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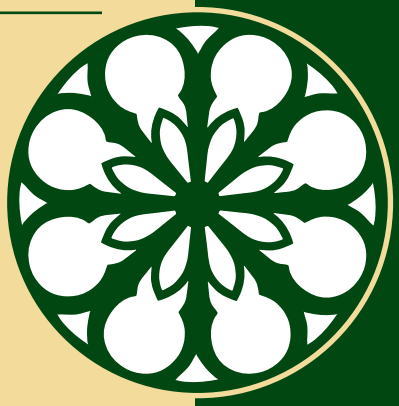

Supreme Court Preview

A PENDULUM SWUNG TOO FAR: WHY THE SUPREME COURT MUST PLACE LIMITS ON PROSECUTORIAL IMMUNITY

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I. INTRODUCTION

In the more than thirty years since the Supreme Court conferred absolute immunity on prosecutors,[1] a number of public policy factors have shifted. Chief among these factors are the nature of prosecutorial elections and the change in media coverage of criminal investigations and prosecutions. It further appears that prosecutorial misconduct is becoming more flagrant and more frequent. The legal landscape has also changed; evidence shows that prosecutorial misconduct is often not the subject of disciplinary proceedings or criminal charges, and the standards and procedures applicable to government officials raising claims of qualified immunity have been altered substantially.

In this changed context, this Term the Supreme Court will address prosecutorial immunity in the case of *Pottawattamie County, Iowa v. McGhee*.[2] The case concerns whether a prosecutor can be held liable for constitutional violations committed during the investigative phase of a case.[3] This Essay examines how the changes in public policy and the law impact the judgment on whether absolute immunity is appropriate for prosecutors engaged in investigations and concludes that: (1) it is necessary to set some boundary on prosecutorial immunity and (2) because of the important distinction between investigating and prosecuting, the case before the Supreme Court is the right place to begin to draw this line.

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1. Imbler v. Pachtman, 424 U.S. 409, 420–29 (1976).

2. 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 556 U.S. ___, 129 S. Ct. 2002 (U.S. Apr. 20, 2009) (No. 08-1065). *McGhee* is currently pending before the Supreme Court and argument in the case is scheduled for November 4, 2009. *See* http://www.supremecourtus.gov/orders/09grantednotedlist.pdf. The question presented is whether a prosecutor is subject to personal liability under 42 U.S.C. § 1983 for a wrongful conviction and incarceration where the prosecutor allegedly procured false testimony during the criminal investigation and then introduced that same testimony against the criminal defendant at trial to obtain a conviction. Petition for Writ of Certiorari, Pottawattamie County, Iowa v. McGhee, No. 08-1065 (U.S. Feb. 18, 2009).

3. *Id.*

II. MODERN PROSECUTORIAL IMMUNITY

Federal law 42 U.S.C. § 1983 states that every person who, under color of state law, deprives an individual of "any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law."[4] In short, § 1983 allows those whose rights have been violated by a state or federal official to sue for damages. Originally passed as part of the Civil Rights Act of 1871, § 1983 was largely ineffectual for almost one hundred years. It was not until 1961 that the Supreme Court held: (1) Congress intended and had the power to protect individuals from infringements of their constitutional rights by state officials; (2) a cause of action exists not only when the violation is specifically authorized by state law, but where the official commits the violation in abuse of his or her position or power; and (3) the law creates a federal right enforceable in federal court.[5]

Traditionally, under common law, many types of state officials, including judges, legislators, and prosecutors, had immunity, which protected them against the leveling of certain claims in court. Having recognized the purpose of the right created by § 1983, the Supreme Court was next compelled to examine whether Congress intended the provision to supersede or abrogate these common law immunities.

The Court first addressed the specific issue of prosecutorial immunity in *Imbler v. Pachtman*[6] and rejected the notion that Congress intended § 1983 to strip all officials of all previously existing immunities.[7] Instead, the Court determined that previous immunities would persist provided they were "well grounded in history and reason."[8] The Court found that, historically, under common law, prosecutors had been afforded absolute immunity for prosecutorial acts.[9] The majority then

4. 42 U.S.C. § 1983 (2006) (hereinafter § 1983).
5. Monroe v. Pape, 365 U.S. 167, 172, 180 (1961).
6. 424 U.S. 409 (1976).
7. *Id.* at 417.
8. *Id.* at 418 (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)).
9. *Id.* at 422–24.

proceeded to analyze and weigh the public policies underlying this absolute immunity and concluded, albeit apologetically,[10] that absolute immunity was appropriate.[11] Specifically, the Court found that any possibility that prosecutors may be held liable could take away from prosecutorial independence, causing "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."[12] Moreover, the Court found that there are ample other means of deterring prosecutorial overreaching and vindicating the constitutional rights of a defendant, including post-trial motions, professional discipline, and criminal sanctions against the prosecutor.[13]

The major question left open in the *Imbler* decision was whether a prosecutor could be liable for acts not "integral" to the "judicial process."[14] The *Imbler* Court held open the possibility that a prosecutor might be held liable for "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate."[15] In the years following the *Imbler* decision, the Court addressed what was integral to the judicial process in a number of cases. For example, the Court held that prosecutors are entitled to immunity for actions taken in preparation of the initiation of a judicial proceeding but not when speaking to the press.[16]

The Court also began to define when the prosecutor is acting as an investigator and therefore not entitled to absolute

10. The Court acknowledged that its decisions would leave victims of serious prosecutorial misconduct without redress, but concluded that doing so was a lesser evil than forcing all prosecutors to face the prospect of unfounded litigation and, potentially, have their decisions impacted by concerns about liability. *See id.* at 427–28. ("As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative.") (citation omitted).

11. *Id.* at 424–31.

12. *Id*. at 423.

13. *Id.* at 427–29.

14. *Id.* at 430 (quoting Imbler v. Pachtman, 500 F.2d 1301, 1302 (1974)).

15. *Id*. at 430–31.

16. Kalina v. Fletcher, 522 U.S. 118, 131 (1997).

immunity—the issue the Court will revisit this Term in *Pottawattamie*. In *Burns v. Reed*,[17] the Court held that prosecutors are not entitled to absolute immunity when participating in the investigative process by giving advice to the police.[18] And, in *Buckley v. Fitzsimmons*,[19] the Court held that "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'"[20]

Burns and *Buckley* might appear to decide *Pottawattamie*; however, last Term the Court took up the issue of prosecutorial immunity in *Van de Kamp v. Goldstein*.[21] The issue in *Van de Kamp* concerned whether supervisors in a prosecutor's office could be held liable for administrative acts.[22] The case was brought by Goldstein, who had been prosecuted and convicted of murder, in part based on the testimony of a jailhouse informant.[23] The informant was given favorable treatment for his information, but this fact was not disclosed to the defense attorney as required.[24] In the suit, Goldstein alleged that the supervisors in the prosecutor's office had failed to establish proper training and procedures to ensure that information concerning informants was transmitted to line prosecutors and appropriately sent to defense counsel.[25]

The Ninth Circuit Court of Appeals held that the supervising prosecutors were entitled to qualified immunity, rather than absolute immunity, because the acts alleged concerned their administrative roles in the prosecutor's office, not direct involvement in a prosecution.[26] The Supreme Court reversed

17. 500 U.S. 478 (1991).

18. *Id.* at 492–93.

19. 509 U.S. 259 (1993).

20. *Id.* at 273 (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973)).

21. 555 U.S. ___, 129 S. Ct. 855 (2009).

22. *Id.* at 858-59.

23. *Id.* at 859

24. *Id.*

25. *Id.*

26. Goldstein v. City of Long Beach, 481 F.3d 1170, 1176 (9th Cir. 2007)

and, in a unanimous opinion, held that the administrative acts in question were "directly connected with the conduct of a trial."[27] Specifically, the administrative decisions in question "necessarily require legal knowledge and the exercise of related discretion, e.g., in determining what information should be included in the training or the supervision or the information-system management."[28]

The *Van de Kamp* opinion is noteworthy for its unanimity and its brevity.[29] The treatment of prosecutorial immunity stands in stark contrast to the Court's previous discussions of the subject, most notably in *Buckley*.[30] Rather than beginning with "[t]he presumption . . . that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties,"[31] the Court presumed the absolute immunity of the prosecutor.[32] Moreover, the Court accepted wholesale the public policy rationales for absolute immunity articulated more than thirty years ago in *Imbler*, specifically noting the concern that, if entitled to only qualified immunity, civil liability concerns might impact the discretionary decision-making of prosecutors.[33]

The question at issue in *Pottawattamie* is whether

("The allegations against Van De Kamp and Livesay, which involve their failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject, bear a close connection only to how the District Attorney's Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases. Consequently, the challenged conduct is not prosecutorial in function and does not warrant the protections of absolute immunity.") (citation omitted).

