THE AMERICAN INJUSTICE SYSTEM: THE INHERENT CONFLICT OF INTEREST IN POLICE-PROSECUTOR RELATIONSHIPS & HOW IMMUNITY LETS THEM 'GET AWAY WITH MURDER'

ALEXANDRA HODSON*

ABSTRACT

There is an inherent conflict of interest in the American justice system arising out of the intimate police-prosecutor relationship that has evolved in the United States over the last forty years. While police and prosecutors formerly operated as independent units, a concerted effort to join forces has resulted in close working relationships. These relationships have increasingly led law enforcement to employ perjury and unethical tactics to obtain unjust convictions against criminal defendants. In addition, they have allowed law enforcement to commit atrocious acts without fear of punishment. And, because police and prosecutors enjoy immunity under 42 U.S.C. § 1983 for almost any conduct, victims and their families are often left without recourse in either a criminal or civil forum—even when law enforcement officials commit criminal, malicious, or bad faith acts against them.

But there is hope yet. This Comment proposes a larger degree of separation between officers and prosecutors. It also proposes that law enforcement officials be held accountable for purposefully failing to report each other's misconduct and criminal acts. Finally, it suggests that immunity doctrines should be limited to exclude malicious and bad faith acts. These modifications will result in a more trustworthy and predictable criminal justice system—one that stifles the insidious behavior that leads to unjust criminal convictions, and provides § 1983 plaintiffs a better chance at recovery when law enforcement officials violate their rights.

Human progress is neither automatic nor inevitable . . .

Every step toward the goal of justice requires

sacrifice, suffering, and struggle;

the tireless exertions and passionate concern

of dedicated individuals.[1]

---

* Alexandra Hodson, University of Idaho College of Law, J.D. Candidate, 2018. I would like to thank Professors Katie Ball and Katherine Macfarlane of the University of Idaho College of Law for their guidance with this project. I would also like to thank Leland for inspiring me to believe in my wildest dreams, and Scotty for being my biggest fan and my unwavering partner.

1. MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY 191 (Beacon Press ed., 2010) (1958).

TABLE OF CONTENTS

I. INTRODUCTION

Officer-prosecutor relationships embody an inherent conflict of interest in the American justice system. This conflict is most evident when prosecutors and officers tag-team to obtain unjust convictions against criminal defendants, and when those in law enforcement walk away from criminal charges or civil liability for even the most egregious unlawful acts or constitutional deprivations. These injustices are possible because prosecutorial decisions to bring criminal charges are entirely discretionary and because immunity doctrines render § 1983 civil actions largely unsuccessful. In addition, law enforcement misconduct is all but translucent. These aspects of our justice system leave victims and their families without recourse for the wrongs committed against them.

This Comment argues that if prosecutors and officers operated on a more separate basis, if they were held accountable for their unlawful and unethical actions, and if immunity doctrines were limited to exclude malicious and bad faith acts, our

justice system would take a giant leap toward living up to its maxim of "Equal Justice Under [the] Law."[2]

Part II of this Comment will introduce 42 U.S.C. § 1983 and the private right of action it created to hold state actors civilly liable when they violate a person's rights under the Constitution or a federal statute. It will discuss the doctrines of absolute and qualified immunity as a defense for officers, prosecutors, and judges in a § 1983 lawsuit. And, it will illustrate how these immunities are overly broad, leading to injustice for § 1983 plaintiffs. Part III will discuss the conflict of interest inherent in the prosecutor-officer relationship, provide concrete examples of the repercussions of our current system, and discuss how the wide net cast by immunities fosters law enforcement misconduct. Part IV will conclude this Comment by advocating for limiting the relationship between officers and prosecutors, appointing independent prosecutors to investigate and prosecute law enforcement, and limiting the immunity doctrines to exclude protection for malicious or bad faith acts.

II. HISTORY OF § 1983 AND COMMON LAW IMMUNITIES

By enacting 42 U.S.C. § 1983 ("§ 1983"), Congress created a private right of action for an individual to bring a claim against a state actor who, under color of law, deprives the individual of rights secured by the Constitution or a federal law.[3] In sum, the statute allows a person to obtain damages or an injunction against a state actor who violates that person's individual or federal rights.[4] However, the statute "is not itself a source of substantive rights."[5] Instead, it provides "a method for vindicating federal rights elsewhere conferred."[6] As the Supreme Court noted in *Monroe v. Pape*, § 1983's "purpose is plain from the title of the legislation, '[a]n Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States[.]'"[7]

However, the Supreme Court has since established that the common law doctrines of absolute and qualified immunity are affirmative defenses to a § 1983 action.[8] These different immunities may protect a judge, a prosecutor, or a police officer from having to pay damages to the injured plaintiff when acting under color of law in violating that plaintiff's rights.[9] This Section discusses the history of § 1983 and the judicially created doctrines of absolute and qualified immunity. It then ad-

2. Quote engraved on the front of the United States Supreme Court building.
3. 42 U.S.C § 1983 (2012).
4. *Id.*
5. Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).
6. *Id.*
7. Monroe v. Pape, 365 U.S. 167, 171 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658 (1978).
8. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 239–41 (1974); Imbler v. Pachtman, 424 U.S. 409, 434–35 (1976); Briscoe v. LaHue, 460 U.S. 325, 342 (1983).
9. *Scheuer*, 416 U.S. at 237–38.

dresses the ramifications of these immunities for civil plaintiffs and criminal defendants. It concludes with an argument for limiting immunity to exclude bad faith and malicious actions.

A. Providing a Remedy for Constitutional Deprivations: The History of § 1983

42 U.S.C. § 1983 states:

> Every person who, under color of any statute . . . subjects, or causes to be subjected, 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 in an action at law, suit in equity, or other proper proceeding for redress . . . .[10]

Section 1983 arose as a mechanism to enforce the Fourteenth Amendment to the United States Constitution.[11] The states adopted this post-Civil War Amendment primarily to shield individuals from the egregious racial discrimination occurring predominantly in the South.[12] However, it was also implemented to protect citizens from state interference with individual rights, generally.[13] The Fourteenth Amendment applies only to the states and provides for due process and equal protection of the laws (among other constitutional safeguards incorporated against the states).[14] Section 5 of this Amendment expressly provides Congress with the power to pass legislation to enforce the Amendment.[15] In1871, Congress did so by enacting what is commonly known as the Ku Klux Klan Act (Act).[16]

Among several other statutes, § 1983 has its origins in this Act.[17] "The scope of section 1983 is as broad as the scope of the Fourteenth Amendment itself, which includes not only the Due Process and Equal Protection Clauses but also . . . many of the provisions of the Bill of Rights."[18] Consequently, a plaintiff can employ § 1983 to enforce federal rights expressly enumerated in the Fourteenth Amendment itself, as well as other rights that have been incorporated through the Amendment.[19] The statute is also a mechanism to enforce rights created by federal statutes.[20]

---

10. 42 U.S.C. § 1983 (2012).

11. *Monroe*, 365 U.S. at 171.

12. *Id.* at 171–175.

13. *See generally* Brown v. Bd. of Educ., 349 U.S. 294 (1955); Roe v. Wade, 410 U.S. 113 (1973) *holding modified by* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Bush v. Gore, 531 U.S. 98 (2000); Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

14. U.S. CONST. amend. XIV, §§ 1–4; *see also* Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1052 (2011).

15. U.S. CONST. amend. XIV, § 5.

16. *See* Steven F. Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation*, 27 B.C. L. REV. 911, 913–914 (1986).

17. *Id.* at 914.

18. S. Nahmod, *A Section 1983 Primer (1): History, Purposes and Scope*, NAHMOD L. (Oct. 29, 2009), https://nahmodlaw.com/2009/10/29/a-section-1983-primer-1-history-purposes-and-scope/.

19. *Id.*

20. *See* OFFICE OF STAFF ATTORNEYS, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, SECTION 1983 OUTLINE 16 (2015), http://cdn.ca9.uscourts.gov/datastore/uploads/guides/section_1983/Section_1983_Outline_nolinks.pdf [hereinafter SECTION 1983 OUTLINE].

