BACKING OUT OF A CONSTITUTIONAL DITCH: CONSTITUTIONAL REMEDIES FOR GROSS PROSECUTORIAL MISCONDUCT POST *THOMPSON*

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In the past three years, we have witnessed what may be the most significant series of cases on prosecutorial immunity under Title 42 U.S.C. § 1983[1] since the seminal decision of *Imbler v. Pachtman* (1976).[2] In 2009, the Supreme Court accepted for review the case of *Pottawattamie County, Iowa v. McGhee,*[3] although the parties settled after oral arguments before the Court;[4] then, in 2009, along with issuing a decision in *Van de Kamp v. Goldstein*,[5] the Court accepted *Connick v. Thompson* (decided March 2011).[6] These cases involved allegations of gross prosecutorial misconduct resulting in the wrongful conviction of innocent persons.[7] At the heart of these cases is the question of how far—and at what cost—the Supreme Court is willing to defend the doctrine of absolute immunity for prosecutors. *McGhee* and *Connick* posed the question plainly: is such prosecutorial misconduct a necessary price to pay for assuring the proper functioning of the criminal justice system?[8] The question was not unforeseen, since, as Justice Powell had remarked in *Imbler*, absolute immunity protects both the honest and the dishonest prosecutor.[9] In this article we argue that the largely

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1 42 U.S.C. § 1983 (2012).

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

3 McGhee v. Pottawattamie Cnty., Iowa, 547 F.3d. 922, 925 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009) (mem.), *cert. dismissed*, 130 S. Ct. 1047 (2010) (mem.).

4 *McGhee*, 130 S. Ct. at 1047 (dismissing certiorari pursuant to Rule 46 of the Court).

5 Van de Kamp v. Goldstein, 555 U.S. 335, 335 (2009).

6 Thompson v. Connick, 553 F.3d 836 (5th Cir. 2008), *cert. granted*, 130 S. Ct. 1880, 1880 (2010) (mem.), *rev'd*, 131 S. Ct. 1350, 1350 (2011).

7 *See Connick*, 131 S. Ct. at 1356–57; *Van de Kamp*, 555 U.S. at 339–40; *Imbler*, 424 U.S. at 411–13; *McGhee*, 547 F.3d at 925.

8 *See Connick*, 131 S. Ct. at 1360, 1366; *McGhee*, 547 F.3d. at 932–33.

9 Justice Powell wrote:

theoretical possibility acknowledged by Justice Powell (since the prosecutor in *Imbler* deserves the appellation of honest rather than dishonest) has now become a reality. To continue to apply, or worse, to extend, Justice Powell's reasoning to cases revealing egregious prosecutorial actions backs us into a constitutional ditch. Instead, we suggest that there are at least two paths leading out of the ditch for the future.

In Part I, we describe the major developments in the law of prosecutorial immunity under § 1983. In Part II, we discuss the contours of the ditch in which we find ourselves. We focus on the need for both individual and organizational liability, the lack of accountability for prosecutors, and present a typology of honest and dishonest prosecutors. In Part III, we outline the type of case that might successfully challenge the current doctrine on absolute immunity for prosecutors in hopes of placing some checks on prosecutorial misconduct.

I. HISTORY OF PROSECUTORIAL IMMUNITY UNDER 42 U.S.C. § 1983

42 U.S.C. § 1983 created a means by which citizens could address civil wrongs perpetrated by state actors.[10] It states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

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> We conclude that the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law. 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. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution.
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> > As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.
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> *See Imbler*, 424 U.S. at 427–28 (footnote omitted) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d. Cir. 1949)).

[10] *See* 42 U.S.C. § 1983 (2012).

> suit in equity, or other proper proceeding for redress . . . .[11]

One justification often cited by the courts for clothing prosecutors with absolute immunity under § 1983 is the supposed long history of treating prosecutors as entitled to it.[12] However, this alleged history has been challenged. For example, Justice Scalia, in a concurring opinion in *Kalina v. Fletcher*,[13] took issue with the view that, in 1871, prosecutors had enjoyed absolute immunity:

> There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted. (Indeed, as the Court points out, there generally was no such thing as the modern public prosecutor.) The common law recognized a "judicial" immunity, which protected judges, jurors and grand jurors, members of courts-martial, private arbitrators, and various assessors and commissioners. That immunity was absolute, but it extended only to individuals who were charged with resolving disputes between other parties or authoritatively adjudicating private rights. When public officials made discretionary policy decisions that did not involve actual adjudication, they were protected by "quasi-judicial" immunity, which could be defeated by a showing of malice, and hence was more akin to what we now call "qualified," rather than absolute, immunity. I continue to believe that "prosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial."[14]

Similarly, former Solicitor General Paul Clement, who represented the exonerated defendants in the case of *Pottawattamie County v. McGhee* in the Supreme Court,[15] disputes the prevailing view that absolute immunity for prosecutors dated back to the passage of the law in 1871: "Nonetheless, the problem for an originalist looking for a basis for absolute immunity is that the law was very clear at the time of 1870 that there was no special rule for prosecutors; prosecutors, just like police officers, were entitled at most to a species of qualified immunity."[16] Finally, legal scholar Margaret Johns, in discussing the history of § 1983, states that

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[11] *Id.*

[12] *See, e.g.*, Kalina v. Fletcher, 522 U.S. 118, 123–25 (1997); *Imbler*, 424 U.S. at 421.

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

[14] *Kalina*, 522 U.S. at 132 (Scalia, J., concurring) (quoting Burns v. Reed, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in part, dissenting in part)).

[15] *See infra* Part I.G.

[16] Paul D. Clement, *Lawyering in the Supreme Court*, 38 HOFSTRA L. REV. 909, 909, 919–20 (2010).

neither the language of § 1983 nor its legislative history suggest a Congressional intention to extend immunity to officials who violated a defendant's civil rights.[17] However, the potential for § 1983 to serve as a federal civil rights statute was not explored for nearly a century, because § 1983 lay "dormant"[18] until the 1961 United States Supreme Court decision in *Monroe v. Pape*.[19] In *Monroe*, the Supreme Court held that § 1983 allows recovery against police officers who violate a citizen's constitutional rights, despite the existence of a state remedy.[20] The scope of immunity for prosecutors under § 1983, however, was not addressed until the case of *Imbler v. Pachtman*.[21] Although *Imbler* was a unanimous decision,[22] the eight justices who participated in the decision agreed only as to the case at bar and disagreed on the scope of prosecutorial immunity in general, as a concurring opinion sets forth.[23] We therefore discuss *Imbler* in some detail. The decision set the terms of the debate over the scope of prosecutorial immunity and the debate has changed little in succeeding years.

A. *Imbler v. Pachtman* (1976)

A California court sentenced Mr. Imbler to death for felony murder and his appeal was unsuccessful.[24] While Imbler was on death row, the deputy district attorney, Richard Pachtman, who had prosecuted his trial, turned up new evidence of witnesses who could corroborate Imbler's alibi, as well as evidence that the chief witness against him had recanted his testimony.[25] Mr. Pachtman wrote a letter to the governor of California describing this new evidence.[26] Imbler meanwhile filed an unsuccessful state habeas petition.[27] A few years later Imbler filed a federal habeas petition which included Mr. Pachtman's letter to the governor of California.[28] The federal district court granted the petition and

[17] Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 74–75 (2005).
[18] *Id.* at 73–74.
[19] Monroe v. Pape, 365 U.S. 167 (1961).
[20] *See id.*; *see also* Johns, *supra* note 17, at 73 (pointing out the significance of *Monroe*).
[21] *See* Imbler v. Pachtman, 424 U.S. 409, 421 (1976).
[22] *See id.* at 432.
[23] *See id.* at 432–33 (White, J., concurring).
[24] *Imbler*, 424 U.S. at 411–12.
[25] *Id.* at 412–13.
[26] *Id.* at 412.
[27] *Id.* at 413.
[28] *See id.* at 414.

Imbler was released when the state declined to retry him.[29] He then filed a § 1983 action against Pachtman and several police officers for conspiring to deny him his civil rights.[30] The federal district court granted Pachtman's motion under FED. R. CIV. P. 12(b)(6)[31] to dismiss the complaint against him on grounds of absolute immunity.[32] The Ninth Circuit affirmed the dismissal[33] and the Supreme Court "granted certiorari to consider the important and recurring issue of prosecutorial liability under the Civil Rights Act of 1871,"[34] in the words of Justice Powell.[35]

Earlier case law had established that the common law defense of absolute immunity under § 1983 applied to the actions of a legislative committee that had acted improperly[36] and to judges[37] in order to protect those exercising legislative and judicial duties, respectively.[38] However, qualified immunity applied to several other types of officials, including police officers,[39] the governor and other executive officers of a state,[40] and school officials.[41] The question in *Imbler* was whether prosecutors perform a "quasi-judicial" function in initiating and pursuing a prosecution, similar to judges and grand jurors, or an executive function, similar to other officials like those mentioned earlier.[42] The majority concluded that the actions of prosecutors are "quasi-judicial" and hence are protected by absolute immunity.[43] Justice Powell enumerated several reasons for this conclusion. A prosecutor protected only by the defense of qualified immunity would be looking over his shoulder, distracted by the possibility of being sued, and devoting resources to his own defense when a lawsuit was filed.[44] A second argument introduced a new issue, i.e., the effect of such liability on

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[29] *Id.* at 415.
[30] *Id.* at 415–16.
[31] FED. R. CIV. P. 12(b)(6).
[32] *Imbler*, 424 U.S. at 416.
[33] Imbler v. Pachtman, 500 F.2d 1301 (9th Cir. 1976).
[34] Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (2012) (codified as amended at 42 U.S.C. §§ 1983, 1985–86 (2010)).
[35] *See Imbler*, 424 U.S. at 410, 417.
[36] *See* Tenney v. Brandhove, 341 U.S. 367, 372, 377–79 (1951).
[37] Pierson v. Ray, 386 U.S. 547, 553–55 (1967).
[38] *Id.* at 554; *Tenney*, 341 U.S. at 373–74.
[39] *See Pierson*, 386 U.S. at 555, 557.
[40] Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974).
[41] *See* Wood v. Strickland, 420 U.S. 308, 321–22 (1975).
[42] *Imbler*, 424 U.S. at 420–21 (citing *Pierson*, 386 U.S. at 553–55 (discussing the absolute immunity of judges)); *see also, e.g.*, *Scheuer*, 416 U.S. at 247–48 (explaining that executive officials, such as the governor, have qualified immunity).
[43] *See Imbler*, 424 U.S. at 422–23, 427.
[44] *See id.* at 423–25.

the honest prosecutor:

> Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and—ultimately in every case—the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.[45]

Finally, Justice Powell reasoned, even the subconscious knowledge that a verdict in favor of the defendant could open the door to a § 1983 claim against the prosecutor would weaken the impartiality of the criminal justice system, especially with regard to post-trial procedures, including the remedial powers of the trial judge, the appellate process, and state and federal post-conviction collateral remedies.[46]

However, having introduced the honest prosecutor, Justice Powell acknowledged that the case of the dishonest prosecutor is much harder: "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."[47] Thus, the Court weighed the interest of the public in protecting the honest prosecutor more heavily than

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[45] *Id.* at 425–26 (footnote omitted).
[46] *Id.* at 427.
[47] *Id.*

that of the wronged individual.[48]

Lastly, Justice Powell reminded his readers that there are other sanctions for prosecutorial misconduct, e.g., the criminal law and professional discipline.[49] The Court held that prosecutors are absolutely immune from suit under § 1983 for conduct that is an "integral part of the judicial process,"[50] stating that "[w]e hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983."[51]

In a concurring opinion signed by two other justices,[52] however, Justice White argued that the Court's ruling was too sweeping:

> I write, however, because I believe that the Court's opinion may be read as extending to a prosecutor an immunity broader than that to which he was entitled at common law; broader than is necessary to decide this case; and broader than is necessary to protect the judicial process. Most seriously, I disagree with any implication that *absolute* immunity for prosecutors extends to suits based on claims of unconstitutional suppression of evidence because I believe such a rule would threaten to *injure* the judicial process and to interfere with Congress' purpose in enacting 42 U.S.C. § 1983, without any support in statutory language or history.[53]

Justice White emphasized that the "purpose of § 1983 is to 'give a remedy to parties deprived of constitutional rights, privileges and immunities by an *official's* abuse of his position.'"[54] As a result, he believed that the common law immunity of prosecutors against suits for malicious prosecution and defamation was important in § 1983 suits as well.[55] Where he departed from the reasoning of the majority involved the allegations of suppression of exculpatory evidence: "Most particularly I disagree with any implication that the absolute immunity extends to suits charging unconstitutional suppression of evidence."[56]

At the time *Imbler* was being decided, the Court was considering

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[48] *See id.*

[49] *Id.* at 428–29.

