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1 Stetson J. Advoc. & L. 169 (2014)

When the State Becomes the Criminal,

Is Sorry Enough?

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I. Introduction

169. The past century reveals critical issues questioning the fundamental value of the criminal justice system,[2] which proclaims that "it is far worse to convict an innocent man than to let a guilty man go free."[3] The fact the system is flawed is not alarming. However, what is alarming is the state's reluctance to accept responsibility when prosecutors willfully engage in misconduct — misconduct that deprives the wrongly accused not only of a fair trial but of freedom and life.

170. John Thompson's case exemplifies conscious misconduct of the prosecution and supports the doubt about whether innocence is in fact protected at all costs. Thompson's exoneration came just weeks before his execution date in 1999 after serving eighteen years in prison, fourteen of them on death row. Thompson was the victim of a double assault by the Orleans Parish district attorney's office who shamelessly achieved convictions for both armed robbery and murder. The assault began when

1 LeslieRae Newton graduated from Stetson University College of Law in December 2012, and is now an Air Force JAG Officer. The views expressed here should not be taken as representing those of the Air Force.

2 Hugo Munsterberg, On The Witness Stand: Essays on Psychology and Crime (1923, originally published in 1908).

3 See In re Winship, 397 U.S. 358, 372 (1970); William Blackstone, Commentaries on the Laws of England: Of Trial, and Conviction, Book 4 ch. 27; see also Alexander Volokh, N Guilty Men, 146 U. Pa. L. Rev. 173 (1997).

two separate eyewitness reports, initially describing the assailant who shot and killed Raymond Liuzza, Jr., as a man with "close cut hair," were ignored. Thompson's hair was styled in a large "Afro" during the time of the murder, quite contrary to the "close cut" described by eyewitnesses. The reports were never turned over to the defense or the court, and forced Thompson to fight a senseless battle for his life.

171. Through media coverage of the murder investigation, Thompson's face entered homes across the city and thereby became a second target of misidentification for an unrelated armed robbery. The father of the victims of the attempted robbery showed the children Thompson's picture from the newspaper. The children said that he was the man who tried to rob them. The same picture from the newspaper was used in a photographic lineup. The children picked the same picture they saw in the newspaper from the lineup.

172. After this (mis)identification as the assailant in the armed robbery, the unscrupulous conduct continued. When the prosecution received DNA results from a blood sample taken during the robbery investigation providing the assailant's blood type, rather than testing Thompson's blood for a match, the prosecution suppressed the report and never mentioned it to the defense. (The assailant left the blood on one of the children's pants leg.) The report would have provided the defense with DNA proof the assailant in the robbery had type-B blood, while Thompson has type-O. Elisa Abolafia, the investigator hired to research the last appeal, discovered all this. The swatch itself has never been recovered. This information stayed the execution and led to Thompson's subsequent exoneration.[4]

173. Further efforts to keep the defense in the dark occurred when the prosecution checked all the evidence out of the police property room, just after receiving the report, and transferred everything to the courthouse property room. Then the assistant district attorney checked out the bloody pants twice, returning them the first time but not the second.[5] Neither the report nor the swatch was mentioned for fourteen years. Through tactical planning, The State was able to convict Thompson of both crimes, and because it strategically sought the armed robbery conviction first, the jury complied with the state's prescription for execution.

174. Thompson did not just miss out on his own life. He missed teaching his sons — aged four and six at the time of his conviction — how to play ball, drive a car, treat a woman, and become men. Thompson's story is not unique. There are many men and women who have suffered years and years in prison or, worse, on death row, for crimes they did not commit because the prosecution did not want to lose.

4 John Thompson, The Prosecution Rests, but I Can't, New York Times, April 9, 2011.

5 Email from Elisa Abolafia, Thompson Paper (Oct. 9, 2011, 11.09 a.m. EDT).

175. Although time and diligence revealed the injustice and prompted exoneration, Thompson's case exposed another fatal flaw in the "justice" system. The 2011 Supreme Court's opinion in Connick v. Thompson shut one more door for exonerees to redress the willful and malicious discard of the criminal justice system's fundamental value in protecting the innocent.[6]

176. The ability for exonerees to seek compensation through civil litigation is fading faster with every trip to the Supreme Court. The Court has repeatedly decided that the doctrines protecting prosecutors, regardless of culpability, are stronger than the need for the state to right the wrong and attempt to make the victim whole again. Law school teaches students that people who break the law will be held accountable under the criminal system and that the victim can be made whole through civil litigation. Law school fails to mention the exceptions that apply to prosecutors' liability for wrongful conviction, or that the victims of willful prosecutorial misconduct are generally barred from suit.

177. This paper will briefly address the history of prosecutorial duties and protections before considering the reasons associated in abandoning those duties and engaging in willful misconduct. Despite the protections in place to dissuade it, misconduct occurs in its most egregious form: wanton and willful. The results of misconduct can be deadly, and yet when willful misconduct is evident, victims are seldom compensated. The third section discusses redressing exonerees and mitigating misconduct through an examination of prosecutorial immunity, municipality immunity, state and legislative monetary compensations, the effectiveness of apologies for wrongdoing, and the unnecessary deference to precedent. The final section suggests a possible direction to correct this injustice.

II. Prosecutorial Duties and Protections

178. State and federal prosecutors are in a unique subset of lawyers who possess a duty that transcends mere representation of a client. The primary duty of a lawyer engaged in public prosecution is "not to convict, but to see that justice is done."[7] In fact, a prosecutor is a representative of all the people, the defendant included. If we are to believe the old adage "innocent until proven guilty," a prosecutor's duty to maintain the constitutional rights of the defendant is just as important as his or her duty to any other citizen. This unique obligation is embodied through the development and advancement of the ethic codes adopted by the states and reflected in case law.

