The Civil Regulation of Prosecutors

Lesley E. Williams

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/flr/vol67/iss6/16

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
The Civil Regulation of Prosecutors

Cover Page Footnote
I would like to thank Professor Bruce Green for his encouragement and insight.
THE CIVIL REGULATION OF PROSECUTORS

Lesley E. Williams*

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. . . . [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.1

INTRODUCTION

The availability of discipline by professional associations in cases of prosecutorial misconduct encouraged the Supreme Court to grant prosecutors absolute immunity for trial-related activities under § 1983. For over twenty years, courts have invoked the reasoning in *Imbler v. Pachtman*2 to bolster and justify the bestowal on prosecutors of broad immunity from civil suit regardless of the alleged wantonness or recklessness of prosecutorial behavior. *Imbler* assumes that prosecutors are amenable to professional discipline.3 *Imbler* further assumes that professional discipline will protect the public from prosecutorial misconduct.4

*Imbler*'s immunity doctrine rendered § 19835 and *Bivens*6 actions ineffective in the regulation of prosecutors. Recognizing that it was removing a consequential device from the regulatory arsenal, the *Imbler* court proposed that the availability and efficacy of professional discipline would offset prosecutors' immunity from those actions.7 Twenty-three years of case law after *Imbler* suggest that professional disciplinary bodies do not sufficiently compensate for the broad grant of immunity prosecutors receive from the courts against civil rights actions.8 When prosecutors properly invoke immunity, judges dismiss § 1983 and *Bivens* actions.9 This obviates the need for judges to analyze the allegations of misconduct and resolve factual questions about a prosecutor's conduct. Because professional disciplinary mechanisms do not address the prosecutorial misconduct either, no public record

---

* I would like to thank Professor Bruce Green for his encouragement and insight.

2. 424 U.S. 409.
3. See id. at 429.
4. See id.
8. See infra Part IV.A–B.
9. See infra Part III.A–B.
exists that could be used in the future by prosecutors as a barometer of their conduct or a guide to appropriate behavior.\textsuperscript{10}

This Note examines the role of § 1983 and \textit{Bivens} actions in the regulation of prosecutors. Part I discusses the regulation of prosecutors through statutory law and professional norms. Part II discusses the regulation of prosecutors through the Constitution. Part III examines, through the filter of absolute and qualified immunity, the civil liability prosecutors face for certain behavior. Part IV analyzes why \textit{Imbler}'s premise is incorrect. Part V proposes several ways to fill the void created by broad grants of immunity and the dearth of regulatory follow-up. This Note concludes that, regardless of the method chosen to address this void, the end must be the same: to provide prosecutors with a barometer of acceptable behavior that details specifically what should and should not be done in both the investigative and the advocacy processes.

I. The Regulation of Prosecutors Generally

This part provides background on the regulation of prosecutors. It explains the role positive law plays in this regulation, and examines professional standards and enforcement of professional norms.

\textbf{A. Positive Law}

Prosecutors are regulated, in part, by statutory law. If prosecutors engage in illegal conduct, such as the obstruction of justice,\textsuperscript{11} subornation of perjury,\textsuperscript{12} or withholding of exculpatory evidence,\textsuperscript{13} they may be subject to criminal prosecution. For example, there is a case currently pending in Chicago against the "Du Page Seven."\textsuperscript{14} This case, which is scheduled to go to trial imminently, stems from a forty-seven count indictment of three former Du Page County prosecutors and four Du Page sheriff's officers arising out of the prosecution of Rolando Cruz for the 1983 murder and kidnapping of ten-year-old Je-anine Nicarico.\textsuperscript{15} The seven men are charged, in pertinent part, with

\textsuperscript{10}See infra Part IV.
\textsuperscript{11}See, e.g., N.Y. Penal Law § 195.05 (McKinney 1999) (obstructing governmental administration). In New York, a person is guilty of obstructing governmental administration in the second degree when she "intentionally obstructs, impairs or perverts the administration of law or other governmental function . . . ." \textit{Id.}
\textsuperscript{12}See, e.g., \textit{id.} §§ 210.05, 210.10, 210.15 (perjury). The New York Penal Law does not contain a crime separately defined as subornation of perjury, but according to the doctrine of accomplice liability, \textit{see id.} § 20.00, the person who suborns perjury is guilty of the perjury committed by the person who was suborned. \textit{See id.} §§ 210.00–210.50 practice commentary, at 356.
\textsuperscript{13}See Brady v. Maryland, 373 U.S. 83, 87 (1963).
\textsuperscript{15}See \textit{id.}
consisting to fabricate evidence against Cruz and concealing evidence that may have exonerated him of the kidnapping, rape, and murder.¹⁶