[50] *Id.* at 430 (quoting Imbler v. Pachtman, 500 F.2d 1301, 1302 (9th Cir. 1974)).

[51] *Imbler*, 424 U.S. at 431.

[52] Justices Brennan and Marshall also joined in Justice White's concurring opinion. *Id.* at 432.

[53] *Id.* at 432–33 (White, J., concurring).

[54] *Id.* at 433 (quoting Monroe v. Pape, 365 U.S. 167, 172 (1961) (emphasis added)).

[55] *Imbler*, 424 U.S. at 438, 440.

[56] *Id.* at 441 (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)).

a companion case, *Williams v. Hilliard*, which was remanded for further consideration in light of *Imbler v. Pachtman*.[57] According to Justice White, the holding in *Imbler* would treat the allegation in *Hilliard*—that a prosecutor had instructed a witness not to disclose that FBI testing had revealed that several brown stains on the defendant's clothing at the time of arrest were *not* bloodstains[58]—on a par with allegations that the prosecutor knew or should have known that his witness had testified falsely in certain respects.[59] That is to say, both types of allegations would be absolutely immunized by the ruling in *Imbler*, which Justice White would argue involves a paradox.[60] The result of immunizing a prosecutor from charges of defamation is to encourage the prosecutor to bring information to the court's attention.[61] The result of immunizing a prosecutor who suppresses exculpatory evidence is to encourage that prosecutor to keep information from the court.[62] The latter course of action, according to Justice White, injures the judicial process significantly.[63] Thus, Justice White would deny absolute immunity to prosecutors on charges of unconstitutional suppression of evidence.[64]

Let us sum up the areas of agreement laid out in *Imbler*. First, the Court distinguished among the different functions of a prosecutor, granting absolute immunity only to the function of initiating and pursuing a prosecution, but not to any investigative or administrative actions.[65] Second, both sides agreed that the honest prosecutor requires the protection of absolute immunity against the allegations of the defendant who is acquitted or exonerated of the charges against him or her.[66] There are at least two areas of disagreement. First, whether the great federal civil rights statute provided prosecutors with immunity as broad as that of the common law, or whether the statute's purpose requires courts

[57] Williams v. Hilliard, 424 U.S. 961, 961 (1976) (mem.) (citing *Imbler*, 424 U.S. 409 (1976), *remanded to* 540 F.2d 220 (6th Cir. 1976)).

[58] Hilliard v. Williams, 465 F.2d 1212, 1215 (6th Cir. 1972), *vacated*, 424 U.S. 961.

[59] *See Imbler*, 424 U.S. at 441–47 (White, J., concurring) (explaining that prosecutors who actively withhold information from the court or encourage witnesses to present false testimony are treated as any other prosecutor who is accused of malicious prosecution and defamation and therefore, extended absolute immunity).

[60] *See id.* at 442–44.

[61] *Id.* at 442.

[62] *Id.* at 442–43.

[63] *Id.* at 433.

[64] *Id.*

[65] *See id.* at 430–31 (majority opinion).

[66] *Id.* at 425–26 (majority opinion); *id.* at 437–38 (White, J., concurring).

to treat *Brady* violations differently from other allegations of prosecutorial misconduct at trial.[67] Second, there are competing visions of what more impairs the integrity of the judicial process: the possibility that the prosecutor and her fellow courtroom actors would be so tender to exposure to lawsuits that they would pull their punches,[68] or the possibility that the dishonest prosecutor can commit grave constitutional violations with impunity.[69] Now we turn to later cases.

B. *Burns v. Reed* (1991)

Justice White wrote for the majority in the case of *Burns v. Reed*.[70] The former defendant challenged the prosecutor's conduct in two respects: first, the prosecutor had advised police that it was permissible to interview the defendant, who denied committing the crime, under hypnosis.[71] Then the prosecutor participated in a probable cause hearing without telling the judge that the defendant's admission had been obtained under hypnosis, despite her consistent denials.[72] A search warrant was issued.[73] At a pretrial hearing, however, a judge suppressed the evidence obtained through hypnosis, and the charges against the defendant were dropped.[74] The Court held that the absolute immunity of § 1983 applies to the prosecutor's conduct at the probable cause hearing, but not to the earlier legal advice the prosecutor had given to the police about the use of hypnosis to interview the defendant because this was not "intimately associated with the judicial phase of the criminal process."[75] However, in denying absolute immunity for the actions in advising the police, *Burns* reaffirmed the principle from *Imbler*: "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."[76]

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[67] *See id.* at 432–33 (White, J., concurring).
[68] *See id.* at 426–28 (majority opinion).
[69] *See id.* at 442–44 (White, J., concurring).
[70] Burns v. Reed, 500 U.S. 478, 481 (1991).
[71] *Id.* at 481–82.
[72] *Id.* at 482–83.
[73] *Id.* at 483.
[74] *Id.*
[75] *See id.* at 491–92, 495–96 (quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976)).
[76] *Id.* at 484 (quoting *Imbler*, 424 U.S. at 428); *see also* Butz v. Economou, 438 U.S. 478, 521 (1978) (Rehnquist, J., concurring in part, dissenting in part) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)) (explaining that an official's entitlement to absolute immunity depends on whether the official was acting within his or her delegated authority, whether this results in unconstitutional acts or not).

Justice Scalia filed a separate opinion, concurring in part and dissenting in part.[77] While he agreed with the Court's holding, he believed the former defendant had raised a claim that, if proven, would not be shielded by absolute immunity; namely, the prosecutor had had an improper motive in seeking the search warrant:

> Petitioner's second question presented asks whether a prosecutor is absolutely immune "when he seeks a search warrant in a probable cause hearing *and* intentionally fails to fully inform the court" of relevant circumstances. It is plausible to read this as challenging *both* the decision to apply for a search warrant *and* the in-court statements at the hearing; and petitioner's arguments support that reading. . . . I think it entirely plain that, in 1871 when § 1983 was enacted, there was no absolute immunity for procuring a search warrant.[78]

So, although in *Burns*, Justice White no longer discussed the issue of a lack of information presented to the court that he had expressed in dissent in *Imbler v. Pachtman*,[79] Justice Scalia seemed to be troubled by a similar concern: that the prosecutor had failed to disclose to the court that the defendant's "confession" was obtained through hypnosis.[80]

C. *Buckley v. Fitzsimmons* (1993)

As previously outlined here, *Imbler v. Pachtman* stated that prosecutors enjoy absolute immunity for initiating a prosecution.[81] In *Buckley*, the Court was faced with the question of when the "initiation of a prosecution" starts and whether out of court statements made prior to the judicial phase require full or qualified immunity.[82] Petitioner Buckley (defendant below) argued that prosecutors had conspired to manufacture evidence against him and, to do so, had shopped for expert witnesses who would support the prosecution's theory.[83] After a boot print was found at the scene of a horrific home invasion, culminating in the murder of an eleven-

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[77] *Burns*, 500 U.S. at 496 (Scalia, J., concurring in part, dissenting in part).

[78] *Id.* at 503–04 (quoting Brief for Petitioners at i, Burns v. Reed, 500 U.S. 478 (1991) (No. 89-1715), 1990 WL 505711, at *i).

[79] *See Imbler*, 424 U.S. at 442–44.

[80] *See Burns*, 500 U.S. at 503 (Scalia, J., concurring in part, dissenting in part).

[81] *Imbler*, 424 U.S. at 431.

[82] Buckley v. Fitzsimmons, 509 U.S. 259, 272, 276–77 (1993) (quoting *Imbler*, 424 U.S. at 431 n.33).

[83] *See Buckley*, 509 U.S. at 262–64.

year-old girl, investigators working jointly for the sheriff's office and the prosecutor's office contacted three different crime labs to ask whether Mr. Buckley's boot could have made the boot print.[84] All three labs said it was not possible to answer the question.[85] The investigators then sought the opinion of an anthropologist, who identified Buckley's boot as the source of the boot print.[86] A grand jury was convened for eight months but was unable to return an indictment.[87] The prosecutor admitted in public that there was insufficient evidence to identify the perpetrator of the crime.[88] Then, two months later, just three days before a very tight primary election, the prosecutor announced at a press conference that an indictment would be returned against Buckley and two other men, whom Fitzsimmons claimed were involved in a burglary ring and were responsible for the murder.[89]

Buckley's trial that began ten months later ended in a mistrial.[90] After nearly three years awaiting closure, he was released when a third party confessed to the crime.[91] Buckley's § 1983 claim focused on the investigation, in which he argued that the district attorney's behavior was not protected by prosecutorial immunity.[92] Justice Stevens, writing for the majority, found that while evaluating evidence and preparing to present it by means of expert witnesses are ordinarily part of a prosecutor's pretrial preparation and hence are immunized, nevertheless, in this case, they were not immunized.[93] This was because at the time these activities took place probable cause to arrest the defendant did not exist:

> The prosecutors do not contend that they had probable cause to arrest petitioner or to initiate judicial proceedings during that period. Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.[94]

In short, this holding means that when a prosecutor's

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[84] *Id.* at 261–63.
[85] *Id.* at 262.
[86] *Id.*
[87] *Id.* at 263–64.
[88] *Id.* at 264.
[89] *See* LETTIE MCSPADDEN, MISTAKES WERE MADE: PROSECUTORIAL MISJUDGMENT OR MISCONDUCT 36–37 (2009).
[90] *Buckley*, 509 U.S. at 264.
[91] *Id.* at 261, 264.
[92] *See id.* at 272.
[93] *See id.* at 261, 272–73, 275.
[94] *Id.* at 274.

investigative work (which he may view as preparation for trial) takes place before probable cause to arrest exists, it is not protected by absolute immunity.[95] It might be noted, then, somewhat tongue in cheek, that when prosecutors stand near police, their halo of absolute immunity begins to wane.[96]

The Court further held that the prosecutor's false or defamatory statements at a press conference were not fully immunized and the prosecutor would only be protected by qualified, or "good-faith," immunity, as the tasks were considered "administrative" in nature.[97] Here, Justice Stevens noted that there was no comparable common law immunity for prosecutors, nor was the prosecutor acting as an advocate when he made the statements.[98] Hence the prosecutor's statements were covered by qualified immunity only, like those of any other executive official.[99]

Justice Scalia filed a concurring opinion in which he mentioned an issue that he would raise in future cases.[100] Speaking of the allegation that the prosecutor had prepared false evidence against the defendant, Justice Scalia observed that the prosecutor's introduction of that evidence at trial is immunized under § 1983.[101] Paradoxically, an attempt to hold the prosecutor liable for *preparing* that evidence before trial would fail, he asserted, since such an action does not violate the Constitution.[102] As we will see later, the prosecutors in the *McGhee* case raised this very argument.[103]

Justice Kennedy also filed a separate opinion dissenting in part from the majority's holding that the prosecutor's conduct in seeking expert witnesses was not immunized.[104] First, Kennedy expressed the fear that the majority's holding that some pre-trial conduct by prosecutors is not immunized would leave prosecutors open to suit:

> There is a reason even more fundamental than that stated by the Court for rejecting Buckley's argument that *Imbler*

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[95] *See id.* at 275–76.