6 Connick v. Thompson,131 S. Ct. 1350 (2011).

7 1908 Canons of Prof'l Ethics Canon 5: The Defense or Prosecution of Those Accused of a Crime; see also Berger v. United States, 295 U.S. 78, 79 (1935).

179. The American Bar Association (ABA) has long recognized that justice can only be fulfilled if advocates maintain integrity and impartiality in the administration of the law. In 1908, the ABA created a series of canons to address the need for a written resource to guide advocates in proper behavior. The original thirty-two canons became insufficient to guide lawyers and have evolved into the current Model Rules of Professional Conduct (Model Rules), which every state (except California) has adopted to some extent.

180. The current Model Rules directly address prosecutorial ethics and specifically address the responsibility to "make timely disclosure" of any and all evidence that negates guilt or mitigates the offense at all stages of the trial, and extends to post-conviction discovery. Additionally, the Model Rules require any prosecutor who "knows of clear and convincing evidence" establishing a convicted individual's innocence to "seek to remedy the conviction."[8]

181. In addition to the adoption of ethic codes, the Supreme Court has addressed the disclosure duties of prosecutors. In Brady v. Maryland, the Court held explicitly that prosecutors must turn over any material favorable to the defendant.[9]

182. The Brady Rule has developed strength within the Court over the past fifty years and is a necessary component of due process to "ensure that a miscarriage of justice does not occur." When the "miscarriage of justice" does occur concerning evidence with a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different," the Court states the conviction should be reversed, and a new trial granted, but makes no offering of compensation.[10] Before granting relief for a Brady violation, the claimant must establish that:

1. The evidence is exculpatory or impeaching;[11]
2. The evidence was withheld by the state; and
3. Prejudice resulted.[12]

183. Like most rules, there are exceptions to Brady's application. The prosecution is not required to disclose exculpatory evidence during plea bargaining[13] or post-conviction proceedings. The proper claim for post-conviction due process is not under

8 1908 Canons of Prof'l Ethics, Canon 5: The Defense or Prosecution of Those Accused of a Crime, R. 3.8(h).

9 Brady v. Maryland, 373 U.S. 83 (1963).

10 U.S. v. Bagley, 473 U.S. 667, 682 (1985); see also Kyles v. Whitley, 514 U.S. 419, 438 (1995).

11 Youngblood v. West Virginia, 547 U.S. 867 (2006).

12 Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

13 U.S. v. Ruiz, 536 U.S. 622, 630 (2002).

Brady, but under examination if the state's action "offends some principle of justice."[14] Additionally, Brady does not consider the reason behind the suppression of evidence. There is no distinction between intentional and accidental suppression of evidence.

184. Sometimes the misconduct is a result of a poor choice or inherent affect of a choice made under pressure. However, it is the misconduct that is willful and wanton that should shock the conscience of the court and permit the wrongfully convicted to seek civil redress.

III. The Rationale for Willful Misconduct

185. It would be difficult to argue that a prosecutor, who suppressed, fabricated, or destroyed evidence, could think he or she was within the color of the law.[15] A more accurate assessment for such tortious behavior would reveal the presence of arrogance, tunnel vision, or departmental influence. It is not hard to believe that pressure to maintain a high conviction rate can dim a young prosecutor's zeal for truth and justice.

186. While misconduct can be linked to many factors, the primary causes appear to be the institutionalization of the career, political pressures, and mere personal ambition — any of which creates an environment where prosecutors may resort to cutting corners, many of them right off the Constitution.[16]

Batting Averages in the Office and the Polls

187. The mentality of prosecutors' offices can be "win at all costs," which fosters an environment that abandons the impartial advocate in exchange for a high-conviction batting average[17] and stimulates "conviction psychology."[18] The political veil most state chief prosecutors wear as elected officials can influence their department's "win at

14 District Attorney's Office v. Osborne, 129 S. Ct. 2308, 2319–20 (2009).

15 While prosecutorial misconduct is not the only condition for which the wrongfully convicted are exonerated, for the purposes of this paper, only willful misconduct will be examined.

16 See generally Ephraim Unell, A Right Not to Be Framed: Preserving Civil Liability of Prosecutors in the Face of Absolute Immunity, 23 Geo. J. Legal Ethics 955 (2010); Brad Heath & Kevin McCoy, Prosecutors' Conduct Can Tip Justice Scales, USA Today, Sept. 23, 2010.

17 See Kenneth Bresler, "I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions, 9 Geo. J. Legal Ethics 537, 541–42 (1996); Malia N. Brink, A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity, 4 Charleston L. Rev. 1, 16–17 (2009).

18 Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291, 328 (2006).

all costs" mentality. While the term "chief" prosecutor conveys a single person, states can have over one hundred chief prosecutors who typically serve four-year terms. Like any other elected official, candidates facing opposition for election need to create favor with the public and address public issues and concerns. Chief prosecutors generally run on a "tough-on-crime" or "hard-nosed prosecutor" platform and highlight agendas to expedite backlogs, with rare discussion of actual performance within the office.[19]

188. Individual office approaches are a bit different. Rather than a generalized theme, there may be a direct campaign on conviction, sometimes highlighted by bulletin boards promoting a "conviction psychology." This psychology is often nurtured by the filtered presentation of "all the evidence" given to the prosecutor, as well as confirmation of the evidence against the accused through a grand jury's indictment. Evidence the police deem to be unimportant is not always retained or turned over to the state prosecutor.[20]

189. The public scrutiny on high-profile cases can add to the pressure on a prosecutor to meet shifting public expectations. Typically, when the victim is a member of the affluent community, the public interest is swift "justice" for the victim, which is often centered more on "closing the case" and obtaining a conviction than ensuring the accused is the actual assailant.[21] However, when the defendants are members of the affluent community, the interest shifts to concern for a fair trial, the maintenance of every constitutional guarantee and the highest ethical behavior by the state.[22]

190. Another office pressure is the increased case load prosecutors have come to handle. USA Today reported less than ten years ago there was one prosecutor for every fourteen defendants, but by 2009 the case load doubled.[23]

191. The maintenance of a good conviction rate does not coincide with a reputation for integrity or accountability. Sometimes the quest for the truth is lost in the quest for a conviction. The real shame is that when the truth does surface around the misconduct of a case tallied in the 'win' column, little if anything is done to change the environment fueling the problem.

