justices of Mass., 698 F.2d 52, 57–58 (1st Cir. 1983) (plaintiff could not recover monetary damages against prosecutor for allegedly initiating a prosecution in bad faith); Perez v. Borchers, 567 F.2d 285, 287 (5th Cir. 1978) (per curiam); Jennings v. Shuman, 567 F.2d 1213, 1221–22 (3d Cir. 1977) ("[A] prosecutor is entitled to absolute immunity 'while performing his official duties' as a officer [sic] of the court, even if, in the performance of those duties, he is motivated by a corrupt or illegal intention." (quoting United States *ex rel*. Rauch v. Deutsch, 456 F.2d 1301, 1302 (3d Cir. 1972))).

falsely;[96] or improperly has the plaintiff indicted and, at trial, induces a person to commit perjury and files false affidavits.[97]

Several major studies indicate that significant numbers of innocent people have been convicted as a result of prosecutorial misconduct. The National Registry of Exonerations reports that misconduct by prosecutors and police occurred in 42% of the 873 exonerations that occurred in the United States from January 1989 through February 2012.[98] There was official misconduct in 56% of homicide exonerations.[99] A study by the Center for Public Integrity released in 2003 noted that since 1970, prosecutorial misconduct resulted in innocent people being convicted of crimes including murder, rape, kidnapping, and robbery in 28 cases involving 32 defendants.[100] Some of these people even received death sentences.[101] From 1992 to 2011, the Innocence Project at the Benjamin N. Cardozo School of Law used DNA evidence to exonerate 289 people who were wrongly convicted.[102] The organization reported that prosecutorial misconduct was a leading cause of the wrongful convictions.[103] An Innocence Project report from 2000 indicated that in 67 cases in which innocent people were sent to death row and later exonerated by DNA evidence, prosecutorial misconduct was a factor in 26% of those cases.[104]

In 1999, the *Chicago Tribune* conducted a national study that painted a vivid picture of some of the more egregious violations committed by prosecutors.[105] The study found that since 1963, 381 homicide convictions were reversed due to prosecutorial misconduct.[106] In describing some of the

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[96] *See* Hilliard v. Williams, 540 F.2d 220, 221–22 (6th Cir. 1976) (per curiam).

[97] *See* Bruce v. Wade, 537 F.2d 850, 852 (5th Cir. 1976).

[98] SAMUEL M. GROSS & MICHAEL SHAFFER, NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 67 (2012), *available at* http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

[99] *Id.*

[100] CTR. FOR PUB. INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS i, 2, app. at 98–108 (2003). The study also indicated that since 1970, there had been more than 2000 cases in which prosecutorial misconduct by state and local prosecutors was sufficient to require the court to dismiss charges, reverse convictions, or reduce sentences. *Id.* at app. 108; *see also* Johns, *supra* note 4, at 60.

[101] CTR. FOR PUB. INTEGRITY, *supra* note 100; s*ee also* Johns, *supra* note 4, at 60–61.

[102] *Know the Cases: Innocence Project Case Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited Mar. 25, 2012).

[103] *See* EMILY M. WEST, INNOCENCE PROJECT, COURT FINDINGS OF PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AND CIVIL SUITS AMONG THE FIRST 255 DNA EXONERATION CASES 1 (2010), *available at* http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf; *see generally* Johns, *Unsupportable*, *supra* note 6, at 512 (providing further anecdotal and statistical evidence of wrongful convictions).

[104] BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED xiv, app. 2 at 263 (2000).

[105] *See* Ken Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice to Win* (pt. 1), CHI. TRIB., Jan. 10, 1999, at 1.

[106] *Id.*

more serious forms of misconduct, reporters wrote, "[Prosecutors] have prosecuted black men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs."[107]

When the Supreme Court adopted absolute prosecutorial immunity in *Imbler* and refined the doctrine in *Burns*, it justified its decision, in part, by noting the other existing deterrent and remedial mechanisms that would serve to protect the accused from prosecutorial abuse.[108] It singled out several measures, such as the likelihood of discipline within the organization;[109] "the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies";[110] and the possibility that prosecutors could face criminal liability for the most abusive conduct.[111] The Court was wrong in its assumptions about the availability of these remedies. Many of the studies cited above found that even in the most egregious, willful situations of prosecutorial misconduct, the remedial powers of the court were inaccessible or ineffective, and prosecutors were rarely disciplined, forced to pay a financial penalty, or criminally prosecuted.[112] With little possibility of appellate or collateral review,[113] punishment, or financial reprisal under § 1983, the only significant safeguard deterring prosecutors from overstepping their bounds falls to the rules articulated by the Supreme Court in *Brady v. Maryland*.[114] In *Brady*, prosecutors pursuing a murder conviction withheld evidence from defense counsel that the defendant's confederate had confessed to performing the actual killing.[115] The Court found that a prosecutor has a constitutional obligation to provide the defense with all exculpatory material as a matter

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[107] *Id.*

[108] *See* Imbler v. Pachtman, 424 U.S. 409, 425–29 (1976); *see also* Burns v. Reed, 500 U.S. 478, 492 (1991) ("[T]he safeguards built into the judicial system tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." (alteration in original) (quoting Butz v. Economou, 438 U.S. 478, 512 (1978)) (internal quotation marks omitted)).

[109] *See Imbler*, 424 U.S. at 429.

[110] *Id.* at 427.

[111] *See id.*; *see generally* Johns, *Unsupportable*, *supra* note 6, at 517.

[112] *See generally* CTR. FOR PUB. INTEGRITY, *supra* note 100, app. at 78–90 (finding that of the more than 2000 cases of documented prosecutorial misconduct, prosecutors were disciplined in only 44 cases and were never criminally prosecuted); SCHECK ET AL., *supra* note 104, at 180–81; Johns, *Unsupportable*, *supra* note 6, at 516–21 (systematically deconstructing the *Imbler* Court's assumptions about alternative protections for the accused using empirical studies); Armstrong & Possley, *supra* note 105. *See also* Johns, *Reconsidering*, *supra* note 4, at 60–63; James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2121–22 (2000).

[113] The remedial powers of the courts are not available in the 97% of cases that settle before going to trial, and even when prosecutorial misconduct in the 3% of cases can be appealed, the offense is usually found to be harmless. *See* Johns, *Unsupportable*, *supra* note 6, at 517.

[114] 373 U.S. 83 (1963).

[115] *Id.* at 84.

of due process.[116] If a prosecutor fails to produce the required information, the defendant is entitled to a new trial, provided the defendant can show there is a "reasonable probability" that the case would have turned out differently had the exculpatory evidence not been withheld.[117]

Professor James S. Liebman has argued that *Brady* is largely ineffective as a disciplinary and remedial tool because prosecutors who commit misconduct receive little more than a "slap on the wrist" in the form of a reversal.[118] In a comprehensive study of prosecutorial discipline, Professor Richard Rosen examined numerous public filings and contacted state bar associations in an attempt to uncover disciplinary cases involving prosecutorial suppression of exculpatory evidence.[119] Rosen found just nine cases where disciplinary action followed a *Brady* violation, four of which resulted in minor sanctions such as censure or reprimand, and just two of which resulted in a recommendation of disbarment.[120] A similar study conducted in California found 159 instances from 1997 to 2009 in which appellate courts ruled that prosecutorial conduct in a criminal proceeding had resulted in harmful error.[121] Only six prosecutors were disciplined for misconduct.[122] Furthermore, immunity makes money damages almost entirely unavailable, injunctions to change policies and practices that led to the mistakes are nonexistent, and as just noted, discipline by the relevant bar or internal investigations rarely find punishable offenses even in situations where previously condemned prisoners have been released due to prosecutorial error.[123]

Clearly, significant commentary has been dedicated to the proposition that the protections afforded to defendants in *Brady* and via other institutional safeguards are inadequate.[124] These considerations indicate that

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[116] *Id.* at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

[117] United States v. Bagley, 473 U.S. 667, 682 (1985) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

[118] Liebman, *supra* note 112.

[119] *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 696–97 (1987). A 1996 article supplemented Professor Rosen's research and found no additional *Brady* incidents for which prosecutors were publicly sanctioned. *See* McNamara, *supra* note 6, at 1184 n.396.

[120] Rosen, *supra* note 119, at 720–31.

[121] KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 18–19 (2010), *available at* http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online version.pdf.

[122] *Id.* at 16.

[123] Liebman, *supra* note 112.

[124] *See, e.g.*, Johns, *Reconsidering*, *supra* note 4, at 60–63; Jannice E. Joseph, *The New Russian Roulette:* Brady *Revisited*, 17 CAP. DEF. J. 33, 37–39 (2004); Liebman, *supra* note 112; Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial*

the *Imbler* Court's assumption that these alternative protections would ensure the lowest possible degree of prosecutorial misconduct in a world of absolute immunity were wrong. Many scholars have argued further that the inadequacy of these alternative protections stands as a justification for retreating from *Imbler* and scaling back absolute prosecutorial immunity.[125] Regardless, the standard for absolute prosecutorial immunity remains tied to the line *Imbler* and *Buckley* drew: the scope of the prosecutor's adversarial function. However, as discussed below in Part I.D, the Court seems to be getting closer to reconsidering the standard.

C. Policy Rationales for Absolute Prosecutorial Immunity

In *Imbler*, the Supreme Court offered both historical and prudential reasons for why prosecutors deserve absolute immunity. This section will argue that the historical prong of the Court's analysis is unconvincing, if not outright wrong, leaving its policy rationales as the strong remaining support for the doctrine of absolute prosecutorial immunity.

As noted above, historical analogy plays perhaps the most significant role in the Court's current jurisprudence regarding absolute prosecutorial immunity.[126] In *Imbler*, the Court followed the *Tenney* approach, considering whether the Reconstruction Congress had intended to restrict the availability of immunity for state prosecutors in § 1983 suits.[127] It reached the conclusion that the availability of absolute immunity for prosecutors was "well settled."[128] However, as jurists and scholars have noted, the Court's historical analysis in this area was likely flawed.[129] The Court's justifications for why certain governmental functions should be immune from suit under § 1983 were heavily based on the common law immunities present in 1871 when Congress passed the Ku Klux Klan Act, the precursor to § 1983.[130] As Professor Margaret Z. Johns argues in two

Incentives, 64 FORDHAM. L. REV. 851, 890–901 (1995); Rosen, *supra* note 119; Weeks, *supra* note 20, at 835.