By its express language, § 1983 allows a plaintiff to bring a suit against every person who, while acting under color of state law, violates that person's individual right(s).[21] A prima facie case under the statute is established when a plaintiff alleges that: (1) a person committed the act under color of state law, and "(2) the action is a deprivation of a constitutional right or a federal statutory right."[22] For example, "whenever a state or local law enforcement officer makes an arrest, conducts a search[,] or uses force in alleged violation of the Fourth Amendment, section 1983 is potentially implicated."[23]

While it may at first blush seem like this would be a straightforward process, it is far more perplexing than it appears. A prime example of the complexity of § 1983 revolves around its phrase, "every person."[24] In fact, every person under the statute does not mean literally every person,[25] and it is not an intuitive process to determine what this phrase actually entails. Over the years, the Supreme Court has interpreted the phrase to include obvious persons: "state and local government officials" (e.g., state judges, prosecutors, and officers), as well as not-so-obvious persons: "local governments" themselves (i.e., municipalities).[26] "Every person" excludes private citizens entirely because private citizens generally do not act "under color of state law".[27] And while federal officials are generally excluded from the purview of the statute, they may also fall within the ambit of "every person" if they act in concert with state officials to deprive a person of a federal right.[28]

There are further confusing caveats within the category of "state officials." For example, state officials who are sued in their official capacity for *damages* are not persons under § 1983,[29] while those sued in an official capacity for an *injunction* are persons under the statute.[30] However, state officials sued in an *individual* capacity for either damages or an injunction are persons under the statute.[31] To further befuddle plaintiffs, determining whether a person is a state official to begin with is difficult because "[a]n official may be a state official for some purposes and a local

21. 42 U.S.C. § 1983 (2012).

22. *See id.*; KAREN M. BLUM & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 4 (Fed. Judicial Ctr. 1998) [hereinafter BLUM & URBONYA].

23. Nahmod, *supra* note 18.

24. *See id.*

25. *See* Blessing v. Freestone, 520 U.S. 329, 340–41 (1997).

26. *See id.*; Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658 (1978). In a subsequent case, the Supreme Court enumerated four elements to establish municipal liability: "(1) that [the plaintiff] possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy 'amounts to deliberate indifference' to the plaintiff's constitutional right; and (4) that the policy is the 'moving force behind the constitutional violation.'" Oviatt v. Pearce, 954 F.2d 1470, 1474 (9th Cir. 1992) (quoting City of Canton v. Harris, 489 U.S. 378, 389–91 (1989).

27. *See* SECTION 1983 OUTLINE, *supra* note 20, at 12.

28. *Id.* at 15. There is also a federal counterpart to § 1983 that addresses individual right violations by federal actors. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

29. *See* Arizonans for Official English v. Arizona, 520 U.S. 43, 69 n.24 (1997); Hafer v. Melo, 502 U.S. 21, 27 (1991); Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).

30. *See Will*, 491 U.S. at 71 n.10.

31. *See* SECTION 1983 OUTLINE, *supra* note 20, at 10.

government official for others."[32] The effect of this scheme is that an individual wishing to bring a § 1983 action will undoubtedly need the help of a lawyer to even have the prospect of understanding what the Statute requires.

Additional uncertainty arises in the context of employing § 1983 as a remedy when a state actor has violated rights provided under a federal statute.[33] To succeed, the statute must give rise to a federal right, must create a private right of action, and must not foreclose a § 1983 remedy.[34] To determine whether a statute gives rise to a federal right, the court considers three questions: (1) Did Congress intend that the provision in question benefit the plaintiff?; (2) Did the plaintiff "demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence"?; and (3) Does the statute "unambiguously impose a binding obligation on the States"? (i.e., is the provision giving rise to the asserted right "couched in mandatory rather than precatory terms"?).[35] Only if the court answers all three of these questions affirmatively will the statute be deemed to give rise to a federal right.[36]

If the statute does provide a federal right, a court will look to whether Congress foreclosed a § 1983 remedy for the particular statute.[37] Whether a statute itself contains "an express, private means of redress" is key to determining congressional intent, and "the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which . . . an action would lie under § 1983, and those . . . that it would not."[38] "Where statutes contain provisions for criminal penalties, citizen suits, judicial review, or even administrative proceedings alone, the Supreme Court has found" that a § 1983 cause of action is foreclosed.[39]

The Supreme Court in *Blessing v. Freestone* proffered a somewhat ambiguous rule for determining whether Congress foreclosed a § 1983 remedy for violation of a particular statute:

> Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983. Because our inquiry focuses on congressional intent, dismissal is proper if Congress "specifically foreclosed a remedy under § 1983." Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.[40]

---

32. BLUM & URBONYA, *supra* note 22, at 53 (referencing McMillian v. Monroe Cty., 520 U.S. 781 (1997)).
33. *See* Blessing v. Freestone, 520 U.S. 329, 341 (1997).
34. *See id.*; Smith v. Robinson, 468 U.S. 992, 1005 (1984).
35. *Blessing*, 520 U.S. at 340–41; *see also* SECTION 1983 OUTLINE, *supra* note 20, at 16.
36. *See Blessing*, 520 U.S. at 340.
37. *Id.* at 341.
38. Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121 (2005).
39. SECTION 1983 OUTLINE, *supra* note 20, at 16 (citing *Abrams*, 544 U.S. at 121–22).
40. *Blessing*, 520 U.S. at 341 (quoting Smith v. Robinson, 468 U.S. 992, 1005 n.9 (1984)).

Whether a "comprehensive enforcement scheme" is incompatible with § 1983 is left up to the court to decide.[41] In sum, it is incredibly difficult not only to discern whom a § 1983 action may be brought against, but also what federal laws § 1983 is compatible with.

And yet another common reason an individual who brings a § 1983 action may face difficulty obtaining relief is because the Supreme Court adopted "a plethora of defenses called 'immunities'" that protect individual state and local government officials from liability for damages.[42] The various immunities are discussed below.

B. Immunity: Taking the Wind Out of § 1983's Sails

Almost one hundred years after § 1983 was enacted, the Supreme Court, in a series of decisions, determined that the common law defenses of qualified and absolute immunity apply in § 1983 actions.[43] These immunities act as a figurative get-out-of-jail-free card for some state employees acting in their official capacities, such as judges, prosecutors, and law enforcement officers.[44] Absolute and qualified immunity are affirmative defenses in a § 1983 action that preclude state officials from being held liable for damages incurred by a plaintiff, even though the official may have violated that person's rights under the Constitution or a federal statute.[45] In endorsing these immunities, the Court was concerned with policy considerations that promote officials being comfortable doing their jobs.[46] These policy considerations were laid out by the Supreme Court in *Scheuer v. Rhodes*:

> [T]he public interest requires decisions and action to enforce laws for the protection of the public . . . . Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.[47]

41. *Id.*
42. *See* Nahmod, *supra* note 18.
43. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 245–49 (1974); Imbler v. Pachtman, 424 U.S. 409, 432–35 (1976); Briscoe v. LaHue, 460 U.S. 325, 354–56 (1983). Section 1983 was enacted in 1871 as the Ku Klux Klan Act to suppress Klan activity in the South after the adoption of the Fourteenth Amendment. *See* Eric John Nies, Article, *The Fiery Cross: Virginia v. Black, History, and the First Amendment*, 50 S.D. L. REV. 182, 197 (2004).
44. *Scheuer*, 416 U.S. at 241.
45. *Id.* at 242.
46. *Id.* at 241–42.
47. *Id.*

This "error" occasionally occurs in the form of malicious or bad faith acts. But, as the Court pointed out in *Scheuer*, even intentional harm will never by itself preclude a defense of immunity.[48] This is because a court does not focus on the individual act at hand when addressing whether immunity applies.[49] Instead, the immunity inquiry is focused on the government function being performed and on the specific official's job responsibilities.[50]

While discussing immunity, the Court in *Scheuer v. Rhodes* also reasoned that there were two specific rationales for applying it at common law: "(1) the injustice, *particularly in the absence of bad faith*, of subjecting to liability an officer who is required . . . to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required" for the good of the public.[51] And, although common law immunity clearly included a good faith requirement and did not extend to malicious or bad faith acts,[52] in extending immunity to § 1983 actions, the Court abandoned the good faith requirement entirely in favor of an objective reasonable person standard.[53]

The cost of this overly-broad application of immunity is an immeasurable injustice to victims of malicious and bad faith acts. And the stated public policy arguments for extending immunity in this way do not hold up when it comes to protecting state actors from liability at the expense of injured individuals. These immunities and their ramifications are discussed further below.