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19 Ronald F. Wright, Symposium, Prosecutorial Discretion: How Prosecutor Elections Fail Us, 6 Ohio St. J. Crim. L. 581, 600, 602–04 (2009).

20 Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291, 330 (2006); Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U.L. Rev. 125 (2004).

21 See Connick v. Thompson, 131 S. Ct. 1350, 1371 (2011) (Ginsburg, J., concurring).

22 See Wikipedia, Duke Lacrosse Case

23 Brad Heath & Kevin McCoy, Prosecutors' Conduct Can Tip Justice Scales, USA Today, Sept. 23, 2010.

The Rogue Prosecutor

192. Despite years of training to uphold — and allegiance to — the Constitution, prosecutors are not immune to misconduct for personal ambition. When a state or federal prosecutor's dedication to winning becomes stronger than his or her professional responsibility, the consequences can destroy careers, lives, and families. Unfortunately, there are few deterrents in place to control misconduct and often, the prosecutor at fault not only goes unpunished, but maintains his or her "win." The office handling the post-conviction case sustains the "loss" which in most cases is not the same office that tried the case.[24]

193. Recounting successful convictions to colleagues and friends can generate "atta-boy" self-confidence that manifests into a methodology of defining success in terms of wins and losses or convictions and acquittals, creating tunnel vision. Experts break tunnel vision down into several categories of biases, each with the potential to create an inaccurate reality based on subconscious tendencies. The charge of the prosecutor to be an objective and impartial officer of the court fades when the prosecutor interprets information and circumstantial evidence in the light of a personally generated, or suggested, theory.[25]

194. Examining evidence with a preconceived idea of what happened is not exclusive to the criminal justice world. Scientists have noted skewed research results based on inaccurate conceptualizing of observations in a variety of testing environments. One suggestion for the skewed vision, despite training, is that the individual may "equate what they think they see, and sometimes what they want to see, with what actually happens." An influenced distortion of information is not only common, but it is actually necessary to understanding new information. The framework of experience and knowledge allows individuals to perceive new information with the ability, through former associations, to process information in a meaningful manner. One scientist describes the theory as a necessary contradiction and notes "we cannot perceive unless we anticipate, but we must not see only what we anticipate."[26]

195. Such biased perception in a prosecutor's office does not just throw off data in an experiment; it costs people years, decades, and sometimes their life. Studies reveal that the desire to confirm prior beliefs or theories, whether introduced by a supervisor or investigator or created through the investment of time, causes people to use information in ways that confirm the original conclusion. One manner is to use

24 James S. Liebman, The Overproduction of Death, 100 Colum. L. Rev. 2030, 2120 (2000).

25 Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291, 307–08 (2006).

26 Michael D. Risinger, et al., The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion, 90 Calif. L. Rev. 1, 7–14 (2002).

only information that supports the original conclusion. Another tendency is to recall facts, observations, and conversations in a manner supporting the original conclusion. Possibly the most fatal tendency is to discredit information that contradicts the original conclusion. Especially in environments inflicted with a "conviction psychology," maintaining an original conclusion by discrediting contradictory evidence, or altering the interpretation, facilitates the rationalization for misconduct, particularly Brady violations.[27]

196. Perhaps the best description of the internal justification for prosecutorial misconduct is from Jack Wolfe, a former federal prosecutor in Texas, who told USA Today:

> Prosecutors think they're doing the Lord's work, and that they wear the white hat. … I thought everything I did was right. So even if you got out of line, you could tell yourself that you didn't do it on purpose, or that it was for the greater good.[28]

197. Prosecutorial misconduct and arrogance can be attributed to a variety of factors emerging from countless sources, but the true problem is the systemic protection of unfettered arrogance.[29] The checks in place to review a claim of innocence may be enough to vindicate the wrongly convicted, but the checks do very little, if anything, to stop prosecutorial misconduct. Because the system lacks adequate repercussions for prosecutorial misconduct, not only are the wrongly convicted denied actual justice, but the prosecutors are all but encouraged to continue with their conviction-hungry antics.

IV. Redress, and Mitigating Misconduct

198. Human institutions are inherently imperfect. In fact, Justice Scalia addressed the imperfection stating, "one cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation."[30] While human error cannot be completely negated, the redress John Thompson sought did not trickle down from a mistake. Thompson's suit was not against the eyewitnesses who mistakenly identified Thompson. He sought accountability from the prosecutors who willfully suppressed evidence that would have

27 Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291, 311–15, 328 (2006).

28 Brad Heath & Kevin McCoy, Prosecutors' Conduct Can Tip Justice Scales, USA Today, Sept. 23, 2010.

29 Brad Heath & Kevin McCoy, Prosecutors' Conduct Can Tip Justice Scales, USA Today, Sept. 23, 2010.

30 Kansas v. Marsh, 548 U.S. 163, 199 (2006).

vindicated him of the false charge before spending eighteen years in prison. Thompson's exoneration was only the first step in reclaiming his life.