[125] *See generally* Johns, *Reconsidering*, *supra* note 4, at 54 ("While qualified immunity strikes a balance between providing a remedy for egregious misconduct and protecting the honest prosecutor from liability, absolute immunity should be reconsidered." (footnote omitted)); Johns, *Unsupportable*, *supra* note 6 (arguing for a reconsideration of absolute immunity); McNamara, *supra* note 6 (same).

[126] *See supra* Part I.A.

[127] Imbler v. Pachtman, 424 U.S. 409, 417–18 (1976) (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)).

[128] *Id.* at 424.

[129] *See, e.g.*, Johns, *Reconsidering*, *supra* note 4, at 55; *see also* Buckley v. Fitzsimmons, 509 U.S. 259, 279–80 (1993) (Scalia, J., concurring); Burns v. Reed, 500 U.S. 478, 499–500 (1991) (Scalia, J., concurring in part and dissenting in part); *Imbler*, 424 U.S at 437 (White, J., concurring) ("The public prosecutor's absolute immunity from suit at common law is not so firmly entrenched as a judge's, but it has considerable support.").

[130] *See supra* Part I.A.

articles focusing on prosecutorial immunity, this justification is "just plain wrong"[131]:

> [E]ven assuming Congress intended to retain the existing common-law immunities, absolute prosecutorial immunity was *not* the established law in 1871. In fact, the first case affording prosecutors absolute immunity was not decided until 1896. Congress could not have intended to retain this immunity when it adopted § 1983 because it simply did not exist at that time. Rather, in 1871 prosecutors would have been accorded qualified immunity, not absolute immunity. Thus, the historical argument for absolute prosecutorial immunity is unfounded.[132]

The Court has stressed that when "a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under § 1983."[133] Therefore, it would seem the Court erred in its creation of absolute prosecutorial immunity in *Imbler*.

Justice Scalia has also pointed out the historical fallacy of absolute prosecutorial immunity.[134] In his concurrence in *Burns*, Justice Scalia noted that absolute immunity did not exist for any prosecutorial conduct in 1871.[135] He pointed out that the protection afforded to prosecutors in 1870 was more akin to "quasi-judicial immunity," which was not absolute and could be overcome by proving malice.[136] With the historical prong of the justification for absolute prosecutorial immunity on shaky ground, the Court's policy rationales for providing prosecutors with absolute immunity from suit under § 1983 stands as its strongest justification. This too has been under fire.

Imbler has received perhaps its most vehement criticism due to the fact that an individual wronged by a prosecutor's constitutional violations has little chance of recovering a damages award.[137] However, it is important to note that this casualty of judicial discretion was intentional. The *Imbler* Court recognized the problem and determined that other interests should prevail.[138] In *Imbler*, the Court faced a choice and placed the competing interests on a utilitarian scale. On the one hand, the Court had the interests

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[131] Johns, *Unsupportable*, *supra* note 6, at 521; *see also* Johns, *Reconsidering*, *supra* note 4, at 107–08.

[132] Johns, *Reconsidering*, *supra* note 4, at 54–55 (footnotes omitted).

[133] *Burns*, 500 U.S. at 498 (Scalia, J., concurring in part and dissenting in part).

[134] Kalina v. Fletcher, 522 U.S. 118, 132–33 (1997) (Scalia, J., concurring) (arguing that unlike judicial and legislative immunity, prosecutorial immunity did not exist at common law in 1871).

[135] *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part) (citing Billings v. Lafferty, 31 Ill. 318, 322 (1863); Reed v. Conway, 20 Mo. 22, 44–52 (1854); and Wight v. Rindskopf, 43 Wis. 344, 354 (1877)).

[136] *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part).

[137] *See, e.g.*, SCHUCK, *supra* note 29, at 111; John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 84–85 (1989); Liebman, *supra* note 112, at 2121–22.

[138] Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976).

of a person who had been sentenced to death and spent years in prison as a result of a prosecutor's intentional suppression of exculpatory evidence and was now seeking some compensation for his suffering.[139] But the Court maintained that on the other hand, there was no viable alternative to protect an essential public institution—the role of the prosecutor in a liberal democracy. The "alternative of qualifying a prosecutor's immunity . . . would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."[140]

At its most abstract, the core rationale for absolute prosecutorial immunity is that it best promotes the "broader public interest."[141] It is based on a concern that the possibility of personal liability will have a chilling effect on a prosecutor's performance of his duties and hamper his independence:

> If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.[142]

The *Imbler* Court added that its decision was driven by another practical fear—that less than absolute immunity would result in a specter of litigation that would distract prosecutors from their official duties.[143] The Court was "concern[ed] that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by this public trust."[144] The Court also articulated a number of ancillary concerns that drove its decision, including: a greater chance of eventual prosecutor liability for suits that survive the pleading stage,[145] the fact that certain suits would result in a virtual retrial of

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[139] *See id.* at 411–17, 427 (explaining the factual and procedural history of the case and noting that absolute immunity "leave[s] the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty").

[140] *Id.* at 427–28.

[141] *Id.* at 427.

[142] *Id.* at 424–25.

[143] *Id.* at 423.

[144] *Id.*

[145] *Id.* at 425 ("Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and—ultimately in every case—the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions.").

criminal offenses,[146] an impact on prosecutorial decisionmaking that might deny the triers of fact in criminal proceedings (i.e., the jury) relevant information,[147] and an adverse effect on the efficient functioning of the criminal justice system's post-trial procedures.[148]

Other courts have also commented on the dilemma of deciding between the twin evils of liability and immunity. Judge Learned Hand offered a similarly utilitarian justification in *Gregoire v. Biddle*,[149] a malicious prosecution case cited by the *Imbler* Court,[150] writing:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it 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.[151]

Simply put, courts have decided that the need to protect the overwhelming majority of ethical prosecutors with absolute immunity outweighs the cost of creating a class of constitutional harms that have no possibility of recompense.[152]

D. Criticisms of the Court's Prosecutorial Immunity Jurisprudence

As the previous section explains, the primary policy justifications for absolute prosecutorial immunity stress the need to avoid chilling vigorous prosecutions and the need to shield prosecutors from harassing or frivolous litigation. Though the Court has remained steadfast in supporting these justifications for the need to protect prosecutors, the reach of absolute immunity has been harshly criticized by jurists and scholars alike. In his

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[146] *Id.* at 425 ("The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury.").

[147] *Id.* at 426 ("Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify, as is illustrated by the history of this case. If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence." (footnote omitted)).

[148] *Id.* at 427 ("Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment.").

[149] 177 F.2d 579, 581 (2d Cir. 1949).

[150] *Imbler*, 424 U.S. at 424 n.21.

[151] *Gregoire*, 177 F.2d at 581.

[152] For an argument that financial compensation for denials of constitutional rights should not be a goal of the justice system, see Jeffries, *supra* note 137, at 83 ("In my view, the goal of compensation for denials of constitutional rights is more problematic than has been supposed.").

concurrence in *Imbler*, Justice White, joined by Justices Brennan and Marshall, expressed unease about extending the potential scope of absolute immunity to cover knowing suppression of evidence.[153] The Justices "believe[d] such a rule would threaten to *injure* the judicial process and to interfere with Congress' purpose in enacting 42 U.S.C. § 1983, without any support in statutory language or history."[154] Justice White and the other two concurring Justices supported absolute immunity in specific situations, such as the one in *Imbler* itself, where prosecutors face allegations that "they knew or should have known that the testimony of a witness called by the prosecution was false."[155] In any other situation, however, Justice White felt that absolute immunity was improper.[156]

Justice Rehnquist was another *Imbler* critic. He believed that the decision created an imbalance whereby some officials receive absolute immunity while others are left with only qualified immunity. In his dissent in *Butz v. Economou*, Justice Rehnquist pointed out the imbalance between offering judges and prosecutors absolute immunity for certain actions and not doing so for other officials.[157] He posited that a dubious reason for the discrepancy might be that Justices are simply more personally attuned to the pressures that would be felt by judges and prosecutors in the absence of absolute immunity and are less readily able to empathize with the comparable concerns that weigh on non-judicial public officials.[158]

Professor Johns argues that absolute immunity is unnecessary to meet the policy justifications the Court has advanced for it and should therefore be abolished.[159] She argues that absolute immunity is "not needed to prevent frivolous litigation or to protect the judicial process."[160] Absolute immunity is unnecessary to protect the honest prosecutor since the requirements for establishing a cause of action,[161] coupled with the defense of qualified

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[153] *Imbler*, 424 U.S. at 433, 441 (White, J., concurring).

[154] *Id.* at 433.

[155] *Id.* at 440.

[156] *Id.* at 441 ("However, insofar as the majority's opinion implies an absolute immunity from suits for constitutional violations other than those based on the prosecutor's decision to initiate proceedings or his actions in bringing information or argument to the court, I disagree. Most particularly I disagree with any implication that the absolute immunity extends to suits charging unconstitutional suppression of evidence.").

[157] Butz v. Economou, 438 U.S. 478, 528 n.* (1978) (Rehnquist, J., concurring in part and dissenting in part).

[158] *Id.*

[159] Johns, *Reconsidering*, *supra* note 4, at 55–56.

[160] *Id.* at 55.

[161] *See, e.g.*, Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) ("[I]n order to recover damages . . . a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus . . . .").

immunity, "will protect all but the most incompetent and willful wrongdoers."[162] She notes that:

> [U]nder a qualified immunity regime, the victim of misconduct can only maintain an action by defeating the criminal charges and proving that the prosecutor violated clearly established constitutional law with a culpable state of mind. And the qualified immunity defense has been strengthened to provide a complete defense at the earliest stages of litigation for all but the most inexcusable misconduct. Thus, qualified immunity provides prosecutors sufficient protection to ensure that they perform their functions independently, without undue timidity or distraction.[163]

The Court itself has acknowledged that qualified immunity is adequate to protect an official from frivolous § 1983 litigation. As explained in Part I.A, the *Burns* Court noted that the qualified immunity standard now provides ample support to all but the plainly incompetent or those who knowingly violate the law.[164] This statement suggests that under the right circumstances, with the right protections in place, the Court may be willing to take a step back from a regime of absolute prosecutorial immunity.