B. Professional Norms

Besides statutory law, prosecutors are also regulated by a variety of standards of conduct promulgated by courts, the American Bar Association, internal regulators, and others. This section examines these regulations and the methods of their enforcement.

1. Standards of Conduct

Prosecutors are regulated by professional norms. The foundation of professional regulation for lawyers consists of the ethics codes adopted by each state.¹⁷ State courts adopt ethics rules to govern lawyers in their jurisdictions; the application of any state's rules is limited by the jurisdiction of the state.¹⁸ The rules state courts develop, however, are largely based on the American Bar Association's templates: the Model Code of Professional Responsibility¹⁹ and the Model Rules of Professional Conduct.²⁰

¹⁶. See id. Cruz was finally acquitted of the charges in November 1995 during his third trial. See id. By that time, he had been in prison for 12 years, 10 of which he spent on death row. See id. In dismissing the charges against Cruz, Judge Ronald Mehling of Du Page County criticized the Cruz investigation. See id. His comments led to the appointment of a special prosecutor and the grand jury probe of the case. See id.


¹⁸. See id.


²⁰. See Model Rules of Professional Conduct (1997). The ABA first codified ethics rules in 1908 in the Canons of Professional Ethics. These were in effect for 62 years and functioned "not as a detailed guide to daily practice, but as an expression of the general norms to which a lawyer should conform ..." Frank O. Bowman, III, A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State, 9 Geo. J. Legal Ethics 665, 761 (1996). In 1969, the ABA supplanted the Canons with the Model Code of Professional Responsibility. The Model Code contains three tiers of norms: "Canons," which are short statements of general principle; "Ethical Considerations," which are "should" rules and aspirational in nature; and "disciplinary rules," which are "must" rules, imposing minimum standards of conduct. In 1977, the ABA attempted to replace the Code with the Model Rules of Professional Conduct, which consists of 54 statute-like rules that describe both prohibitions and conduct in which lawyers may engage in certain circumstances. See Model Rules of Professional Conduct (1998). ABA rules, however, have no binding legal effect unless they are adopted by a state's judiciary. Forty-two states have based their ethics rules on the Model Rules. See Model Rules: Virginia Makes Numerous Changes in Adopting ABA Model Rules of Conduct, 15 Laws. Man. on Prof. Conduct (ABA/BNA) 38 (Feb. 17, 1999). Other states follow the Model Code, or, like California, have developed their own rules. See State Ethics Rules, Laws. Man. on Prof. Conduct (ABA/BNA) 01:3 (Aug. 20, 1997). There have been several occasions when federal courts have intervened to nullify state bar regulations contrary to the Constitution or federal statutes. See Bowman, supra, at 748 nn.419-20; see also, e.g., Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 278 (1985) (striking down residency requirements for bar membership and holding that the New Hampshire...
As lawyers, prosecutors are subject to the same rules and regulations that govern the conduct of lawyers generally.\(^1\) Prosecutors, however, are not only lawyers, they are also "ministers of justice."\(^2\)

This epithet subjects prosecutors to additional rules, such as Model Rule 3.8, which regulates a narrow range of conduct in which only prosecutors engage.\(^3\) All jurisdictions have such a rule.\(^4\) Most have adopted a version of Model Rule 3.8.\(^5\) As a minister of justice, the prosecutor must not attempt to achieve her ends of justice through unjust means.\(^6\)

Prosecutors' conduct is also regulated by court rules.\(^7\) For example, federal courts regulate the admission and conduct of lawyers who

---

\(^1\) See, e.g., Model Rules of Professional Conduct Rules 3.3, 3.4, 3.6 (governing the general conduct of lawyers).