199. Exoneration only places the wrongfully convicted on the outside of prison walls. Exoneration does not reestablish the life held before being convicted of a crime committed by someone else. Competing for a job is difficult after spending years in prison on the wrong side of the learning curve, and can be particularly hard for members of broken homes.[31] The options to financially stabilize victims of prosecutorial misconduct are increasingly scarce.

200. With criminal prosecution of rogue prosecutors at the discretion of the state and unable to provide the victim with actual compensation, civil litigation should be a readily available avenue for victims of prosecutors' willful misconduct. Indeed, such redress is the very heart and soul of civil litigation — the ability to make one whole after an injury inflicted by another. However, prosecutors, and their offices, are generally protected by civil immunity for their actions, regardless of cause or effect.[32]

Barring Civil Litigation

201. The primary federal statute used in a civil claim for an unlawful constitutional violation, including unjust conviction, is 42 U.S.C. § 1983, which states in part:

> Every person who under color of any statute … subject[s] any citizen of the United States … to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured … except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity …[33]

202. While section 1983 provides the unjustly convicted hope for civil redress, the opportunity to use the statute is limited. The Supreme Court, in interpreting prosecutors' role in advocating a case as "quasi-judicial," has afforded prosecutors absolute immunity against civil suit and liability to injured parties in all acts or omissions as an advocate.[34] If the act or omission occurred outside the "quasi-judicial" delineation, during the prosecutor's role as an investigator or administrator, a qualified immunity is applied.[35] As a result, very few cases have made it to court, and even fewer have

31 Adele Bernhard, A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why, 18 B.U. Pub. Int. L.J. 403, 407 (2009).

32 Imbler v. Pachtman, 424 U.S. 409, 428–30 (1976).

33 42 U.S.C. § 1983 (1996).

34 Imbler v. Pachtman, 424 U.S. 409, 424–27 (1976).

35 Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993); Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

provided relief for the wrongly convicted.[36]

Prosecutorial Immunity

203. While the reasons behind prosecutorial misconduct are elusive, the immunity attached to prosecutorial misconduct is well defined and often all-inclusive. There are two types of immunity to which a prosecutor may be entitled: absolute immunity and qualified immunity.

204. Generally speaking, immunity is a protection provided in certain situations to encourage action without fear of suit. Such is demonstrated in the Good Samaritan Doctrine that most states have adopted by statute to some extent. The goal of the Good Samaritan Doctrine is to encourage people to help others in need without the hesitation of being sued if something goes wrong. Nonetheless, there are exceptions.[37] Justice Cardozo noted that "[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."[38]

205. The Good Samaritan Doctrine provides an exception to immunity from civil litigation for victims who are injured as a result of another's failure to exercise "reasonable care to protect his undertaking."[39]

206. Prosecutors enjoy a type of immunity that extends far beyond the Good Samaritan rule, despite the difference that a prosecutor is trained in the law, takes an oath to perform duties faithfully, and is charged with the extraordinary power to seek justice, not convictions.[40] Perhaps the more important observation is that prosecutorial immunity does not pause to consider why the injustice occurred or if the prosecutor even exercised "reasonable care to protect his undertaking." In fact, the only consideration is in which functional capacity the prosecutor was acting when the misconduct occurred.[41]

207. Prosecutorial immunity is far more than a defense to a civil suit; it removes the ability to even file a civil suit against a prosecutor and frees prosecutors from all burdens associated with litigation.[42] If the misconduct happened during the prosecutor's

36 Innocence Project, Frequently Asked Questions.

37 Good Samaritan Doctrine.

38 Glanzer v. Shepard, 135 N.E. 275, 276 (N.Y. 1922).

39 Restatement (Second) of Torts 324A (1965).

40 32 C.F.R. § 12.3 (b)(11).

41 Van de Kamp v. Goldstein, 129 S. Ct. 855, 861 (2009).

42 Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982); see also Mitchell v. Forsyth, 472 U.S. 511, 525–26 (1985).

role as an advocate, then absolute immunity protects the prosecutor.[43] Whereas, if the court finds the act does not meet the guidelines for absolute immunity, the prosecutor may still be protected by qualified immunity depending on the factual determination[44] regarding the prosecutor's role as an investigator or administrator.[45]

Absolute v. Qualified Immunity

208. In extending absolute immunity to prosecutors, the Court equated prosecutors with legislators, judges and jurors who, "acting within the scope of their duties," have historically operated under the guarantee of absolute immunity.[46] Common law has long recognized absolute immunity as a necessary protection in the judicial process because of the inherent need to use discretionary judgment — which is often a subject for debate. Similarly, the Court has protected prosecutorial immunity through the prosecutor's "quasi-judicial" role and may only be challenged when the prosecutor's act or omission occurs outside the role of advocate during his or her role as an investigator or administrator.[47]

209. The nature of the specific act determines whhich prosecutorial duties receive absolute immunity and which receive qualified immunity, not the result of the act or the title of the actor. Prior to establishing probable cause to arrest a suspect, the Court finds most acts by prosecutors analogous to investigative acts by police and detectives, which only receive qualified immunity. Acts that can be "retrospectively described as 'preparation' for a possible trial" are not automatically afforded absolute immunity, and there is no rationale to extending prosecutors absolute immunity where police, performing the same function, receive qualified immunity. Nevertheless, probable cause is not a definitive line. After probable cause is established (or if a prosecutor decides to bring an indictment without probable cause), it is still necessary to determine if the act was committed as an advocate, or as an investigator or administrator.[48]

210. Finding the act occurred outside the role as an advocate is the only lifeline a claimant has against a prosecutor. If the act occurred when the person was not acting as an advocate, the person is only entitled to a qualified immunity. If the only immunity applicable is qualified immunity, it only applies when the conduct "does not violate clearly established statutory or constitutional right of which a reasonable