C. Judicial Immunity & Ramifications

Although judges are not the focus of this Comment, they are integral to the criminal justice system and the process by which unjust convictions are possible. Thus, a discussion of judicial immunity is appropriate. Judges enjoy absolute immunity while acting in their official capacity and qualified immunity while acting in an administrative capacity.[54] Official capacities of judges are defined as "judicial acts taken within the jurisdiction of their courts."[55] A string of Supreme Court precedents establish that "generally, a judge is immune from a suit for money damages."[56] Judges also enjoy immunity from injunctions, except in rare circumstances; § 1983 specifically provides that, "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not

48. *Id.* at 242.

49. *Id.* at 241–42.

50. Hope v. Pelzer, 536 U.S. 730, 739 (2002); Bogan v. Scott-Harris, 523 U.S. 44, 54–55 (1998); Cleavinger v. Saxner, 474 U.S. 193, 201–02 (1985).

51. *Scheuer*, 416 U.S. at 240 (emphasis added).

52. *See* Dinsman v. Wilkes, 53 U.S. 390, 402 (1851).

53. *See* Rehberg v. Paulk, 566 U.S. 356, 365 (2012).

54. Stump v. Sparkman, 435 U.S. 349, 355–57 (1978); Imbler v. Pachtman, 424 U.S. 409, 423–24 (1976).

55. Schucker v. Rockwood, 846 F.2d 1202, 1204 (9th Cir. 1988) (per curiam); *see also* Mireles v. Waco, 502 U.S. 9, 9 (1991) (per curiam).

56. *Mireles*, 502 U.S. at 9.

be granted unless a declaratory decree was violated or declaratory relief was unavailable."[57] While it has been proposed that "[t]he remedy for judicial errors is an appeal, not a § 1983 lawsuit for damages,"[58] this proposition does not consider that an appeal is only desirable if the outcome of a case is not in the injured individual's favor. Thus, when a judge violates a person's individual rights, but the case ultimately comes out in that person's favor, an appeal is useless for remedying the judge's wrong.

It has been said that "[a] seemingly impregnable fortress in American Jurisprudence is the absolute immunity of judges from civil liability for acts done by them within their judicial jurisdiction."[59] Even when judges act maliciously, corruptly, or in error, they retain absolute immunity.[60] A judge may assert absolute immunity unless she "acts in the clear absence of all jurisdiction or performs an act that is not judicial in nature."[61] The Supreme Court has acknowledged that "[a]lthough unfairness and injustice to a litigant may result . . . 'it is a general principle of the highest importance to the proper administration of justice that a judicial officer . . . shall be free to act upon his own convictions, without apprehension of personal consequences.'"[62] Thus, judicial immunity, like all others under § 1983, "is not overcome by allegations of bad faith or malice[.]"[63] The Supreme Court has interestingly opined that even though this immunity will protect an unscrupulous judge, it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence . . . ."[64]

The Supreme Court case *Mireles v. Waco* offers a prime example of the egregious behavior that judicial immunity may condone. In that case, Judge Mireles of the California Superior Court ordered two police officers at the courthouse to "'forcibly and with excessive force seize and bring plaintiff into his courtroom.'"[65] The officers using "unreasonable force and violence seize[d] plaintiff [a public defender] and remove[d] him backwards" out of a different courtroom where he was expected to appear.[66] They then "'slammed' him through the doors" into Judge Mireles's courtroom.[67] Mr. Waco sued the judge for damages.[68] Even though the Supreme Court acknowledged that the judge "knowingly and deliberately approved

57. 42 U.S.C. § 1983 (2012).

58. BLUM & URBONYA, *supra* note 22, at 74.

59. Gregory v. Thompson, 500 F.2d 59, 62 (9th Cir. 1974).

60. *See Mireles*, 502 U.S. at 11; Stump v. Sparkman, 435 U.S. 349, 356–57 (1978); Meek v. Cty. of Riverside, 183 F.3d 962, 965 (9th Cir. 1999).

61. Schucker v. Rockwood, 846 F.2d 1202, 1204 (9th Cir. 1988) (per curiam) (internal citations omitted); *see also Mireles*, 502 U.S. at 12.

62. *Mireles*, 502 U.S. at 10 (quoting Bradley v. Fisher, 80 U.S. 335, 347 (1871)).

63. *Id.* at 11.

64. Pierson v. Ray, 386 U.S. 547, 554 (1967); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982) (stating that allegations of malice are insufficient to overcome qualified immunity).

65. *Mireles*, 502 U.S. at 10.

66. *Id.*

67. *Id.*

68. *Id.*

and ratified" the actions of the police officers, Mr. Waco was denied relief because the judge was entitled to absolute immunity.[69] Although it does not seem that such conduct would fall into the category of a judicial function, the Court reasoned that Judge Mireles was eligible for absolute immunity because "[a] judge's direction to court officers to bring a person who is in the courthouse before him is a function normally performed by a judge."[70]

Another example of injustice resulting from the application of absolute immunity is evidenced in the Supreme Court case, *Stump v. Sparkman*.[71] The issue in *Stump* was whether a circuit court judge was absolutely immune from suit when he authorized sterilization of a "somewhat retarded" fifteen-year-old girl.[72] The judge approved the petition instituted by the girl's mother the same day he received it "in an ex parte proceeding without notice to the minor, without a hearing, and without the appointment of a guardian ad litem."[73] Six days later, the girl was sterilized under the belief that she was just having her appendix removed.[74] It was not until she was married and trying to have children that she found out about the court order and sterilization procedure.[75] At that time, she brought a suit against the judge for violating her constitutional rights.[76]

The U.S. District Court found that the judge had absolute immunity because "whether or not Judge Stump's 'approval' of the petition may in retrospect appear to have been premised on an erroneous view of the law, [he] surely had jurisdiction to consider the petition and to act thereon."[77] The Seventh Circuit reversed on appeal holding that the judge had not acted within his jurisdiction and failed to comply with "elementary principles of procedural due process."[78] But, the United States Supreme Court reversed the Seventh Circuit, reasoning that judges are "absolutely immune from monetary liability 'for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.'"[79] Because the inquiry into the judge's actions is halted once immunity is deemed to apply, even a judge who truly acts maliciously or corruptly will not be questioned for her actions.

As a result, absolute immunity effectively excuses a judge's behavior when he commits not just an innocent mistake, but also an intentional malicious or bad faith act as long as the reviewing court decides the action was one normally performed by a judge.

69. *Id.* at 10–11.
70. *Id.* at 12.
71. Stump v. Sparkman, 435 U.S. 349 (1978).
72. *Id.* at 351.
73. *Id.* at 360.
74. *Id.* at 353.
75. *Id.*
76. *Id.*
77. *Stump*, 435 U.S. at 354–55.
78. *Id.* at 355.
79. *Id.* at 364–65 (Stewart, J., dissenting) (quoting Bradley v. Fisher, 80 U.S. 335, 336 (1871).

D. Prosecutorial Immunity & Ramifications

Prosecutors also enjoy absolute immunity while acting in their official capacities and qualified immunity when they are acting in an administrative capacity.[80] "[P]rosecutors are absolutely immune from liability under § 1983 for their conduct in 'initiating a prosecution and in presenting the State's case,' insofar as that conduct is 'intimately associated with the judicial phase of the criminal process[.]'"[81] "The test . . . for determining the scope of immunity to be afforded for particular prosecutorial activities is a functional one: there is absolute immunity for quasi-judicial functions, but only qualified immunity for administrative or investigative functions."[82] There are several factors to consider in determining which function a prosecutor's act falls under.[83] If the act is "primarily concerned with the prosecutor's role as an advocate"; has a close temporal and physical relationship to the judicial process; and "depends upon legal opinions and/or discretionary judgments," it is likely quasi-judicial and entitled to absolute immunity.[84]

Akin to judicial immunity, prosecutorial immunity is based on public policy considerations. The Supreme Court first applied this principle of prosecutorial immunity under § 1983 in its 1976 decision, *Imbler v. Pachtman:*

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges . . . acting within the scope of their duties. These include concern 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 his public trust.[85]

The Court in *Imbler* noted: "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest."[86] As evidenced by the *Imbler* opinion, the Court blatantly favored prosecutors' welfare over that of criminal defendants in creating this immunity.

The illustrious Judge Learned Hand also endorsed this view on prosecutorial immunity while acknowledging the injustice that may be wrought from it.[87] His

---

80. *See* Imbler v. Pachtman, 424 U.S. 409, 423–24 (1976); Pearson v. Callahan, 555 U.S. 223, 231(2009).