[96] *See id.* at 276 (explaining that when prosecutors and police perform the same function they are afforded the same qualified immunity).

[97] *Id.* at 276–77.

[98] *Id.* at 277–78.

[99] *Id.* at 278.

[100] *Id.* at 281 (Scalia, J., concurring); *see, e.g.*, McGhee v. Pottawattamie Cnty., Iowa, 547 F.3d 922, 932 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009) (mem.), *cert. dismissed*, 130 S. Ct. 1047, 1047 (2010) (mem.).

[101] *Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

[102] *Id.* (citing Buckley v. Fitzsimmons, 919 F.2d 1230, 1244 (7th Cir. 1990), *vacated*, 502 U.S. 801 (1991)).

[103] *See McGhee*, 547 F.3d at 932.

[104] *Buckley*, 509 U.S. at 282–84 (Kennedy, J., concurring in part, dissenting in part).

> applies only to the commencement of a prosecution and to in-court conduct. This formulation of absolute prosecutorial immunity would convert what is now a substantial degree of protection for prosecutors into little more than a pleading rule.[105]

Thus, Justice Kennedy was concerned that the creation of a bright-line rule (immunity can only attach to actions taken after probable cause exists) would lead to clever litigants managing to sue for malicious prosecution by including allegations about a prosecutor's pretrial actions.[106] He also felt that the bright-line rule had the effect of superseding the functional test used in earlier cases.[107] The federal courts could be trusted with the job of deciding whether a prosecutor had acted as an investigator, an advocate, or an administrator.[108]

D. *Kalina v. Fletcher* (1997)

In *Kalina v. Fletcher*,[109] the Supreme Court continued to apply the functional analysis developed in *Imbler v. Pachtman*.[110] Commencing criminal proceedings against Mr. Fletcher, the prosecutor, "[f]ollowing customary practice," filed an affidavit supporting an application for an arrest warrant in which she made inaccurate statements of fact.[111] Fletcher was arrested and spent a day in jail.[112] A month later, the prosecutor moved to dismiss charges against him.[113] When sued under § 1983, the prosecutor claimed absolute immunity because the affidavit had been filed as part of the commencement of a criminal proceeding.[114] The Court—noting that anyone supplying facts in an affidavit functions as a witness—found that absolute immunity did not apply, despite any prosecutorial credentials he may have.[115]

Justice Scalia filed a concurring opinion, in which he opined on the history of prosecutorial immunity under § 1983: "There was, of course, no such thing as absolute prosecutorial immunity when §

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[105] *Id.* at 283.
[106] *Id.* at 287.
[107] *See id.* at 289.
[108] *Id.* at 290.
[109] Kalina v. Fletcher, 522 U.S. 118 (1997).
[110] *See id.* at 123–25 (citing Imbler v. Pachtman, 424 U.S. 409, 410 (1976)).
[111] *Kalina*, 522 U.S. at 120–21.
[112] *Id.* at 122.
[113] *Id.*
[114] *Id.*
[115] *See id.* at 129–31.

1983 was enacted."[116] Nonetheless, he expressed dissatisfaction with the divergence between the cases decided under *Imbler*'s functional analysis and what he characterized as the "common law embodied in § 1983."[117] Justice Scalia's characterization reminds us of the fundamental disagreement expressed in *Imbler* as to whether § 1983 simply reflected the notions of prosecutorial immunity existing in 1871,[118] or whether prosecutorial immunity must be interpreted in light of the purposes of the Civil Rights Act, as Justice White had argued in his concurring opinion in *Imbler*.[119] Justice Scalia's views on this subject will be important in understanding the case of *Connick v. Thompson*,[120] discussed below.[121]

E. *Van de Kamp v. Goldstein* (2009)

The Roberts Court has heard three significant cases involving § 1983 for prosecutorial misconduct in the last three years: *McGhee v. Pottawattamie County, Iowa*,[122] *Van de Kamp v. Goldstein*,[123] and *Connick v. Thompson*,[124] with the latter two considerably strengthening and extending the principles set forth in *Imbler*.[125] The first of these cases is *Van de Kamp v. Goldstein*, where an inmate served twenty-four years in a maximum-security prison for murder before being released on a habeas petition.[126] During the habeas case, the district court found that a longtime jailhouse informant named Fink had not been truthful in his testimony against the defendant.[127] Further, Goldstein claimed that the chief deputy District Attorney had failed to disclose that fact, as well as Fink's extensive history in exchanging testimony for reduced sentences, to the defense.[128] This information, argued Goldstein,

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[116] *Id.* at 131–32 (Scalia, J., concurring).

[117] *See id.* at 135.

[118] *See* Imbler v. Pachtman, 424 U.S. 409, 417–19 (1976) (holding that § 1983 should be interpreted according to tort principles that establish common law absolute immunities for government officials).

[119] *See id.* at 433–34 (White, J., concurring).

[120] Connick v. Thompson, 131 S. Ct. 1350 (2011).

[121] *See infra* Part I.F.

[122] McGhee v. Pottawattamie Cnty., Iowa, 547 F.3d. 922, 925 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009) (mem.), *cert. dismissed*, 130 S. Ct. 1047, 1047 (2010) (mem.).

[123] Van de Kamp v. Goldstein, 555 U.S. 335 (2009).

[124] *Connick*, 131 S. Ct. 1350.

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

[126] *Van de Kamp*, 555 U.S. at 339.

[127] *Id.*

[128] *Id.*

would have allowed his lawyer to impeach Fink's testimony, and thus the failure of the prosecution to disclose this information led to Goldstein's wrongful conviction.[129] Goldstein sought to hold the chief and deputy chief prosecutors liable relying upon a 1972 case, *Giglio v. United States*, on three theories of liability under § 1983, including "(1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about informants."[130] Specifically, the petitioner argued that the supervisor's failure to implement a system to track informants' exchanges and favors deliberately kept the line level prosecutors in the dark about the motivation for Fink's testimony.[131] Justice Breyer, writing for a unanimous court, held that all of these claims were barred by absolute immunity.[132]

The Court distinguished between ordinary administrative duties (such as payroll administration and workplace hiring) and the administrative duties described in *Van de Kamp*:

> [T]he types of activities on which Goldstein's claims focus 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. And in that sense also Goldstein's claims are unlike claims of, say, unlawful discrimination in hiring employees. Given these features of the case before us, we believe absolute immunity must follow.[133]

Should these activities not be protected by absolute immunity, the harm would be that envisioned by *Imbler v. Pachtman*: the prosecutor might pull his punches for fear of being sued.[134] Justice Breyer acknowledges several times that this holding leaves the wrongfully convicted person with no remedy, but reminds us that that is the lesser of two evils.[135]

Notable in the case of *Van de Kamp v. Goldstein* is the absence of concern about the suppression of information that did not reach the court.[136] Also striking is the lack of discussion of the obligations

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[129] *Id.*
[130] *Id.* at 339–40 (citing Giglio v. United States, 405 U.S. 150 (1972)).
[131] *Van de Kamp*, 555 U.S. at 340, 344.
[132] *See id.* at 337, 349.
[133] *Id.* at 344 (emphasis omitted).
[134] *See id.* at 345 (citing Imbler v. Pachtman, 424 U.S. 409, 422–23 (1976)).
[135] *See, e.g.*, *Van de Kamp*, 555 U.S. at 340, 348.
[136] *See Van de Kamp*, 555 U.S. at 341, 348 (including that the prosecutor was alleged to be

created in *Giglio*.[137] Decided in 1972, before *Imbler v. Pachtman*, *Giglio v. United States* held that a promise of leniency made by an Assistant U.S. Attorney to a cooperating witness was attributable to the entire office of the U.S. Attorney, and a failure to disclose the promise constituted a denial of due process.[138] Chief Justice Burger wrote:

> [W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.[139]

Nearly thirty years later, in *Van de Kamp*, for the Court to assume that prosecutorial immunity trumps the constitutional mandate of *Giglio*, as well as the values of § 1983, is surprising.[140] Still, Justice Breyer's reference to the choice of the lesser of two evils indicates uneasiness,[141] and the unanimity of the Court in *Van de Kamp v. Goldstein* broke down in the case of *Connick v. Thompson*, to which we turn next.

F. *Connick v. Thompson* (2011)

Connick was a five to four decision, dubbed by critics "cruel but not unusual,"[142] that inspired dueling separate opinions by Justice Scalia, concurring and Justice Ginsburg, dissenting.[143] Justice

"responsible for the expert's having suppressed important evidence," yet stating that they must find the prosecutor to have absolute immunity even if a plaintiff is deprived compensation that he merits).

[137] *See generally* Giglio v. U.S., 405 U.S. 150, 154 (1972) (holding that a prosecutor has an obligation to communicate all relevant information to all parties).

[138] *Id.* at 153–54.

[139] *Id.* at 154 (citations omitted).

[140] *See, e.g.*, *Van de Kamp*, 555 U.S. at 344, 348 (holding that even if *Giglio* imposes an obligation on prosecutors, prosecutors must still be afforded absolute immunity).

[141] *Id.* at 348.

[142] *See* Dahlia Lithwick, *Cruel but Not Unusual: Clarence Thomas Writes One of the Meanest Supreme Court Decisions Ever*, SLATE MAGAZINE (Apr. 1, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html.

[143] Connick v. Thompson, 131 S. Ct. 1350, 1350 (2011).

Thomas wrote the opinion of the majority.[144] The philosophical division among members of the Court is illustrated through the very different descriptions of the facts of the case given by Justices Thomas and Ginsburg.[145] Justice Thomas gives a straightforward account of a man who had the misfortune to be wrongly identified as the perpetrator of both an armed robbery and an unrelated murder.[146] Justice Ginsburg's account is more complex, detailing the extensive record of misconduct by a variety of members of a district attorney's office that clearly cared more about winning cases than about *Brady* violations.[147] Misconduct on the part of the prosecutor was established in this case by the deathbed confession of ADA Deegan, who told a colleague (ADA Riehlmann) that he had intentionally hidden an exculpatory lab report, and urged him to make things right, but the colleague failed to do so.[148] Mr. Thompson, the defendant, convicted of armed robbery and murder, came within one month of execution before an investigator turned up that evidence that had been deliberately concealed by at least two prosecutors involved in the case.[149] Thompson served a total of eighteen years in prison for crimes of which he was exonerated (armed robbery) or eventually acquitted (murder).[150]

Thompson sued the District Attorney's office, District Attorney Connick himself, and a variety of ADAs under § 1983 for conduct that led to his wrongful conviction, incarceration on death row, and near execution.[151] His theory of the case was that the District Attorney's office violated the requirements of *Brady v. Maryland* by failing to disclose the crime lab report at Thompson's trial for armed robbery.[152] He sought therefore to hold District Attorney Connick liable by making two arguments: first, having unconstitutional policies in his office led to *Brady* violations; second, the *Brady* violations were caused by Connick's "deliberate indifference" to a need to train his staff on avoiding such violations.[153] The jury

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[144] *See id.* at 1355.