43 Imbler v. Pachtman, 424 U.S. 409, 428–30 (1976).

44 Johnson v. Jones, 515 U.S. 304, 313 (1995).

45 Burns v. Reed, 500 U.S. 478, 494–96 (1991).

46 Imbler v. Pachtman, 424 U.S. 409, 417–23 (1976).

47 Burns v. Reed, 500 U.S. 478, 500–01 (1991).

48 Buckley v. Fitzsimmons, 509 U.S. 259, 274 (1993).

person would have known."[49] Thus good faith comes into question when determining if qualified immunity applies.[50] Stated another way, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[51]

211. When the Court found prosecutors to be "quasi-judicial" officers and afforded them absolute immunity for all actions, regardless of malicious intent, the Court enabled even the "plainly incompetent or those who knowingly violate the law" to behave without liability to the very justice they are charged with protecting.

Policy v. Reality

212. In extending prosecutorial immunity, the Court relied up the fear that if prosecutors are not afforded absolute immunity as advocates, the fear of unfounded litigation would distract the prosecutor and "shade his decision instead of [allowing him to] exercise[e] the independence of judgment required by his public trust."[52] But, the reality of absolute immunity allows prosecutors to act without accountability, under the color of law, and without fear that a defendant will file a civil suit when that power is abused.

213. The policy behind absolute immunity treats the prosecutor's office as an ideal group of people, and forgets human intuitions are inherently imperfect, with imperfect and corrupt participants. One thing separating many criminals from the rest of the world (besides getting caught) is the self-assurance he or she will not face punishment. Absolute immunity furthers that notion. A vivid illustration rests in the media attention during the market crash in 2007. In the wake of the crash, Investment News reported more than half of those surveyed said they would take part in insider trading if they knew they would not be arrested, noting "[i]t can't be wrong if I can't get caught."[53] Absolute immunity may not remove the fear of being caught, but it does remove accountability to the victim.

214. The line separating absolute immunity from qualified immunity not only offers courts confusion in application,[54] but it is not even necessary to protect public policy. In reality, absolute immunity weakens faith in the criminal justice system because

49 Behrens v. Pelletier, 516 U.S. 299, 306–07 (1996) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

50 Fed. Prac. & Proc. Juris. § 3573.3

51 Malley v. Briggs, 475 U.S. 335, 341 (1986).

52 Imbler v. Pachtman, 424 U.S. 409, 423 (1976).

53 Darla Mercado, Getting Caught's the Crime, Says Traders, Investment News, Aug. 20, 2007.

54 Compare Buckley v. Fitzsimmons, 509 U.S. 259 (1993), with Imbler v. Patchman, 424 U.S. 409 (1976).

the individuals who suffer the most from the overbreadth of its application are the same individuals targeted by the prosecutorial misconduct that is protected by its application. Indeed, there is significant distrust of the criminal justice system among the poor and minorities. An estimated 57% of those wrongfully convicted are African-American.[55]

215. While the Court interprets section 1983 to contain, through silence, absolute immunity for prosecutors in "quasi-judicial" roles,[56] it does not make sense for Congress to establish a remedy for victims of governmental officials who illegally abuse their power by depriving citizens of their constitutional rights, if the protectors of citizens' constitutional rights are absolutely immune when they illegally abuse their power.

216. Indeed, public policy is offended when criminal activity is protected against litigation. Imbler v. Pachtman is a cornerstone in the Court's interpretation and application of absolute immunity. Interestingly, Justice White's concurring opinion in Imbler challenges the historic footing of prosecutorial immunity and notes the use of civil damages in section 1983 as a congressional attempt to deter governmental misconduct against its citizens. Absolute immunity could not frustrate this objective more. Justice White stated "it is by no means true that such blanket absolute immunity is necessary or even helpful in protecting the judicial process" and concluded "one would expect that the judicial process would be protected — and indeed its integrity enhanced — by denial of immunity to prosecutors who engage in unconstitutional conduct."[57] Nevertheless, Justice White upheld the majority's application of absolute immunity because the violations were not adequately alleged.

217. Despite extending absolute immunity, Imbler accurately described absolute immunity as "leav[ing] the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." In spite of the consequences, Imbler's majority rested with the notion that anything less than absolute immunity would "disservice the broader public interest."[58] The question remains: if qualified immunity is a sufficient tool to protect the honest governmental officials, why does the Court majority insist on extending absolute immunity to dishonest and incompetent prosecutors?

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55 Margaret Johns, Reconsidering Absolute Prosecutorial Immunity, 2005 B.Y.U.L. Rev. 53, 123, 124–25 (2005).

56 Fed. Prac. & Proc. Juris. § 3573.3 at note 32.

57 Imbler v. Pachtman, 424 U.S. 409, 430–31, 442 (1976) (White, J., concurring).

58 Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

Municipality Immunities

218. In light of prosecutors' absolute immunity as advocates, exonerees such as John Thompson have sought to hold the local government accountable for prosecutors' misconduct, under section 1983 through an "inadequate training" claim.[59] However, while section 1983 may hold local governments or municipalities — although "local government" and "municipality" are used interchangeably by the Court in the application of section 1983, "municipality" will be used throughout the discussion here — liable for deprivation of federal rights, section 1983 is not a vicarious liability outlet and may not be applied through a theory of respondeat superior.[60] The limited application by the Court diminishes the glimmer of hope section 1983 gave to holding someone accountable for prosecutorial misconduct.