27. *Van de Kamp*, 555 U.S. ___, 129 S. Ct. at 862.

28. *Id.*

29. *See, e.g.,* Posting of Lyle Dennison to SCOTUSblog, http://www.scotusblog.com/wp/analysis-more-power-for-police-more-immunity-for-prosecutors/ (Jan. 26, 2009 14:27 EST) (calling the *Van de Kamp* decision an "opinion[] so spare that the Supreme Court did not labor long to produce [it]").

30. *Compare Van de Kamp*, 555 U.S. ___, 129 S. Ct. at 862, *with* Buckley v. Fitzsimmons, 509 U.S. 259, 273–74 (1993).

31. Burns v. Reed, 500 U.S. 478, 486–87 (1991); *see also* Butz v. Economou, 438 U.S. 478, 506–07 (1978).

32. *Van de Kamp*, 555 U.S. ___, 129 S. Ct. at 860.

33. *Id.*

prosecutors have absolute immunity when they allegedly coerced a witness to fabricate evidence and implicate particular suspects.[34] The case involves the claims of individuals whose convictions were overturned in part based on prosecutorial misconduct.[35] The individuals assert that the prosecutors led the initial investigation of the crime and coerced a witness to change his story and implicate the individuals.[36]

The Eighth Circuit Court of Appeals concluded that "immunity does not extend to the actions of a [prosecutor] who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal changes, because this is not 'a distinctly prosecutorial function.'"[37] The prosecutors have appealed to the Supreme Court noting that the use of falsified testimony at trial is a distinctly prosecutorial function and that, because the harm of falsifying evidence does not accrue until the introduction at trial, holding prosecutors potentially liable for the falsification effectively abrogates this absolute immunity.[38]

Prior to the *Van de Kamp* decision, this case could have appeared to be a simple application of *Buckley*: Prosecutors are entitled to qualified immunity only when acting as investigators.[39] Following the *Van de Kamp* decision,[40] it might be fair to assume that, despite prevailing below, the respondents in *Pottawattamie* face an uphill battle in seeking to set some limit on prosecutorial immunity. Prosecutors have absolute immunity even for administrative acts if those acts meet any or all of the following criteria: concern "the conduct of a trial," utilize "legal knowledge," or involve "the exercise of related discretion."[41]

The Court should follow neither of these tracks. Instead, the

34. Petition for a Writ of Certiorari, *supra* note 2, at i.

35. McGhee v. Pottawattamie County, Iowa, 547 F.3d 922, 925 (8th Cir. 2008).

36. *Id*. at 926–27.

37. *Id.* at 933 (citation omitted).

38. Petition for a Writ of Certiorari, *supra* note 2, at 18.

39. Buckley v. Fitzsimmons, 509 U.S. 259, 273–74 (1993).

40. *See* Van de Kamp v. Goldstein, 555 U.S. ___, 129 S. Ct. 855, 862 (2009).

41. *Id*.

Court should thoroughly examine the public policy underpinnings of the prosecutors' claim to absolute immunity in light of modern circumstances. The Court has repeatedly acknowledged that its review of whether common law immunities should continue to be enforced after the passage of § 1983 is, in part, a public policy analysis.[42] Indeed, as noted above, the Court stated that immunities should continue only so long as they are "'well grounded in history *and reason*.'"[43] It is only appropriate that the Court revisit that analysis to take into account significant changes in circumstance.[44] Undertaking such an analysis reveals that much indeed has changed, and that these changes are of particular importance during the investigative phase in a criminal case.

III. NEW PRESSURES ON PROSECUTORS

In *Van de Kamp,* the Court focused solely on the possible pressure that facing a civil rights claim might place on prosecutors in deciding whether and how to undertake a prosecution.[45] Taking the language directly from *Imbler*, the

42. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976).

43. *Id.* at 418 (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)) (emphasis added); *see also Buckley*, 509 U.S. at 268 (noting that § 1983 forbids the Court from creating new immunities but does not prohibit analysis to determine whether common law immunities ought to continue).

44. The Court recently demonstrated a willingness to revisit its previous jurisprudence based in common law and take into account new circumstances. In *Caperton v. A. T. Massey Coal Co.*, the Supreme Court considered how the political process of judicial elections altered the traditional analysis regarding recusal. 556 U.S. ___, 129 S. Ct. 2252, 2256–57 (2009). The case involved the CEO of a coal company expending considerable funds in a judicial election, after which the legitimacy of a major verdict against the coal company was brought before the Judge whom the CEO had supported. *Id.* at 2257. The Court ruled that Due Process required the Judge's recusal from the case. *Id.* at 2265–67. As in immunity cases, the recusal context requires the Court to look at common law to determine when recusal is necessary. *Id.* at 2259. But the Court was also willing to closely examine "the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed." *Id.* at 2262. As in *Caperton*, the issue here is the fundamental fairness of the justice system. It is imperative that the Court not simply rely on common law in a vacuum but look carefully at the considerations created by the modern context.

45. *Van de Kamp,* 555 U.S. ___ , 129 S. Ct. at 859–61.

Court feared "'that harassment by unfounded litigation' could both 'cause a deflection of the prosecutor's energies from his public duties' and also lead the prosecutor to 'shade his decisions instead of exercising the independence of judgment required by his public trust.'"[46] In the thirty-three years since *Imbler*, however, a variety of new pressures push prosecutors to move quickly to file charges and convict, mostly resulting from the twenty-four-hour news cycle and increased media coverage of criminal investigations and prosecutions. Compounding these circumstances is the increased political pressure placed on prosecutors, particularly at the state level where prosecutors must be elected. It is unsurprising, given these pressures, that prosecutorial misconduct is becoming increasingly common. Indeed, these pressures have led to a win-at-all-costs mentality in prosecutors' offices—a mentality that encourages prosecutors to skirt, if not cross, the line of misconduct.

A. The Pressure of the Media

Media coverage of crime is not new. Heinous murders and crimes involving celebrities have long garnered media attention. However, in the time since the *Imbler* decision, there has been a dramatic rise both in the amount of news coverage generally, and the amount of that news coverage that is about crime and prosecution. This coverage is not limited merely to sensational cases, but to a wide range of criminal cases that the public follows with rapt attention. This rise in coverage and attention has placed prosecutors under enormous pressure to deliver arrests and convictions quickly.

Imbler was decided in 1976. Cable News Network (CNN), the first twenty-four hour news channel, was launched in 1980.[47] From 1991 to 2007, Court TV broadcasted court news and criminal trials live from around the country twenty-four hours a day.[48] Today, there are at least six twenty-four-hour news

46. *Id.* at 860 (quoting *Imbler*, 424 U.S. at 423).

47. Turner – About – Corporate History, http://www.turner.com/about/corporate_history.html (last visited Sept. 17, 2009).

48. David Bauder, *Court TV Exits, truTV Appears*, USA TODAY, Dec. 30, 2007, http://www.usatoday.com/life/television/2007-12-30-346923757_x.htm.

channels operating nationally.[49] Most of them have programs devoted exclusively to criminal justice news, such as Nancy Grace's program on CNN and Greta Van Susteren's program on Fox News.

As news coverage spread to cable, the networks similarly expanded their news offerings, most notably in the form of newsmagazines.[50] In 1968 *60 Minutes* began, two years after the *Imbler* decision, as did *20/20*. In the 1980s, *48 Hours* followed, and *Dateline NBC* began airing in 1992. Throughout the 1990s, these newsmagazines proliferated, at times running up to eleven shows per week.[51]

During the same period, the amount of news coverage devoted to crime and the justice system increased dramatically. "Crime stories appear to be a staple of cable television news, and critics have condemned the cable networks' drawn-out coverage of high-profile crime stories . . . ."[52] The coverage of crime on the network evening news also dramatically increased throughout the 1990s:[53] crime was the number one topic covered on the

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Court TV was renamed truTV in 2008. *See id.* Although it still features legal programming, it also airs its brand of reality TV, "tell[ing] real stories about real people." *Id.*

49. Twenty Four Hour News Networks – Television Tropes & Idioms, http://tvtropes.org/pmwiki/pmwiki.php/Main/TwentyFourHourNewsNetworks (last visited Sept. 18, 2009) (listing CNN, CNN *HLN*, MSNBC, CNBC, and Fox News as examples of the leading twenty-four hour news networks).

50. Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 427 (2006).

51. *Id.* at 427 n.114. For example, in 1997, ABC launched a second edition of *20/20*, which was soon followed by a third and fourth. 1 MUSEUM OF BROAD. COMMC'NS, ENCYCLOPEDIA OF TELEVISION 2383 (Horace Newcomb ed., 2d ed. 2004) (1997). Similarly, CBS launched *60 Minutes II* in 1999. ENCYCLOPEDIA OF TELEVISION NEWS 238 (Michael D. Murray ed., 1999). *Dateline* also aired two editions for a period of time. 1 MUSEUM OF BROAD. COMMC'NS, *supra* at 661. Although all three networks have cut their primary newsmagazines back to one night a week, other newsmagazines have been introduced, including *48 Hours* and *Primetime*. *See generally*, David Zurgwik & Chrisina Stoehr, *Eclipsing the Nightly News*, AM. JOURNALISM REV., Nov. 2004, http://www.ajr.org/Article.asp?id=1706.

52. Beale, *supra* note 50, at 439–40.

53. *Id.* at 422; *see also Network News in the Nineties: The Top Topics and Trends of the Decade*, MEDIA MONITOR (Ctr. for Media and Pub. Affairs, Washington, D.C.), July/August 1997, at 1, *available at*

evening news during that period.[54] Crime was similarly the number one topic on local television news.[55] "Between 2000 and 2003, crime remained the second or third most frequent topic on the network news . . . . There was, however, a significant reduction in crime stories in 2004, when crime news fell to fifth place, trailing the war in Iraq, the presidential election, the economy, and terrorism."[56]

At the same time, newsmagazines also increased their focus on crime. In 1997, over one-quarter of the segments on both *Dateline* and *60 Minutes* concerned crime and the areas of law and justice.[57] "A 1998 study examined the percent of news magazine broadcasts that contained a tabloid-style crime story and found it ranged from a low of 19% of programs on *20/20* to 47% of the airings of *48 Hours*."[58] Indeed, *48 Hours* has become *48 Hours Mystery* and broadcasts almost exclusively crime stories.[59]

This increase in time devoted to news coupled with the

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http://www.cmpa.com/files/media_m onitor/97julaug.pdf ("Crime has been by far the biggest topic of the decade, with 9,391 stories on the network evening news shows—an average of over 110 stories per month, or nearly four per day, during the past seven years.").

54. Beale, *supra* note 50, at 422–23.

55. *Id.* at 430.

56. *Id.* at 424 (citations omitted).

57. *Id.* at 428.

58. *Id*. at 428–29 (citing RICHARD L. FOX & ROBERT W. VAN SICKEL, TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY 79 (2001)).

59. The amount of crime in dramatic television has also drastically increased during this period. *Law & Order* first began its run in 1990. It spurred no less than four spinoffs, including *Law & Order: Special Victims Unit*, which began in 1999, and *Law & Order: Criminal Intent*, which began in 2001. *See* Ginia Bellafante, *Back on the Beat, With a High Q Rating*, N.Y. TIMES, Apr. 24, 2009, at C25. *CSI* began its run in 2000, and its spinoffs *CSI Miami* and *CSI New York* also continue to run. *See* Jon Caramanica, *'CSI' Spinoffs Hit Milestones With Traits and Ties Intact*, L.A. TIMES, Nov. 16, 2008, at E17. Additional crime dramas on television this year included *Cold Case*, *Criminal Minds*, *The Mentalist*, *NCIS*, *NCIS Los Angeles*, and *Numb3rs*. *See* Lynette Rice, *CBS Announces Fall Schedule: 'The Mentalist' Jumps To Thursdays*, ENTERTAINMENT WEEKLY, May 20, 2009, http://hollywoodinsider.ew.com/2009/05/20/cbs-announces-f/. In the twenty-one hours of primetime television each week, last season no less than twelve hours of drama focused on major crime, in addition to the five hours of newsmagazines that often focused on crime.

increase in the amount of time news outlets devote to crime coverage have converged into a massive increase in the media coverage of crime and prosecution. This increase is likely to continue to grow with the rise of new forms of media. Already, new media outlets spend an extraordinary amount of time on crime coverage. For example, CNN has at least three "channels" of coverage that individuals can watch on the Internet.[60] Frequently, one of the channels broadcasts live trial coverage from a criminal courtroom. All across the country, interested lay persons, as well as journalists and criminal justice professionals, are blogging about criminal investigations and trials.[61]

As media coverage of crime has increased, and perhaps because of it, public opinion polls have shown that people had increased anxiety about crime. "National polls identified crime as the most important problem facing the nation each year from 1994 to 1998, and in 1999 and 2000 crime was selected as the second- or third-most important national problem."[62] The ranking dipped in the aftermath of the attacks of September 11, 2001, when concerns about the war and terrorism became priorities,[63] but in recent years, crime once again has become a foremost concern.[64]

This marked increase in media coverage and public concern has inevitably subjected prosecutors to increased pressure to bring charges quickly and to win convictions. Indeed, the Supreme Court has noted the presence and impact of the media in individual cases. In *Buckley*, for example, the Court noted that the alleged prosecutorial misconduct occurred in the context

60. *See, e.g.*, Video – Breaking News Videos from CNN.com, http://www.cnn.com /video/ (follow link for "Live Video") (last visited Sept. 23, 2009).

61. *See, e.g.,* Bonnie's Blog of Crime, http://mylifeofcrime.wordpress.com/ (discussing crimes and criminal investigations that one particular woman finds interesting); The Dallas Morning News: CRIME Blog, http://crimeblog.dallasnews.com/ (discussing local crimes); Memphis Trial Blog, http://www.memphistrialblog.com/ (following Memphis's most important trials").

62. Beale, *supra* note 50, at 418.

63. *Id.*

64. *See* David Hill, *Crime in Presidential Politics*, THE HILL, Apr. 17, 2007, http://thehill.com/opinion/columnist/david-hill/8354-crime-in-presidential-politics (noting that "crime is growing in its salience to many voters").

of a "highly publicized" murder investigation during which the prosecutor made allegedly defamatory statements about the defendant during a press conference.[65]

B. Political Pressure

In this climate of media saturation and public concern with crime, prosecutors also face enormous political pressure to bring and win cases.

1. Elected Prosecutors

Most chief prosecutors in the country are elected. Forty-seven states elect their prosecutors, and in the remaining three, an elected attorney general appoints the local chief prosecutors.[66] The rigors of the election process frequently place pressure on prosecutors to deliver convictions, not simply to seek justice.

In recent years, prosecutorial elections most often have revolved around assertions that one candidate is tougher on crime than his or her opponent.[67] "Prosecutorial candidates have favored broad, noncontroversial messages about public safety and their ability to maintain it, matters of concern to the vast majority of voters who see themselves primarily as prospective victims of crime rather than as potential defendants."[68]

A 2008 election in Cass County, Michigan typified the rhetoric of modern prosecutorial elections. The incumbent stated his first priority was to be tough on crime: "'My agenda is simple and direct: Be tough on crime,' . . . . 'My entire career has been tough on crime, particularly violent crime and drugs.'"[69] The challenger articulated his top priority to be "[p]rotecting the

65. Buckley v. Fitzsimmons, 509 U.S. 259, 261–62 (1993).

66. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 589 (2009).

67. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 153 (2004).

68. *Id.*

69. Lynn Turner, *Challenger Thomas D. Swisher takes on Cass Prosecutor Victor A. Fitz*, KALAMAZOO GAZETTE, July 18, 2008, http://blog.mlive.com/kalamazoo_gazette_extra/2008/07/challenger_Thomas_d_swisher_ta.html.

safety and security of our communities."[70] He further stated, "Right now there should be more focus on habitual criminals that are preying on the community."[71]

Prosecutorial candidates frequently rely on their record of "wins," either generally or in high profile cases, to support their general tough-on-crime claims.[72] In the rare instances prosecutorial elections move beyond general rhetoric, they tend to focus on the outcome or conduct in one notorious case, or allegations that cases are not processed quickly enough, resulting in a backlog.[73] The lack of focus on whether the results are just is noteworthy. Indeed, a recent study of prosecutorial elections bluntly concluded that prosecutor "candidates believe that voters care more about the speed and quantity of work" than they do about whether the outcomes were just or unjust.[74] The rush to be able to claim the "tough on crime" mantle, along with the emphasis placed on winning and winning quickly, places undeniable pressure on elected prosecutors to win cases, regardless of whether a conviction is actually the just outcome.