\(^2\) See Berger v. United States, 295 U.S. 78, 88 (1935). As Justice Sutherland eloquently opined:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor.... But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

\(^3\) See Model Rules of Professional Conduct Rule 3.8.


\(^5\) Only one jurisdiction has adopted section "g," which was the ABA's 1994 amendment prohibiting extrajudicial statements likely to increase public condemnation of the accused. See Trial Conduct: Prosecutors, Laws. Man. on Prof. Conduct 61:601-06. Further, only several states have adopted section "f," which regulates prosecutors' issuance of subpoenas to lawyers. See id.

\(^6\) See id. Prosecutors may also seek guidance in the ABA Standards Relating to the Administration of Criminal Justice: The Prosecution Function ("Prosecution Function") and the National District Attorney's Association: National Prosecution Standards ("District Attorney Standards"). No jurisdiction has adopted either the Prosecution Function or the District Attorney Standards in their entirety, see Bruce A. Green, Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?, 8 St. Thomas L. Rev 69, 74 (1995) [hereinafter Green, Policing], but courts often invoke them when they are interpreting law or formulating case-by-case disciplinary rules. See id.

\(^7\) See id. at 75-76.
practice in them. Although they do not apply a uniform set of professional rules, most district courts have adopted either the rules promulgated by the highest court of the state in which they sit or the Model Rules. Some district courts also develop ethical rules on a case-by-case basis. These types of rules, which are authorized by the courts’ supervisory powers, have been announced in judicial opinions that criticize a prosecutor’s conduct in a specific case. For example, judges have ordered prosecutors to make disclosure to the court and have set limits on a prosecutor’s subpoena power. While the court may be very clear that a prosecutor has transgressed a norm, it rarely explicates the norm in its opinion, and even more rarely creates a standard for future use.

Prosecutors are subject to internal regulations, which include office-created procedure manuals such as the ten-volume Department of Justice Manual for United States Attorneys (“DOJ Manual”). The DOJ Manual contains an entire section on ethical standards. DOJ employees must report to their United States Attorney or other appropriate supervisor any evidence or genuine allegation of misconduct in violation of any law or applicable professional standard.

The 105th Congress altered the regulatory stage with the Citizens Protection Act of 1998, which subjects federal prosecutors and other attorneys for the government to the same state laws, rules, and local federal court rules as other attorneys in the state. The legislation champions the long-standing views of the ABA and state ethics authorities that federal prosecutors should be held to the same standards.

28. See Bowman, supra note 20, at 750 & n.434. The Judicial Conference of the United States writes the rules of procedure that govern lawyers in federal courts. See Schneyer, supra note 17, at 40 n.37.


30. See Green, Policing, supra note 26, at 73.

31. See id. at 75-76.

32. For an examination of courts’ supervisory power, see infra notes 45-52 and accompanying text.

33. See Green, Policing, supra note 26, at 75.

34. See id.

35. See id.


38. 2 Department of Justice Manual § 1-4.100 (1995-1 Supp.).

39. 28 U.S.C.A. § 530B (West Supp. 1999). The Act is informally known as the McDade Amendment because the original proposal was sponsored by Rep. Joseph McDade (R-Pa.), who was acquitted in 1996 of federal conspiracy and racketeering charges. See 14 Laws. Man. on Prof. Conduct (ABA/BNA) 498, 498 (Oct. 28, 1998). According to one of McDade’s aides, the Congressman sought the new law, not to exact revenge for the lengthy, failed prosecution against him, but to ensure that the DOJ could not exempt itself from the ethical rules and guidelines that govern all other attorneys. See id. The Act drew harsh criticism from the DOJ. See id.

40. See id.
that govern state prosecutors and other lawyers. Although the text of the Act does not discuss ethics rules or professional conduct, the phrase "ethical standards" in the section's title suggests that the Act refers to professional conduct rules, not all state laws. Some ethics scholars have suggested that under the new law, state ethics rules may function like rules of criminal procedure for federal prosecutors. Thus, the private bar may have the potential to create more regulations for federal prosecutors. The Act was scheduled to take effect in April 1999.