Early Interpretations of Section 1983

219. The emergence of section 1983 brought decades of Supreme Court decisions, and several subsequent reversals, regarding application to municipalities. Initially in interpreting section 1983, the Court held municipalities were not included in the "persons" addressed as having liability under section 1983, creating absolute municipality immunity.[61] Seventeen years later, the Court overruled Monroe and decided municipalities were not entitled to absolute immunity and may be liable under section 1983 in some situations.[62] The question of qualified immunity was not, however, addressed.

220. After failing to address under which situations municipalities may be liable for under section 1983, the Court specifically addressed municipality immunity. While reaffirming a state officer's qualified immunity when acting in accordance to policy or custom, the Court rejected extending qualified immunity to municipalities for the employee's corresponding "good-faith" constitutional violation. However, the Court stated municipality liability does not arise out of a theory of respondeat superior; municipality liability only attaches to constitutional violations when the tort arises from the official policy or custom an employee was carrying out. The Court noted that, if municipalities were afforded immunity with any greater application, not only would the legislative purpose of section 1983 be discredited, but such application would offend public policy. [63]

59 Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011).

60 Pembaur v. City of Cincinnati, 475 U.S. 469, 478 (1986).

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

62 Monell v. Dept. of Social Serv., 436 U.S. 658, 702 (1978).

63 Owen v. City of Independence, 445 U.S. 622, 650 (1980).

221. In short, liability under section 1983 extends to the individual or entity whose own act or omission caused the illegal deprivation of a federal right. As a result, if the prosecutor illegally deprived an individual's constitutional rights based on an "action pursuant to official municipal policy of some nature," the individual or municipality responsible for imposing the policy or custom may be held civilly liable.[64]

Vanishing Liability for Prosecutorial Misconduct

222. The potential for municipalities to be civilly liable for employees' actions, based on custom or policy, seemingly created an avenue toward redress. However, to have a valid cause of action, the exoneree must base his claim on the prosecutor's misconduct arising from a municipality's policy or custom.[65] Prosecutorial misconduct, by definition, is an "improper or illegal act (or failure to act)";[66] findings that a policy or custom directly generated such "improper or illegal" behavior in a district attorney's office have been few and very far between.[67] Some exonerees, such as John Thompson, have filed claims based on a municipality's failure to train, which allegedly provided cause for the prosecutorial misconduct.[68]

223. In Connick, the Court construed a decision not to train employees to avoid violating a citizen's rights as an "official policy" under section 1983. However, the Court further indicated a failure to train claim must be supported by the municipality's "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." Deliberate indifference is an exceedingly tough standard to prove because the burden of proof requires establishing that "a municipal actor disregarded a known or obvious consequence of his action."[69]

224. The Court indicates a pattern of constitutional violations may be enough to put a municipality on notice of the need to train, but a single act of tortious conduct in a "peculiar incident" does not indicate improper training or knowing disregard. Though not explicit, the Court seems to imply that a pattern of constitutional violations requires not only similar acts or omissions, but also similar details surrounding the act or omission. The Court's cavalier statement makes two cases of misconduct, by

64 Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986) (quoting Monell v. Dept. of Social Serv., 436 U.S. 658, 664, 691 (1978)); see also Connick v. Thompson, 131 S. Ct. 1350, 1359–60 (2011).

65 Connick v. Thompson, 131 S. Ct. 1350, 1359–60 (2011).

66 Black's Law Dictionary (Bryan A. Garner ed., 9th ed., 2009).

67 Compare Redcross v. County of Rensselaer, 511 F. Supp. 364, 370 (N.D.N.Y. 1981) with Cerbone v. County of Westchester, 508 F. Supp. 780, 783–84 (S.D.N.Y. 1981).

68 Connick v. Thompson, 131 S. Ct. 1350 (2011).

69 Connick v. Thompson, 131 S. Ct. 1350, 1359, 1360 (2011) quoting City of Canton, Ohio v. Harris, 489 US 378, 388 (1989) and Board of Comm'rs of Bryan Co. v. Brown, 520 U.S. 397, 410 (1997).

suppressing evidence, singular "peculiar incident[s]" if the nature of the suppressed material is technically different. Factual distinctions between cases will inherently classify virtually all misconduct cases as "peculiar incident[s]."[70] Because the Court's scrutiny focused on the details of what the violation pertained to, and not the violation itself, it is hard to imagine enough cases where the details would afford proper notice.

225. There is an exception to the requirement that a pattern of constitutional violations must exist before a municipality may be liable. If the constitutional violation encountered was the "obvious" consequence of inadequate training, the single incident may be enough to establish municipal liability because such a failure may imply deliberate indifference to the obvious need.[71] The Connick Court addressed the need for Brady training as being "unobvious" because law school provides prosecutors with ample training to prepare them in practice.[72] Through discounting any suggested fault or oversight of the chief prosecutor or municipality, the Court suggests the prosecutors' actions were independent, self-generated decisions to disobey the law, and were made despite adequate academic preparation in the application of clearly defined law. It is this very type of behavior which the Court finds eludes local government detection, that should fit within the classification of "plainly incompetent or those who knowingly violate the law."[73]

226. The protection of prosecutors' voluntary decisions to violate the law is mysterious. With the judiciary systematically removing the ability for the unjustly convicted to seek redress against prosecutorial misconduct, the exonerated are left seeking legislative provisions.

Other Options for Monetary Compensation

227. With immunity barring civil litigation as a viable option for exonerees, the alternative for compensation is through a private bill providing for reparation or a compensation statute. Of the two governmental attempts to compensate exonerees private bills are the most difficult, inconsistent, and least frequented course of compensation primarily because of their inherent political nature.[74]

70 Connick v. Thompson, 131 S. Ct. 1350, 1354, 1360 (2011); see Board of County Comm'rs, 520 U.S. 397, 408–09 (1997).

71 City of Canton, Ohio v. Harris, 489 U.S. 378, 388–89 (1989).

72 The formal training and continuing education, coupled with the ethics training and assessments — which should provide policy support to holding prosecutors liable for their wanton disregard for the oath taken as a prosecutor — is the same rationale for removing fault from the chief prosecutor and municipality. Connick v. Thompson, 131 S. Ct. 1350, 1361–63 (2011).