The concern that election politics could affect the conduct of prosecutors in specific cases is not merely hypothetical. In the Duke lacrosse case, there was considerable evidence that District Attorney Michael Nifong engaged in misconduct in large part to ensure his reelection. Indeed, Chairman of the Disciplinary Panel that heard the *Nifong* case, issued the panel's decision, she stated: "At that time he was facing a primary and yes he was politically naïve. But we can draw no other conclusion that that [sic] those initial statements that he made were to forward his

70. *Id.*

71. *Id.* Candidates for the chief prosecutor's job in East Baton Rouge Parish, Louisiana similarly jostled for who could claim the tough-on-crime mantle. Two of the three candidates specifically claimed they would be tough on crime, while the third stated "there would be a whole lot less plea bargaining if [I] were elected." Joe Gyan, Jr., *Prem Burns Enters Race for DA of EBR*, BATON ROUGE ADVOCATE, July 12, 2008, at A11.

72. Medwed, *supra* note 67, at 156 ("In running for election as a district attorney, candidates often convey tough-on-crime rhetoric sprinkled with references to their winning percentage and successes in high-profile cases.") (citation omitted).

73. Wright, *supra* note 66, at 602–03.

74. *Id.* at 604.

political ambitions."[75] Similarly, in *Buckley*, the petitioner claimed that the prosecutor's misconduct was motivated by an impending election. "The theory of petitioner's case is that in order to obtain an indictment in a case that had engendered 'extensive publicity' and 'intense emotions in the community' the prosecutor fabricated false evidence."[76]

2. Appointed Prosecutors

In contrast to local prosecutors, United States Attorneys—the chief prosecutors in each federal district—are appointed.[77] But they are appointed by the President and subject to confirmation by the Senate, an inherently political process.[78] Moreover, there is considerable evidence, particularly in recent years, of politics affecting the hiring and firing of U.S. attorneys.[79] Specifically, two U.S. attorneys appear to have been fired for failing to pursue investigations or bring indictments of certain political figures.[80] In the course of defending against the allegation that the firings were political, Department of Justice officials asserted that they had performance-based reasons for firing the prosecutors and cited insufficient prosecution rates as the legitimate cause.[81] The defense is, in many ways, as telling as the allegations because it brings to light the organizational acceptance and propagation of the pressure on prosecutors to bring and win cases. The fact that the Department of Justice would view prosecution numbers alone as sufficient grounds for dismissal is breathtaking.

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75. F. Lane Williamson, Chairman, Disciplinary Hearing Comm'n, Comments on Disbarment of Michael Nifong (June 17, 2007), *available at* http://www.nytimes.com/2007/06/17/us/17duke-text.html?pagewanted=all.

76. Buckley v. Fitzsimmons, 509 U.S. 259, 262 (1993).

77. Medwed, *supra* note 67, at 152.

78. *Id.*

79. *See* Adam Zagorin, *Why Were These U.S. Attorneys Fired?* TIME, Mar. 7, 2007, http://www.time.com/time/printout/0,881 6,1597085,00.html.

80. *Id.*

81. *Id.*

3. Assistant Prosecutors

Assistant district attorneys generally serve at the pleasure of the chief prosecutor.[82] Accordingly, chief prosecutors can, and often do, place pressure on others in the office to convict. "Prosecutors with the highest conviction rates (and, thus, reputations as the best performers) stand the greatest chance for advancement internally."[83] Moreover, all prosecutors can feel pressure to deliver convictions or "wins" by legislative bodies on whom prosecutors must rely for funding. "[O]ffices may use conviction statistics as leverage in budget negotiations, trumpeting their records of success to support demands for greater resources."[84] In this way, the pressure to produce convictions extends throughout the office.

C. Win at All Costs: The Mentality of the Prosecutor's Office

The pressure to bring and win cases has infiltrated the very culture of the prosecutor's office. Prosecutors may have once believed their role to be like that of a judge—to evaluate and determine when it is fair to bring criminal charges or pursue a conviction. Now the primary purpose of the prosecutor is to seek as many convictions as possible. In turn, the pressure to produce wins has led to a "win-at-all-costs" mentality, which pushes prosecutors toward misconduct as a means to an end.

There is an inherent conflict in the dual roles of the prosecutor—advocate and officer of justice. The Supreme Court has stated that the goal of a prosecutor in a criminal case "is not that [he or she] shall win a case, but that justice shall be done."[85] In other words, the Court has said that the goal of justice should take priority over the role of advocate.[86] In practice, however, the

82. Medwed, *supra* note 67, at 151.

83. *Id.* at 134–35 (citing George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 112 (1975)).

84. *Id.* at 135 (citation omitted).

85. Berger v. United States, 295 U.S. 78, 88 (1935).

86. Some have argued that this dichotomy is a myth and that there is no tension between the two roles. As one former prosecutor pointed out, if we charge the right people, then seeking the win is seeking justice. Thomas A.

"realities of life in the prosecutorial workplace . . . have arguably led to . . . an environment where convictions are prized above all and the minister of justice concept becomes a myth."[87]

Contrary to the ideal articulated by the Supreme Court, in part because of the media and political pressures addressed above, the goal of winning often takes precedence over the ends of justice in key moments. Indeed, the primary objective of many prosecutor offices has become to get convictions and not simply to seek justice.[88] Offices compute "batting average[s]" of each prosecutor and publicly track wins and losses.[89] Defying "the conviction-seeking mentality . . . may, in certain circumstances and with certain bosses, serve as a death knell to career advancement within the office."[90]

The circuit attorney's office in the City of St. Louis is an example of an office that had a culture of prosecutorial misconduct. A study by the Center for Public Integrity found that during the 1970s, 1980s, and 1990s, "there were 129 rulings by trial judges and appellate judges . . . that addressed alleged prosecutorial error by the circuit attorney's office."[91] The conduct

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Hagemann, *Confessions from a Scorekeeper: A Reply to Mr. Bresler*, 10 GEO. J. LEGAL ETHICS 151, 153–54 (1996). In many cases, however, things are not that simple. For example, there will be evidence tending to show that the defendant did not commit the crime, and often that evidence is not discovered or given to the prosecutor until after charges have been filed. The test of prosecutors is whether, in that moment, they choose to do as justice requires, by turning over the evidence, or they make a different choice, to delay or to hide the evidence in an effort to ensure victory.

87. Medwed, *supra* note 67, at 137.

88. *See* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 542 (1996) ("[W]hat is counting 'wins' and 'losses,' if not an admission that a prosecutor is seeking convictions?"); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?* 14 GEO. J. LEGAL ETHICS 355, 388 (2001) ("In view of the institutional culture of prosecutor's offices and the culture of the adversary system generally, it is perhaps inevitable that the overriding interest of prosecutors would be winning.") (citations omitted).

89. Medwed, *supra* note 67, at 137.

90. *Id.*; *see also* Smith, *supra* note 88, at 391–93 (noting the problems faced by prosecutors who reject the win-at-all-costs culture).

91. Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?,* CTR. FOR PUBLIC INTEGRITY, June 26, 2003, http://projects.publicintegrity.org/PM/default.aspx?act=main.

of a single assistant prosecutor was challenged in an enormous number of cases.[92] In twenty-four of those cases, prosecutorial error was found. In seven cases, the misconduct was found prejudicial and remedial action was taken.[93] Numerous other prosecutors in that office were also cited for error and misconduct several times.[94] The prosecutors involved in most of these incidents have since left the office, and the current elected circuit attorney "has instituted a number of reforms aimed at cleaning up the office culture of St. Louis."[95]

In offices with this focus on winning, it can become normal to bend the rules in pursuit of victory, if not break them.[96] "The desire to win inevitably wins out over matters of procedural fairness, such as disclosure."[97] Soon, bending or breaking the rules can become habit. One ethics professor has observed that this has become the case with regard to the requirement that prosecutors turn over exculpatory evidence, noting that prosecutors violate the requirement "so often that [the *Brady* decision] stands more as a landmark to prosecutorial indifference and abuse than a hallmark of justice."[98]

D. A Rise in Prosecutorial Misconduct

Media and political pressures, as well as office culture, can push prosecutors to skirt ethical and constitutional norms in order to achieve victory. While prosecutorial conduct is not new, it is all but undeniable that instances of misconduct have become

92. *Id*.