2. Enforcement

Professional norms are enforced by state and federal courts, prosecutors' offices, and state disciplinary authorities. State and federal courts may ensure prosecutors' adherence to professional norms through the use of their contempt and supervisory powers. A judge may hold a prosecutor in contempt when the prosecutor's behavior is willfully disobedient or exhibits contemptuous or contumacious conduct in court that threatens the administration of justice. In the past, supervisory powers have allowed courts to dismiss criminal cases and suppress evidence because of prejudice caused by a prosecutor's misconduct.

A number of recent Supreme Court decisions have narrowed the scope of the use of supervisory powers to remedy prosecutorial indiscretion merely for violations of ethics rules. In Bank of Nova Scotia v. United States, the Supreme Court held that a trial court may not use its supervisory power as a means of remedying prosecutorial misconduct before a grand jury unless the prosecutor's actions prejudiced the defendant. The Court opined that courts may formulate procedural rules not specifically articulated by itself or Congress. Courts may not, however, invoke the supervisory powers if the exercise of such powers would conflict with the Constitution or federal statutes.

41. See id.
42. See id. at 500.
43. See id.
44. See id. at 498.
46. See United States v. Giovanelli, 897 F.2d 1227, 1230 (2d Cir. 1990).
47. See Green, Policing, supra note 26, at 80-83.
48. See, e.g., United States v. Williams, 504 U.S. 36, 45-55 (1992) (holding that courts have no authority to prescribe a duty to disclose exculpatory evidence to the grand jury).
50. See id. at 254.
51. See id. at 255.
52. See id.
Professional norms may also be enforced through prosecutors' offices' internal investigative procedures. For example, prosecutors in U.S. Attorneys' Offices must report evidence and non-frivolous allegations of serious misconduct that relate to the "exercise of [the] authority to investigate, litigate, or provide legal advice . . . to the Office of Professional Responsibility ["OPR"] . . . ." OPR has jurisdiction to investigate and mete out discipline to federal prosecutors.

State disciplinary authorities, which are under the supervision of state appellate courts, may also initiate disciplinary investigations of prosecutorial wrongdoing. Additionally, they may prosecute and sanction lawyers based on meritorious claims. All disciplinary committee determinations are subject to judicial review. No public record of the investigation is created unless the offending prosecutor is disbarred or sanctioned in some substantial way.

Along with the significant number of statutory and ethical limitations enumerated above, the Constitution also places limits on prosecutorial conduct. The Due Process Clauses of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment play perhaps the most prominent role in shaping prosecutors' actions in the criminal justice process. Part II examines the parameters set by these constitutional guarantees.

II. THE CONSTITUTIONAL REGULATION OF PROSECUTORS

Because prosecutors are agents of the government, they are also regulated by the Constitution. This part examines the constitutional provisions that most often pertain to prosecutors. This part presents the amendments pertinent to prosecutorial function and discusses remedies available for prosecutors' violations of constitutional provisions.

A. Controlling Amendments

Prosecutors' actions are limited by numerous constitutional guarantees. For instance, the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments regulate the prosecutor's charging discretion. Prosecutors have wide discretion in initiating prosecutions, but decisions to prosecute may not be based on such considerations as race, religion,
or suppression of other constitutional rights. Defendants, however, must clear high hurdles to prove a prosecutor's discriminatory intent. The defendant must show that the prosecutor selected a particular course of action "because of," not merely "in spite of," its adverse effects upon an identifiable group. In addition, a defendant must show current intent, not historical evidence, to prove a prosecutor acted with discriminatory purpose. A defendant pursuing a selective prosecution claim must show that similarly situated persons are not being prosecuted for the same offense.

The guarantee of due process also prohibits a prosecutor from choosing to proceed against a defendant for exercising a statutory or constitutional right. Claims of pretrial vindictiveness are not often successful because, in the pretrial context, a defendant must show "actual vindictiveness" on the part of the prosecutor.

Further, the Due Process Clause regulates a prosecutor's decision as to whether to disclose exculpatory evidence to the accused. Regardless of good or bad faith, the non-disclosure by a prosecutor of evidence favorable to the accused upon request "violates due process where the evidence is material either to guilt or to punishment." The duty of disclosure does not always depend on a defense request. Undisclosed evidence is material if there is a reasonable probability that the result would have been different had the evidence been revealed. When determining the materiality of evidence, the court questions whether the defendant received a fair trial without the evidence, rather than whether the defendant would have been acquitted had the undisclosed evidence been revealed.