73 Malley v. Briggs, 475 U.S. 335, 341 (1986).

74 Innocence Project, Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation (2009).

228. Private legislative bills proposing a monetary award to compensate an exoneree for the state's misconduct[75] have several drawbacks beginning with those state constitutions that prohibit private legislative bills and continuing with the need for the political connections necessary to pass the bill.[76]

229. The very nature of a private bill's success requires the exoneree to find a legislator who will introduce the bill and enough political favor to see its passage.[77] If successful, the outcome can be very lucrative because the amount approved depends on the favor of the political players, not the limits of a statutory formula, but the process can take years, is unpredictable, and not guaranteed to bear fruit.[78]

230. More frequently, exonerees receive monetary compensation through a state statute. Twenty-seven American governments, including the District of Columbia and the federal system, have compensation statutes. Compensation statutes offer a formula for the amount of financial assistance to those able to demonstrate actual innocence and wrongful conviction. Since the statutes are not uniform, the variations between each statute prescribe a wide range of monetary compensation depending on the state, the conviction, and a variety of statistical formulations. Yet, the compensation is not certain, swift, accommodating, or comprehensive. The average wait for exonerees who meet all the requirements in a state with a compensation statute is three full years. Even then, the majority of exonerees do not receive the full amount, and few are offered assistance with societal integration. In fact, 81% receive less than the federal standard and only ten states provide services such as educational assistance, employment training, or other social services.[79]

231. Compensation statutes do not immediately afford exonerees compensation even when actual innocence is demonstrated. There are countless requirements, varying from state-to-state, precluding compensation for reasons such as providing a false confession (regardless of coercion) or having a previous felony (even if unrelated). As a result, compensation for actual innocence of a wrongful conviction for rape and kidnapping can be barred by a single, unrelated drug conviction that is over ten years old.

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75 Adele Bernhard, When Justice Fails: Indemnification for the Unjust Conviction, 6 U. Chi. L. Sch. Roundtable 73, 93–97 (1999).

76 John J. Johnston, Student Author, Comment & Note: Reasonover v. Washington: Toward a Just Treatment of the Wrongly Convicted in Missouri, 68 U.M.K.C.L. Rev. 411, 416–17 (2000).

77 Adele Bernhard, A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why, 18 B.U. Pub. Int. L.J. 403, 408 (2009); see also Innocence Project, Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation (2009).

78 Adele Bernhard, A Short Overview of the Statutory Remedies for the Wrongly Convicted: What Works, What Doesn't and Why, 18 B.U. Pub. Int. L.J. 403, 407–08 (2009).

79 Innocence Project, Reforms by State.

232. While compensation statutes present a variety of serious problems, the most prevalent problem is how the prosecutor's role in the wrongful conviction is ignored.[80] Whether the exoneree suffered decades of death row incarceration because of witness misidentification or because of the prosecution's deliberate suppression of evidence, the statutory award remains the same. Mistakes happen and state compensation statutes try to address the inherent flaws of human institutions, but compensation statutes do nothing to redress the prosecutors' malicious constitutional violations of the defendant in the first place.

The Effectiveness of Apologies

233. Redress and accountability for prosecutorial misconduct is increasingly limited. Judicial options are few and far between, and legislative options never consider the prosecutor's fault for the injustice. As a result, victims of prosecutorial misconduct are left with only the possibility of an apology as acknowledgment for wrongdoing. While an apology does nothing to sustain financial well-being for exonerees, an apology can be critical in the healing necessary for the exoneree to begin life again and to reintegrate with society.

234. Apologies have been long documented to help victims overcome suffering from the wrongdoing of another. Apologies help erase stigmas that a mere exoneration cannot, and yet an overwhelming number of prosecutors deny the simple gesture.[81] By denying public acceptance of responsibility, the individual and community skepticism of the justice system continues unfettered. When an exoneration based on actual innocence does not automatically expunge the conviction record,[82] the public acknowledgment of the prosecutor's wrongdoing helps confirm the actual innocence of the victim to those skeptical of the release by relieving some of the stigma previously felt by the exoneree, even after being released.[83]

235. Even though apologies are documented to make a difference in the healing process, many prosecutors whose misconduct created the avoidable injustice are reluctant to apologize. Aside from pride and arrogance, there are few reasons the prosecutor

80 See Innocence Project, Reforms by State.

81 Abigail Penzell, Apology in the Context of Wrongful Conviction: Why the System Should Say It's Sorry, 9 Cardozo J. Conflict Resol. 145, 145–47 (2007).

82 Exoneration does not necessarily seal the conviction record of the wrongful conviction. Many states have required procedures in order to seal the record often, requiring the hiring of an attorney to carry out the required procedures, which takes money many exonerees do not have. See 22 Okl. St. Ann. § 18 (2011); 22 Okl. St. Ann. § 19 (2002); Buechler v. State, 175 P.3d 966, 969 (2007).