[145] *See id.* at 1355–58 (majority opinion); *id.* at 1366 (Scalia, J., concurring); *id.* at 1371–83 (Ginsburg, J., dissenting).

[146] *See id.* at 1356–57 (majority opinion).

[147] *See id.* at 1372–75 (Ginsburg, J., dissenting) (listing at least three instances of the prosecution withholding evidence that could have been used to impeach witnesses at trial).

[148] *Id.* at 1374–75.

[149] *See id.* at 1355 (majority opinion); *id.* at 1373–1375 (Ginsburg, J., dissenting).

[150] *See id.* at 1355–57 (majority opinion).

[151] *Id.* at 1357.

[152] *Id.* (citing to Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that any exculpatory evidence held by the prosecution must be turned over to all parties upon request)).

[153] *Connick*, 131 S. Ct. at 1357.

rejected the first argument but awarded Thompson $14 million on the second.[154] The Supreme Court focused its attention, therefore, on the second theory.[155]

We pause here to make two observations. First, the most obviously culpable individual (Deegan, the prosecutor who had made the deathbed confession) was beyond Thompson's reach.[156] However, Connick himself and a number of other ADAs were still employed at the DA's office.[157] Connick argued throughout that the responsibility for the misconduct did not attach to him, seemingly alleging that responsibility attached only to Deegan and the colleague to whom he made his confession, Riehlmann.[158] After the commencement of the § 1983 action, Connick subjected Riehlmann to a disciplinary proceeding; Riehlmann was then reprimanded by the Supreme Court of Louisiana.[159] Second, Thompson wanted to hold the whole office responsible for the wrongdoing.[160] To that end, Justice Ginsberg's dissent chronicles the extensive history of misunderstanding, even sometimes willful ignorance, of the *Brady* ruling by the Orleans Parish District Attorney's office.[161] This institutional history includes Connick's misunderstanding of *Brady* requirements (per his own testimony under oath), that his line level supervisors similarly couldn't articulate the meaning of the ruling, and that no one in the office received any *Brady* training.[162] Justice Ginsberg goes on:

> Connick, who himself had been indicted for suppression of evidence, created a tinderbox in Orleans Parish in which *Brady* violations were nigh inevitable. And when they did occur, Connick insisted there was no need to change anything, and opposed efforts to hold prosecutors accountable on the ground that doing so would make his job more difficult.[163]

The dissent seemed to argue that all of this behavior sufficiently

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[154] *Id.*

[155] *See id.* at 1357–58.

[156] *See id.* at 1374–75 (Ginsburg, J., dissenting).

[157] *See id.* at 1357 (majority opinion).

[158] *See id.* at 1357–58 (majority opinion); *id.* at 1372–73 nn. 4–5, 1374–75 (Ginsburg, J., dissenting) (implying that Connick, who stated that he should not be at fault, also implied that fault only should be attributed to his colleagues who committed a constitutional violation by withholding the blood evidence).

[159] *Id.* at 1356 n.1 (majority opinion); *id.* at 1375 (Ginsburg, J., dissenting).

[160] *See id.* at 1357 (majority opinion).

[161] *See id.* at 1373–74, 1377–80 (Ginsburg, J., dissenting) (detailing the *Brady* violations).

[162] *See id.* at 1378.

[163] *Id.* at 1387.

constituted deliberate indifference.[164] Nevertheless, the minority on the Court were not able to persuade their colleagues with this institutional history.

By contrast with *Van de Kamp* and *Connick v. Thompson*, most of the earlier cases had spoken of "the prosecutor" as an organizational entity, not an individual.[165] In *Van de Kamp*, the Court had elevated absolute immunity over Goldstein's argument that a prosecutor's constitutional obligations give rise to obligations to train and monitor assistant district attorneys.[166] Thompson sought to raise a slightly different version of Goldstein's argument, basing his argument not on *Giglio v. United States*, but on a line of cases concerning the liability under § 1983 of a municipality for the actions of its employees, including *Monell v. Department of Social Services of New York* and *Canton, Ohio v. Harris*.[167]

Thompson argued that the *Brady* violations were caused by the District Attorney's deliberate indifference to the need to train his staff regarding their obligation to avoid *Brady* violations.[168] Justice Thomas countered this argument succinctly:

> The *Brady* violation conceded in this case occurred when one or more of the four prosecutors involved with Thompson's armed robbery prosecution failed to disclose the crime lab report to Thompson's counsel. Under Thompson's failure-to-train theory, he bore the burden of proving both (1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the need to train the prosecutors about their *Brady* disclosure obligation with

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[164] *See id.* at 1386–87.

[165] *See, e.g.*, Giglio v. United States, 405 U.S. 150, 154 (1972) (explaining that the prosecutor's office is an entity and the promises of an individual attorney are attributed to the government). *But see Connick*, 131 S. Ct. at 1358, 1365–66 (implying that the prosecutor is an individual by stating that only one conceded *Brady* violation occurred and that Connick was not responsible as an acting policymaker on behalf of the district attorney's office because it was not established that he was deliberately indifferent for failing to train attorneys); Van de Kamp v. Goldstein, 555 U.S. 335, 343–44 (2009) (suggesting that a prosecutor is to be treated as an individual by concluding that even if they held that *Giglio* did impose an obligation on prosecutors to train deputy district attorneys, those prosecutors still enjoy absolute immunity).

[166] *Van de Kamp*, 555 U.S. at 343–44.

[167] *See Connick*, 131 S. Ct. at 1358–61 (citing Canton, Ohio v. Harris, 489 U.S. 378, 390 & n.10 (1989); Monell v. Dep't Soc. Servs. of the City of N.Y., 436 U.S. 658, 690–91, 694 (1978)) (stating that Thompson's claims were that the municipality violated § 1983 because their failure to train their employees was a violation of an official municipal policy that constituted deliberate indifference).

[168] *See Connick*, 131 S. Ct. at 1358–61 (stating that Thompson claimed that the municipality violated § 1983 because it failed to train its employees, an official municipal policy, and that this failure constituted deliberate indifference).

> respect to evidence of this type and (2) that the lack of training actually caused the *Brady* violation in this case. Connick argues that he was entitled to judgment as a matter of law because Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training. We agree.[169]

This analysis illustrates the stark contrast between the approach of the majority and the dissent. What is noteworthy here is the extent to which Justice Thomas views the responsibility of prosecutors as belonging solely to the individual.[170] Both his statement that only one *Brady* violation occurred[171]—a view with which the dissenters vigorously took issue[172]—and his belief that one incident does not a pattern make,[173] demonstrate the assumption that *only* the individual prosecutor has responsibility for his or her misconduct. There is no awareness of the prosecutor's office as an entity. Given these premises, Justice Thomas's conclusions follow logically.

G. *McGhee v. Pottawattamie County, Iowa*, 8th Cir. (2008)

It is interesting to speculate how the Supreme Court might have ruled in *McGhee v. Pottawattamie County, Iowa*,[174] which was accepted for review after *Van de Kamp*, but before *Connick*.[175] Since the Supreme Court did not render a decision due to the parties' settlement,[176] we are arbitrarily posing this question in the post-

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[169] *Id.* at 1358.

[170] *See id.* at 1358, 1365–66 (implying that the prosecutor is an individual by stating that only one conceded *Brady* violation occurred and that Connick was not responsible as an acting policymaker on behalf of the district attorney's office because it was not established that he was deliberately indifferent for failing to train attorneys).

[171] *See id.* (stating that the conceded errors of the four prosecutors who tried Thompson's armed robbery charge and did not disclose the blood evidence in the crime lab report amounted to a *Brady* violation).

[172] *See id.* at 1370 (Ginsburg, J., dissenting).

[173] *See id.* at 1360–61, 1364–65 (majority opinion) (explaining that a single-incident *Brady* violation cannot be substituted in lieu of showing a pattern of deliberate indifference because of the inherent difficulty proving when a municipality commits a violation by failing to train its employees).

[174] McGhee v. Pottawattamie Cnty., Iowa, 547 F.3d. 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009) (mem.), *cert. dismissed*, 130 S. Ct. 1047, 1047 (2010) (mem.).

[175] *See* Van de Kamp v. Goldstein, 552 U.S. 1309 (certiorari granted Apr. 14, 2008), *rev'd*, 555 U.S. 335, 335 (2009); *McGhee*, 129 S. Ct. 2002 (certiorari granted Apr. 20, 2009), *cert. dismissed*, 130 S. Ct. 1047 (2010) (mem.); Connick v. Thompson, 130 S. Ct. 1880, 1880 (2010) (mem.) (certiorari granted in part Mar. 22, 2010), *rev'd*, 131 S. Ct. 1350, 1350 (2011).

[176] *McGhee*, 130 S. Ct. at 1047 (dismissing certiorari pursuant to Rule 46 of the Court).

Thompson era. Our description of the case derives largely from the decision of the Eighth Circuit.

In the small town of Council Bluffs, Iowa, the killing of a local man caused an uproar in the community.[177] Law enforcement turned out in force, and an assistant county attorney joined the investigation, keeping his boss, the County Attorney, advised of all progress.[178] For two months the police focused on a local suspect, until the interrogation of a teenager for an unrelated episode resulted in the identification of three young African American men from the neighboring state of Nebraska.[179] Two of those identified, McGhee and Harrington, were convicted and sentenced to life in 1978, where they remained until an investigator turned up evidence of the numerous instances of prosecutors violating the *Brady* rule.[180]

In 2002, the Iowa Supreme Court overturned their convictions.[181] McGhee and Harrington's problems were not at an end, however. The new County Attorney, although he dismissed the charges against Harrington and agreed to vacate McGhee's sentence in exchange for an Alford plea for time served, called a press conference in which he announced his belief that the two men were guilty of the offenses for which they had been imprisoned.[182] Although the appellate court does not mention the possibility that race played a part in this case, McGhee's and Harrington's appellate lawyer, Paul Clement, raised that possibility in an interview with National Public Radio when he noted that Council Bluffs has a largely white population—except the three men identified by the teenager (McGhee, Harrington, and Houston), who are African American and lived in the neighboring state of Nebraska as well.[183]

McGhee and Harrington brought suit against the original county attorney and assistant county attorney for their actions in 1977 and against the county attorney in 2002 who held the press conference and stated his belief that they were guilty.[184] Their suit described misconduct by the first two prosecutors including arrest without

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[177] *See McGhee*, 547 F.3d. at 926.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 925, 927–28.

[181] *Id.* at 925.

[182] *See id.* at 925, 928.

[183] Nina Totenberg, *Can Prosecutors Be Sued by People They Framed?*, NAT'L PUB. RADIO (Nov. 4, 2009), http://www.npr.org/templates/story/story.php?storyId=120069519. Charges against the teenager were dropped in exchange for his testimony against McGhee and Harrington. *Id.*

[184] *McGhee*, 547 F.3d at 926–28 (detailing the multiple instances of alleged prosecutorial misconduct).

probable cause, coercing and coaching witnesses, and fabricating evidence.[185] They also alleged defamation by the third prosecutor.[186] The three prosecutors raised both state claims and the issue of absolute immunity on motions for summary judgment, which the district court denied.[187] With regard to the absolute immunity claims, the two prosecutors argued that even if they had acted to obtain, manufacture, coerce, and fabricate evidence before the filing of the true information, "it is only the use of this evidence, not its procurement, that constitutes a violation of McGhee's and Harrington's substantive due process rights."[188] This argument, it will be remembered, is the one raised by Justice Scalia in his concurring opinion in *Buckley v. Fitzsimmons*.[189] However, the district court held that these actions constitute a due process violation and that to hold otherwise "would be a perverse doctrine of tort and constitutional law."[190] The Eighth Circuit agreed: "We find immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not a distinctly prosecutorial function."[191]

Thus, if the Supreme Court were to consider the *McGhee* case today, it would once again face the tradeoff that Justice Powell described thirty-six years ago in *Imbler v. Pachtman* and approached again by Justice Breyer in *Van de Kamp v. Goldstein*, i.e., the idea that prosecutorial immunity is so vital that shielding bad prosecutors is a price worth paying.[192] It will be recalled that the Court decided *Van de Kamp* unanimously,[193] but was bitterly divided in *Connick v. Thompson*,[194] despite the superficial similarity

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[185] *Id.* at 928, 930.