93. *Id*. In the remaining seventeen cases, "appellate judges affirmed the conviction or trial judges allowed the proceeding to continue, despite finding [the prosecutor] committed prosecutorial error." *Id*.

94. *Id*.

95. *Id*.

96. *See* Bresler, *supra* note 88, at 543–44 ("A prosecutor protective of a 'win-loss' record has an incentive to cut constitutional and ethical corners to secure a guilty verdict in a weak case – to win at all costs.") (citation omitted).

97. Smith, *supra* note 88, at 390.

98. Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007); *see also* Smith, *supra* note 88, at 390 ("The concealment of exculpatory evidence by prosecutors remains a serious problem.").

more common and more flagrant.

Prosecutorial misconduct has long been noted as a problem in the criminal justice system. According to the Innocence Project, prosecutorial misconduct was a factor in thirty-three of the first seventy-four cases (44.6% of the cases) in which DNA led to exonerations.[99] A recent study similarly found that almost 400 homicide cases have been reversed because prosecutors failed to turn over exculpatory evidence or presented falsified evidence.[100]

Prosecutorial misconduct is not easily susceptible to empirical study. At least some, if not most, prosecutorial misconduct is never discovered. It is inherently difficult for defense lawyers and defendants to find out that exculpatory material was withheld, that an alternative lead was not investigated, or that the informant used in a case received a reward. It is, therefore, impossible to set a baseline or account for any rise or fall. However, the number of uncovered cases of misconduct seems to be growing, and the misconduct itself is increasingly brazen. Three examples from the first part of 2009 demonstrate these trends.

The first example, *United States v. Shaygan*,[101] was a "pill mill" case, in which a doctor was accused of prescribing controlled substances for recreational, rather than medical, reasons.[102] The case is noteworthy because it was not one that captured widespread media attention, yet the prosecutorial misconduct was egregious. The prosecutors, apparently motivated by ill-will toward defense counsel, began a collateral investigation into witness tampering without any evidence; improperly interfered with the collateral investigation; authorized two witnesses to tape their discussions with members of the defense team; filed a

99. Innocence Project, *Understand the Causes: Government Misconduct*, http://www.innocenceproject.org/understand/Government-Miscond uct.php (last visited Sept. 17, 2009).

100. Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 313 (2001) (citing Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, CHICAGO TRIBUNE, Jan. 10, 1999, at 3).

101. No. 08-20112-CR-GOLD-MCALILEY, 2009 WL 980289 (S.D. Fla. Apr. 9, 2009)

102. *Id.* at 6.

superseding indictment adding 115 counts, many without any evidentiary basis; and repeatedly violated discovery obligations.[103] In March of this year, the jury found the defendant not guilty on all 141 counts alleged.[104] The defense moved for sanctions against the prosecutors, and the judge held a two-day evidentiary hearing at which two of the prosecutors testified.[105] After hearing all of the evidence, the judge (1) issued public reprimands against the prosecutors involved in the case, as well as the U.S. Attorney and the head of the Narcotics Section for failure to supervise; (2) ordered the United States to pay more than $600,000 in defense fees and costs; (3) enjoined the U.S. Attorneys' office from opening witness tampering investigations concerning any prosecution proceeding before authorization from the court; and (4) ordered the U.S. Attorney to report on efforts to correct problems in the office, including "enhanced supervision of his attorneys."[106] In sanctioning the head of the office, the Judge noted that, "it is the responsibility of the United States Attorney and his senior staff to create a culture where 'win-at-any-cost' prosecution is not permitted."[107]

Second, in *United States v. W.R. Grace & Co.,* considered to be one of the most important environmental criminal prosecutions ever brought, the prosecutors were found to have violated their constitutional obligations to turn over exculpatory evidence to the defense by failing to provide the defense with evidence that could have been used to discredit a key prosecution witness.[108] The judge called the violations an "inexcusable dereliction of duty," and he instructed jurors not to consider that witness's testimony with regard to one defendant and use "great skepticism" in considering the testimony with regard to the

103. *Id.* at 7–27.

104. *Id.* at 2.

105. *Id.* at 2–3.

106. *Id.* at 4–6.

107. *Id.* at 5.

108. *See* Kirk Johnson, *Asbestos Prosecution Results in Acquittals*, N.Y. TIMES, May 9, 2009, at A10; Tristan Scott, *Stevens Case Haunts*, THE MISSOULIAN, Apr. 26, 2009, at A1; Ben Hallman, *W.R. Grace Acquittal in Asbestos Trial a Victory for Longtime Kirkland Counsel*, LAW.COM, May 11, 2009, http://law.com/jsp/article.jsp?id=1202430591287.

remaining defendants.[109] On May 8, 2009, after deliberating for less than two days, the jury acquitted all defendants of all charges.[110]

Third, in *United States v. Ted Stevens*, a corruption case against the former Senator from Alaska, allegations of misconduct became public in a motion to dismiss the indictment that was premised on the government's failure to comply with its statutory and constitutional discovery obligations.[111] The court held three prosecutors in contempt and the judge called their conduct "outrageous."[112] An FBI agent later filed a complaint with the Office of Professional Responsibility of the Department of Justice alleging, among other things, that the prosecutors: (1) schemed to relocate a witness to ensure the witness would not testify at trial, (2) redacted exculpatory information from a document provided to the defense, and (3) deliberately concealed other exculpatory information.[113] The entire prosecution team was eventually replaced, and a review of evidence by the new team discovered additional exculpatory material that should have been turned over to the defense.[114] As a result, in April of this year, the Attorney General announced that he had "had enough" and asked the court to dismiss the indictment.[115]

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109. Jury Instruction, United States v. W.R. Grace & Co., No. 05CR00007 (D. Mont. Apr. 8, 2009), 2009 WL 1160402.

110. Johnson, *supra* note 108.

111. Senator Stevens's Motion to Dismiss or for a New Trial, or in the Alternative, Motion to Hold Government in Contempt for Violating Court's January 21, 2009 Order, United States v. Stevens, No. 08-cr-231 (EGS) (D.D.C. Feb. 5, 2009).

112. Editorial, *The Ted Stevens Scandal: After Yesterday's Dismissal, Time to put Prosecutors in the Dock,* WALL ST. J., Apr. 2, 2009, at A18; *see also* Carrie Johnson & Del Quentin Wilber, *Holder Asks Judge to Drop Case Against Ex-Senator*, THE WASHINGTON POST, Apr. 2, 2009, at A1; Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES, Apr. 8, 2009, at A1; Editorial, *Justice for Ted Stevens*, WALL ST. J., Feb. 20, 2009, at A16.

113. Neil A. Lewis, *F.B.I. Agent Asserts that Prosecution Team Concealed Evidence at Stevens Trial*, N.Y. TIMES, Feb. 11, 2009, at A14; Gregory F. Linsin, *"A Cancerous Effect on the Administration of Justice"—What Can Be Done About the Rash of Flagrant DOJ Discovery Violations?* FOR THE DEFENSE (Summer 2009), *available at* http://www.blankrome.com/index.cfm?contentID=37&itemID=2000 (last visited Sept. 13, 2009)

114. *See* Johnson & Wilber, *supra* note 112.

115. *Id.*

There is significant evidence to suggest that these are not isolated cases. The prosecutorial team involved in *Stevens* was involved in two almost identical cases of misconduct this year, which similarly required the Department of Justice to seek the release of the defendants involved.[116] Similarly, in *Shaygan*, the Judge noted that the same prosecutors had previously filed a complaint alleging that a defendant engaged in witness tampering in a case involving the same defense attorneys.[117] The complaint was "dropped without an indictment" after a meeting with "senior members of the United States Attorney's Office."[118]

In the District of Massachusetts, Federal Judge Mark Wolf has become so frustrated with the pattern of misconduct engaged in by United States attorneys in his jurisdiction that he made his concerns, and the failure of the Department of Justice to respond, a matter of public record.[119] In January 2009, Judge Wolf issued a decision on a motion to suppress in *United States v. Jones,*[120] a felon in possession of a firearm case. Judge Wolf found the case "disturbing because of repeated government misconduct that, if not discovered, might have frustrated the court's ability to find the facts reliably and might have deprived [the defendant] of his right to due process."[121] The misconduct in question involved the prosecutor's failure to timely disclose inconsistent statements by a police officer concerning the facts giving rise to the stop of the defendant, which directly impacted the probable cause determination.[122] Although the defense eventually got the information and was not prejudiced,[123] Judge Wolf noted: "The

116. *See* Linsin, *supra* note 113 (noting that in *United States v. Kohring* and *United States v. Kott*, as a result of uncovering information that should have been, but was not, disclosed to the defense, the Department of Justice "filed consent[ing] motions in two cases on appeal seeking the remand of the cases to the district court and requesting the immediate release of the appellants on personal recognizance").