A prosecutor's actions are additionally limited by the defendant's Fifth Amendment rights to a fair trial, protection against self-incrimination, and right to counsel, which guarantees the assistance of a lawyer in the context of custodial interrogation. The prosecutor must also abide by the Sixth Amendment right to counsel, which at-

---

65. See Blackledge v. Perry, 417 U.S. 21, 28-29 (1974) (holding that a prosecutor may not upgrade the defendant's charges after the defendant invokes the right to a trial de novo).
taches when the proceeding reaches a critical stage at the initiation of adversary judicial proceedings.  

B. Remedies

Criminal defendants who believe that they have been deprived of their constitutional rights have criminal procedural and civil substantive remedies available to them.

1. Procedural

If a prosecutor's misconduct deprives a defendant of a constitutional right, courts may grant a remedy to the defendant during the criminal proceeding by suppressing evidence or dismissing the case. The harmless error doctrine, however, which precludes granting relief unless the prosecutor's misconduct contributed to the conviction, has reduced the availability of these procedural remedies. Judges' authority to remedy prosecutorial misconduct by granting relief to criminal defendants has also been narrowed by Supreme Court decisions that restrict the scope of courts' supervisory power. Supervisory power may not be invoked to reverse a defendant's conviction unless the defendant was prejudiced by the conduct. The district courts may not avoid the harmless error doctrine by invoking their supervisory power.

2. Civil

In addition to criminal procedural remedies, defendants who have been deprived of their constitutional rights have civil remedies such as § 1983 and Bivens actions. This section discusses those remedies and the limitations the courts and congress have placed on them, such as absolute and qualified immunity.

---

5. See Morton, supra note 45, at 1089-90.
78. 42 U.S.C. § 1983 (1994). After the Civil War, acts of terrorism were perpetrated by the Ku Klux Klan and other vigilante groups against blacks and Union sympathizers. See Eric Foner, Reconstruction 1863-1877: America's Unfinished Revolution 119-23, 425-59 (1988). Although almost all these acts were violations of state law, local officials rarely intervened and sometimes overtly supported the lawless behavior. See id. To remedy the situation, Congress passed the Ku Klux Klan Act of 1871. See id. Section 1 of the Act is now codified at 42 U.S.C. § 1983.
Because prosecutors are agents of the government, there is a remedy for any action prosecutors take that deprives a person of her constitutional rights. For state and local prosecutors, this remedy can be found in 42 U.S.C. § 1983. For federal prosecutors, the remedy is a Bivens action. The elements and defenses of these causes of action in the context of deprivations of constitutional rights, however, are sufficiently analogous to be treated the same in this Note.

Section 1983 grants a cause of action against any person who, under color of state law, violates a person’s rights under a federal statute or the Constitution. To state a claim under § 1983, a plaintiff must

---

80. 42 U.S.C. § 1983. Individuals alleging prosecutorial misconduct may also file state common law claims for malicious prosecution. State claims for malicious prosecution are routinely dismissed for failure to state a claim because of the immunities available to prosecutors at common law.

81. In Bivens, 403 U.S. at 388, the Supreme Court recognized a cause of action parallel to that of § 1983 against federal officials who, while acting under the color of federal law, violate a person’s constitutional rights. See Megan M. Rose, Note, The Endurance of Prosecutorial Immunity: How the Federal Courts Vitiated Buckley v. Fitzsimmons, 37 B.C. L. Rev. 1019, 1021 (1996). Actions brought against federal employees to remedy violations of federal law have become known as Bivens actions. In Bivens, six federal agents allegedly violated the plaintiff’s Fourth Amendment right to be free from unreasonable searches and seizures. See Bivens, 403 U.S. at 389-90. The Supreme Court has been very reluctant to expand Bivens to new contexts. See Schweiker v. Chilicky, 487 U.S. 412, 414 (1988) (holding that a Bivens action is unavailable for alleged violations of due process by government officials who administered the Federal Social Security program); see also Bush v. Lucas, 462 U.S. 367, 368 (1983) (refusing to create a Bivens remedy for a First Amendment violation when a federal employee was demoted for making public statements critical of the agency in which he worked); Chappell v. Wallace, 462 U.S. 296, 304 (1983) (holding that a Bivens action was unavailable for enlisted military personnel who were allegedly injured by the unconstitutional actions of their superior officers). But see Carlson v. Green, 446 U.S. 14, 20 (1980) (recognizing a Bivens action against federal prison employees); Davis v. Passman, 442 U.S. 228, 234 (1979) (recognizing a Bivens cause of action under the Fifth Amendment Due Process Clause for a congressional employee who alleged sexual discrimination). To state a claim under Bivens, a plaintiff must show that a person acting under the color of federal law deprived her of a federally protected constitutional right. See Rose, supra, at 1021.