[186] *Id.* at 928.

[187] *Id.* at 928, 930.

[188] *Id.* at 932.

[189] Buckley v. Fitzsimmons, 509 U.S. 259, 280 (1993) (Scalia, J., concurring) (citing Buckley v. Fitzsimmons, 919 F.2d 1230, 1244 (7th Cir. 1990), *vacated*, 502 U.S. 801 (1991)).

[190] McGhee v. Pottawattamie Cnty., Iowa, 547 F.3d. 922, 932 (8th Cir. 2008) (quoting McGhee v. Pottawattamie Cnty., Iowa, 475 F. Supp. 2d 862, 907 (S.D. Iowa 2007)).

[191] *McGhee*, 547 F.3d at 933 (internal quotation marks omitted).

[192] Van de Kamp v. Goldstein, 555 U.S. 335, 340 (2009) (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949); Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976)).

[193] *Van de Kamp*, 555 U.S at 337 (unanimous opinion).

[194] Connick v. Thompson, 131 S. Ct. 1350, 1355 (2011) (as evidenced by the fact that Justice Thomas wrote the majority opinion and was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, while Scalia filed a concurrence that Alito joined, and Ginsberg authored a dissenting opinion in which Justices Bryer, Sotomayer, and Kagan joined).

in legal theory (i.e., both involved allegations of failure to train prosecutors).[195] Furthermore, the argument advanced by the prosecutors in *McGhee*,[196] echoing Justice Scalia in his concurring opinion in *Buckley v. Fitzsimmons*,[197] that there is no constitutional violation in the preparation of false evidence is unlikely to find favor with the other justices according to Paul Clement, lawyer for McGhee and Harrington in their Supreme Court case, even though its use at trial is immunized.[198] To rule that absolute immunity bars the types of allegations of prosecutorial misconduct in *McGhee* would lead to more headlines like the one reported on National Public Radio: "Can Prosecutors Be Sued by People They Framed?"[199] Increasing concerns about wrongful conviction have changed the legal and public landscape since *Imbler v. Pachtman* was decided in 1976.[200] It is time for a more nuanced approach.

II. SURVEYING THE CONTOURS OF THE DITCH

In this part, we will discuss three aspects of the constitutional ditch in which we find ourselves as a result of favoring the protection of good prosecutors over exposing bad prosecutors to civil liability. First, we will return to the issue of whether liability for prosecutorial misconduct should fall only on the prosecutor in question, not on the prosecutor's office as well.[201] Second, we will discuss the lack of accountability structures for prosecutors in the performance of their job.[202] Third, we will discuss a typology of prosecutorial misconduct, beginning with Judge Hand's distinction between the honest and dishonest prosecutor.[203] We will argue in Part III for a strategy that takes into account the different types of misconduct by prosecutors.[204]

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[195] *Id.* at 1357; *Van de Kamp*, 555 U.S at 339.

[196] McGhee v. Pottawattamie Cnty., Iowa, 547 F.3d. 922, 932 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009) (mem.), *cert. dismissed*, 130 S. Ct. 1047, 1047 (2010) (mem.).

[197] Buckley v. Fitzsimmons, 509 U.S. 259, 280 (1993) (Scalia, J., concurring) (citing Buckley v. Fitzsimmons, 919 F.2d 1230, 1244 (7th Cir. 1990), *vacated*, 502 U.S. 801 (1991)) (arguing that respondents have failed to show that there is a constitutional violation in the preparation of fabricated evidence).

[198] Clement, *supra* note 16, at 921.

[199] Totenberg, *supra* note 183.

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

[201] *See infra* Part II.A.

[202] *See infra* Part II.B.

[203] *See infra* Part II.C; *see* Gregoire v. Biddle, 177 F.2d 579, 581 (2d. Cir. 1949) (discussing Learned Hand's balance between disciplining dishonest prosecutors and protecting the integrity of honest prosecutors).

[204] *See infra* Part III.

A. Individual and Organizational Liability for Prosecutorial Misconduct

In Justice Thomas's view, expressed in *Connick v. Thompson*, discussed earlier,[205] prosecutorial liability for misconduct exists only at the level of the individual and not at the level of the organization (the prosecutor's office).[206] This is a commonly held view, but it is not the only way to understand responsibility. Social scientists propose that organizations and societies influence the choices made by individuals. Compare, for example, the obedience experiments of Stanley Milgram[207] and the well-known Stanford University "prison" experiment of Philip Zimbardo.[208] According to Joycelyn Pollock, most police managers subscribe to the "rotten apple" theory of understanding police misconduct.[209] According to this view, disciplining or firing officers guilty of misconduct solves the problem and discharges the manager's responsibility.[210] Connick, the Orleans Parish District Attorney,[211] clearly considered the deceased Deegan and the disgraced Riehlmann to be the "rotten apples" that should be discarded in order to preserve the barrel.[212] However, using Pollock's theory, throwing out the bad apples may not solve the problem if there are organizational and societal factors that tend to increase the risk of such misconduct.[213] For example, the organization may unintentionally reward officers who coerce

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[205] *See supra* Part I.F.

[206] *See* Connick v. Thompson, 131 S. Ct. 1350, 1358, 1365–66 (2011) (implying that the prosecutor is an individual by stating that only one conceded *Brady* violation occurred and that Connick was not responsible as an acting policymaker on behalf of the district attorney's office because it was not established that he was deliberately indifferent for failing to train attorneys).

[207] *See generally* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 2–3, 13–14 (1974) (documenting the results of different psychological experiments aimed at obedience to authority).

[208] *See generally* Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOLOGIST 709 (1998) (using the 1973 Stanford Prison Experiment ("SPE") to show how crime and punishment policies have changed as of 1998 and taking insights learned from the SPE to suggest resolutions for the correctional policy problems existing in 1998).

[209] JOCELYN M. POLLOCK, ETHICAL DILEMMAS AND DECISIONS IN CRIMINAL JUSTICE 255 (6th ed. 2010).

[210] *See id.*

[211] Connick v. Thompson, 131 S. Ct. 1350, 1355 (2011).

[212] *See id.* at 1356 n.1, 1357 (showing that Connick conceded Riehlmann and Deegan's misconduct in suppressing the blood evidence, but also alleged that he had no knowledge of a pattern of similar Brady violations in the District Attorney's office, thereby insinuating that this was an isolated incident).

[213] *See* POLLOCK, *supra* note 209, at 257–60 (explaining how organizational leaders promulgate corruption and how society condones illegal activities by the police).

confessions by urging investigators to complete their work quickly, without emphasizing the importance of conducting interrogations in an appropriate manner. Managers and supervisors who fail to understand these explanations for individual misconduct risk the repetition of the behavior in the future.

Thus, the Court's rulings in *Van de Kamp v. Goldstein* and *Connick v. Thompson* may risk empowering the "bad apples", by removing incentives from poor supervisors like District Attorney Connick to monitor and hold their staff accountable.[214] It may further empower poor supervisors to continue to believe that they have washed their hands of responsibility once they have sanctioned their subordinates, and consequently they may fail to look for deeper causes.

Other considerations apply here as well. As mentioned earlier,[215] *Giglio v. United States* (1972), which was discussed in *Van de Kamp v. Goldstein,* described the entity theory of the prosecutor's office.[216] We argue that the nature of prosecutorial work makes the entity theory appropriate. Prosecutors are both professionals and officers of the court; they are bound by a code of ethics that should play an important part in their decision-making.[217] Yet what one prosecutor does inevitably affects what other prosecutors in the office do.[218] There is no way that a prosecutor can resolve ethical dilemmas in isolation from others in the office.[219] To give just one example:

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[214] *Connick*, 131 S. Ct. at 1365 (stating that in order to prove deliberate indifference, Thompson needed to meet the very high burden of showing that Connick was on notice that without training it was highly predictable that assistant prosecutors would make *Brady* violations, therefore his failure to train amounted to conscious disregard of defendant's constitutional rights).

[215] *See supra* note 165 and accompanying text.

[216] Giglio v. United States, 405 U.S. 150, 154 (1972) (stating that the prosecutor's office is an entity and the promises of one prosecutor are attributed to the government and the prosecutor's office should manage this burden by putting policies and procedures in place that allow individual prosecutors to carry that burden and disclose all relevant information to all parties); *see* Van de Kamp v Goldstein, 555 U.S. 335, 340, 343–44 (2009) (citing *Giglio*, 405 U.S. at 154) (explaining that the *Giglio* obligation on individual attorneys to communicate impeachment-related information on behalf of their entity to any attorney dealing with the applicable case does not negate the absolute immunity of individual prosecutors accused of failure to train and supervise all deputy assistant attorneys).

[217] MODEL RULES OF PROF'L CONDUCT R. 3.8 (1983) (Special Responsibilities of a Prosecutor).

[218] *See, e.g.*, *Van de Kamp*, 555 U.S. at 346–47 (explaining that the threat of liability for trial-related decisions would lead an individual prosecutor to take account of such a risk and thereafter could lead all the attorneys in an office to take into consideration the risk of widespread liability).

[219] *See, e.g.*, *id.* (explaining how many lawyers in an office work together on supervisory and training issues and how, if one prosecutor was exposed to liability, they all should bear in mind the risk of liability when making trial-related decisions).

What is the responsibility of prosecutor A if she learns that prosecutor B has extracted sexual favors from prostitutes in exchange for dropping charges against them? Are there not three problems here—A's obligations, B's obligations, and the obligations of the office itself? For these reasons, we argue that both ethics and organizational theory support the contention that prosecutorial misconduct creates both individual and organizational liability.

B. Absence of Structural Accountability

In *Imbler v. Pachtman*, Justice Powell listed other remedies such as criminal prosecution and professional sanctions for the errant prosecutor.[220] Could these work instead?

Recent scholarship has pointed out a general lack of accountability in the criminal justice system.[221] The workings of the prosecutor's office are so opaque to the public that the only measurement available to citizens is the prosecutor's win-loss record.[222] Not only is the criminal justice system complicated for the public to understand, but those who work within it may feel only slightly less mystified.[223] Since prosecutors' actions have effects upon other actors in the criminal justice system, as well as upon suspects and defendants, what are the potential constraints on prosecutors, aside from professional ethics? The answer is that there are only weak professional constraints on prosecutors.[224] One example is the under-prosecution of crimes such as domestic

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[220] Imbler v. Pachtman, 424 U.S. 409, 410, 428–29 (1976).

[221] *See generally* GREG BERMAN & AUBREY FOX, TRIAL & ERROR IN CRIMINAL JUSTICE REFORM: LEARNING FROM FAILURE (2010) (describing that the lack of communication between departments in the criminal justice system results in repeated errors and encourages trial and error as a means of innovation); James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109, 110, 113, 146 (2010) (analyzing how we can learn from current post-conviction exoneration efforts to effect greater change in our criminal justice system to prevent wrongful convictions).