81. Burns v. Reed, 500 U.S. 478, 486 (1991) (citations omitted) (quoting *Imbler*, 424 U.S. at 431).

82. Wilkinson v. Ellis, 484 F. Supp. 1072, 1080 (E.D. Pa. 1980).

83. *Id.* at 1080–81.

84. *Id.* at 1081.

85. *Imbler*, 424 U.S. at 422–23 (emphasis added) (internal citations omitted). It stands to reason that the court could dispose of *unfounded* litigation quickly by simply dismissing patently frivolous cases. Thus, there would be no need to invoke absolute immunity in those instances, and founded litigation could go forward.

86. *Id.* at 427 (referencing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

87. *See generally Gregoire*, 177 F.2d 579.

opinion in *Gregoire v. Biddle* discusses the reasoning for dismissing a § 1983 suit outright on account of an immunity defense:

> [A]n official, who is in fact guilty of . . . any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter.[88]

He went on to state that "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."[89] But the risk of denying valuable relief to plaintiffs who assert founded claims against prosecutors far outweighs the benefit of protecting officials from unfounded lawsuits. This ability for prosecutors to essentially 'get away with murder' fosters distrust in the criminal justice system. And although there are other methods of punishing prosecutors who commit misconduct, they are constrained to either criminal prosecution or professional discipline,[90] neither of which provide relief to the actual victim of the prosecutor's wrongdoing.

Further, uncertainty looms in determining which actions qualify for absolute immunity. One case that exemplifies this uncertainty is the Sixth Circuit case, *Rouse v. Stacy*.[91] In March, 2006, Mr. Rouse was indicted for various criminal acts.[92] Mr. Rouse alleged that, "while he was incarcerated in the Fulton County Detention Center awaiting his . . . trial, [prosecutor] Stacy called the jailer on his cell phone during a court hearing and told him that Rouse had not pled guilty. . . ."[93] He then instructed the jailer to "do it tonight."[94] The prosecutor was irritated that Mr. Rouse had not pled guilty, and so he ordered violence:

---

88. *Id.* at 581.

89. *Id.*

90. *See* Imbler v. Pachtman, 424 U.S. 409, 429 (1976); *see also* BLUM & URBONYA, *supra* note 22, at 76. ("The remedies of professional self- discipline and the criminal law serve as checks to the broad discretion of prosecutors.").

91. Rouse v. Stacy, 478 F. App'x 945 (6th Cir. 2012). Although this is an unpublished opinion, it is not serving as precedent, but is used to exemplify the kind of reproachful behavior that prosecutors may believe immunity applies to, and the confusion even within the court about the standard for applying immunity.

92. *Id.* at 946.

93. *Id.*

94. *Id.*

> Around 2:00 a.m. the following morning, the jailer and two detention guards allegedly entered Rouse's cell, smothered him with a pillow, "busted his face" against an intercom, and choked him with a string. While walking out of Rouse's cell, the jailer told Rouse that next time he should plead guilty.
>
> During the first day of trial, Rouse changed his plea to guilty as part of a plea agreement with [prosecutor] Stacy.[95]

Prior to sentencing, Mr. Rouse moved to withdraw his guilty plea, but the court denied his motion.[96] Thereafter, he was sentenced to twenty-seven years in prison.[97] Mr. Rouse initiated a § 1983 action against the prosecutor and the police officers for using excessive force against him.[98] In response to the allegations, the prosecutor said that his conduct was part of "negotiating a plea agreement[,]"[99] and he asserted that he was simply "performing a prosecutorial function in seeking to induce Mr. Rouse to plead guilty to the charges against him."[100] He also argued that, "[b]ecause plea bargaining [wa]s a 'quasi-judicial' function," he was absolutely immune from suit, "however 'illegal and reprehensible'" his actions may have been.[101] The court rejected this defense and stated that his actions were "entirely outside the scope of the duties of a prosecutor."[102]

The majority's outcome in *Rouse* was logical. However, a dissenting judge agreed with the prosecutor that he should have been protected by absolute immunity, "however egregious" his actions may have been.[103] The reasoning? Because the beating was in furtherance of a plea bargain, which "falls within the protected prosecutorial function . . . ."[104] This judge assertedthat the case turned upon the purpose of the beating: if it was punishment for not pleading guilty the first time, then the prosecutor was not immune.[105] But, if the beating was to induce Mr. Rouse to plead guilty in the future, then the prosecutor was absolutely immune because he would have been "advocating for the State[.]"[106]

As evidenced in *Rouse*, the lack of standards governing prosecutorial conduct that will and will not be protected under absolute immunity is damaging to both §

---

95. *Id.*
96. *Id.*
97. *Rouse*, 478 F. App'x at 946.
98. *Id.*
99. *Id.* at 950.
100. *Id.* at 953.
101. *Id.* at 950.
102. *Id.*
103. *Rouse*, 478 F. App'x at 956. (McKeague, J., dissenting).
104. *Id.*
105. *Id.* at 960 ("Rouse . . . alleged that Stacy ordered the beating for the purpose of inducing him to plead guilty, which begins and ends his case.").
106. *Id.* This dissenter opined that "the proper question is whether alleged misconduct was related to a prosecutorial function—i.e., was the prosecutor, regardless of the egregiousness of the act, advocating for the State?" *Id.*

1983 plaintiffs and prosecutors alike.[107] Without clear boundaries, both sides of a § 1983 suit are left unable to predict whether immunity will apply.

In sum, the prosecutorial immunity announced in *Imbler* has gone too far and simultaneously not far enough.[108] The Court should both limit absolute prosecutorial immunity to exclude bad faith and malicious acts while clearly delineating when a prosecutor will be liable for her conduct under the *Imbler* standard.

E. Police Immunity & Ramifications

Police officers also enjoy either qualified or absolute immunity, depending on the context. In *Pierson v. Ray*, the Supreme Court established that police officers have qualified immunity while acting in their official capacities as long as they do not violate a clearly established right.[109] In *Briscoe v. LaHue* and *Rehberg v. Paulk*, the Court established that officers have absolute immunity while acting as witnesses in a criminal trial or before a grand jury.[110] As discussed herein, these immunities have the potential to inflict enormous harm to civil plaintiffs and criminal defendants alike.

i. Police Acting as Police: Qualified Immunity

The case *Monroe v. Pape* opened the door for § 1983 damage suits against officers acting in their official capacities.[111] Typical § 1983 actions that are brought against officers acting in their official capacities are: excessive force, unlawful arrest and imprisonment, illegal search and seizure, deprivation of medical attention, inaction when there is a duty to act, and coercion or illegal interrogation.[112] But, because § 1983 is merely a mechanism for vindicating federal rights, police abuses that do not violate either a federal law or a specific constitutional provision, "no matter how objectionable or egregious, are not cognizable under [§ 1983]."[113]

Whereas *Monroe* seemed to provide an avenue for § 1983 plaintiffs to gain relief against officers, *Harlow v. Fitzgerald* reined *Monroe* in by establishing that officers are entitled to qualified immunity while acting in their official capacities.[114] Qualified immunity shields an officer not merely from paying damages but from litigation altogether when a plaintiff brings a § 1983 action.[115] The *Harlow* Court proffered a method for determining when qualified immunity will apply; "[G]overnment officials performing discretionary functions generally are shielded from liability for

---

107. *See generally id.*

108. *See* Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, HARV. CIV. RTS.-CIV. LIBERTIES L. REV. (2010), http://harvardcrcl.org/wp-content/uploads/2010/08/Gershman_Publish.pdf.

109. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967).

110. Briscoe v. LaHue, 460 U.S. 325, 335–37 (1983); Rehberg v. Paulk, 566 U.S. 356, 368 (2012).

111. Monroe v. Pape, 365 U.S. 167 (1961), *overruled in part by* Monell v. Dep't of Soc. Services, 436 U.S. 658 (1978).

112. Matthew V. Hess, Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 157–58 (1993).

113. *Id.* at 158.

114. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

115. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[116] Thus, officers are not liable for damages while acting under color of state law if they reasonably could have thought at the time they acted that their actions were "consistent with the rights they are alleged to have violated."[117] This immunity is considered "qualified" because it kicks in only after a separate condition is satisfied ,i.e., the officer's conduct must be deemed to not violate a clearly established right.[118] But whether an officer is acting under color of state law and whether a right is "clearly established" are not so clear.[119]

In *White v. Pauly*, the Supreme Court stated that while a previous court case does not have to be directly on point to prove that a right is clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate."[120] That premise appears to be fairly straightforward, but the Court has created muddled precedent in favor of qualified immunity, even when the *right* was clearly established at the time of the action, but the *action itself* was not yet clearly recognized as a violation of that right.[121] For example, in *Mitchell v. Forsyth*, the Court held that an official was entitled to qualified immunity for authorizing an unconstitutional wiretap because "it was not clearly established" that such a wiretap violated the Fourth Amendment.[122] This reasoning permits an official to take a novel action (e.g., wiretapping) that even she may even believe is in violation of a clearly established right, and still have no liability to a § 1983 plaintiff simply because she committed a new type of constitutional violation.[123] In effect, this means that until a court creates binding precedent that this particular action is a clear violation of that right—which may be years later, if ever—the officer can repeat the act with immunity, even when she believes that she is violating a person's rights. In essence, the Court has contributed murky principles to the "clearly established" inquiry.

---

116. *Harlow*, 457 U.S. at 818.

117. Anderson v. Creighton, 483 U.S. 635, 638 (1987).

118. *Harlow*, 457 U.S. at 818.

119. Though the Supreme Court has attempted to clarify the scope and meaning of qualified immunity, it has acknowledged the continuing confusion surrounding its applicability. *See* White v. Pauly, 137 S. Ct. 548, 551 (2017). In *White v. Pauly,* the Court highlighted the fact that from 2012–2017, it granted certiorari and issued "a number of opinions reversing federal courts in qualified immunity cases." *Id.*

120. *Id.* (internal citation omitted). The purpose of this standard is to give officers and other officials "breathing room to make reasonable but mistaken judgments . . . ." City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1774 (2015).

121. *See* Mitchell v. Forsyth, 472 U.S. 511 (1985).

122. *Id.* at 530–34.

123. Because the court applies a reasonable person standard to immunity, as opposed to a good faith standard, the court would never delve into the subjective knowledge of the officer in this example to determine if immunity applies. Although it is arguable that reasonable people do not act maliciously, the Supreme Court has rejected the proposition that maliciousness equates to objective unreasonableness, at least in the Fourth Amendment context: "Whatever the empirical correlations between 'malicious and sadistic' behavior and objective unreasonableness may be . . . the 'malicious and sadistic' factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing" on unreasonableness. Graham v. Connor, 490 U.S. 386, 397 (1989).

An officer is deemed to be acting under color of state law when she is acting within the scope of her employment.[124] Even when an officer abuses her authority or goes outside of her authority, she may still be acting under color of law.[125] This interpretation is beneficial for plaintiffs because it hinders an officer from evading liability for egregious conduct by claiming that her actions do not fall under color of law.

For example, in *Johnson v. Phillips*, an officer who sexually assaulted a homeless woman asserted that he could not have violated her constitutional rights because he was not acting within the scope of his employment when he committed the assault.[126] While he was on duty, the officer stopped the woman and enticed her into following him to an empty parking lot by telling her that he was going to provide her with information about homeless shelters.[127] He then "pressed his body up against [hers] and began making comments about her genitals."[128] At that point, he "pulled [her] shorts and underwear to the side, and proceeded to take pictures of her genitals" with his cell phone while also "penetrat[ing] her vagina with his finger."[129] The court found that he was acting within the scope of his employment because he used his position as a police officer to perpetrate these atrocities.[130]

Conversely, if an officer does not act within his scope of employment, he acts as a private citizen.[131] For example, in the Ninth Circuit case *Van Ort v. Estate of Stanewich*, an officer (Stanewich) had searched Mr. Van Ort's house.[132] The day after the search, the officer returned to the home wearing a mask, bound Mr. Van Ort, "placed a pillowcase over his head and doused him with lighter fluid[,]" while he "threatened to set him on fire unless he was given the combination to [a] safe."[133] The officer also dragged Mr. Van Ort's grandmother from room to room, demanding the safe's combination.[134] In its opinion that Van Ort could not employ § 1983 to obtain relief from Stanewich, the court reasoned that:

> Individuals do, indeed, have a right to be free from state violations of the constitutional guarantees to be secure in one's person and home, not to be deprived of life, liberty, or property without due process, and to be free from cruel and unusual punishment. Individuals, however, have no right to be free from the infliction of such harm by private actors.[135]

---

124. *See* SECTION 1983 OUTLINE, *supra* note 20, at 12.

125. *See* Anderson v. Warner, 451 F.3d 1063, 1068–69 (9th Cir. 2006); Shah v. Cty. of Los Angeles, 797 F.2d 743, 746 (9th Cir. 1986).

126. Johnson v. Phillips, 664 F.3d 232, 239 (8th Cir. 2011).

127. *Id.* at 236.

128. *Id.*

129. *Id*.

130. *See id.* at 240.

131. Van Ort v. Estate of Stanewich, 92 F.3d 831, 835 (9th Cir. 1996).

132. *Id.* at 834.

133. *Id.*

134. *Id.*

135. *Id.* at 835. The Supreme Court previously opined that the Fourteenth Amendment's "purpose was to protect the people from the State, not to ensure that the State protected them from each other." DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989).

Even though Stanewich undoubtedly exploited his position as an officer to commit this heinous crime—he had just searched the house and at that time presumably saw the safe that he eventually came back to plunder—the court found no state action. [136]

Even when an officer *is* said to be acting under color of state law, protection under qualified immunity means that officers are almost never held liable in a § 1983 suit. This is because

> [q]ualified immunity is not simply a defense to recovery at trial; it is a substantial legal barrier to preclude the defendant from undergoing the risk, expense, and aggravation of litigation where . . . the actions of the defendant, even if excessive, were within the bounds of any objective reasonable judgment.[137]

This effectively means that a judge will glaze over the facts of the case to determine whether the official violated a clearly established right while acting under color of law, without delving into any of the details.[138] And while limited discovery may be allowed in some cases as a basis for a Court's determination of whether qualified immunity applies, this is the exception and not the rule.[139] Thus, unless qualified immunity is overcome, an officer will not be subjected to the "aggravation" of litigation and a plaintiff will not receive the benefit of discovery or a trial.[140]

While qualified immunity is a substantial barrier to § 1983 plaintiffs in actions against officers, absolute immunity is an insurmountable one.

ii. Police Acting as Witnesses: Absolute Immunity

In the highly contested Supreme Court opinion *Bristiol v. LaHue*, the Court established that police witnesses have absolute immunity from actions for damages that result from their testimony at trial.[141] The court justified its japplication of absolute immunity to police testimony by contending that "[a] witness's apprehension of subsequent damages liability" might cause her to censor her testimony or cause her reluctance in coming forward to testify.[142] For example, the Court said "[a] witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence."[143]

---

136. *Van Ort*, 92 F.3d at 835. As it turned out, another police officer arrived on the scene to stop the crime and shot the intruder (whom he did not realize was Stanewich) twice, killing him. *Id.* at 834. Hence, the "Estate of Stanewich" designation for the defendant in the case.

137. Kathleen L. Daerr-Bannon, *Cause of Acti`on Under 42 U.S.C.A. § 1983 for Use of Excessive Force by Police in Making Arrest*, 59 CAUSES OF ACTION 2D 173 (2013) (Sept. 2017 Update).

138. *See* SECTION 1983 OUTLINE, *supra* note 20, at 11."The question of whether a person who has allegedly caused a constitutional injury was acting under color of state law is a factual determination." *Id.*

139. *See* Anderson v. Creighton, 483 U.S. 635, 645 (1987).

140. *Id.*

141. Briscoe v. LaHue, 460 U.S. 325, 336 (1983).

142. *Id.* at 333 (internal citations omitted).