82. Section 1983 provides, in pertinent part:

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

42 U.S.C. § 1983. Section 1983 actions can be brought in state and federal courts. Though it was passed in the latter half of the nineteenth century, the statute lay unused until Monroe v. Pape, 365 U.S. 167 (1961), in which plaintiffs sued local police officers under § 1983 for unlawful search and arrest. See id. at 168-69. The Supreme Court upheld the complaint. See id. Plaintiffs alleged that 13 police officers broke into their home without search or arrest warrants and ransacked every room while plaintiffs stood naked nearby. See id. Monroe was held for 10 hours in the police
show that a person acting under the color of state law deprived her of a federally protected constitutional or statutory right.\textsuperscript{83} Section 1983 does not provide substantive rights itself,\textsuperscript{84} but provides a federal remedy for the violation of constitutional or federal statutory rights.\textsuperscript{85} The underlying substantive claim provides the intent component of the § 1983 claim.\textsuperscript{86} For example, a plaintiff may file a § 1983 claim against a prosecutor for violating her due process rights. If the plaintiff is unable to establish the elements of the underlying constitutional or statutory violation, the § 1983 claim will be dismissed for failure to state a claim upon which relief can be granted.\textsuperscript{87} The phrase "under the color of state law" has been interpreted by the courts to apply to public officials acting within their authority,\textsuperscript{88} public officials acting in abuse of authority granted to them the state,\textsuperscript{89} and private individuals whose conduct might be fairly attributable to the state.\textsuperscript{90} Prosecutors are clearly state actors for the purposes of § 1983.\textsuperscript{91} Section 1983 provides damages and injunctive relief for private plaintiffs.\textsuperscript{92}

The plaintiff in a § 1983 or \textit{Bivens} action may file a civil suit directly against the state or federal official and seek compensatory and punitive damages against that official in her personal capacity.\textsuperscript{93} A plaintiff who charges prosecutorial misconduct relating to a wrongful conviction must also establish that the prior criminal proceeding ended in her favor.\textsuperscript{94}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{83} See \textit{Monroe}, 365 U.S. at 168-69.
\item \textsuperscript{84} See \textit{Maine v. Thiboutot}, 448 U.S. 1, 7 (1980).
\item \textsuperscript{85} See \textit{id.} at 4 (holding that the § 1983 remedy broadly encompasses violations of constitutional as well as federal statutory law).
\item \textsuperscript{86} See \textit{Daniels v. Williams}, 474 U.S. 327, 330 (1986).
\item \textsuperscript{87} See, e.g., \textit{Estelle v. Gamble}, 429 U.S. 97, 104-06 (1976) (holding that to demonstrate a constitutional violation arising from prison officials' alleged withholding of a prisoner's medical care, the prisoner must prove deliberate indifference to serious medical needs).
\item \textsuperscript{88} See \textit{Monroe}, 365 U.S. at 184.
\item \textsuperscript{89} See \textit{West v. Atkins}, 487 U.S. 42, 49-50 (1988).
\item \textsuperscript{90} This is a complicated question of fact and law. The Supreme Court has developed several tests to determine when private parties may be considered state actors for the purposes of § 1983. See, e.g., \textit{West}, 487 U.S. at 54 (delegation test); \textit{Lugar v. Edmondson Oil Co.}, 457 U.S. 922, 931 (1982) (joint participation test); \textit{Moose Lodge No. 107 v. Irvis}, 407 U.S. 163, 172-73 (1972) (nexus test); \textit{Adickes v. S.H. Kress & Co.}, 398 U.S. 144, 150-61 (1970) (state compulsion test and joint participation test); \textit{Burton v. Wilmington Parking Auth.}, 365 U.S. 715, 725 (1961) (symbiotic relationship test); \textit{Terry v. Adams}, 345 U.S. 461, 469 (1953) (public function test).
\item \textsuperscript{91} See \textit{Imbler v. Pachtman}, 424 U.S. 409, 410 (1976).
\item \textsuperscript{92} See 1A Martin A. Schwartz & John E. Kirklin, \textit{Section 1983 Litigation: Claims and Defenses} 2 (3d ed. 1997).
\item \textsuperscript{93} See \textit{id.} at 478.
\item \textsuperscript{94} See \textit{Rose}, supra note 81, at 1022-23. For example, the plaintiff must prove that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or been the subject of a federal court's issuance of a writ of habeas corpus." \textit{Id.} at 1023.
\end{itemize}
\end{footnotesize}
b. Defenses to § 1983 and Bivens Actions