[222] *See* AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 131, 137–38 (2009).

[223] The famous flowchart to describe the criminal justice "system" developed by the President's Commission on Law Enforcement and the Administration of Justice in 1967 is still in use. *See The Justice System: What is the Sequence of Events in the Criminal Justice System?*, BUREAU JUST. STAT., http://bjs.ojp.usdoj.gov/content/justsys.cfm (last updated Mar. 30, 2012). Bach describes the inability of many criminal justice actors to understand the operation of the system as a whole. *See* BACH, *supra* note 222, at 132–35, 144–45 (discussing how the high number of unprosecuted cases in Quitman County, Mississippi led the author to investigate and discover that the county prosecutor consistently alleged that there was not enough evidence to prosecute).

[224] *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5, 8, 15–18 (2007) (exploring the lack of a functional checks and balances system on prosecutorial discretion and calling for increased prosecutorial accountability).

violence,[225] and the under-prosecution in Massachusetts of the offense of operating under the influence, where even insiders in the criminal justice system had difficulty explaining why so many charges of drunk driving were dropped or dismissed.[226]

Justice Powell suggested that prosecutors are unique in their "amenability to professional discipline."[227] However, more than three decades later, there is little evidence to support his characterization. In her book ARBITRARY JUSTICE, Angela Davis describes numerous instances of prosecutorial misconduct, but there have only been a handful of disciplinary proceedings against prosecutors in the twentieth century; of those, fewer still end in reprimands, disbarments, or other sanctions.[228] In a study by the Center for Public Integrity, researchers examined 11,000 cases of alleged prosecutorial misconduct.[229] Of those, only forty-four of the cases have resulted in disciplinary hearings for the prosecutor since 1970.[230] In a separate study on the same topic, Ken Armstrong and Maurice Possley found that not only were the prosecutors not sanctioned, but most enjoyed gains in their careers after the allegations.[231] Of the 381 cases reviewed, only one person was fired (and was later reinstated), one suspended, and another had his law license suspended for two months.[232] Instead of facing discipline, many of the attorneys were promoted to supervisory positions or to judgeships.[233] Pollock's conceptual framework might suggest that organizations are more likely to reward certain kinds of unethical behavior by prosecutors than to sanction them.[234]

We recognize that many prosecutors' offices contend with a variety of issues. Many offices are small, poorly staffed, and

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[225] *See* BACH, *supra* note 222, at 147–49 (describing a history of under-prosecution of domestic violence crimes and noting that despite the modern view that domestic violence is a serious crime, there is still the ever-present view that such cases are difficult to prosecute, especially when the victims do not wish to testify).

[226] *For Drunk Drivers, a Habit of Judicial Leniency*, BOS. GLOBE, (Dec. 28, 2011), http://articles.boston.com/2011-12-28/news/30560720_1_drunk-drivers-judges-guilty-verdict.

[227] Imbler v. Pachtman, 424 U.S. 409, 429 (1976).

[228] DAVIS, *supra* note 224, at 128–29, 135.

[229] *Id.* at 126.

[230] *Id.* at 128–29.

[231] *Id.* at 135–36 (citing Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 3–4, http://articles.chicagotribune.com/1999-01-10/news/9901100269_1_retrials-and-appeals-conviction-prosecutors).

[232] DAVIS, *supra* note 224, at 136 (citing Armstrong & Possley, *supra* note 231, at 3).

[233] DAVIS, *supra* note 224, at 136, 138 (citing Armstrong & Possley, *supra* note 231, at 3–4).

[234] *See* POLLOCK, *supra* note 209, at 258 (describing examples of prosecutorial misconduct and noting that such overzealous prosecution can be ignored if it leads to a strong record of convictions for that prosecutor's office).

overwhelmed by impossible caseloads.[235] Even today, many offices consist of a single prosecutor, or perhaps a full-time prosecutor assisted by an investigator or a part-time prosecutor.[236] *Pace* Justice Thomas, it is also not clear that most prosecutors are indeed equipped to deal with ethical and legal issues on their own.[237] In some states, lawyers can renew their licenses annually without the continuing education requirements imposed on other professions such as teachers or certified public accountants.[238]

Thus, the constraint on prosecutorial misconduct mentioned by Justice Powell in *Imbler*[239] does not appear to operate very often. But perhaps the most serious criticism of professional discipline for

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[235] *See* BACH, *supra* note 222, at 6 (noting that prosecutors have "crushing workloads"); *For a More Perfect Union–Prosecution Reform*, ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS 3 (Sept. 1971), http://www.library.unt.edu/gpo/acir/Reports/information/M-66.pdf ("Although in larger cities the prosecutor has a staff of assistant[] [prosecutors] the typical district attorney or county attorney has a staff of one or two assistant[] [prosecutors], frequently part time.").

[236] Until the last quarter of the twentieth century, many jurisdictions lacked full-time prosecutors. *See For A More Perfect Union–Prosecution Reform*, *supra* note 235, at 2–3 (noting that "more than half" of the local prosecutors are only part-time prosecutors, splitting their time between public and private practice). As recently as 1992, the second national survey of local prosecutors' offices by the Bureau of Justice Statistics reported that "[a]bout 70% of the [n]ation's chief prosecutors occupied full-time positions." John M. Dawson, Steven K. Smith & Carol J. DeFrances, BUREAU OF JUSTICE STATISTICS, *Prosecutors in State Courts, 1992*, 1, 4–5 (Dec. 1993), *available at* http://www.bjs.gov/content/pub/ascii/PISC92.TXT. In the 1970s, in many prosecutorial offices, there was only one prosecutor. *See For a More Perfect Union–Prosecution Reform*, *supra* note 235, at 3.

[237] *See, e.g.*, Lincoln Caplan, Editorial, *The D.A. Stole His Life, Justices Took His Money*, N.Y. TIMES, July 2, 2011, http://www.nytimes.com/interactive/2011/07/03/opinion/sunday/20110703_Editorial_Annotation.html ("With [Justice Thomas's] ruling [in *Thompson v. Connick*], the court made it even more likely that innocent people will be railroaded by untrained prosecutors . . . ."). *But see* Connick v. Thompson, 131 S. Ct. 1350, 1366 (2011) (holding that Connick was not deliberately indifferent under § 1983 for failing to train the assistant prosecutors because there is no other pattern of constitutional violation).

[238] *See Connick*, 131 S. Ct. at 1362 ("[A] few jurisdictions . . . do not impose mandatory continuing-education requirements [for lawyers]."); *see also, e.g.*, OFFICE OF THE PROFESSIONS, N.Y. STATE EDUC. DEP'T, *MCE Questions & Answers*, NYSED.GOV (last updated July 18, 2011), http://www.op.nysed.gov/prof/cpa/cpace.htm (mandating that CPAs and PAs meet continuing education requirements in New York); OFFICE OF TEACHING INITIATIVES, N.Y. STATE EDUC. DEP'T, *Professional Development for Certification*, NYSED.GOV (last updated Feb. 28, 2012), http://www.highered.nysed.gov/tcert/faqpd.html#one (dictating that those holding professional teaching certificates need to complete "professional development hours").

[239] *See Imbler v. Pachtman*, 424 U.S. 409, 428–29 (1976) ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. . . . Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.").

prosecutors as the main constraint is the fact that such discipline is not transparent.[240] Neither members of the public nor other prosecutors can discover what sorts of misconduct are sanctioned with what penalties.[241] Thus, systems of professional discipline may be able to achieve specific deterrence (of a particular prosecutor), but they fail the test of general deterrence (of prosecutors in general who might be tempted to break the rules) and of public accountability.[242]

C. The Honest and Dishonest Prosecutor

If we consider the prosecutors in the cases we have discussed, it seems clear that, whatever Judge Hand meant by the terms "honest" and "dishonest" prosecutors, the individuals discussed here fall into two distinct categories based on their alleged misconduct.[243] In *Imbler v. Pachtman*, as we remarked earlier, prosecutor Pachtman had such high professional standards that when he discovered evidence indicating the wrongful conviction of Imbler, he examined the evidence with an open mind and then supported Imbler's efforts at post-conviction relief.[244] By contrast, the prosecutor in *Burns v. Reed*—who failed to inform the court that the defendant's confession had been obtained under hypnosis even though the defendant consistently otherwise denied involvement[245]—withheld information from the court that might have cast doubt on the prosecution's own performance.[246] So let us name our two categories "*Imbler*" and "*Burns*." In the "*Imbler*" category is the prosecutor from *Kalina v. Fletcher*, where the defendant alleged that the prosecutor attached an affidavit attesting to the facts of the case based on her own knowledge,

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[240] *See* BACH, *supra* note 222, at 247, 260–61, 263 (establishing that prosecutors are rarely sanctioned, at least such sanctions are rarely mentioned in case law, and explaining that lack of transparency and the absence of a public information system to assess performance exacerbates the underlying problem).

[241] *See id.*

[242] *See id.* at 2–3.

[243] *See* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) ("In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.").

[244] *See Imbler*, 424 U.S. at 412–13, 427 n.25 (noting that Pachtman recognized his duty to turn over potentially exculpatory evidence and without this Imbler would not have had his opportunity for post-conviction relief).

[245] Burns v. Reed, 500 U.S. 478, 482–83 (1991).

[246] *See id.* at 501–03 (Scalia, J., concurring in part, dissenting in part) (exploring facts outside the complaint that suggested Reed knew or should have known that hypnotically-induced evidence was inadmissible as a basis to obtain a warrant, yet did so anyways).

following what the Court described as "customary practice."[247] In other words, she made no attempt to conceal or misrepresent information to the court or anyone else. When the prosecutor discovered that the facts alleged in the affidavit were not true, the prosecutor moved to dismiss the charges against Fletcher.[248] In the "*Burns*" category we can put the prosecutors in *Buckley v. Fitzsimmons* (allegations of conspiring to manufacture evidence and shop for expert witnesses before probable cause to arrest existed when under public pressure to solve a gruesome crime against a child),[249] *Van de Kamp v. Goldstein* (allegations that jailhouse informant's prior history of receiving deals offered by the prosecutor's office in exchange for false testimony were concealed from the court as well as the defense),[250] *Connick v. Thompson* (prosecutor's destruction of evidence and failure to disclose lab report were not revealed to the court or to the defense),[251] and *McGhee v. Pottawattamie County* (evidence that prosecutors concealed the fabrication of evidence and witness testimony).[252]

The prosecutors in our first category (encompassing *Imbler* and *Kalina*) correspond to the usual sense of "honest," i.e., prosecutors who abide by the rules and occasionally make mistakes, which they then attempt to set right.[253] The second category, which we have called "*Burns*" cases, includes prosecutors whose performance of the job has been corrupted either by a willingness to bend the rules to achieve their goal or by self-interest.[254] This is both an ethical issue and a practical issue, because when mistakes are discovered this type of prosecutor generally attempts to conceal the mistake rather

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[247] Kalina v. Fletcher, 522 U.S. 118, 120–21 (1997).

[248] *See id.* at 121–22.

[249] *See* Buckley v. Fitzsimmons, 509 U.S. 259, 262–64 (1993).

[250] Van de Kamp v. Goldstein, 555 U.S. 335, 339 (2009).

[251] *See* Connick v. Thompson, 131 S. Ct. 1350, 1356–57 (2011) (majority opinion); *id.* at 1370 (Ginsburg, J., dissenting).

[252] *See* McGhee v. Pottawattamie Cnty., Iowa, 547 F.3d. 922, 926–27 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009) (mem.), *cert. dismissed*, 130 S. Ct. 1047, 1047 (2010) (mem.).