143. *Id.*

The plaintiffs in *Briscoe* provided a plethora of arguments against applying absolute immunity to police witnesses:

> [T]he reasons supporting common-law immunity—the need to avoid intimidation and self-censorship—apply with diminished force to police officers. Policemen often have a duty to testify about the products of their investigations, and they have a professional interest in obtaining convictions which would assertedly counterbalance any tendency to shade testimony in favor of potentially vindictive defendants. In addition, they are subject to § 1983 lawsuits for the performance of their other duties, as to which they have only qualified immunity[.] . . . . Further, petitioners urge that perjured testimony by police officers is likely to be more damaging to constitutional rights than such testimony by ordinary citizens, because the policeman in uniform carries special credibility in the eyes of jurors. And, in the case of police officers, who cooperate regularly with prosecutors in the enforcement of criminal law, prosecution for perjury is alleged to be so unlikely that it is not an effective substitute for civil damages.[144]

In response, the court callously stated, "[t]hese contentions have *some* force[,]" but "our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant."[145] And "[a] police officer on the witness stand performs the same functions as any other witness" who would receive absolute immunity for her testimony.[146]

To further justify its position, the court went on to assert that "other considerations of public policy support absolute immunity more emphatically for [government witnesses] than for ordinary witnesses."[147] For example, the Court said, "[s]ubjecting government officials, such as police officers, to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties."[148] Further, "[t]his category of § 1983 litigation might well impose significant burdens on the judicial system and on law enforcement resources."[149]

After thoroughly explaining its position in *Briscoe*, the Court concluded by stating:

> In short, the rationale of our prior absolute immunity cases governs the disposition of this case. In 1871, common-law immunity for witnesses was well settled. The principles set forth in *Pierson v. Ray* to protect judges and in *Imbler v. Pachtman* to protect prosecutors also apply to witnesses, who perform a somewhat different function in the trial process but whose

144. *Id.* at 341–42.
145. *Id.* at 342 (emphasis added).
146. *Id.*
147. *Briscoe*, 460 U.S. at 343.
148. *Id.*
149. *Id.*

> participation in bringing the litigation to a just—or possibly unjust—conclusion is equally indispensable.[150]

After *Briscoe* in 1983, officers only had absolute immunity for testimony given at trial.[151] That is, until 2012 when the Supreme Court decided *Rehberg v. Paulk*.[152] In *Rehberg*, the Court extended absolute immunity to officers testifying before a grand jury.[153] Echoing *Briscoe*, the court stated that in neither the trial context nor the grand jury context is the threat of civil liability necessary to prevent false testimony "because other sanctions—chiefly prosecution for perjury—provide a sufficient deterrent."[154] The Court went on: "Since perjury before a grand jury, like perjury at trial, is a serious criminal offense . . . there is no reason to think that this deterrent is any less effective in preventing false grand jury testimony."[155]

But in coming to this conclusion in both the trial and grand jury context, the Court did not properly consider the relationship between a prosecutor and a testifying officer. While the ordinary witness may have no intimate connection to a prosecutor for which he testifies, the testifying officer often knows and works very closely with the prosecutor.[156] Indeed, the officer likely worked with the prosecutor step-by-step on the very case he is testifying about. This may create an incentive for the officer to commit perjury, and for the prosecutor to never call it out.

In addition, prosecutors themselves enjoy absolute immunity for actions taken in their official capacity.[157] This includes immunity for decisions about which crimes to prosecute.[158] The *Briscoe* and *Rehberg* Courts failed to acknowledge this significant feature of absolute immunity, which provides a prosecutor 100% discretion in deciding who to bring charges against and 0% incentive to charge an officer who commits perjury to help obtain a conviction.[159]

Another, broader issue that also applies in this context is that an independent prosecutor is almost never appointed when an individual alleges that an officer has

---

150. *Id.* at 345–46. Justice Marshall penned a vigorous dissent in that case, stating:

> In considering the competing interests at stake in this area, the majority strikes a very one-sided balance. It eschews any qualified immunity in favor of an absolute one. Thus, the mere inquiry into good faith is deemed so undesirable that we must simply acquiesce in the possibility that government officials will maliciously deprive citizens of their rights. For my part, I cannot conceive in this case how patent violations of individual rights can be tolerated in the name of the public good.

Id. at 368 (Marshall, J., dissenting).

151. *Id.* at 336 (majority opinion).

152. Rehberg v. Paulk, 566 U.S. 356, 359 (2012).

153. *Id.* at 367–69.

154. *Id.* at 367.

155. *Id.* (internal citation omitted).

156. Jon Swaine et al., *Ties that Bind*, GUARDIAN, (Dec. 31, 2015), https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings.

157. *8.2 Suits Against Public Officials in Their Individual Capacity*, SHRIVER CTR., http://www.federalpracticemanual.org/chapter8/section2 (last updated 2016).

158. *Id.*

159. *See id.; see also Briscoe*, 460 U.S. 325; *Rehberg*, 566 U.S. 356.

committed a crime, such as perjury, against him.[160] This creates a clear obstruction for the victim—who will prosecute the officer if not theofficer's colleague, i.e., the local prosecutor? Well…nobody.

In addition, evidence of perjury can be elusive and plaintiffs in § 1983 cases do not even have an opportunity to request discovery once absolute immunity is deemed to apply.[161] Even more perverse is the fact that if a criminal defendant is convicted due to perjured police testimony, that individual cannot assert a § 1983 claim against the officer unless she first has her conviction invalidated—a process that is nearly impossible.[162] And even if by some miracle she did have the conviction invalidated, absolute immunity would still bar her § 1983 claim against the officer in that instance because he was acting as a witness.[163]

The decisions in both *Briscoe* and *Rehberg* have led to unfortunate consequences for victims of police misconduct, especially in light of the police-prosecutor relationship. In sum, if given the opportunity, the Court should reconsider its proposition that criminal prosecution is an adequate deterrent to police perjury.

III. THE HISTORY OF THE POLICE-PROSECUTOR RELATIONSHIP AND RESULTING CONFLICT

A. The Police-Prosecutor Problem

The "police-prosecutor problem" has been discussed before, but in a much different context.[164] One in which officers and prosecutors were not cohorts, as they are today, but in fact they hardly communicated.[165] Prior to the 1980s, police and prosecutors were drastically less cooperative with each other than they are now, and that resulted in what was previously dubbed the police-prosecutor problem.[166] The lack of collaboration between the two groups was referred to as the cooperation gap and was characterized as the "frequent and characteristic want of cooperation between the investigating and prosecuting agencies in the same locality."[167]

---

160. The lack of "special" or "independent" prosecutor appointments is due in large part to authority given by states to their prosecutors. *See, e.g.*, CONG. RESEARCH SERV., SPECIAL PROSECUTORS: INVESTIGATIONS AND PROSECUTIONS OF POLICE USE OF DEADLY FORCE 1 (2014), https://archive.org/details/SpecialProsecutorsInvestigationsandProsecutionsofPoliceUseofDeadlyForce-crs. "The process for appointing special prosecutors varies widely from state to state. One reason for this divergence is the constitutional status of each state's prosecuting attorneys. Depending on the state, the attorney general, the district attorney, or both, are allocated prosecuting authority in their state constitutions." *Id.*

161. *See* Anderson v. Creighton, 483 U.S. 635, 645 (1987).

162. Wilkinson v. Dotson, 544 U.S. 74, 81–82 (2005). A convicted individual's "§ 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Id.* (emphasis in original).

163. *See Briscoe*, 460 U.S. at 345; *Rehberg*, 566 U.S. at 367.

164. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NIJ REPORTS NO. 214, POLICE-PROSECUTOR TEAMS: INNOVATIONS IN SEVERAL JURISDICTIONS 1 (1989), https://www.ncjrs.gov/pdffiles1/Digitization/120288NCJRS.pdf.

165. *Id.*

166. *See id*.

167. *Id.* (internal quotations omitted).

The National Institute of Justice (NIJ) proposed various reasons for this cooperation gap in its 1989 report on the issue.[168] It stated, for example, that "lawyers and police officers have different vantage points and thus different perspectives on crime. Differences between police and prosecution policies and priorities can make coordination difficult."[169] Additionally, "[a] prosecutor is likely to work normal business hours but an officer's hours may vary considerably," which could make "even simple telephone contact difficult."[170]

The NIJ stated that "[c]ase attrition (where an arrest is made but no charge is ever filed) [was] one result of poor coordination."[171] And that "[p]oor communication between the police officer and the prosecutor, for whatever reason, [made] the defense attorney's job easier and the prosecutor's job harder."[172] Consequently, various jurisdictions across America started a movement during the '80s to remedy the effects of the cooperation gap.[173] In one jurisdiction, state law mandated that officers and prosecutors work closely together.[174] In another, the county created a homicide investigation unit wherein "investigators and prosecutors work[ed] in the same office and communicate[d] every day about the progress of pending cases."[175]

The NIJ noted that while a task force approach to crime-stopping was not inventive, these new programs were distinguishable for several reasons.[176] For instance, these task forces "[did] not go out of existence when one crime [was] solved or one group of criminals [was] convicted."[177] Instead, the police officer and the prosecutor worked "in physical proximity and ha[d] daily access to one another."[178] Importantly, the aspect that gave rise to many problems that we see today was that "[t]he same investigators work[ed] with the same prosecutors, and vertical prosecution [wa]s the general rule."[179]

Vertical prosecution occurs when one prosecutor takes a case from inception to appeal.[180] "In a vertical structure, prosecutors become familiar with the cases

168. *Id.*

169. *Id.*

170. NAT'L INST. OF JUSTICE, *supra* note 164, at 1.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* ("Consider the State of Maine. In 1987, the legislature created an entirely new agency, the Bureau of Intergovernmental Drug Enforcement, which has reshaped the narcotics investigation-prosecution process. The agency is responsible for 'the integration and coordination of investigative and prosecutorial functions in the State with respect to drug law enforcement.' This specific language is unprecedented. For the first time, a State law mandates that investigators and prosecutors team up to create a more efficient and effective drug law enforcement strategy.")