117. *Shaygan*, No. 08-20112-CR-GOLD-MCALILEY, Slip op. at 6 (S.D. Fla. Apr. 9, 2009).

118. *Id.*

119. *See* United States v. Jones, 609 F. Supp. 2d 113, 115 (D. Mass. 2009).

120. *Id.* at 115.

121. *Id.*

122. *Id.*

123. *Id.* at 118.

egregious failure of the government to disclose plainly material exculpatory evidence in this case extends a dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court."[124]

Shortly after issuing the *Jones* decision, Judge Wolf wrote a letter to Attorney General Holder detailing the history of misconduct to which he was referring, as well as describing the Judge's longstanding efforts to bring these matters to the attention of past Attorneys General and their failures to respond.[125] The letter described various instances of misconduct, characterizing them, in turn, as "blatant," "deliberate," "outrageous," "extreme," and "intentional."[126] The letter further noted that Judge Wolf had raised the issue of pervasive prosecutorial misconduct with both Attorney General Gonzales and Attorney General Mukasey, among others, but received no response from the Department of Justice.

In May 2009, Judge Wolf revisited the misconduct in the *Jones* case to determine whether to sanction the government or the prosecutor or both.[127] Noting that "in the District of Massachusetts the government has had enduring difficulty in discharging its duty to disclose material exculpatory information to defendants in a timely manner," Judge Wolf reviewed numerous instances of documented prosecutorial misconduct from Massachusetts and elsewhere occurring since the mid-1990s.[128] Returning to the particular circumstances in the *Jones* case, the Judge found that the prosecutor's failure to timely produce the exculpatory evidence reflected either "a fundamentally flawed understanding of her obligations, or a reckless disregard of them."[129] In an effort to correct any misunderstanding that might exist amongst the prosecutors in the district and encourage them to take their discovery

124. *Id.* at 119 (footnote omitted).

125. Judge Wolf chose to file the letter as a matter of record in two cases; it is therefore a matter of public record. *See* Barone v. United States, 610 F. Supp. 2d 150, 151–53 (D. Mass. 2009).

126. *Id.* at 151.

127. United States v. Jones, 620 F. Supp. 2d 163, 165 (D. Mass. 2009).

128. *Id.* at 168–69.

129. *Id.* at 167.

obligations seriously, Judge Wolf decided to arrange "a program presented on discovery in criminal cases."[130] The judge further decided to defer a decision on whether to sanction the office or the prosecutor for at least six months and ordered "the Department of Justice and [the prosecutor] to file additional affidavits in November, 2009, addressing whether their performance and progress have obviated the need to impose sanctions in this matter."[131]

E. Rebalancing the Public Policy Analysis

In *Imbler*, the Court was primarily concerned with the pressure that a lack of absolute immunity might place on prosecutors, specifically that prosecutors might act more conservatively if they were aware that their decisions could expose them to possible civil liability if incorrect.[132] The Court did not discuss what pressures, if any, the prosecutor might be under, particularly when shielded by immunity, to commit misconduct in order to achieve convictions. As demonstrated above, pressures from the media, the electorate, politicians, and supervisors are intense, and they have led to a situation where misconduct is a generally accepted part of prosecutorial practice. In the interest of justice, these considerations must be at least taken into account by the Court in its public policy discussions on when absolute immunity is appropriate for prosecutors.

IV. CHANGES IN THE LEGAL LANDSCAPE

In addition to the relevant changes in the public policy analysis, the legal landscape has changed dramatically since the *Imbler* decision. In *Imbler*, the Court relied on a lack of procedural protections in civil rights cases as well as the availability of alternative procedures for deterring and correcting prosecutorial misconduct in concluding that absolute immunity was appropriate for prosecutors.[133] However, in the years since

130. *Id.*
131. *Id.* at 168.
132. *See* Imbler v. Pachtman, 424 U.S. 409 (1976).
133. *Id.* at 424–31.

Imbler, a variety of factors have rendered the alternative procedures cited by the Court largely inapposite. Criminal charges against a prosecutor are almost unheard of, and independent studies show that prosecutors are rarely subjected to professional discipline. Moreover, the Court's concern that granting prosecutors only qualified immunity would require them to engage in substantial litigation before immunity might be found to apply has been significantly assuaged by intervening decisions on how claims of qualified immunity must be addressed.

A. Charging the Prosecutor

In 2001, a law professor published an empirical study to determine whether and how often, as compared with private counterparts, prosecutors are subject to professional discipline.[134] The study compared the rate of disciplinary cases brought against prosecutors and private attorneys who engaged in similar conduct.[135] The study demonstrated that although prosecutors are the subject of disciplinary charges, the number of cases is notably small, particularly "in light of the many prosecutors and criminal cases that exist."[136] The study concluded that "prosecutors are disciplined rarely, both in the abstract and relative to private lawyers."[137]

These findings are consistent with a study conducted by the Center for Public Integrity, which analyzed cases of prosecutorial discipline going back to 1970. The Center found only 37 cases published between 1970 and 2002 in which a court had disciplined a prosecutor for misconduct relating to the "fundamental fairness of pending criminal proceedings" or "the constitutional rights of criminal defendants."[138] The most

134. *See* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001).

135. *Id.* at 725.

136. *Id.* at 744–45.

137. *Id.* at 755. It is noteworthy, though not relevant to the current topic, that the study also found that criminal defense lawyers are disciplined less often than their civil counterparts. *Id.* at 753–54.

138. Neil Gordon, *Misconduct and Punishment: State Disciplinary*

common punishment for the misconduct was an assessment of the costs of the disciplinary proceedings.[139] In only twelve cases, the prosecutor's license to practice law was suspended, and in two cases, the prosecutor was disbarred.[140]

There are a variety of reasons cited for the absence of professional disciplinary proceedings against prosecutors. First, because prosecutors do not have specific clients, there is no obvious person to raise a claim of misconduct against them.[141] "The bar cannot rely on aggrieved defendants as the instigators of complaints, because almost all defendants have antipathy toward their prosecutors."[142] Defense attorneys frequently must work with the same prosecutors time and again and thus are understandably hesitant to file complaints.[143] Moreover, the types of misconduct prosecutors typically engage in, such as hiding or withholding information, are not the self-serving actions, like the stealing of client funds, that are commonly addressed by bar authorities.[144]

Disciplinary authorities may also be hesitant to discipline prosecutors for behavior in the course of a criminal case for fear "of interfering with, or having an undue effect upon, the judicial process."[145] Specifically, the concern is that if the criminal or appeals courts understand that any finding of misconduct will automatically result in an disciplinary charge, the courts may be

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Authorities Investigate Prosecutors Accused of Misconduct, in HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS (Center for Public Integrity ed., 2003), http://projects.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=39.

139. *Id.*

140. *Id.*

141. *See* Zacharias, *supra* note 134, at 758; Andrew Smith, *Note:* Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1953 (2008) ("Disciplinary complaints typically are initiated by individuals, and because prosecutors, unlike private attorneys, do not have individual clients, lodging a complaint falls to the defense attorney or the defendant, who often are more focused on the underlying case than on reporting the prosecutor.").