This section discusses the limitations courts and Congress have placed on § 1983 and Bivens actions. Section 1983 and Bivens claims may be defeated by one or more immunities.\(^9\) Absolute immunity protects prosecutors in their individual capacities from civil liability in all § 1983 and Bivens claims that involve a prosecutor's role as advocate for the state.\(^9\) Further, qualified immunity shields a prosecutor's investigative and administrative actions from these claims.\(^9\) Absolute and qualified immunity pertain to claims for monetary relief against officials in their personal capacities.\(^9\) Absolute and qualified immunity, however, do not extend to injunctive or declaratory relief.\(^9\)

Although the broad language of § 1983 does not refer to any exceptions or immunities, the Supreme Court, in Tenney v. Brandhove,\(^10\) held that this silence meant that Congress intended the individual immunities available at common law at the time § 1983 was enacted to

---

\(^9\) The Eleventh Amendment prevents individuals from suing states. Under Ex Parte Young, 209 U.S. 123 (1908), neither states nor state officials in their official capacities may be named as defendants under § 1983. See id. at 150. Plaintiffs must name state officials in their individual capacities to avoid Eleventh Amendment immunity. The concept of state action embodied in the Eleventh Amendment is much narrower than the color of law requirement of § 1983 or the state action principle of the Fourteenth Amendment. Thus, as long as public officials are named in their individual capacities, they can be found to have been acting under the color of state law without triggering the Eleventh Amendment immunity. See Price v. Akaka, 915 F.2d 469, 473 (9th Cir. 1990).

The Eleventh Amendment does not apply to municipalities, counties, or other localities. A plaintiff may name a municipality as a defendant of a § 1983 claim, but pursuant to the doctrine of municipal liability set out in Monell v. Department of Social Services, 436 U.S. 658 (1978), a municipality cannot be held liable under a respondeat superior theory for § 1983 claims caused by a municipal official. See id. at 993-94. To maintain a claim for municipal liability, a plaintiff must show that the municipality had a policy or custom made by a final policy maker that actually and proximately caused the injury. See id. at 694. The question of who is a final policy maker is a question of state law and should be resolved as a matter of law by the judge. See Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989).


96. See infra Part III.B.
97. See infra Part III.B.
98. See 1B Schwartz & Kirklin, supra note 92, at 202.
99. See id.
100. 341 U.S. 367 (1951).
be imputed to the statute.\textsuperscript{101} Courts have held that the immunities available to public officials under § 1983 are also available in \textit{Bivens} actions.\textsuperscript{102}

i. Absolute Immunity

Absolute immunity\textsuperscript{103} precludes suit absolutely, even if the offending official knew that her conduct was unlawful, malicious, or otherwise without justification.\textsuperscript{104} Absolute immunity completely insulates the official from civil liability.\textsuperscript{105} Absolute immunity is an immunity from suit rather than a defense to liability.\textsuperscript{106} Defending officials may appeal a district court's denial of absolute immunity immediately, as long as the immunity issue may be resolved as a matter of law.\textsuperscript{107} Absolute immunity is granted by the courts only when it is in the public interest to protect a public official's smooth job function from the interference that would be caused if the official had to defend a civil lawsuit.\textsuperscript{108} The Supreme Court has extended absolute immunity to legislators,\textsuperscript{109} judges,\textsuperscript{110} the President,\textsuperscript{111} and prosecutors.\textsuperscript{112} Suits against officials entitled to absolute immunity are generally dismissed on pretrial motions.\textsuperscript{113} The defendant has the burden of establishing absolute immunity.\textsuperscript{114}