175. *Id.* at 3.

176. NAT'L INST. OF JUSTICE, *supra* note 164, at 5.

177. *Id.*

178. *Id.*

179. *Id.*

180. LISA D. WILLIAMS ET AL., SIZING UP THE PROSECUTION: A QUICK GUIDE TO LOCAL PROSECUTION 9 (HARVARD COLLEGE, 2010), http://hls.harvard.edu/content/uploads/2008/07/prosecution2010.pdf.

and develop strong working relationships with the witnesses and police officers involved."[181] The intended consequence of this approach was that an officer and prosecutor would develop strong bonds by working together as partners on a case for potentially years at a time.

In the early days, effects of the new officer-prosecutor relationship were patently positive. "Commitment to cooperation by law enforcement executives and individual officers and prosecutors has yielded some impressive beginnings."[182] In regard to one jurisdiction's homicide investigation unit, the NIJ stated: "Of the 24 murder convictions the unit has succeeded in bringing about since its inception, probably fewer than 5 would have been obtained without the team approach."[183] In its report, the NIJ praised the trailblazing jurisdictions that were beginning to pave the path "for investigators and prosecutors to work closely together every step of the way, focusing on the same goal—conviction."[184]

But the notion behind promoting these close relationships appears to be premised, not on the fact that officers and prosecutors needed to work so closely together to obtain convictions, but on the fact that technology was not advanced enough to allow them to communicate important information efficiently. In its report, the NIJ noted:

> Prosecutors benefit in other ways from the close relationship with [police] investigators. Up-to-date, in-depth information from a knowledgeable detective can help the prosecutor's case. For example, the complexion of a minor case can change substantially when an investigator tells the prosecutor that the suspect has an extensive narcotics background. Such information is not normally included in the case file that is passed from the police to the prosecutor when charges are requested.
>
> In addition, police input during plea bargain discussions is invaluable to prosecutors considering offers of cooperation from suspects or making recommendations for jail time or other penalties.[185]

Because technology was inadequate at that time, the groups' communication needs were perhaps best met by officers and prosecutors effectively becoming "partners in crime" to obtain convictions. Today, though, these justifications for what has become a grossly familiar prosecutor-officer relationship do not hold water. The use of technology to share information is rampant and the communication problems of yesteryear are obsolete. Consequently, officers and prosecutors no longer need to be so intimately connected to keep each other up to speed with details of a criminal case.

181. *Id.*
182. NAT'L INST. OF JUSTICE, *supra* note 164, at 5.
183. *Id.* at 3.
184. *Id.* at 1.
185. *Id.* at 3 (internal quotations omitted).

B. Permeating Boundaries: Community Policing and Community Prosecution

While collaboration to exchange information more efficiently was one justification for the paradigm shift in the police-prosecutor relationship, there was another, less innocuous, reason for the change. During the 1980s and early '90s, police in cities around the country began implementing what they referred to as "community policing" practices.[186] Community policing involved "preventing crime and problem solving—not just arresting wrongdoers after the commission of a crime."[187] "Both in the local context, and as a development around the country that had gained significant national attention, community policing provided a model and in some cases put pressure on prosecutors."[188] One prosecutor described the pressure he felt as a result of community policing:

> I felt instinctively that, as community policing was being implemented . . . if I didn't change the way I did business…the community would draw closer to the police department. And the community and the police department, together, would come to despise my office...they would be pitted as a team against the brick wall that I represented. And they would, to the extent that they had failures…blame them on me, as the most visible proponent of the criminal justice system.[189]

This fear was likely rooted in the fact that most district attorneys and county prosecutors in America are "elected officials and political leaders, who can be blamed at the ballot box for a failure of leadership . . . ."[190] Consequently, "the prosecutor . . . emerge[s] frequently as the acknowledged leader in criminal justice."[191] Thus, the community prosecution model emerged, not in an effort to reduce crime or obtain more convictions per se, but to stay in good graces with the public who favored police tactics under the community policing model.[192]

Still, the community prosecution model effected an increased cooperation with police as well as an increase in convictions, because in this model, "the prosecutor assumes a leadership role in working closely with . . . other criminal justice agencies in the community[,]" and "boundaries demarcating the prosecutor's office

186. Catherine M. Coles, *Community Prosecution, Problem Solving, And Public Accountability: The Evolving Strategy of the American Prosecutor* 14 (Harv. Univ. Malcolm Wiener Ctr. for Soc. Policy Program in Criminal Justice Policy & Mgmt., Working Paper No. 00-02-04, 2000), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.91.2361&rep=rep1&type=pdf.

187. *Id.*

188. *Id.* at 17. "The example of community policing 'wins,' the growing use of problem-solving tactics by police, the popularity of community policing with the public, and the increase in the number of police available, all were apparent at the national level if not in every locality." *Id.*

189. *Id.*

190. *Id.* at 4.

191. *Id.* at 6.

192. *Id.* at 6–7.

from other justice, public/governmental and private agencies are increasingly permeated as they become partners."[193] Therefore, in addition to task forces, the convergence of community policing and community prosecution during the late 1980s and early 1990s "produced not only changes in the activities of prosecutors themselves, but also a trend toward greater cooperation and collaboration between prosecutors and police."[194]

C. Police and Prosecutors—Partners in Crime

Almost forty years after the beginning of the community prosecution movement and the mission to fill in the cooperation gap, our current system is in a state opposite from that of the 1980s, but with no fewer negatives. While the '80s arguably saw more criminals go free as a result of a lack of communication between officers and prosecutors, the current generation is seeing a drastic increase in misconduct as a result of the fraternal bond between the two agencies.[195] Though the former goal of increasing convictions by bringing officers and prosecutors together has been realized across the nation, it has come at the enormous cost of increased distrust in the judicial system. As evidenced in the subsequent sections, the pendulum has swung too far in the opposite direction.

i. Testifying or Testi*lying*?

Some of the tactics used in police-prosecutor tag-teams are both insidious and elusive. One pervasive example is police perjury used to obtain a criminal conviction or to avoid charges being brought against an officer.[196] Judges, prosecutors and police are in a unique position to detect and call-out false testimony. But instead of bringing indiscretions to light, these actors have condoned the use of lying on the stand to the detriment of criminal defendants, § 1983 plaintiffs, and society in general.

Police perjury "is so common and so accepted in some jurisdictions that the police themselves have come up with a name for it: 'testilying.'"[197] Testilying, as the phrase suggests, occurs when police lie under oath.[198] "Even prosecutors—or at least former prosecutors—use terms like 'routine,' 'commonplace,' and 'prevalent' to describe the phenomenon."[199] Though police perjury is a "widely known" problem in the legal system, it is nearly impossible to define the scope and depth of it.[200] A government investigation of police misconduct in New York City discussed the inevitable link between police perjury and police misconduct.[201] The study found

193. *Id.* at 26.
194. *Id.* at 16.
195. *See, e.g.*, Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1489 (2016); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1047 (1996).
196. *See* Slobogin, *supra* note 195, at 1047–48.
197. *Id.* at 1040.
198. *Id.*
199. *Id.* at 1041–42.
200. *Id.*
201. *Id.* at 1042.

that "police falsification, . . . perhaps the most common form of police corruption," was rampant in criminal prosecution cases.[202]

The problem of police testilying is one involving the entire criminal justice system, including judges who, for example, turn a blind eye on perjury to avoid having to suppress evidence when they think a defendant is guilty.[203] In one study, defense attorneys, prosecutors, and judges estimated that officers lie on the stand in twenty to *fifty* percent of suppression hearings alone.[204] In addition to suppression hearings, "[p]olice perjury has become very common in [police] brutality cases, primarily because of the pressures an officer receives from his colleagues."[205] In sum, testilying has become an epidemic in criminal cases.