[253] *See* Kalina v. Fletcher, 522 U.S. 118, 121–22 (1997) (dismissing charges after discovering inaccuracies in the probable cause affidavit); Imbler v. Pachtman, 424 U.S. 409, 412–13 (1976) (providing evidence to the authorities that suggested defendant may have been wrongfully convicted).

[254] *Connick*, 131 S. Ct. at 1356–57 (confessing to suppressing evidence); *Van de Kamp*, 555 U.S. at 339 (relying on jailhouse informant's testimony for an indictment without disclosing his history of receiving favorable treatment from the government); *Buckley*, 509 U.S. at 262–64 (alleging that the county prosecutor made false statements twelve days before his primary election, fabricated evidence, and "shopped" for an expert who would link this evidence to the defendant); Burns v. Reed, 500 U.S. 478, 482–83 (1991) (misleading the court about the nature of the defendant's confession during a probable cause hearing); *McGhee*, 547 F.3d at 926–27 (pursuing murder charges based on testimony from an unreliable witness).

than set it right. It is in this sense that these attorneys can be described as dishonest prosecutors.

The theory of noble cause corruption has been advanced to explain police misconduct. John Crank and Michael Caldero explain that "[t]he noble cause [of police officers is] to make the world a safer place to live."[255] As a result, an individual who believes in the noble cause may employ utilitarian thinking and reason that the ends (getting the bad guys off the street) justify the means (e.g., planting evidence or lying on the witness stand).[256] Many prosecutors believe strongly in the noble cause as well and may also engage in this type of ends-oriented thinking, especially in a highly-charged situation such as that in *Buckley v. Fitzsimmons* and the *McGhee* case.[257] If we review the list of "*Burns*" prosecutors, we see that the allegations against them are allegations of ends-oriented thinking.[258] By contrast, the two prosecutors in our "*Imbler*" list are prosecutors who appear to employ deontological reasoning, in which the question "[d]o the ends justify the means?" would elicit the answer "no."[259]

While lawyers are trained to believe in the value of due process, which is based on deontological reasoning, in fact all people engage in both deontological and utilitarian thinking depending on the context.[260] The difference between the two types of reasoning can be

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[255] JOHN P. CRANK & MICHAEL A. CALDERO, POLICE ETHICS: THE CORRUPTION OF NOBLE CAUSE 35 (2000); *see* POLLOCK, *supra* note 209, at 267 (quoting CRANK & CALDERO, *supra*, at 35).

[256] Randall Grometstein, *Prosecutorial Misconduct and Noble-Cause Corruption*, 43 Crim. L. Bull. 63, 64 (2007) (quoting CRANK & CALDERO, *supra* note 255, at 35).

[257] *Buckley*, 509 U.S. at 261–62 (facing public outrage and substantial publicity over the rape and murder of a young girl); *McGhee*, 547 F.3d at 926 (failing to produce a suspect for the murder of a retired police captain).

[258] *Connick*, 131 S. Ct. at 1372 (Ginsburg, J., dissenting) (arranging the defendant's criminal trials in an order most favorable to the prosecution, suppressing evidence in the first trial to secure a conviction, and thereby preventing the defendant from testifying in the second trial); *Van de Kamp*, 555 U.S. at 339 (concealing unfavorable information about a prosecution witness); *Buckley*, 509 U.S. at 262 (falsifying evidence and securing an expert who would validate the prosecution's theory); *Burns*, 500 U.S. at 482–83 (refusing to accept the defendant's initial denials of the crime and inducing a state of hypnosis to secure a confession); *McGhee*, 547 F.3d at 926–27 (promising a discredible witness immunity for his testimony and failing to disclose a prior suspect in order to charge the defendant with the murder of a retired police captain).

[259] Grometstein, *supra* note 256, at 66; *see* Kalina v. Fletcher, 522 U.S. 118, 121–22 (1997) (holding that the greater good is not served by allowing false evidence act as the basis for someone's arrest in a probable cause affidavit); Imbler v. Pachtman, 424 U.S. 409, 412–13 (1976) (recognizing that allowing a defendant's conviction to stand in the light of newly revealed false evidence does not achieve the greater good).

[260] Grometstein, *supra* note 256, at 66–68 (saying that everyone in society considers the end result of our actions, at least in regards to certain values, including police officers and prosecutors who may justify their misconduct by the claim that they are protecting society).

seen at the extremes.[261] Extreme deontological thinking can result in rigidity and inflexibility, while extreme utilitarian thinking can license selfishness at the expense of the interests of others.[262] People need to be able to use both types of reasoning at appropriate times and explain the reasons for whichever choice is made. But this is not something that individuals tend to do in isolation, no matter how well trained they are (again, *pace* Justice Thomas).[263] Situations that often elicit objectionable ends-oriented thinking in prosecutors include those where junior prosecutors believe that supervisors care only about a prosecutor's win-loss record or that a prosecutor who "knows" the suspect is guilty is obligated to do whatever is necessary to get the "bad guy" off the street.[264] This type of ends-oriented thinking is where mistakes are made that cost innocent citizens their freedom. We need to find ways to provide countervailing pressures to balance prosecutors' thinking, so they do not go to one extreme or the other. Sadly, a ruling that immunizes corruption, of the noble-cause or self-interest variety, does not accomplish that goal.

We argue that prosecutorial immunity has different implications for the types of prosecutors discussed here. For the honest prosecutor, absolute immunity delivers the protection from aggrieved suspects, defendants, acquittees, and exonerees that Justice Powell envisioned.[265] However, the dishonest prosecutor, such as the one who engages in the ends-oriented reasoning of getting the "bad guys" off the street, currently enjoys the same protection of the rule, as does the dishonest prosecutor of the self-interested type, who may engage in behavior that, while criminal, is extremely unlikely to be prosecuted or disciplined.[266] Also, since the

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[261] *Id.* at 66.

[262] *See id.* (providing an example of the deontological extreme, hypothesizing that people would see fit to punish an indiivdual who stole food to feed his children, who are starving, while an extreme version of utilitarianism, rule utilitariansim, makes an actor think that he would not be willing to allow everyone else to do the same act even if they were achieving the same goal).

[263] *But see Connick*, 131 S. Ct. at 1363 ("A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same 'highly predictable' constitutional danger as [an] untrained officer.").

[264] Grometstein, *supra* note 256, at 65, 68; *see* Bach, *supra* note 222, at 3–8 (investigating a number of cases that were under-prosecuted, often for reasons that suggest rigid beliefs about what type of evidence is required to prosecute that type of case (e.g., domestic violence cases), or the belief that it was not the prosecutor's job to do the necessary investigation, no matter how compelling the complaint). These examples suggest that excessively deontological reasoning can lead to ethical lapses on the part of prosecutors as well.

[265] *See* Imbler v. Pachtman, 424 U.S. 409, 423–24 (1976).

[266] *See id.* at 427–29.

Supreme Court has been reluctant thus far to hold the prosecutor's office liable for the behavior of its members, a ruling that not only immunizes noble-cause or self-interest corruption also removes any organizational incentive to stop the conduct. Finally, due to lack of transparency, there is often no way for the public to hold assistant district attorneys accountable at election time.[267]

Now we turn to the future. How can the current formulation of absolute immunity for prosecutors be challenged?

III. MOVING FORWARD: STRATEGIC PETITIONS TO THE COURT

The gulf between the five justices in the majority and the four in the dissent in *Connick v. Thompson*[268] may signify that the Court's position on absolute immunity for egregious prosecutorial misconduct has eroded in the two years between *Van de Kamp* and *Connick v. Thompson*.[269] In particular, Ginsberg et al.'s dissent expressed contempt for the behavior of both the District Attorney (Connick), as well as his subordinates.[270] Even on the opposite side of the ideological divide, other analysts sense that there may be additional signs that the ground is shifting.[271] Paul Clement, discussing the approach he took in representing McGhee and Harrington when the parties settled, stated that he expected to find allies not only among the four justices who dissented in *Connick*, but also perhaps in Justices Scalia and Thomas, whose views on originalism and textualism suggested that they might be open to his arguments on behalf of his clients.[272] Indeed, Justice Scalia has reiterated his belief that in 1871 prosecutors enjoyed only qualified immunity in several concurring opinions.[273] Qualified immunity, it would appear, is a pretty good defense for prosecutors in many situations since it successfully shielded them until well into the twentieth century.

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[267] *See supra* Part II.B.

[268] *See Connick*, 131 S. Ct. at 1355 (showing that Justices Thomas, Roberts, Scalia, Kennedy, and Alito were in the majority, while Justices Ginsburg, Breyer, Sotomayor, and Kagan filed a dissenting opinion).

[269] *See id.* at 1350 (decided Mar. 29, 2011); Van de Kamp v. Goldstein, 555 U.S. 335, 339 (2009) (decided Jan. 26, 2009).

[270] *See Connick*, 131 S. Ct. at 1370, 1381–82. (Ginsburg, J., dissenting).

[271] Clement, *supra* note 16, at 919–20 (discussing why originalists or textualists, like Justices Thomas and Scalia, might eventually come to recognize the problems with awarding absolute immunity to prosecutors, and if not for the strict limitations of stare decisis might change their vote).

[272] *See id.*

[273] *See, e.g.*, Kalina v. Fletcher, 522 U.S. 118, 131–32 (1997) (Scalia, J., concurring); Buckley v. Fitzsimmons, 509 U.S. 259, 279–80 (1993) (Scalia, J., concurring).

Since cases of wrongful conviction will likely continue to occur, it seems safe to predict that soon a person exonerated by a court and released or acquitted, like Mr. Thompson,[274] will consult a lawyer and ask about the possibility of suing the prosecutor for damages (if this has not already happened). Many states have no provision for compensating exonerees,[275] and it is not hard to imagine that a prosecutor, rather than admitting that a mistake may have been made in this person's case, will insist that the exoneree is factually guilty and being released only on a "technical" violation, as what happened to Mr. McGhee and Mr. Harrington.[276] What advice can the lawyer give the exoneree about the possibility of suit, following *Connick v. Thompson*?

First, the doctrine of absolute prosecutorial immunity has a number of exceptions to it, such as the exception for conduct that occurs prior to the existence of probable cause to arrest,[277] the exception for investigative and administrative tasks,[278] and the holding, discussed in *Houston v. Partee*, that prosecutorial immunity does not protect prosecutors who suppress exculpatory evidence in a post-conviction proceeding.[279]

Second, the Court may be ready to revisit the argument once raised by Justice White in his concurring opinion in *Imbler*, i.e., that prosecutorial immunity under § 1983 for initiating and prosecuting the state's case should have some limit to it.[280] The Court does not appear ready to take up the issue of *Brady* violations

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[274] *See Connick*, 131 S. Ct. at 1355.

[275] Marvin Zalman, Matthew J. Larson & Brad Smith, *Citizens' Attitudes Toward Wrongful Convictions*, 37 CRIM. JUST. REV. 51 (2012) [hereinafter Zalman, *Citizens' Attitudes*]; *see also Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*. INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Executive_Summary_Making_up_for_Lost_Time_What_the_Wrongfully_Convicted_Endure_and_How_to_Provide_Fair_Compensation.php (last visited May 6, 2012) (stating that in 2009, twenty-seven states had compensation laws).

[276] McGhee v. Pottawattamie Cnty., Iowa, 547 F.3d. 922, 925, 928 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (2009) (mem.), *cert. dismissed*, 130 S. Ct. 1047, 1047 (2010) (mem.) (noting that the prosecutor held a press conference when he vacated McGhee's sentence and dismissed the charges against Harrington, stating that he still believed Harrington had committed the murder and that McGhee participated in this crime, but could not pursue these charges because of the *Brady* violation).