142. Zacharias, *supra* note 134, at 758.

143. Smith, *supra* note 141, at 1953.

144. Zacharias, *supra* note 134, at 757.

145. *Id.* at 754.

less willing to note or address prosecutorial misconduct.[146] Timing heightens this issue. "Disciplinary authorities may be loath to review a prosecutor's conduct while appellate proceedings are pending, for fear of interfering, or being perceived as interfering, in the appellate process. Yet if disciplinary proceedings are held in abeyance until the completion of the criminal proceedings, many years may pass."[147]

While disciplinary proceedings are rare, criminal charges against a prosecutor are rarer still. In *Imbler*, the Court noted that since "[e]ven judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U. S. C. § 242, . . . [t]he prosecutor would fare no better for his willful acts"[148] But, even if prosecutors were willing to charge other prosecutors to be successful in a criminal case, one would have to prove beyond a reasonable doubt that the prosecutor's conduct was willful.[149] As a result, the leveling of criminal charges against a prosecutor for conduct occurring in the course of a prosecution is all but unheard of.[150]

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146. *Id.* The identical argument is made by the Court in the context of civil rights cases: if civil rights cases were likely to result from findings of misconduct, courts might be less willing to find and redress misconduct. In neither case is there any evidence that judges are willing to turn a blind eye to misconduct in order to protect the prosecutor from further scrutiny. To the contrary, it seems more likely that judges would turn a blind eye to misconduct because of the signal, created by the existence of immunity and the lack of professional disciplinary cases, that such conduct is tacitly accepted in the criminal justice system. At the very least, it is disconcerting to note that the various arenas in which prosecutorial conduct might be addressed may all be relying on another to address it—the Court relies on the professional disciplinary system, and the professional disciplinary system relies on the criminal court judges and the appeals process. The almost inevitable result is that the matter is not being addressed.

147. *Id.* at 762.

148. Imbler v. Pachtman, 424 U.S. 409, 429 (1976).

149. Smith, *supra* note 141, at 1967–68; *see* Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 878–79 (1997).

150. *See* Smith, *supra* note 141, at 1966–71 (noting that criminal prosecution is rarely utilized and calling for its expanded use); *see also* Weeks, *supra* note 149, at 879. It is only slightly more common for criminal contempt charges to be brought against a prosecutor. Criminal contempt charges appear to be reserved for the most public, most egregious cases. By way of example,

Regardless of the reasons, the fact is that, despite the persisting problems of prosecutorial misconduct, prosecutors are rarely subject to professional discipline or criminal charges. In the absence of common use, the ability of these procedures to deter prosecutorial misconduct must be considered dubious, at best, which places into doubt the Court's assertion in *Imbler* that civil liability was not necessary to dissuade prosecutors from committing misconduct.[151]

B. Qualified Immunity

The *Imbler* Court also found that qualified immunity, as an alternative to absolute immunity, would not be sufficient to protect prosecutors. Since *Imbler*, the Court's decisions, with regard to qualified immunity, all but ensure that the standards

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Michael Nifong, the prosecutor in the Duke lacrosse rape case, was found guilty of criminal contempt and required to spend one evening in jail. Associated Press, *Nifong Gets Day in Jail for Criminal Contempt in Duke Rape Case,* ESPN, Aug. 31, 2007, http://sports.espn.go.com/espn/print?id+2999217&type=story. But contempt of court seems not to have the dissuasive power of professional discipline, civil liability, or separate criminal charges, perhaps because the punishment for contempt is often slight—a contribution to a charity or an afternoon in jail. In addition, either rightfully or wrongfully, it is viewed as badge of honor because it most frequently happens to attorneys who are being incredibly zealous on behalf of their clients. *See, e.g.,* Life at the Harris County Criminal Justice Center, http://harriscountycriminaljustice.blogspot.com/2008/05/contempt.html (May 6, 2008, 21:45 EST).

151. It is far from clear that the increased use of either professional discipline or criminal sanctions would be a sufficient solution to the problem of prosecutorial misconduct. First, neither professional discipline nor criminal convictions serve to vindicate the rights of the individual harmed by the misconduct, and providing such a vindication was the primary purpose of the enactment of § 1983. The criminal codes are narrower—requiring willfulness, not mere constructive knowledge. Second, in neither case do the standards for enforcement track constitutional norms. The ethical rules are broader, seeking not just to enforce constitutional requirements but, more generally, to define a lawyer's role. Indeed, a recent ABA ethics opinion sought to emphasize this point specifically with regard to prosecutors. In ABA Ethics Opinion 09-454, the Standing Committee on Ethics and Professional Responsibility held that, even though the language tracks the constitutional obligation, Rule 3.8(d) places a broader obligation on prosecutors to disclose not only exculpatory evidence that is material, but also "information known to the prosecutor [that] would be favorable to the defense." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

and procedures for addressing such claims are sufficient to protect even prosecutors.

At the time of the *Imbler* decision, the standard and procedures applicable in cases of qualified immunity were quite different than they are today. Qualified immunity was then thought of as good-faith immunity.[152] The Court described the immunity as follows: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity."[153] The test had both an objective and subjective component.[154] The action had to violate the individual's constitutional rights, and the official had to reasonably know that the action was unconstitutional or act with the "malicious intention to cause a deprivation of constitutional rights or other injury."[155]

Good-faith immunity was intended to permit quick resolution of matters and therefore ensure immune officials were not burdened by prolonged litigation.[156] In practice, however, the standard proved incompatible with quick resolution because the issue of good faith and malice were found to be questions of fact, which the jury must decide.[157] It was in this context that the

152. *See* Scheuer v. Rhodes, 416 U.S. 232 (1974).

153. *Id.* at 247–48.

154. Wood v. Strickland, 420 U.S. 308, 321 (1975) (holding that school officials were entitled to good-faith immunity); Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

155. *Wood*, 420 U.S. at 322.

156. Butz v. Economou, 438 U.S. 478, 507–08 (1978) ("Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss.").

157. Harlow v. Fitzgerald, 457 U.S. 800, 815–16 (1982).

> The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

Id. (citations omitted).

Court determined that qualified immunity would provide insufficient protection to prosecutors.

Because of these problems, shortly after *Imbler*, the Court altered the qualified immunity standards, in large part to rectify the problem of immune officials having to engage in substantial litigation in order to prove their immunity.[158] In 1982, in *Harlow v. Fitzgerald*, the Court eliminated the subjective component of qualified immunity so that "bare allegations of malice [would] not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."[159] The Court declared that qualified immunity would bar suit against government officials whenever "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[160]

Following *Harlow*, the Court emphasized that qualified immunity is "an *immunity from suit* rather than a mere defense to liability."[161] Lower courts were directed to resolve the issue of immunity "prior to discovery,"[162] "at the earliest possible stage in litigation."[163] To this end, the Court has repeatedly refined the procedure for determining qualified immunity to ensure that suits against immune officials are dismissed expediently.[164]

The changes to the standards and procedures used to determine the applicability of qualified immunity in an

158. *See id.*

159. *Id.* at 817–18.

160. *Id.* at 818 (citations omitted).

161. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

162. Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987).

163. Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam) (citations omitted).

164. For example, in *County of Sacramento v. Lewis,* the Court gave lower courts the authority to determine, at the outset of the case, whether the actions alleged, if true, would constitute a violation of a constitutional right. 523 U.S. 833, 841 n.5 (1998). In 2001, the Court made this procedure mandatory. Saucier v. Katz, 533 U.S. 194, 201 (2001). Last Term, the Court reversed *Saucier*, holding that courts "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Pearson v. Callahan, 555 U.S. ___, 129 S. Ct. 808, 818 (2009). In determining how to proceed, the Court advised that judges should continue to emphasize the quick resolution of immunity claims. *See id.*

individual case have significantly lessened the burdens of government officials claiming the immunity. The standard is now objective and easy to understand, and courts have flexibility and discretion in determining how best to evaluate qualified immunity claims.

C. Rebalancing the Legal Considerations

After thirty years, the Court's reliance on other procedures for the redress of harms caused by prosecutorial misconduct, as well as its concern that qualified immunity alone would provide insufficient protection to prosecutors, appear misplaced. Prosecutorial misconduct is not regularly redressed through criminal courts or bar disciplinary procedures. To the extent bar disciplinary proceedings exist, the punishments are frequently minor and never accrue to the benefit of the injured individual. In contrast, civil liability ensures that the person injured has some control over the process by which redress is sought and directly receives compensation for the harm. It was precisely for this reason that Congress passed § 1983. Moreover, the burden of allowing victims of misconduct to bring suit has been substantially lessened by intervening jurisprudence permitting judges to address claims of immunity in the most efficient way possible. Indeed, an official raising a claim of qualified immunity—where the claim is applicable—is likely to have the case resolved in equal time as an official raising a valid claim of absolute immunity. All of these factors weigh in favor of limiting the extent to which prosecutors can claim absolute immunity from civil suit.