As cracks continue to appear in the *Imbler–Buckley* rationale, the Court's decision to grant certiorari in *Pottawattamie County, Iowa v. McGhee*[165] indicates that it may be ready to reconsider the increasingly unworkable standards that characterize the current prosecutorial immunity jurisprudence. The case presented the question of whether a prosecutor may be held liable under § 1983 for a wrongful conviction that occurred as a result of the prosecutor's procurement of false testimony during a criminal investigation and subsequent use of that testimony at trial.[166] In 1978, Curtis McGhee and Terry Harrington received life sentences for murdering a security guard.[167] In 2003, Harrington's conviction was overturned by the Iowa Supreme Court, which found that the prosecutor had obtained the convictions by offering perjured testimony, fabricating evidence, and suppressing material exculpatory evidence.[168] Prosecutors subsequently agreed to vacate McGhee's conviction.[169] The two brought § 1983 suits against the prosecutors, the county, and the investigators involved in the case.[170]

The suit presented crucial questions regarding the reach of absolute prosecutorial immunity. If a prosecutor fabricates evidence during the early

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[162] Johns, *Reconsidering*, *supra* note 4, at 55.

[163] *Id.* at 55–56.

[164] Burns v. Reed, 500 U.S. 478, 479–80 (1991); *see supra* Part I.A.

[165] 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009).

[166] *Id.* at 932–33.

[167] *Id.* at 925.

[168] Harrington v. State, 659 N.W.2d 509, 524–25 (Iowa 2003).

[169] *McGhee*, 547 F.3d at 928.

[170] *Id.* at 925.

stages of a criminal investigation, does he receive only qualified immunity? Does the answer change if the prosecutor uses that evidence at trial during the course of his advocacy function, which is protected by absolute immunity? Does the dilemma posed by these questions indicate that the *Imbler–Buckley* standard is unworkable? The lower courts were split on the issue of whether qualified or absolute immunity applied if a prosecutor used tainted evidence at trial,[171] indicating the issue was ripe for Supreme Court review.

On appeal, the Eighth Circuit affirmed the district court in holding that, under *Buckley*, prosecutorial immunity does not extend to the fabrication of evidence before the filing of formal charges because it is not "a distinctly prosecutorial function."[172] The court went so far as to say that when a prosecutor's misconduct consists of both fabricating evidence during an investigation and then using it at trial, no immunity—neither qualified nor absolute—shields the prosecutor from liability.[173]

Although the case settled before the Supreme Court could render an opinion,[174] the Justices' comments during oral argument provide an interesting window into their dissatisfaction with *Buckley*'s investigatory–advocacy line as the rubric for when prosecutorial immunity should apply.[175] A series of questions between Justice Alito and respondent's counsel regarding the adequacy of the investigatory–advocacy line indicated skepticism about its practical utility and continued viability.[176]

Probing the application of *Buckley* to the facts of the case, Justice Alito wanted to know where the "line to be drawn between the investigative stage and the prosecutorial stage" falls when a § 1983 claim is based on the evaluation of the truthfulness of a testifying witness.[177] Respondent's conception of that line—that the investigatory phase is a search to establish probable cause and not part of the advocacy function of shaping a witness for trial—evidences the difficulty and arbitrariness inherent in applying *Buckley* to criminal investigations, where the existence of probable cause is

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[171] The Third Circuit held that absolute immunity applies, Michaels v. New Jersey, 222 F.3d 118, 123 (3d Cir. 2000), while the Second and Ninth Circuits apply qualified immunity, Milstein v. Cooley, 257 F.3d 1004, 1011 (9th Cir. 2001); Zahrey v. Coffey, 221 F.3d 342, 349 (2d Cir. 2000).

[172] *McGhee*, 547 F.3d at 933.

[173] *Id.*

[174] David G. Savage, *Iowa County Settles with 2 Men*, L.A. TIMES, Jan. 5, 2010, at A9.

[175] *See generally* Van Patten, *supra* note 19, at 250–52 ("The granting of certiorari and the subsequent oral argument in the *Pottawattamie County* case provides some evidence of dissatisfaction on the Court with the existing case law. . . . [T]here is a serious question whether there is a principled basis on which to keep *Imbler's* absolute immunity in balance with *Buckley's* limited exception for qualified immunity based on function and probable cause.").

[176] *See* Transcript of Oral Argument at 27–29, Pottawattamie Cnty., Iowa v. McGhee, No. 08-1065 (Nov. 4, 2009), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1065.pdf.

[177] *Id.* at 27.

often in flux.[178] It makes sense, then, that Justice Alito was wholly unsatisfied with a rule that relies on a shaky distinction between advocacy and investigation, which itself turns on a witness's frequently changing status as the target of a criminal investigation or prosecution versus a resource to the police or prosecutor when the focus turns to another.[179]

In this exchange and others during oral argument, Justice Alito and Justice Scalia, who made comments similar to Justice Alito's,[180] indicated skepticism regarding two important and ongoing problems with the *Buckley* standard: first, whether a principled distinction exists between the prosecutorial and investigatory functions and second, whether the *Buckley* standard, which relies on probable cause as the dividing line between investigatory and prosecutorial functions, is workable given practical fluctuations in the presence of probable cause.[181] Chief Justice Roberts seemed to share these concerns.[182]

Although these comments during oral argument are by no means dispositive, they suggest that at least three Justices—all of them toward the politically conservative end of the Court[183]—are dissatisfied with the current

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[178] *See id.* at 28 ("[B]efore probable cause, when prosecutors are engaging in investigatory functions, I don't think we want them shaping the witness for trial. I think we want them trying to figure out who actually committed this crime and who would we have probable cause to perhaps initiate process against.").

[179] *See id.* at 28–29 ("What concerns me about your argument is the—is a real fear that it will eviscerate *Imbler* . . . . [L]et's take the case of the prosecution of a . . . CEO of a huge corporation for insider trading or some other white-collar violation. And the chief witness against this person is, let's say, the CFO of this company, who when initially questioned by law enforcement officials and investigatory officials, made—made statements denying any participation in any wrongdoing, but eventually changed his story and testifies against the CEO at trial in exchange for consideration in a plea deal. Now, your argument, in a case like that—or you could change the facts, make it an organized crime case, make it a prosecution of a drug kingpin who's testifying—the witness against him is a lower-ranking person in the organization who has a criminal record, maybe has previously committed perjury, has made numerous false statements, is subject to impeachment. In all of those cases a claim could be brought against the prosecutor.").

[180] *See id.* at 39 ("[W]hat's the use of giving [the prosecutor] liability later on if—if you can simply drag him into litigation by—by alleging that he at an earlier stage committed a violation?").

[181] Justice Alito later argued, "[P]robable cause is—is evanescent. It comes, and it goes. It is . . . inextricably intertwined with what the prosecutor is doing in questioning the witness." *Id.* at 52.

[182] Chief Justice Roberts posited that preparing for a case and investigating can occur simultaneously, thus conflating the *Buckley* distinction, when he commented:

> We have also recognized that in the prosecutorial area . . . sometimes, you're investigating and preparing your case at the same time.
>
> You don't just sit back and say . . . I'm just going to look and see what I can find. You have particular areas. The prosecution requires you to show four things, So [sic] you are looking at those four things. You are preparing your case, and you're investigating.

Id. at 50–51.

[183] *See* Adam Liptak, *The Most Conservative Court in Decades*, N.Y. TIMES, July 25, 2010, at A1 ("Four of the six most conservative justices of the 44 who have sat on the court since 1937 are serving now: Chief Justice Roberts and Justices Alito, Antonin Scalia and, most conservative of all, Clarence Thomas.").

test for absolute prosecutorial immunity. The liberal wing of the Court also seems wholly dissatisfied with the Court's recent § 1983 jurisprudence as it relates to prosecutors, as evidenced by the result in *Connick v. Thompson*.[184] That opinion, written by Justice Thomas and decided by a 5–4 vote that fell strictly along the conservative-to-liberal spectrum of Justices, held that a district attorney's office cannot be held liable under § 1983 for a failure to train its prosecutors based on what the majority characterized as a single *Brady* violation.[185] In the case, John Thompson was convicted of robbery and murder, spent eighteen years in prison, and came within one month of his execution before prosecutors revealed they had withheld, in violation of *Brady*, a crime lab report that cast doubt on his guilt.[186] Justice Ginsburg read a vigorous dissent from the bench,[187] which highlighted the deliberate indifference of the prosecutors to Thompson's rights and the fact that the office "never disciplined or fired a single prosecutor" and had "one of the worst *Brady* records in the country."[188]

These cases and the exchanges the Justices had about them indicate that the Court may be losing confidence in the idea that the *Imbler–Buckley* rule can continue to provide a workable standard for when prosecutors should be immune from suit for constitutional torts. The time may be ripe for the Court to articulate a new standard and scope for prosecutorial immunity.

If the Court does so, it should consider the fact that the cloak of absolute immunity is not actually necessary to protect prosecutors from facing the possibility of personal liability for alleged wrongs they committed in office. The law can protect a prosecutor in a manner parallel to absolute immunity while simultaneously compensating a person who has suffered a constitutional wrong stemming from the prosecutor's conduct. This is because states already have in place systems that would protect prosecutors from ultimate liability even if the Court were to abandon its confusing and unjust prosecutorial immunity jurisprudence.

State indemnification of prosecutors facing § 1983 provides a better way to reconcile the Court's desire to protect the honest prosecutor while also providing compensation to parties harmed by unethical prosecution. A universal qualified immunity standard—paired with state-level indemnity—would result in two important benefits: it would be more equitable than the current regime and would simultaneously create less ambiguity than does the confusing *Imbler–Buckley* test. Part II will explore state indemnification schemes and argue that this mechanism provides prosecutors with

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[184] 131 S. Ct. 1350, 1356 (2011).