ii. Reportilying

Another pervasive tactic that lends to unjust convictions is for officers to commit "reportilying" to help the prosecution.[206] Reportilying occurs when an officer knowingly falsifies a police report in an effort to increase the likelihood of a criminal conviction.[207] Although officers allegedly commit testilying and reportilying more frequently when they believe the accused has actually committed a crime, [208] the deception still occurs even when they know that the accused has not committed a crime.[209] "[P]olice lying intended to convict someone, whether thought to be guilty or innocent, . . . diminishes one of our most crucial 'social goods'—trust in government."[210] And "the exposure of police perjury damages the credibility of police testimony."[211]

iii. Above the Law: Law Enforcement Prosecution, or Lack Thereof

The phenomena of testilying and reportilying are a direct result of the police-prosecutor brotherhood in America. The tag-team approach promotes police having a dog-in-the-fight when it comes to prosecution. Instead of conducting an independent investigation, testifying, and stepping out of the picture, police today are heavily invested in the outcomes of cases. In some instances, an officer and prosecutor work closely together for years trying to lock down a conviction.[212] Consequently, this approach fosters both prosecutor and police misconduct. Though

202. MILTON MOLLEN ET. AL., COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, N.Y.C., COMMISSION REPORT 36 (1994).

203. Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 222 (2000).

204. Slobogin, *supra* note 195, at 1041.

205. Koepke, *supra* note 203, at 221.

206. Slobogin, *supra* note 195, at 1044.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 1039.

211. *Id.*

212. *See* NAT'L INST. OF JUSTICE, *supra* note 164, at 1.

these close working relationships have "made possible a blend of police and prosecution skills in the pursuit of the same goals—making strong cases and convicting criminals[,]"[213] they have also made possible great injustices.

Because police work closely with prosecutors to investigate crimes and obtain convictions, they have the ability to bolster a case without detection by the other side. While this is clearly illegal, a prosecutor has little incentive to turn against an officer who lies under oath to help him obtain a conviction. Indeed, prosecutors have an enormous incentive to obtain perjured statements and keep the untruthful nature of such testimony under wraps. Nonetheless, even though it is well-known that some officers commit perjury to obtain convictions or to get themselves off the hook when they otherwise violate the law, neither the police nor the prosecutors—both of whom are entrusted with enforcing the law)—attempt to end this practice. This problem is further exacerbated by police having absolute immunity in their capacity as witnesses. As previously discussed, absolute immunity means perjury will not subject them to liability in a § 1983 suit.[214]

Additionally, prosecutors have broad discretionary power in deciding whom to charge, which presents a clear conflict of interest when local prosecutors handle cases against the police officers they work with on a daily basis.[215] "[T]here is no group more closely linked to prosecutors than the officers they work with daily[,]" and local prosecutors have the job of prosecuting police officers who commit crimes.[216] Thus, conflict-of-interest law plays a crucial role in the "now-popular conclusion that local prosecutors should not handle cases against police suspects."[217] Yet, somehow, "scholars have paid little attention to the policies and practices of local district attorneys who are tasked with investigating and bringing charges against officers who commit crimes."[218]

Perhaps the most disconcerting facet of the police-prosecutor relationship, though, is that officers who kill people, even when unjustified, are often never brought to answer for their actions. And because prosecutors never have to, and rarely do, prosecute the officers they work with, there is no justice for victims in these circumstances. Indeed, both the criminal justice system and immunity to § 1983 suits have failed these victims and their families. This conflict has been especially evident in the wake of the highly publicized killings of unarmed victims in recent years where prosecutors refused to charge the police involved.[219] And because prosecutors have absolute discretion in determining who to prosecute, and absolute immunity protects them from a suit alleging that they have failed to do their job, there is no remedy available to these victims or their families when an officer effectively gets away with murder.

These are dire issues that need to be addressed, and viable remedies do exist. Police can step back from prosecution of criminal defendants so as to lessen their

213. *Id.* at 5.

214. *See* Briscoe v. LaHue, 460 U.S. 325, 345 (1983); Rehberg v. Paulk, 566 U.S. 356, 374 (2012).

215. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 751 (2003).

216. Levine, *supra* note 195, at 1447.

217. *Id.*

218. *Id.*

219. *Id.* at 1449.

sense of investment in the prosecution, and special prosecutors can be appointed in cases where local prosecutors are tasked with potentially charging local officers.

IV. PROPOSED REMEDIES FOR A BROKEN SYSTEM

At the very core of the American judicial system lies courts' duty to provide equal justice under the law and law enforcement's duty to serve and protect. Providing special protections for judges, prosecutors, and police when they commit intentional, egregious acts that injure their fellow Americans is the antithesis of this foundation. While change can be daunting for the courts to embrace, even minor amendments to our system, such as altering the way we handle § 1983 litigation, can go a long way in attaining justice. Additionally, police and prosecutors must be held to the high standard that their positions entail. The following sections proffer three propositions for amending our current system with an eye toward the goal of obtaining justice under the law.

A. Limit the Relationship between Prosecutors and Police

Forty years ago, it was imperative for prosecutors and police to work closely together to efficiently exchange information and effectively prosecute criminal offenders. Today, that is no longer the case. Technological advances make it entirely possible for law enforcement to exchange information almost instantaneously without even seeing each other. This close-knit relationship that began several decades ago has morphed into one that promotes unlawful and unethical conduct. It also puts law enforcement in an awkward position when it comes to prosecuting the people they work so closely with. Limiting the close relationship between prosecutors and officers will help stifle the insidious behavior that leads to unjust criminal convictions, and will promote convictions against law enforcement for unlawful acts and unwarranted constitutional deprivations. Loosening the bonds between police and prosecutors is a crucial step toward improving the justice system and holding law enforcement accountable for their wrongs.

B. Appoint Special Prosecutors to Handle Criminal Prosecutions of Law Enforcement

One of the bases for applying absolute immunity is that bad actors will be subject to answer for their misconduct in a criminal setting. But, as noted previously, prosecutors have unbridled discretion in determining whom to bring a criminal action against, and they rarely prosecute each other or their police cohorts.[220] This creates an enormous conflict of interest that has yet to be addressed. There is a simple fix to this problem, though, in that an independent prosecutor can be appointed to handle cases against law enforcement officers. And while the cost may be greater in terms of tax dollars, the value of bringing in unbiased parties to take on such matters is immeasurable when it comes to retaining community trust and ensuring justice for victims. In addition, appointing special prosecutors when

220. *See generally* Levine, *supra* note 195.

charges need to be brought against police officers or prosecutors would further two important objectives: holding law enforcement accountable for their misdeeds, and diminishing the loss of faith in our justice system that has become especially problematic in recent years.

C. Limit Immunity Doctrines to Exclude Malicious and Bad Faith Acts

Courts cringe at the thought of adjudicating claims of malicious and bad faith acts because there is a purported risk that these kinds of suits will flood the dockets and put a heavy burden on state officials. But this concern for courts and state actors is misplaced. Instead, the courts should be focusing on the injured plaintiff in a § 1983 action whose federal rights may have been willfully violated. Often, § 1983 suits alleging malicious and bad faith acts entail atrocious behavior on behalf of a state actor. While the purpose of our justice system is to hold people accountable for their actions, immunity sends the message to state officials that they will not be held liable for even purposefully harmful conduct.

Additionally, the fear of litigating unfounded claims in these instances can be set aside because complainants must allege facts that demonstrate a legitimate cause of action, and because, in any event, the court has to look into the actor's conduct to determine if immunity applies. At that point, the court can determine if there is enough of a basis to go forward with the litigation. Thus, both absolute and qualified immunity can and should be limited to exclude malicious and bad faith acts.

V. CONCLUSION

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[221] The conflict of interest inherent in the police-prosecutor relationship and the application of immunity to even willful violations of individual rights are directly contrary to the essence of civil liberty in America. When there exist glaring, remediable problems such as these, the status quo must be altered.

There are various mechanisms available to mend our current justice system: If we limit immunity doctrines to exclude malicious and bad faith acts so that law enforcement can be punished meaningfully for intentionally harming victims; if we impose requirements for a special prosecutor to take over criminal cases involving police and prosecutorial indiscretions; and if we limit the police-prosecutor relationship, we will take giant leaps toward a more just legal system.

221. Marbury v. Madison, 5 U.S. 137, 163 (1803).