V. DRAWING THE LINE

The appropriateness of absolute immunity for prosecutors cannot be evaluated by relying solely upon those public policy and legal factors that existed at the time of the *Imbler* decision. Indeed, a review of those factors demonstrates that much has changed with the public policy analysis and the legal factors. These changes strongly support the notion that some limit on the absolute immunity of prosecutors should be set. The case that

comes before the Supreme Court this Term is precisely the type of case that the Court can and should take these changes into account and draw a line in the sand with regard to the absolute immunity of prosecutors.

A. The *Pottawattamie* Case

In *Pottawattamie*, the prosecutors are alleged to have falsified evidence that was eventually used to convict two defendants—McGhee and Harrington—of murder.[165] The Iowa Supreme Court reversed Harrington's conviction because the prosecutor failed to disclose exculpatory evidence.[166] The current prosecutor then determined that it would not be possible to retry Harrington and further agreed to release McGhee.[167] A civil rights action against the county, the prosecutors, and the police followed. Only the claims against the prosecutors remain before the Supreme Court.

The original line prosecutor, Joseph Hrvol, was involved in the investigation of the case from the beginning, "participating in witness interviews and canvassing the neighborhood near the crime scene."[168] He acknowledged that he was "intensely involved in the investigation," even before he was assigned any role in the prosecution of the case.[169] Hrvol was supervised by David Richter, the county attorney.[170] Richter also participated directly in the investigation, interviewing witnesses and even, with Hrvol, "consult[ing] an astrologer regarding their suspicions" about an initial suspect.[171]

Initially, McGhee and Harrington were not suspects; evidence pointed to another individual.[172] McGhee and Harrington assert that the prosecutors and the police pressured a

165. McGhee v. Pottawattamie County, Iowa, 547 F.3d 922, 925 (8th Cir. 2008).
166. *Id.*
167. *Id.*
168. *Id.* at 926.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*

young witness to change his story and implicate them.[173] The witness in question had a considerable criminal history, and the officials had evidence of additional crimes.[174] The officials also offered him a $5000 reward for information.[175] Based on the testimony of this witness, Richter and Hrvol approved the arrest of McGhee and Harrington and filed charges against them for first degree murder.[176] The issue before the Court concerns only the alleged misconduct that occurred during the investigation of the case, i.e. the allegation that prosecutors coerced a witness to fabricate testimony and implicate the defendants. In this context, the changed public policy and legal circumstances have particular applicability.

B. Public Policy Considerations in Criminal Investigations

The consideration of the political and media pressure on prosecutors is particularly appropriate in the context of investigations, as these pressures are most acute early in a criminal case. In the typical case, it is society's idea of a criminal being at large in the public that creates the most political pressure for prosecutors. Similarly, the media appears most interested in the case after the crime has been committed but before the alleged perpetrator is arrested.

Many of the recent identified cases of misconduct bear this out. For example, in the Duke Lacrosse case, the prosecutor all but admitted that the pressure created by an upcoming election and the intense scrutiny of the media led to the egregious misconduct in that case. Indeed, in the *Pottawattamie* case itself, there is significant evidence that precisely these pressures played a role in the prosecutors' conduct. David Richter, the county attorney, had been appointed in 1976, but was scheduled to stand for election in 1978.[177] As the court of appeals noted, "Richter was campaigning in the face of [the] unsolved murder."[178]

173. *Id.* at 927.
174. *Id.* at 926–27.
175. *Id.* at 927.
176. *Id.* at 927–28.
177. *Id.* at 926.
178. *Id.*

Moreover, the investigative phase of a criminal case is precisely the point at which the pressure of potential civil liability ought to be applied to dissuade misconduct by prosecutors. Specifically, the separation of the investigative and prosecutorial functions serves as a check on the police and the prosecutor's conduct. The police gather all available evidence, while the prosecutors review and evaluate that evidence to determine whether, in total, it provides a legal basis for charging and convicting an individual.

The person who investigates the case should have as his sole goal the intent to follow the appropriate leads and endeavor to determine what occurred. The investigator should not, outside of consultations to ensure that investigative tactics are lawful, be driven by legal considerations, such as whether the evidence gathered is sufficient to sustain proof beyond a reasonable doubt. Considering such issues during an investigation could, for example, lead to a decision not to follow an otherwise credible lead for fear that it will produce a second suspect or introduce some doubt into the developing case. Similarly, an investigator concerned primarily with the prosecutorial notion of proof beyond a reasonable doubt might also decide that it is necessary to "produce" more evidence to ensure a conviction or to stop pursuing evidence once he believes a sufficient case has been made.

The conflating of the prosecutorial and investigative roles creates a situation peculiarly ripe for misconduct. The investigative prosecutor has a powerful motive to ensure that he collects evidence solely supporting his theory of the case, while the lack of an independent evidentiary review ensures that no investigative misconduct will come to light. Nevertheless, the prospect of civil liability for prosecutors when they engage in misconduct during investigations would serve to appropriately counteract this immense opportunity for misconduct.

C. Legal Considerations in the Investigative Context

The Supreme Court has explicitly held that prosecutors are not entitled to absolute immunity for their misconduct during the

investigative phase of a case.[179] This holding is consistent with the fact that police officers investigating a case are entitled only to qualified immunity.[180] As the district court observed in *Pottawattamie*, "[i]t would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty."[181]

Nonetheless, the prosecutors' briefs argue that falsifying testimony is not a constitutional violation.[182] It becomes a constitutional violation only when the evidence is introduced, a point at which, as prosecutors, they are entitled to absolute immunity.[183] This argument proves far too much. There is almost no violation that a prosecutor could commit during an investigation, other than physically abusing a suspect, which would cause substantial harm until and unless the information was used in the course of the prosecution. If successful, the argument would essentially insulate prosecutors from all liability. Indeed, under this theory, a prosecutor could open an investigation purely out of malice, fabricate the evidence, bring a completely innocent individual to trial and convict them, and the victim would be unable to obtain redress because the prosecutor would be entirely insulated from civil liability. In light of the inability of professional discipline and criminal liability to effectively deter misconduct, such a broad ruling would effectively give prosecutors a free pass. Such a holding would not only appear to contradict the Supreme Court's decision in *Buckley*, which held that prosecutors could be held liable for

179. Buckley v. Fitzsimmons, 509 U.S. 259, 273–74 (1993).

180. *See, e.g.,* Moran v. Clark, 359 F.3d 1058, 1060 (8th Cir. 2004) (holding that police officers were entitled only to qualified immunity for allegations that they manufactured evidence).

181. *McGhee*, 475 F. Supp. 2d at 907 (quoting Zahrey v. Coffey, 221 F.3d 342, 353–54 (2d Cir. 2000)).

182. Petition for a Writ of Certiorari, *supra* note 38, at 9.

183. *Id.* In *Buckley v. Fitzsimmons*, following remand by the Supreme Court, the Seventh Circuit adopted this argument. *See* Buckley v. Fitzsimmons, 20 F.3d 789, 794–95 (7th Cir. 1994).

misconduct committed during investigations,[184] but would also contravene the general purpose of § 1983.

VI. CONCLUSION

Prosecutors are operating in a very different environment and legal context than that which existed thirty years ago. The pressure to bring and win cases quickly is undeniable and intense. Moreover, the evidence shows that this pressure is taking a toll on prosecutors and, with it, eroding the ability of our criminal courts to produce justice. Close scrutiny of the public policy and legal underpinnings of the Court's prosecutorial misconduct jurisprudence leads inevitably to the conclusion that a broad reexamination is warranted. Such a reexamination would weigh heavily in favor of permitting prosecutors to be held liable for acts of misconduct committed during the initial investigation of crimes, provided the law clearly established that the acts constituted misconduct. In other words, prosecutors should have qualified, not absolute, immunity when participating in the investigation of a case.

The Supreme Court could decide the *Pottawattamie* case in favor of the victims of prosecutorial misconduct without undertaking this type of reexamination. Relying on *Buckley* and distinguishing *Van de Kamp* on facts, the Court could simply hold that this issue was previously addressed. But, the Court's willingness to do more—to look at those pressures which motivate misconduct—would send an important signal that justice, not merely convictions, must be the goal of every prosecutor. Furthermore, it would correct the signal sent, perhaps inadvertently, in the *Van de Kamp* decision that prosecutors, no matter how egregiously they act, are beyond the reach of the law.

The pendulum on prosecutorial misconduct has swung too far. In the *Pottawattamie* case, the Supreme Court can and should draw a line in the sand.

184. *Buckley*, 509 U.S. at 279.