[185] *Id.* at 1366.

[186] *Id.* at 1355–56.

[187] Adam Liptak, *$14 Million Jury Award to Ex-Inmate Is Dismissed*, N.Y. TIMES, Mar. 30, 2011, at A14.

[188] *Connick*, 131 S. Ct. at 1370, 1382–84 (Ginsburg, J., dissenting).

essentially the same protection from ultimate financial liability that they currently enjoy, while allowing the Court to shape a more workable and fair jurisprudence than exists under *Imbler* and *Buckley*.

II. THE VALUE OF INDEMNIFICATION

This Part demonstrates that an indemnification regime coupled with universal qualified prosecutorial immunity would be preferable to the current *Imbler–Buckley* absolute immunity standard. First, this Part argues that because the current absolute immunity regime that the Supreme Court has created is at odds with § 1983 as enacted, state indemnification[189] schemes provide a desirable alternative. Next, this Part argues that even if absolute immunity were curtailed, the various indemnification laws and policies, insurance, and other protections created by states, coupled with qualified immunity, would still shield prosecutors from § 1983 suits. This Part concludes by exploring situations in which legislatures and other government entities have embraced insurance and indemnification regimes in response to a judicial retreat from immunity protections and by analogizing them to the effects of a potential cutting back of absolute prosecutorial immunity.

A. The "Fundamental Purpose" of § 1983 and Why Imber–Buckley *Doesn't Fit*

The Supreme Court has identified compensation for constitutional injuries as a "fundamental purpose" of § 1983.[190] It has noted that the enduring purpose of § 1983 "is to provide compensatory relief to those deprived of their federal rights by state actors."[191] Many other Supreme Court and lower federal court opinions also reflect this sentiment,[192] as do the comments of individual Justices.[193]

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[189] This Note defines indemnification as the duty of a local, state, or federal government body to make good any loss, damage, or liability incurred by one of its officials. *See* BLACK'S LAW DICTIONARY 837 (9th ed. 2009).

[190] Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) (arguing that denial of compensation for a constitutional injury would "be contrary to the fundamental purpose of § 1983").

[191] *See* Felder v. Casey, 487 U.S. 131, 141 (1988) ("[T]he central purpose of the Reconstruction-Era laws is to provide compensatory relief to those deprived of their federal rights by state actors. Section 1983 accomplishes this goal by creating a form of liability that, by its very nature, runs only against a specific class of defendants: government bodies and their officials.").

[192] *See, e.g.*, Bd. of Regents v. Tomanio, 446 U.S. 478, 488 (1980) (singling out deterrence and compensation as "two of the principle policies embodied in § 1983"); Owen v. City of Independence, 445 U.S. 622, 650–54 (1980) (emphasizing "the societal interest in compensating the innocent victims of governmental misconduct" as a key motivation behind § 1983 liability); Jeffries, *supra* note 137, at 84 n.7.

[193] *See, e.g.*, Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 313 (1986) (Marshall, J., concurring) (noting compensation is "the basic purpose of a § 1983 damages award" (quoting Carey v. Piphus, 435 U.S. 247, 254 (1978) (internal quotation mark omitted))); Oklahoma City v. Tuttle, 471

Of course, many factors foreclose the availability of compensation for constitutional harms.[194] For example, the Eleventh Amendment immunizes states and state agencies against damages suits.[195] Even in an instance where a state officer may be sued for individual misconduct, the requirement that the suit be brought against an individual and not the state means that a plaintiff cannot usually sue a "deep pocket."[196] Juries may be more sympathetic to the individual public servant than they would be to the government.[197] Furthermore, "[t]he focus on individual responsibility tends to divert attention from problems of government structure and organization, as distinct from the specific acts of individual officials."[198] Another barrier to compensation is the fact that state law statutes of limitation bar most of the tort and civil rights actions that would otherwise be brought.[199] Finally, and most importantly, all state or federal government officials can claim some sort of immunity against damage awards.[200] The result is that compensation is always extremely difficult, and often impossible, to come by.[201]

The unfairness of such a regime is plain, and a fix is required. In his book *Suing Government*, Professor Peter Schuck proposes that government be "obliged to compensate for every harmful act or omission committed by its agents within the scope of their employment that is tortious under applicable law."[202] This model envisions a "state conceived of not as an autonomous sovereign overarching civil society but as an accountable instrument of collective will. When the collectivity seeks to fulfill benign aspirations but errs and injures, as it often will, it must—like anyone else—repair its damage and compensate its victims."[203] At least one of the architects of the Reconstruction Amendments, Representative Benjamin

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U.S. 808, 842 (1985) (Stevens, J., dissenting) (identifying compensation and deterrence as fundamental purposes of § 1983); Robertson v. Wegmann, 436 U.S. 584, 599 (1978) (Blackmun, J., dissenting) (specifying compensation as one of § 1983's "critical concerns"); Jeffries, *supra* note 137, at 84 n.8.

[194] Jeffries, *supra* note 137, at 84–85.

[195] *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

[196] Jeffries, *supra* note 137, at 85.

[197] *Id.*

[198] *Id.*; *see also* Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225, 259 (1986) (discussing the harms that can stem from inadequate institutional structures).

[199] Bernhard, *supra* note 20, at 87.

[200] *See supra* Part I.A.

[201] Some scholars argue that state indemnification statutes are the only way that those who suffer constitutional harms at the hands of the state can receive compensation. *See* Bernhard, *supra* note 20, at 86 ("Although innocent people can be convicted anywhere, only those convicted in jurisdictions with an indemnification statute have a remedy at law for the harm suffered.").

[202] SCHUCK, *supra* note 29, at 111 ("Allowing for the differences between the substantive legal norms applicable to public officials and private actors, government ought to occupy no better position vis-à-vis its citizens than its citizens do vis-à-vis one another.").

[203] *Id.* at 111–12.

Franklin Butler, shared this belief, stating on the House floor during the debates surrounding the Amendments in 1871, "We are there a community, and if there is any wrong done by our community, or by the inhabitants of our community, we will indemnify the injured party for that wrong . . . ."[204] Such a society is a worthy ideal that we should strive to emulate.[205]

America can move more closely toward an ideal of broader compensation for those injured in the realm of § 1983 suits against prosecutors by shifting costs to the state or federal government. The question is: What model of cost-shifting would best serve the Supreme Court's rationales behind the *Imbler–Buckley* line of cases while better serving Congress's goal of compensation under § 1983? The answer this Note will explore in the next section is state indemnification of prosecutors facing § 1983 suits.

B. Availability of State Indemnification of Prosecutorial Liability for § 1983 Suits

In the private sector, when a corporate officer is found liable for misconduct or injury based on actions committed while exercising her official duties, the corporation will often protect the individual from personal liability via contract, insurance, indemnity, or additional compensation.[206] As these protections have become more commonplace in corporate law, they have garnered significant academic and judicial attention.[207] While academics have paid attention to the similar evolution that has occurred in the indemnification of public officials,[208] the Supreme Court has not.

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[204] CONG. GLOBE, 42d Cong., 1st Sess. 792 (1871).

[205] Detractors argue that as attractive an ideal as it may be, the realities of society dictate that there will always be injuries that go without redress. *See* Jeffries, *supra* note 137, at 90–91 ("In the real world . . . even devastating losses routinely go unredressed. . . . Governments cause many harms. Some result from unconstitutional conduct; others from lawful action. From a distributive point of view, the difference is immaterial. Neither the severity of the injury nor the degree of resulting hardship depends on the legality of the government's act. Lawful government action may cause devastating harm, while even flagrant unconstitutionality may injure only slightly.").

[206] *See* ROBERT W. HAMILTON ET AL., CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 972–77 (11th ed. 2010) ("Today . . . it would be difficult to persuade responsible persons to serve as directors if they were compelled to bear personally the cost of vindicating the propriety of their conduct in every instance in which it might be challenged." (quoting MODEL BUS. CORP. ACT § 8 subch. E, intro. cmt. at 8-72 (2008))).

[207] *See, e.g.*, *id.*; Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE. L.J. 1078 (1968); James J. Hanks, Jr. & Larry P. Scriggins, *Protecting Directors and Officers from Liability—The Influence of the Model Business Corporation Act*, 56 BUS. LAW. 3, 5–8 (2000) (examining the background of judicial decisions leading to the first statutory provisions for the indemnification and exculpation of directors).

[208] *See generally* Bernhard, *supra* note 20, at 101–10 (discussing the development of state indemnification law); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 & n.16 (1998) (reporting on the basis of "personal experience" that state

Writing in 1983, Professor Schuck noted that the Supreme Court had seldom addressed the fact that most government officials have the ability to shift potential liability costs to the government.[209] For example, in *Harlow v. Fitzgerald*, the Court in 1982 reframed its standard for qualified immunity to afford officials enhanced protection due to a fear that the previous articulation of the standard had permitted too many harassing and frivolous lawsuits.[210] In essence, the Court relied heavily on the assumption that without immunity public officials would face the threat of personal liability for constitutional violations committed in the performance of their official duties.[211] This assumption was, and continues to be, wrong.[212]

The modern Court continues to harbor these erroneous assumptions. In *Richardson v. McKnight*, the Court addressed the applicability of qualified immunity to employees of private companies performing state functions, such as contracted correctional officers.[213] The Court concluded that employees of a private company are different from government employees in "critical" ways and therefore are not entitled to qualified immunity.[214] One of the "critical" distinctions the Court focused on was that private employers can purchase liability insurance and indemnify their employees, thereby reducing an individual's exposure to personal liability.[215] The Court's logic is flawed; it wrongly assumes that unlike employees of private companies, government employees do not have the opportunity to shift potential personal liability to their employers and thus need the protections of qualified immunity.

Like in *Harlow*, the Court overlooked the fact that just like employees of private companies, government employees have the ability to shift costs to their employers via insurance and indemnification.[216] This section will show that the Court's assumptions regarding the extent of government

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indemnity is widely available); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1019 (2000) (reporting that indemnification is "generally thought to be widespread").