83 Abigail Penzell, Apology in the Context of Wrongful Conviction: Why the System Should Say It's Sorry, 9 Cardozo J. Conflict Resol. 145, 145–46 (2007).

should resist a public apology. In other situations, people hesitate to apologize for fear that the apology will be used in litigation as acknowledgment of wrongdoing.[84] Absolute immunity from civil litigation bars suits even before the discovery phase begins, however, removing potential liability as a reason for not apologizing.[85]

236. The remaining rationale lends to the same rationale used for prosecutorial misconduct. A prosecutor who is more concerned with a conviction record than justice is similarly unmoved with recanting his or her contribution to the miscarriage of justice. However, the lack of apology does not indicate the prosecutor felt no fault in the wrongful conviction. Some malicious prosecutors will admit fault when an extenuating circumstance, such as declining health, intervenes, perhaps to clean their guilty consciences. In Connick v. Thompson, for example, the prosecutor's confession of his misconduct came just after being diagnosed with terminal cancer; it was given to a former assistant district attorney, who withheld the information until questioned about the recovery of the missing crime lab report.[86]

237. With the Court permitting prosecutorial misconduct to rest behind absolute immunity, there are few people addressing the accountability of the misconduct.[87] As a result, prosecutors are never forced to accept their misconduct was not for the "greater good."[88] Without a public method to confront the problem of prosecutorial misconduct at the source, the conduct will inevitability persist.

Precedent

238. One argument protecting the continued use of absolute immunity is precedent. This argument is unpersuasive and needs little discussion. Indeed, precedent regarding municipality immunity has already been overturned and restructured. Precedent denying justice in constitutional violations has never carried weight to continue injustice. The Dred Scott case reminds us all too well precedent is not an inexorable command.[89] In fact, the Court clearly acknowledges "stare decisis is not an inexorable command. … [It] is a principle of policy and not a mechanical formula of adherence to

84 Abigail Penzell, Apology in the Context of Wrongful Conviction: Why the System Should Say It's Sorry, 9 Cardozo J. Conflict Resol. 145, 152–53 (2007).

85 See Connick v. Thompson, 131 S. Ct. 1350 (2011).

86 Connick v. Thompson, 131 S. Ct. 1350, 1357 (2011).

87 Connick v. Thompson, 131 S. Ct. 1350, 1363 (2011) (citing LSBA Articles of Incorporation and ABA Model Rule of Prof'l Conduct); but see Neil Gordon, Misconduct and Punishment, Ctr. for Pub. Inquiry; Ephraim Unell, A Right Not to Be Framed: Preserving Civil Liability of Prosecutors in the Face of Absolute Immunity, 23 Geo. J. Legal Ethics 955, 960 (2010).

88 Brad Heath & Kevin McCoy, Prosecutors' Conduct Can Tip Justice Scales, USA Today, Sept. 23, 2010.

89 Scott v. Sandford, 60 U.S. 393 (1857).

the latest decision."[90] Indeed, while the judicial process is directed to a political end, the law is a language "judged by its usefulness" to work for the present community rather simple application of what historically was applied.[91]

V. Between a Rock and a Hard Place

239. While the number of exonerees based on actual innocence is low compared to the number of prisoners,[92] it says very little of the priority we place on the claimed fundamental value of the criminal justice system. Claiming "it is far worse to convict an innocent man than to let a guilty man go free" means little when the innocent is convicted, the individual guilty for that injustice is the one who goes free, and the system facilitates it. In fact, it seems that when the fundamental value is compromised, so is the fact that the real victim in the miscarriage of justice is the wrongfully accused. The system becomes tied up in evaluating the need to protect the wrongdoer, and the focus on the victim is lost. Sherrilyn Ifill observed on her blog that neither counsel nor any of the Justices made any reference to John Thompson, or his suffering fourteen years on death row, during the Supreme Court Oral Arguments. Further, she noted in the transcript:

> indifference and cynicism that so often characterizes our society's response to gross and inhumane constitutional violations in the criminal justice system. … A man's life was stolen … and still Justice Scalia's most biting and obnoxious remarks … were greeted … with laughter.[93]

240. Perhaps the media will be the key to changing the injustice happening to a minority of the individuals who pass through the justice system, just as the media were instrumental in bringing a minority's fight against injustice to the forefront of American history during the Civil Rights Movement.[94] Hollywood has taken a step in the production of movies and films such as Conviction, the true story of Betty Anne Waters in her journey to exonerate her brother after eighteen years in prison because of the state's misconduct. And although the movie does not fully explore the extent of the misconduct, it does illustrate the unlawful threat and manipulation of depositions

90 Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quoting Helverling v. Hallock, 309 U.S. 106, 119 (1941); see also Lawrence v. Texas, 539 U.S. 558, 577 (2003); Smith v. Allwright, 321 U.S. 649, 655 (1944): "this Court has never felt constrained to follow precedent."

91 The Canon of American Legal Thought 736–38 (David Kennedy & William W. Fisher III eds., 2006).

92 Kansas v. Marsh, 548 U.S. 163, 197 (2006) (Scalia, J., concurring) (citing Joshua Marquis, The Innocent and the Shammed, N.Y. Times, Jan. 26, 2006).

93 Sherrilyn Ifill, Why We Ignored the Supreme Court's Review of Connick v. Thompson, American Constitution Society for Law and Policy blog, Oct. 12, 2010.

94 Aniko Bodroghkozy, Equal Time: Television and the Civil Rights Movement (2012).

taken by state officials to seek an arrest and ultimately a conviction.[95] The public can only fight to change the injustices it is aware of, and without the media, social striations keep the plight of the injustice from people who influence political players. (While the unjustly convicted are not always a classic minority, minority in this term is used to describe the population targeted by prosecutorial misconduct, which is not the majority of the population.)

241. Until the problem addressing prosecutorial misconduct becomes a "political end," and the polls are affected by the neglect of accountability or redress for avoidable injustice in an already flawed system, we may never see true justice for the exonerated or the true criminal.

95 Conviction, Motion Picture (Columbia Pictures 2010).