[277] *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259, 273–76 (1993) (explaining that when prosecutors perform investigative functions like those of a police officer, such as searching for probable cause to arrest a suspect, they are only entitled to qualified immunity).

[278] *See, e.g.*, *id.* at 273, 275–85 (holding that prosecutors are only entitled to qualified immunity when performing investigative and administrative functions).

[279] Houston v. Partee, 978 F.2d 362, 365, 367 (7th Cir. 1992) (holding that prosecutors who suppress exculpatory evidence at post-conviction hearings function not as prosecutors, but as investigators and therefore are only entitled to qualified immunity).

[280] *See* Imbler v. Pachtman, 424 U.S. 409, 432–33 (1976) (White, J., concurring).

as such. But it might be ready to limit absolute immunity for prosecutors if the misconduct in question were self-interest corruption, say, graft or extortion. This type of case would pose the question most starkly. Very few people are willing to turn a blind eye to corruption, even in the name of preserving prosecutorial functioning. This may be the "low hanging fruit" of prosecutorial misconduct, but we suspect that if the Court were to hear such a case, it is plausible that at least some members of the Court might want to designate a new threshold under which they will not invoke full immunity. Whether the Court would agree to hear such a case is always variable, but the back-to-back selections of *McGhee* and *Thompson* onto the docket at least hint that at least four justices on the Court are interested in clarifying law in this area.

While the Supreme Court does not look to public opinion in rendering verdicts, it often comes up with legal reasoning that is generally in step with popular beliefs. The Supreme Court has reversed itself in a few notable cases in the last ten years. Departures from precedent have been predicated upon shifting or building "national consensus" in cases involving the death penalty.[281] Consider the case of *Roper v. Simmons*.[282] In noting the change from *Stanford v. Kentucky*,[283] the divided Court noted that national opinion on the topic had changed.[284] Similarly, another place the Supreme Court reversed their position was in the *Lawrence v. Texas* ruling, which uprooted the earlier *Bowers v. Hardwick*.[285] Citing that they had too narrowly defined liberty interests in *Bowers*, the Court changed positions, thereby banning anti-sodomy laws.[286] Simply getting this case on the docket was the feat; once there, the justices seemed inclined to revise law to fit with more accepted views on liberty.[287]

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[281] *See* Kennedy v. Louisiana, 554 U.S. 407, 412–13 (2008) (holding that a Louisiana law permitting the death penalty for the rape of a child under twelve years of age is unconstitutional under the Eighth Amendment); Roper v. Simmons, 543 U.S. 551, 564, 578 (2005) (holding that the death penalty cannot be imposed upon juveniles who were under eighteen when they committed their crimes).

[282] *Roper*, 543 U.S. at 551.

[283] Stanford v. Kentucky, 492 U.S. 361 (1989).

[284] *Roper*, 543 U.S. at 562, 564–65 (citing *Stanford*, 492 U.S. at 370–71 (noting that there was not enough established national consensus on the death penalty for juveniles to warrant holding it unconstitutional)) (holding that since *Stanford*, five states, that previously allowed it, had outlawed juvenile death penalty through legislative action and a judicial decision).

[285] Lawrence v. Texas, 539 U.S. 558, 578 (2003) (citing Bowers v. Hardwick, 478 U.S. 186, 192 (holding that there is no fundamental right granted to homosexuals to engage in sexual acts)) (overturning *Bowers*).

[286] *See Lawrence*, 539 U.S. at 566–67 (citing *Bowers*, 478 U.S. at 192).

[287] *See Lawrence*, 539 U.S. at 571–72.

We believe that it might be persuasively argued that, in light of the innocence movement more broadly, the national consensus on wrongful convictions has also changed. Indeed, legal scholar Marvin Zalman has dubbed the 2000s the "age of innocence" as a growing number of states have enacted post-conviction relief policies, as well as legislation around access to DNA evidence post-conviction.[288] The national media frequently covers stories involving wrongful convictions; Innocence Projects have sprung up around the country and the scholarly literature on the topic has burgeoned in the last fifteen years.[289] In the more popular media, movies like CONVICTION (the story of Betty Ann Waters' pursuit of justice to free her brother from wrongful imprisonment)[290] and others have been wildly popular and well received by the public.[291]

To even a casual observer, the public's tolerance for gross injustice on the part of justice actors has receded. Moreover, other areas of the criminal justice field are experiencing unprecedented surges in the demand for accountability. The push for "evidence based" programming in the current administration, which requires some documentation of the consequences and impact of programming and policies (partly the result of a two decade expansion of correctional budgets and an economic downturn), signifies that a movement is afoot for agencies to become more responsible and judicious in their policy implementation.[292] Further, and perhaps more practically speaking, consider how cell phones with cameras have changed the nature of policing. Because anyone with a cell phone can record a police officer's encounter in public, police are generally much more aware now than in previous generations that they will have to account for their behavior and

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[288] Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1499 (2010/2011); *see* Zalman, *Citizens' Attitudes*, *supra* note 275 (online version at 2–3, 13).

[289] *See, e.g.*, JOHN GRISHAM, THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN (2006) (recounting the story of Ron Williamson wrongfully sentenced to death row for the rape and murder of Debra Sue Carter); WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE (Saundra D. Westervelt & John A. Humphrey eds., 2001) (including essays that address the causes of wrongful convictions, coerced false confessions, unreliable informants, and flaws within the criminal justice system); CONVICTION (Omega Entertainment 2010); INNOCENCE PROJECT, http://www.innocenceproject.org/ (last visited Mar. 15, 2012).

[290] CONVICTION, *supra* note 289.

[291] *See, e.g.*, AN INNOCENT MAN (Touchstone Pictures 1989); AFTER INNOCENCE (American Film Foundation 2005); THE TRIALS OF DARRYL HUNT (Break Thru Films 2006); *The Wronged Man* (Sony Pictures Television 2010).

[292] *See* James J. Stephan, *State Prison Expenditures, 2001*, BUREAU JUST. STAT., 1, 7–8 (June 2004), http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf (tracking states' total correctional expenditures from 1986 through 2001).

interactions with the public.[293] In the same way, DNA testing has changed judicial processes. When the public has access to this information—and this is increasingly happening in jurisdictions across the country—they are much less likely to allow or excuse legal chicanery.[294] We suggest that with these new scientific tools in the justice arsenal, the public is much more likely to demand that when mistakes happen, they be rectified swiftly. Simply, legal norms need to keep pace with the increasing demand for accountability that is being felt in many areas of the criminal justice system.

We posit that a case of particularly egregious self-interested, perhaps even criminal, prosecutorial misconduct might offer an opportunity for the camel's nose to enter the tent of prosecutorial accountability. One approach might be to link a future § 1983 case to a growing "national consensus" for intolerance regarding egregious misconduct by prosecutors. By picking a case of self-interested corruption, the justices may be able to carve out a new standard involving the "reasonable prosecutor." Such a standard could lead to a consideration of checks on other types of corruption within the prosecutorial realm.

A second possibility is that if the majority in *Connick* is not solid, it may be time also to raise arguments for organizational liability based on *Giglio v. U.S.* (discussed earlier), as they were in *Van de Kamp v. Goldstein*.[295] Additionally, if there were support from the legal community, for example by means of an opinion survey of prosecutors, that would carry some weight. Honest prosecutors may well not approve of the protection given to dishonest ones by the Court's ruling.

The presiding judge in New Orleans, where the *Thompson* case originated, alluded to the consequences that bad apples can have on the justice system overall.[296] In admonishing the District Attorney's office in New Orleans during the motion to dismiss the robbery and

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[293] *See* Steven Chermak, *Image Control: How Police Affect the Presentation of Crime News*, 14 AM. J. POLICE 21, 21 (1995) (discussing how public opinion and ideology affect how police officers formulate their presentation and response to crime); *see also* Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011). In *Glik* the First Circuit held that the right of a bystander to film a police arrest in a public space was protected by the First Amendment, provided that the filming does not interfere with police processes, and the subsequent arrest of the bystander for filming was without probable cause and hence violated the Fourth Amendment. *Id.*

[294] *See About the Innocence Project*, INNOCENCE PROJECT, http://www.innocenceproject.org/about/ (last visited Mar. 15, 2012).

[295] Van de Kamp v. Goldstein, 555 U.S. 335, 340 (2009) (citing Giglio v. U.S., 405 U.S. 150, 154 (2009)).

[296] *See* Connick v. Thompson, 131 S. Ct. 1350, 1356, 1375 (2011).

murder verdicts, the presiding judge declared:

> All day long there have been a number of young Assistant D. A.'s sitting in this courtroom watching this, and I hope they take home and take to heart the message that this kind of conduct cannot go on in this Parish if this Criminal Justice System is going to work.[297]

All prosecutors should be concerned that the unintended consequences of blanket immunity, even in the case of gross misconduct, will damage the reputation of the office. Although prosecutors do not work as closely with the public as do the police, they need cooperation from the community, and they need people to testify in order to build their cases. Their interaction with the public remains an important piece of their work, and not all cooperation can be gained through coercion. In other words, there are detrimental implications for prosecutors when the office is perceived as illegitimate. More generally, gross prosecutorial misconduct erodes the public's faith not just in prosecutors, but in the justice system. There is a great deal of theoretical work showing that people's faith in the justice system and belief in the system's legitimacy to be a key component in motivating them to obey the law.[298] Conversely, this same body of work links a lack of perceived legitimacy to public facilitation of criminal behavior, in that it enables justifications or excuses for illegal conduct.[299] To put it bluntly, when people feel the process is rigged they are less likely to show any compunction about breaking the law themselves; they do not believe in the law's legitimacy.[300] Right or wrong, police brutality and prosecutorial misconduct then become the future offender's next excuse.

With the development of DNA testing, the establishment of numerous Innocence Projects, and the growing scholarly literature on wrongful conviction, the original purpose of absolute immunity for prosecutors is likely to be subordinated to a more urgent need to ensure the integrity of the criminal justice system. As Justice Ginsburg wrote in *Connick v. Thompson*, the *Connick* holding had the potential to erode confidence in the justice system:

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[297] *Id.* at 1375 (Ginsburg, J., dissenting) (quoting the record from the Louisiana Court of Appeals).

[298] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 62 (2006) (noting that people who believe legal authority is legitimate are more likely to obey the law).

[299] *See* Lawrence W. Sherman, *Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction*, 30 J. RES. CRIME & DELINQ. 445, 458 (1993) ("[D]issatisfaction with government decisions (including sanctions) can cause increased lawbreaking.").

[300] *Id.*

> [A] municipality that leaves police officers untrained in constitutional limits on the use of deadly weapons places lives in jeopardy. But as this case so vividly shows, a municipality that empowers prosecutors to press for a death sentence without ensuring that those prosecutors know and honor *Brady* rights may be no less "deliberately indifferent" to the risk to innocent lives.[301]

The genius of American government is its reliance on checks and balances.[302] Courts can act as a check on the power of the prosecutor by more carefully tailoring the prosecutor's immunity so that honest prosecutors are rewarded, dishonest prosecutors are held accountable, and incentives are put in place to minimize the unjust conviction of citizens.

[301] *Connick*, 131 S. Ct. at 1385 (Ginsburg, J., dissenting) (citing Canton v. Harris, 489 U.S. 378, 390 n.10 (1989)).

[302] *See* U.S. CONST. art. I, § 7, cl. 2–3 (denoting a system of checks and balances).