[209] SCHUCK, *supra* note 29, at 83.

[210] *See* 457 U.S. 800, 814–18 (1982); *see also* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 465 (2002).

[211] *See Harlow*, 457 U.S. at 819; Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 495–96 (2011).

[212] *See* Fallon, *Asking the Right Questions*, *supra* note 211, at 496 & n.94 (noting the scholarly consensus that most officials are indemnified against personal liability for actions committed in pursuance of their official responsibilities); *supra* note 208 and accompanying text.

[213] 521 U.S. 399, 401 (1997).

[214] *Id.* at 409 (pointing out the presence of "certain important differences" between public and private employees "that, from an immunity perspective, are critical").

[215] *Id.* at 411 (noting that insurance and indemnification "reduce[] the employment-discouraging fear of unwarranted liability potential applicants face").

[216] *See* Richard Frankel, *The Failure of Analogy in Conceptualizing Private Entity Liability Under Section 1983*, 78 UMKC L. REV. 967, 979 (2010) (pointing out the Court's flawed reasoning in *Richardson*).

indemnification, which form a key part of the Court's immunity doctrine, are wrong.

The Supreme Court continues to give little attention to alternative prosecutorial protections. Justice Alito's comments during the *Pottawattamie* oral argument reflected deep concerns that the vagaries of the *Imbler–Buckley* standard might open up prosecutors to personal liability.[217] He made no mention of the possibility of protections outside of absolute immunity, such as indemnification. The Court has continued to gloss over the fact that even if immunity were curtailed in certain situations, prosecutors would still be protected from personal liability by other means. The reality is that there exist a wide variety of resources that protect public officials, including prosecutors, from ultimate liability in § 1983 suits.[218]

The chief means of protection are legal defense funds and indemnification provisions established by statute or insurance.[219] As there exists no federal right to indemnification provided in § 1983,[220] it falls to the states to indemnify their officials from potential losses in a § 1983 action.[221] Therefore, whether a prosecutor, absent absolute immunity, would be entitled to indemnification of § 1983 liability is based on interpretations of applicable state and local indemnification provisions.[222]

The overwhelming majority of scholars who have studied state statutory indemnification of government officials believe that it is now widely available.[223] Though Professor Schuck noted many years ago that indemnification was "neither certain nor universal,"[224] the legal landscape has changed significantly since his writing in the early 1980s, and more importantly, since the Supreme Court decided *Imbler* in 1976. Though no empirical study has sought to definitively examine the precise scope of governmental indemnification, there exist many scholarly examinations that

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[217] *See supra* note 179 and accompanying text.

[218] SCHUCK, *supra* note 29, at 83–84.

[219] *See id.* at 83–85.

[220] Allen v. City of Los Angeles, 92 F.3d 842, 845 n.1 (9th Cir. 1996), *overruled on other grounds by* Acri v. Varian Assocs., 114 F.3d 999, 1001 (9th Cir. 1997).

[221] Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1216–17 & n.32 (2001).

[222] *Id.* at 1217 & n.33.

[223] *See, e.g.*, Jeffries, *supra* note 208, at 49–50 & n.16 ("Very generally, a suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment. So far as can be assessed, this is true not occasionally and haphazardly but pervasively and dependably."); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 812 (2007) ("Public employers are usually required by statute to indemnify their employees or otherwise pay judgments against those employees arising from torts committed within the scope of their employment . . . ."); Schwartz, *supra* note 221, at 1217 ("States and municipalities often indemnify officers found personally liable for compensatory damages under § 1983.").

[224] SCHUCK, *supra* note 29, at 85.

indicate that the scope is extremely broad, if not universal.[225] Nearly every state in the union and the District of Columbia now provides some form of indemnification protection for government employees facing potential damages for torts committed in the exercise of their employment.[226] Though the language in these statutes varies from state to state, they "commonly require that to be entitled to indemnification, the employee must (1) have acted within the scope of employment, and (2) not have engaged in intentional, reckless, or malicious wrongdoing."[227] As a result, "the state or local government officer who is acting within the scope of his or her employment in something other than extreme bad faith can count on government defense and indemnification."[228] These statutes now provide far broader protection for state prosecutors than the *Imbler* Court was aware of or could have imagined in 1976.

In 1976, when the Supreme Court decided *Imbler*, just twenty state legislatures had passed indemnification statutes that protected any government employees from § 1983 suits.[229] More than thirty-five years have passed since the *Imbler* Court articulated its core policy rationale for absolute prosecutorial immunity—the fear that qualified immunity would cause a prosecutor to become "constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."[230] During that time, many of the states that already had indemnification provisions in place—provisions that often provided limited

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[225] *See, e.g.*, Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987) (noting that a study of all § 1983 suits in one federal district found no case in which an individual officer was forced to pay the cost of an adverse constitutional tort judgment).

[226] *See* Rosenthal, *supra* note 223, at 812 n.51 (providing an exhaustive list of state indemnification statutes).

[227] Schwartz, *supra* note 221, at 1217 (footnote omitted).

[228] Jeffries, *supra* note 208, at 50.

[229] *See* ARIZ. REV. STAT. ANN. § 41-621(P) (2004 & Supp. 2011) (enacted 1973); CAL. GOV'T CODE § 825 (West 1995 & Supp. 2012) (enacted 1963); CONN. GEN. STAT. ANN. § 7-465 (West 2008) (enacted 1957); IDAHO CODE ANN. § 6-903(b)–(c) (2010) (enacted 1976); 745 ILL. COMP. STAT. ANN. 10/9-102 (West 2005) (enacted 1965); IOWA CODE ANN. §§ 669.22 (West 1998 & Supp. 2011) (enacted 1975), 670.8 (West 1998 & Supp. 2011) (enacted 1873); LA. REV. STAT. ANN. § 13:5108.1 (2006) (enacted 1975); MINN. STAT. ANN. §§ 3.736, subdiv. 9 (West 2005 & Supp. 2012) (enacted 1976), 466.07 (West 2008 & Supp. 2012) (enacted 1963); MONT. CODE ANN. § 2-9-305 (2011) (enacted 1974); NEB. REV. STAT. § 13-1801 (2007) (enacted 1972); N.H. REV. STAT. ANN. § 31:105 (LexisNexis 2008) (enacted 1973); N.J. STAT. ANN. §§ 59:10-1, -4 (West 2006) (enacted 1972); N.M. STAT. ANN. § 41-4-4(C)–(E) (2011) (enacted 1976); N.C. GEN. STAT. § 143-300.3 (2011) (enacted 1967); OR. REV. STAT. § 30.285 (2011) (enacted 1967); S.D. CODIFIED LAWS §§ 3-19-1 to -3 (2004) (enacted 1969); TENN. CODE ANN. § 29-20-310 (2000 & Supp. 2011) (enacted 1973); VT. STAT. ANN. tit. 12, § 5601 (2011) (enacted 1961); VA. CODE ANN. § 15.2-1520 (2008) (enacted 1968); WIS. STAT. ANN. § 895.46 (West 2006 & Supp. 2011) (enacted 1943).

[230] Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976).

or optional coverage to a small subset of local employees[231]—have brought coverage to an expanding universe of officials not provided for under the original statutory schemes.[232] Furthermore, at least twenty-five more states and the District of Columbia have added their own indemnification statutes, protecting government employees, including prosecutors, from the threat of personal liability that the *Imbler* Court so feared.[233] The legal landscape regarding state indemnification that the *Imbler* Court was operating under has undergone monumental change. As the dissent in *Richardson* stated, "the availability of" insurance or indemnification "decreases . . . the need for immunity protection."[234] The expansion of indemnity protections indicates that yet another of the *Imbler* Court's key policy concerns driving the existence of absolute prosecutorial immunity has vanished.

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[231] *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-621(P); CONN. GEN. STAT. ANN. § 7-465; N.H. REV. STAT. ANN. § 31:105; TENN. CODE ANN. § 29-20-310; VA. CODE ANN. § 15.2-1520.

[232] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-820.04 (2003) (enacted 1984) (expanding indemnification coverage to include punitive or exemplary damages); CONN. GEN. STAT. ANN. § 5-141d(a) (West 2007) (enacted 1983) (expanding liability coverage of state officers and employees to include indemnification and legal defense); N.H. REV. STAT. ANN. § 29-A:2 (LexisNexis 2008) (enacted 1979) (expanding indemnification coverage beyond school and public health officials); TENN. CODE ANN. § 9-8-112(a) (1999) (enacted 1982) (expanding permissive indemnity beyond local government employees to include payment of damages following civil actions against state employees); VA. CODE ANN. § 2.2-1837 (2011) (enacted 1980) (creating insurance scheme to protect employees as part of extensive risk management plan).

[233] *See* ALA. CODE § 11-47-24 (LexisNexis 2008 repl.) (enacted 1988); ARK. CODE ANN. § 21-9-203(a) (2004) (enacted 1977); COLO. REV. STAT. § 24-10-118(2)(a) (2011) (enacted 1979); DEL. CODE ANN. tit. 10, § 4002 (1999) (enacted 1978); D.C. CODE § 1-109(a) (LexisNexis 2011) (enacted 1997); GA. CODE ANN. § 45-9-22(a) (West 2003) (enacted 1978); IND. CODE ANN. §§ 34-13-3-5, 34-13-4-1 (West 2011) (enacted 1998); KAN. STAT. ANN. § 75-6109 (1997) (enacted 1979); KY. REV. STAT. ANN. § 65.2005 (LexisNexis 2004) (enacted 1988); ME. REV. STAT. ANN. tit. 14, § 8112 (2004) (enacted 1977); MD. CODE ANN., CTS. & JUD. PROC. § 5-303 (LexisNexis 2002 & Supp. 2006) (enacted 1987); MD. CODE ANN., STATE GOV'T § 12-404 (LexisNexis 2009) (enacted 1984); MASS. ANN. LAWS ch. 258, §§ 9 (LexisNexis 2004) (enacted 1978), 9A (LexisNexis 2004) (enacted 1982), 13 (LexisNexis 2004) (enacted 1979); MISS. CODE ANN. § 11-46-7(3) (2002) (enacted 1984); MO. ANN. STAT. § 105.711(2)(2) (West 1997 & Supp. 2012) (enacted 1983); NEV. REV. STAT. ANN. § 41.0349 (LexisNexis 2012) (enacted 1979); N.Y. PUB. OFF. LAW §§ 17(2)–(3) (McKinney 2008 & Supp. 2012) (enacted 1978), 18 (McKinney 2008) (enacted 1981); N.D. CENT. CODE §§ 32-12.1-04(4) (2010) (enacted 1977), 32-12.2-03(4) (2010) (enacted 1995); OHIO REV. CODE ANN. §§ 9.87 (West 2004 & Supp. 2011) (enacted 1980), 2744.07(A) (West 2006) (enacted 1985); OKLA. STAT. ANN. tit. 51, § 162 (West 2008) (enacted 1978); 42 PA. CONS. STAT. ANN. §§ 8550, 8548 (West 2007) (enacted 1980); R.I. GEN. LAWS §§ 9-31-12(a) (1997 & Supp. 2011) (enacted 1979), 45-15-16 (2009) (enacted 1986); S.C. CODE ANN. §§ 1-11-440 (2005) (enacted 2003), 12-4-325(A) (2000) (enacted 1998); TEX. CIV. PRAC. & REM. CODE ANN. §§ 102.002, 104.001 (West 2011) (enacted 1985); WASH. REV. CODE ANN. § 4.92.075 (West 2006) (enacted 1989); W. VA. CODE ANN. § 29-12A-11(a)(2) (LexisNexis 2008) (enacted 1986); WYO. STAT. ANN. § 1-39-104(c) (2011) (enacted 1979); *see also* Gamble v. Fla. Dep't of Health & Rehabilitative Servs., 779 F.2d 1509, 1517–18 (11th Cir. 1986) (interpreting Florida statute to mandate indemnification of state officers for all unintentional conduct); Livesay v. Balt. Cnty., 862 A.2d 33, 38 (Md. 2004) (interpreting Maryland statute to require indemnification of local employees).

[234] Richardson v. McKnight, 521 U.S. 399, 420 (1997) (Scalia, J., dissenting) (emphasis omitted).

As Professor Schuck points out, there is significant variation in the type and scope of indemnification that state statutes provide. Some state laws provide for mandatory (or permissive) indemnification for employees of any governmental entity,[235] whereas others cover only state employees, leaving municipal employees to local discretion.[236] Most states now mandate indemnification and defense of most state and local employees, either by making the governmental entity liable for official torts[237] or by retaining officials as nominal defendants and requiring the entity to pay their costs.[238] In some cases, blanket statutes cover all employees;[239] other states have individual statutes to address different categories of officials. "Significantly, most laws preclude government liability for 'bad faith' conduct, and some condition indemnification on good faith cooperation by the official in the defense of the case."[240] Regardless of their specific language, such state provisions have become "near[ly] universal."[241]

State and federal court interpretations of these statutes provide another means of determining the scope of officer protection beyond the literal text of the statutes. As noted above, state indemnification statutes routinely require that the tortfeasor employee acted within the scope of employment and not have engaged in intentional, reckless, or malicious wrongdoing. Therefore, in the absence of absolute immunity, it would seem that the extreme case—the prosecutor who intentionally suppresses exculpatory evidence—may not enjoy the protection of indemnity or qualified immunity. As a result, some argue that the indemnification provisions do not actually protect prosecutors. Since many of the statutes mirror the

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[235] For example, CAL. GOV'T CODE § 825 (West 1995 & Supp. 2012) provides for defense and indemnification for employees of any "public entity." *See also* KAN. STAT. ANN. § 75-6109. More commonly, state and local employees are treated separately, and coverage may or may not be equal in scope. *See* SCHUCK, *supra* note 29, at 230 n.26; *see, e.g.*, N.Y. PUB. OFF. LAW § 17 (state employees); N.Y. GEN. MUN. LAW §§ 50-a to -k (McKinney 2007 & Supp. 2012) (municipal employees).

[236] One example is Louisiana, which provides for legal defense and indemnification of state employees but does not appear to have a similar provision that protects local or municipal employees. *See* LA. REV. STAT. ANN § 13:5108.1 (2006) (stating that "covered individual" does not include "[a]n official, officer, or employee of a municipality, ward, parish, special district, including without limitation a levee district, school board, parish law enforcement district, or any other political subdivision or local authority"). Similarly, Missouri has a tort defense fund for limited groups of state employees, but does not appear to provide indemnification or insurance coverage for prosecutors. *See* MO. REV. STAT § 537.165 (2008) (creating a duty to defend tort actions against firemen improperly using motor vehicles but not providing indemnification).

[237] *See, e.g.*, CONN. GEN. STAT. ANN. § 4-165 (West 2007).

[238] *See, e.g.*, CAL. GOV'T CODE § 824 (West 1995 & Supp. 2012).

[239] *Compare* CAL. GOV'T CODE § 825 (applying to any "employee or former employee of a public entity"), *with* N.Y. GEN. MUN. LAW §§ 50-a to -k (treating separately claims against police, corrections officers, and "employees of the city of New York," etc.).

[240] SCHUCK, *supra* note 29, at 86; *see, e.g.*, ARIZ. REV. STAT. § 41-621 (2004 & Supp. 2011).

[241] Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 63 (2005) (noting "the near universal scheme of state indemnification for government agents sued under section 1983").

standards articulated in the Court's immunity jurisprudence, some theorize that they would not protect prosecutors in the absence of absolute immunity.[242] In response, others argue that the "plainly incompetent or those who knowingly violate the law" do not deserve protection from personal liability.[243] Setting any normative judgments aside, case law indicates that indemnity protections may be significantly broader than facial readings of statutory text would indicate.

Whether a state officer or employee is protected from § 1983 liability by a state indemnification statute and how far that protection extends are solely matters of state law, requiring a judicial interpretation of a particular indemnification statute.[244] Many of these statutes have been written and interpreted by the state courts to be limited to cases not involving "conscious wrongdoing," although some offer "virtually unlimited indemnification."[245] Harkening back to the language in *Pierson*, *Tenney*, and *Imbler*, virtually all of these statutes offer protection only for acts that are "within the scope of employment."[246]

However, some courts have been willing to interpret the phrase "within the scope of employment" in a way that could serve two seemingly inapposite goals. The statutes could both protect prosecutors from ultimate liability in a fashion similar to absolute immunity while simultaneously providing injured parties with the possibility of financial compensation that would have been denied under an immunity regime. For example, the Seventh Circuit has construed Illinois and Wisconsin state indemnification statutes to indicate that an employee may act within the scope of her employment even if she acts maliciously and to further her own objectives and injure the plaintiff.[247]

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[242] *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 132, at 1067–68 (5th ed. 1984) (providing examples of statutes that mirror the Court's language).

[243] *See* Johns, *Reconsidering*, *supra* note 4, at 84–85.

[244] *See, e.g.*, Allen v. City of Los Angeles, 92 F.3d 842, 845 n.1, 846–48 (9th Cir. 1996) (noting that there is no federal indemnification statute and analyzing the state statute), *overruled on other grounds by* Acri v. Varian Assocs., 114 F.3d 999, 1001 (9th Cir. 1997); Hassan v. Fraccola, 851 F.2d 602, 604–05 (2d Cir. 1988) (analyzing state statute). Section 1983 does not provide an independent cause of action for indemnification. Banks v. City of Emeryville, 109 F.R.D. 535, 539 (N.D. Cal. 1985); *see, e.g.*, Holman v. Walls, 648 F. Supp. 947, 953 (D. Del. 1986). *See generally* 1B MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 16.17[B], at 16-278 (4th ed. 2004) (discussing these and other cases).

[245] KEETON ET AL., *supra* note 242, at 1068.

[246] SCHWARTZ, *supra* note 221, at 1217; *see also* Jeffries, *supra* note 208, at 50 & n.16.

[247] *See* Coleman v. Smith, 814 F.2d 1142, 1149–50 (7th Cir. 1987) (finding that mayor and police chief were entitled to indemnification under Illinois law because "subjective intent . . . was not the determining factor in deciding whether their actions were within the scope of their duty"); Hibma v. Odegaard, 769 F.2d 1147, 1152–53 (7th Cir. 1985) (finding that acts closely related to the employee's duties were within the scope of employment even if the methods the employee utilized were improper); *see also* 1B SCHWARTZ, *supra* note 244, at 16-279.

In *Graham v. Sauk Prairie Police Commission*, the Seventh Circuit found that the only requirement needed to satisfy Wisconsin's indemnification statute was that the employee's conduct be reasonably connected to his employment duties.[248] Therefore, the police officer's use of deadly force was within the scope of his employment even though he misused his official authority.[249] The District Court for the Northern District of Illinois rendered a similarly forgiving interpretation that protects the employee so long as the conduct has some rational relationship to the employee's duties.[250] These protected actions can be paralleled to a prosecutor who recklessly abuses his official prosecutorial authority and suppresses evidence. Therefore, regardless of normative judgments about whether "the plainly incompetent or those who knowingly violate the law" deserve immunity protection, some courts have been willing to extend to them the shield of indemnification.

These types of interpretations are, in essence, consistent with what *Imbler* and other decisions affirming absolute immunity have held. Though *Graham* involved police officers that received only qualified immunity, the conduct of the tortfeasors is analogous to the prosecutorial conduct that was protected by absolute immunity in *Imbler*, *al-Kidd*, and, potentially, *Pottawattamie.* Under a regime of absolute immunity, an individual would have no cause of action against a prosecutor that willfully suppressed exculpatory evidence to further her own case while at trial.[251] However, under a qualified indemnity regime consistent with *Graham* and similar federal court decisions, a lack of absolute immunity, coupled with the interpretations of indemnity already applied by state and federal courts, would provide for a cause of action under § 1983 against a prosecutor who acts intentionally with the possibility of financial redress that does not come out of the prosecutor's pocket. As a result, more expansive interpretations of what it means to commit an action "within the scope of employment" may indicate that absolute immunity is no longer necessary to protect a prosecutor that commits even the most egregious violations.

C. Examples of State and Federal Expansion of Alternative Protections in Response to Shifts in Supreme Court Jurisprudence

If the Supreme Court were to curtail or eliminate absolute immunity, legislatures would likely move to expand indemnification, insurance, and other protections to fill the void. A number of historical examples show that

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[248] 915 F.2d 1085, 1095–96 (7th Cir. 1990).

[249] *Id.* at 1095.

[250] *See* Lyons v. Adams, 257 F. Supp. 2d 1125, 1139 (N.D. Ill. 2003) (observing that under Illinois law, "conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master").

[251] *See supra* Part I.A.

in situations where states have not yet moved to protect their prosecutors through indemnification, a movement by the Supreme Court toward a primarily qualified immunity regime would likely result in such a development.

One analogous situation is the development of indemnification for public defenders. State courts are split on the issue of whether public defenders should be immune from malpractice suits.[252] The courts that have extended immunity to public defenders have analogized their role to that of judges and prosecutors, using many of the policy justifications and historical analogies set forth in *Pierson*, *Tenney*, and *Imbler*.[253] However, despite the similarities between public defenders and their prosecutor counterparts, other states have not extended immunity to these government employees.[254] In these situations, state legislatures have created other protections to defend these officials from ultimate liability for malpractice, namely insurance and indemnification. For example, in California, Connecticut, Ohio, and Illinois, legislatures have stipulated that in lieu of a judicially created immunity regime, indemnification will protect public defenders from ultimate financial liability arising out of malpractice suits.[255]

The California case of *Briggs v. Lawrence*[256] provides an example of how such a system operates. In that case, the plaintiff attempted to file a

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[252] Some state courts have held that public defenders are entitled to immunity. *See, e.g.*, Wright v. Elston, 701 N.E.2d 1227, 1233 (Ind. Ct. App. 1998) (public defender entitled to immunity under Indiana Tort Claims Act); Kuehne v. Hogan, 321 S.W.3d 337, 343 (Mo. Ct. App. 2010) (Ellis, J., concurring) (noting case could have been decided on other grounds because public defenders enjoy official immunity); Mooney v. Frazier, 693 S.E.2d 333, 344 (W. Va. 2010) (reaffirming immunity for public defenders). Other courts have held that public defenders are not entitled to any immunity whatsoever. *See, e.g.*, Briggs v. Lawrence, 281 Cal. Rptr. 578, 581 (Ct. App. 1991) ("[D]efendants do not and cannot assert that as public defenders they would be individually immune from liability for malpractice."); Reese v. Danforth, 406 A.2d 735, 740 (Pa. 1979) (public defenders "do not serve as public administrators with policy-making functions" and therefore under state law do not receive immunity); *see also* David J. Richards, Note, *The Public Defender Defendant: A Model Statutory Approach to Public Defender Malpractice Liability*, 29 VAL. U. L. REV. 511, 513–14 (1994).

[253] *See* Richards, *supra* note 252, at 514; *see also* Dziubak v. Mott, 503 N.W.2d 771, 775 (Minn. 1993); *Kuehne*, 321 S.W.3d at 348 (Ellis, J., concurring).

[254] *See* Richards, *supra* note 252, at 513–14; *see, e.g.*, *Briggs*, 281 Cal. Rptr. at 581; *Reese*, 406 A.2d at 740.

[255] 55 ILL. COMP. STAT. ANN. 5/5-1003 (West 2005) provides that:

> If any injury to the person or property of another is caused by a public defender or any assistant public defender, while the public defender or assistant public defender is engaged in the performance of his duties as such, the county shall indemnify the public defender or assistant public defender, as the case may be, for any judgment recovered against him as the result of that injury, except where the injury results from the willful misconduct of the public defender or assistant public defender, as the case may be.

See CONN. GEN. STAT. ANN. § 5-141d(a) (West 2008); OHIO REV. CODE ANN. § 120.41 (West 2002); *see also Briggs*, 281 Cal. Rptr. at 582 (stating in malpractice suit against public defender that defendant may be entitled to indemnification under CAL. GOV'T. CODE § 825-825.6); Richards, *supra* note 252, at 555–56 (describing model statute for indemnification of public defenders).

[256] *Briggs*, 281 Cal. Rptr. at 579.

common law malpractice suit against two Monterey County public defenders without first going through the state's statutorily created procedure for claims against public employees.[257] Though the California appellate court noted that the public defenders were not immune from suit, it nevertheless affirmed the dismissal of the plaintiff's claim on summary judgment.[258] The court held that the state's statutory scheme addressing tort suits against public employees, which includes public defenders, requires a plaintiff to first pursue an administrative claim against the employing public agency, which in this case was Monterey County.[259] The agency would then investigate the claim, and if the public defender's actions fell within the conduct protected by the state's indemnification statute, would defend the employee in the course of any legal proceeding and indemnify her against any losses incurred in the course of litigation.[260] This is just one example of how states like California, Connecticut, Ohio, and Illinois would likely expand alternative protections for prosecutors in the event absolute immunity were not available due to a shift in the Supreme Court's jurisprudence.

The government's response to the expansion of potential liability for federal officials under *Bivens*[261] provides another important historical analogue. In the early 1980s, federal employees who were sued for actions within the scope of their employment had no legal entitlement to government representation.[262] The United States generally defended them at the public's expense provided that the government believed the acts in question were within the scope of federal employment.[263] Federal law did not provide for the purchase of insurance against the personal liability of its prosecutors.[264]

Regarding indemnification, no general federal statutory authority existed for indemnifying federal employees, even for conduct that was clearly within the scope of their employment.[265] Since claims against federal officials for constitutional torts can be brought against the United States under the Federal Tort Claims Act,[266] the government relied on the

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[257] *Id.* at 579–80.

[258] *Id.* at 580.

[259] *Id.* at 586.

[260] *Id.* at 582.

[261] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–97 (1971) (establishing a cause of action for individuals to sue federal government employees for constitutional torts).

[262] SCHUCK, *supra* note 29, at 83.

[263] *Id.* at 84.

[264] *See* Michael W. Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U. RICH. L. REV. 281, 296 (1980).

[265] *See* George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1191 (1977); Dolan, *supra* note 264.

[266] 28 U.S.C. § 1346(b) (2006).

unattractiveness of suing an individual official as compared to the allure of suing a "deep-pocketed" defendant like the government to divert many suits.[267] Despite these diversionary protections, individual federal officials were still highly vulnerable to suit. The Justice Department's official stance was that "[i]f an employee suffers an adverse judgment, with very few exceptions, it is he or she who must pay it."[268]

The post-*Bivens* world looks very different. As *Bivens* has given rise to a significant increase in constitutional tort litigation against federal employees over the past few decades,[269] the federal government has enhanced protections to shield their employees from ultimate liability. In a situation where a *Bivens* claim results in individual monetary liability, the federal government now indemnifies its employees against constitutional tort judgments or settlements.[270] Officials are now entitled to representation from Justice Department lawyers to defend against *Bivens* suits or have the option to hire private counsel with government funds.[271] A number of specific agencies have also set aside appropriations in the event that their employees face ultimate financial liability arising from a *Bivens* suit.[272] Indemnification is not fully guaranteed up front; payment will be made only if the challenged conduct was within the scope of employment and indemnification is in the interest of the United States.[273] As a practical matter, however, indemnification is a "virtual certainty."[274]

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[267] *See id.*; §§ 2671–80 (including no motion of individual liability).

[268] *Federal Tort Claims Act: Hearing Before the Subcomm. on Agency Admin. of the Comm. on the Judiciary*, 97th Cong. 160 (1981) (statement of J. Paul McGrath, Assistant Att'y Gen., U.S. Dep't of Justice).

[269] *See supra* Part I.A.

[270] 28 C.F.R. § 50.15(c) (2011); *see generally* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 76–78 (1999) (discussing the protections against individual liability for *Bivens* suits Congress has created).

[271] § 50.15(a). The federal government provides representation in about 98% of the cases for which representation is requested. *See* Pillard, *supra* note 270, at 76 n.51 (citing Memorandum for Heads of Dep't Components from Stephen R. Colgate, Assistant Att'y Gen. for Admin. (June 15, 1998)).

[272] *See* § 50.15(c) (Department of Justice indemnification provisions related to employees); *see also* 13 C.F.R. § 114.110 (2011) (Small Business Administration); 14 C.F.R. § 1261.316 (2011) (National Aeronautics and Space Administration); 17 C.F.R. §§ 142.1–.2 (2011) (Commodity Futures Trading Commission); 22 C.F.R. § 21.1 (2011) (Department of State); 31 C.F.R. § 3.30 (2011) (Treasury Department); 32 C.F.R. § 516.32 (2011) (Department of the Army and Department of Defense); 34 C.F.R. §§ 60.1–.2 (2011) (Department of Education); 38 C.F.R. § 14.514(c) (2011) (Department of Veteran's Affairs); 43 C.F.R. § 22.6 (2011) (Department of the Interior); 45 C.F.R. § 36.1 (2011) (Department of Health and Human Services).

[273] *See* 28 C.F.R. § 50.15(c); *see also id.* § 50.15(a)(8)(iii).

[274] Pillard, *supra* note 270, at 77. An example of a *Bivens* action in which a federal employee "would not be represented and indemnified by the government is one in which the employee is under criminal investigation or prosecution by the government for the conduct that gave rise to the constitutional tort suit. These cases are, however, extremely rare." *Id.* at 77 n.56; *see also id.* at 76–78 & n.51 (noting that the federal government represented 98% of *Bivens* defendants who requested counsel).

The developments in Illinois to protect public defenders from § 1983 liability and the response of Congress and the federal agencies to the establishment of *Bivens* suits reflect a predictable pattern: that of an employer responding to an increase in financial pressure on its employees by protecting the employees in order to, in turn, protect the "business." Professors Fallon and Meltzer point out that the "genius" of the *Bivens* system of liability is that it exerted pressure on the government "to indemnify its officials and thereby convert what appeared to be a system of officers' liability into, for some if not all practical purposes, a regime of governmental liability."[275] As Professor Pillard posits:

> If individuals are held personally liable for harms caused by their employment, they will pressure their employers to cover those costs—whether in the form of additional compensation, insurance, or indemnification. In order to attract employees and to ensure that they fulfill their duties, an employer, whether public or private, may feel compelled to shoulder the costs of employee liability.[276]

This is exactly what has played out in both Illinois and in the federal government.

These examples suggest that if the Court were to roll back absolute immunity for prosecutors, state legislatures and Congress would again respond in kind to protect their employees. During litigation of the *Bivens* case, Solicitor General Erwin Griswold noted his concern that in the early 1970s there was no statutory authority or popular practice of reimbursing federal employees for judgments against them.[277] The implication was that federal employees would be stuck paying judgments if the Court established a cause of action for damage suits against federal employees. His arguments mirror the Court's fears, as articulated in the *Imbler–Buckley* line of cases, of chilling prosecutorial behavior.[278] Forty years later, the federal government has responded to the specter of individual liability on its own. We should expect a similar development if the Court were to decide to roll back absolute prosecutorial immunity.

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[275] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1822 (1991).

[276] Pillard, *supra* note 270, at 76.

[277] Brief for Respondents at 28–30 & n.33, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (No. 70-301), 1970 WL 116900 ("There are no federal statutes or regulations authorizing reimbursement of judgments against federal law enforcement officers in these kinds of cases; and we know of no informal practice of doing so. Even if an informal practice did evolve, it is doubtful that funds would be available to cover awards as high as those sought in this case.").

[278] *See supra* Part I.C for the Court's rationales in support of absolute prosecutorial immunity.

III. CRITICISMS OF AN EXPANSIVE INSURANCE AND INDEMNIFICATION REGIME

Though the expansion of indemnification to protect prosecutors in the absence of absolute immunity is a promising alternative, it would create some financial, practical, and political costs. The first major criticism of an expansive insurance and indemnification regime, and the one that has been paramount in the Supreme Court's decisions to uphold the *Imbler* and *Buckley* line of cases, is that it would insufficiently protect prosecutors in the "vigorous and fearless" exercise of their duties.[279] As Professor Schuck argues, if the denial of protections like insurance and indemnification "could be surgically limited to truly *malicious* officials held liable under § 1983 . . . wrongdoing could be deterred with little or no cost to vigorous decisionmaking."[280] However, where "bad faith is not restricted to actual malice" and may be based upon "a decidedly amorphous judicial standard" under which officials may bear the burden of proof, "the threat to vigorous decisionmaking may be great."[281]

Schuck also argues that insurance contracts and indemnification laws would, unless proscribed by statute, inevitably contain certain limitations on coverage.[282] Similar to the "good faith" test utilized under qualified immunity, these nonstatutory provisions create new boundary problems and uncertainties about coverage.[283] In sum, Schuck posits that "[t]hese gaps . . . resurrect the very incentives for official self-protection that these reforms are designed to obviate."[284]

However, much has changed since Schuck published his seminal work in 1983. Almost all of the indemnification laws in place are, in fact, proscribed by statute, creating a floor for protection and obviating the concern that many of these provisions would be left open to the vagaries of judicial interpretation.[285] Furthermore, the judicial interpretations of statutory indemnification language indicate that courts are most often willing to interpret any vagaries in language in favor of providing indemnification.[286] Looking to the federal *Bivens* indemnification model, as reimbursement alternatives have become more available they have also become significantly more uniform. Inconsistency is now a more minor concern.[287]

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279 *See* Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976).

280 SCHUCK, *supra* note 29, at 87.

281 *Id.*

282 *Id.* at 110.

283 *Id.*

284 *Id.*

285 *See supra* Part II.B.

286 *See supra* Part II.B.

287 Pillard, *supra* note 270, at 78.

Another concern is that even if prosecutors are protected from ultimate financial liability, a cause of action under § 1983 brings with it all of the practical demands of being sued.[288] However, "vengeful ex-defendants face greater obstacles today than in 1976,"[289] and an ethical prosecutor need not fear a flood of civil rights actions.[290] First, the current requirements for imposing liability are sufficiently rigorous to eliminate unfounded and harassing litigation.[291] For example, *Heck v. Humphrey* mandates that certain causes of action under § 1983 cannot ripen until an individual is exonerated from the crime for which she was prosecuted.[292] This eliminates a large swath of frivolous litigation that could be brought against a prosecutor in any indemnification regime. Second, qualified immunity has become a potent defense that minimizes litigation burdens and protects all but the "plainly incompetent or those who knowingly violate the law."[293] This extremely broad protection should not be underestimated. Third, courts have efficient tools for minimizing or penalizing unmeritorious litigation—particularly the strict approach to pleading the Court embraced under *Bell Atlantic Corp. v. Twombly* and reaffirmed in *Ashcroft v. Iqbal*.[294]

On top of these protections, tougher habeas corpus rules also narrow the potential class of § 1983 plaintiffs. Just after deciding *Imbler*, the Court held that Fourth Amendment issues heard and fairly decided in state court could not be the subject of federal habeas corpus review.[295] The following year, the Court barred the "deliberate bypass" of state courts to get to federal court, thereby reducing the ability of a prisoner to get a reversal.[296] These and other changes in habeas corpus law have led to a very small

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[288] Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976).

[289] McNamara, *supra* note 6, at 1178.

[290] *See* Johns, *Reconsidering*, *supra* note 4, at 131–32.

[291] *See* Brief for Respondents at 49, Pottawattamie Cnty., Iowa v. McGhee, No. 08-1065 (Sept. 11, 2009), 2009 WL 2954161 ("The strict limits that this Court already has placed on suits against prosecutors—from absolute immunity for advocacy conduct, to the strict pleading requirements of *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), to the substantive and procedural protections of qualified immunity—will ensure that prosecutors and courts are not burdened by a flood of insubstantial cases."); Johns, *Reconsidering*, *supra* note 4, at 131–32.

[292] 512 U.S. 477, 484 (1994) ("One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused.").

[293] Malley v. Briggs, 475 U.S. 335, 341 (1986); *see also* Devereaux v. Abbey, 263 F.3d 1070, 1077, 1082 (9th Cir. 2001) (stating that "[t]he investigatory behavior of which Devereaux complains is indeed troubling, and we do not condone it," but rejecting the due process claim because using questionable interview techniques in a child sex-abuse investigation is not a violation of clearly established law).

[294] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that "'naked assertion[s]' devoid of 'further factual enhancement'" need not be taken as sufficient (quoting Bell Atlantic Corp. v. Twombly*,* 550 U.S. 544, 557 (2007))).

[295] Stone v. Powell, 428 U.S. 465, 492–95 (1976).

[296] Wainwright v. Sykes, 433 U.S. 72, 85–91 (1977).

success rate for habeas petitions.[297] The result of these reforms means that honest and ethical prosecutors need not fear vexatious litigation from former defendants.

It is likely that an indemnification regime may require a great deal more resources, an increase in bureaucratic staffing, and an expansion of other unforeseen rules to handle an expanded liability regime. This is an obvious cost considering many of the causes of action that would be permitted under an insurance and indemnity regime would be dismissed at the pleading stage if absolute liability were in place. However, it is the contention of this Note that these added costs, to be spread across society, are statutorily mandated by § 1983, practicable, and worth providing for redress to individuals who otherwise would have no form of recompense for their injuries.

A different type of criticism is based on a sense that broad-based indemnification goes too far in making prosecutors feel judgment proof. Some believe that the existence of an almost universal scheme of state indemnification for damage awards would defeat the deterrence potential of monetary awards and not have enough of an impact on prosecutor conduct.[298] It is possible that a regime that protects prosecutors from ultimate financial liability would have a weaker deterrent effect than one in which indemnification does not exist.[299] However, there are a number of other externalities, such as a stronger incentive to hide improper conduct, which would develop if prosecutors were to face ultimate liability.[300] Furthermore, the deterrence rationale will still be greater than under a regime of absolute immunity, where a prosecutor faces little if any negative repercussions for improper conduct.[301]

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[297] Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 681 (1990–91) (finding only about a 4% success rate); McNamara, *supra* note 6, at 1178–80 (detailing ways to shrink and scare the plaintiff pool for potential suits against prosecutors).

[298] *See, e.g.*, Weeks, *supra* note 20, at 929.

[299] Another possibility is that it would create over-deterrence. *See* Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 129 (2010) ("A regime of public official liability without fault . . . would create an unacceptable risk of over-deterrence of individual public officials who would internalize the costs but not the full benefits of their efforts to bring offenders to justice.").

[300] *See* Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 315 (2010) ("An additional problem with a rule of imposing civil liability for prosecutors who have committed *Brady* violations is that it creates a disincentive to disclose, post-conviction, that exculpatory evidence was wrongly suppressed.").

[301] *See* Liebman, *supra* note 112, at 2121–22.

CONCLUSION

In *Burns v. Reed*, the Court indicated that if a body of law were established that provided "ample" support to protect prosecutors from forces that would render them unable to execute their duties, it would be willing to scale back absolute immunity.[302] This Note has provided examples that indicate that federal, state, and local legislation, practices, and judicial decisions continue to build protections that move the current legal regime closer to the ideal of providing sufficient extra-immunity protections for prosecutors. However, empirical analysis can only get us so far. As long as the absolute immunity doctrine remains in place, there will not be significant further development of indemnification for prosecutors as there is nothing to indemnify. As a result, the current scope of indemnification, insurance, and other protections may not yet be sufficiently consistent or reliable to convince the Court to abandon its unworkable absolute prosecutorial immunity standard completely. However, state insurance and indemnification schemes are certainly more expansive than the Court has acknowledged. As these protections continue to expand, hopefully American law will continue to move toward the Aristotelian ideal of a legal system that does not focus on "whether a good man has defrauded a bad man or a bad man a good one," but rather "looks only to the distinctive character of the injury, and treats the parties as equal."[303]

[302] 500 U.S. 478, 492–96 (1991).

[303] ARISTOTLE, NICOMACHEAN ETHICS bk. IV, at 115 (D. Ross trans., Oxford Univ. Press 1998) (c. 384 B.C.E.).