\textsuperscript{101} See id. at 376; Douglas J. McNamara, Buckley, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to its Absolute Means, 59 Alb. L. Rev. 1135, 1138 (1996). \textit{Tenney} involved immunity for state legislators, which was granted to federal legislators in the Constitution and by English and American common law to prevent nuisance suits from hindering the law-making process. \textit{Id.} at 1139. In \textit{Pierson v. Ray}, 386 U.S. 547 (1967), the Court held that the common-law absolute immunity available to judges for "acts committed within their judicial jurisdiction" was preserved under § 1983. \textit{See id.} at 554.

\textsuperscript{102} See, e.g., Briggs v. Goodwin, 569 F.2d 10, 17 n.8 (D.C. Cir 1977); Rose, \textit{supra} note 81, at 1023.

\textsuperscript{103} The Supreme Court applies absolute immunity only when justified by public policy. There is a presumption that qualified immunity is sufficient to protect government actors in their official acts. \textit{See Burns v. Reed}, 500 U.S. 478, 486-87 (1991).


\textsuperscript{105} See 1B Schwartz & Kirklin, \textit{supra} note 92, at 207-08.

\textsuperscript{106} See \textit{id.}

\textsuperscript{107} See \textit{id.}


\textsuperscript{112} See 1B Schwartz & Kirklin, \textit{supra} note 92, at 204.

\textsuperscript{113} See McNamara, \textit{supra} note 101, at 1139.

\textsuperscript{114} See \textit{id.}
ii. Qualified Immunity

Qualified immunity is an affirmative defense ordinarily available to public officials who are sued under § 1983. Like absolute immunity, qualified immunity is theoretically an immunity from suit, but in practice operates more like a standard of culpability. Qualified immunity does not immediately defeat a suit, but instead creates an objective standard against which the defendant’s actions will be measured. To succeed, the § 1983 or Bivens defendant must show that she did not violate “clearly established statutory and constitutional rights of which a reasonable official would have known.” The contours of the right must be sufficiently clear that a reasonable prosecutor would understand that what she was doing would violate that right in the circumstances in which she was acting. If a prosecutor’s actions do violate clearly established rights, qualified immunity will not protect the prosecutor from civil liability. Qualified immunity is an affirmative defense, which must be raised and proved by the defendant. Failure to plead qualified immunity in the answer is a waiver of qualified immunity.

Because of absolute and qualified immunities, prosecutors may potentially engage in a wide variety of egregious conduct without facing civil liability. As discussed below in part III, courts are bound to uphold the immunities regardless of how deplorable the prosecutors’ alleged actions were.

III. The Civil Liability Prosecutors Face After Imbler, Burns, and Buckley

This part explores the grant of absolute immunity to prosecutors’ advocacy functions and qualified immunity to investigative functions. This part also discusses how the application of these immunities to specific prosecutorial behavior operates to shield prosecutors from virtually all civil liability under § 1983 and Bivens.

115. See Guzman-Rivera v. Rivera-Cruz, 55 F.3d 26, 29 (1st Cir. 1995).
116. See 1B Schwartz & Kirklin, supra note 92, at 336-37.
117. See Rose, supra note 81, at 1023-24.
120. See id.
122. See, e.g., Angarita v. St. Louis County, 981 F.2d 1537, 1548 (8th Cir. 1992) (holding that county police officers, who failed to raise the issue of qualified immunity before the district court in a § 1983 action, failed to preserve qualified immunity for appeal); Moore v. Morgan, 922 F.2d 1553, 1557 (11th Cir. 1991) (stating that the failure to plead qualified immunity may result in a waiver of the defense); Kelson v. City of Springfield, 767 F.2d 651, 657 (9th Cir. 1985) (same); Barrett v. Thomas, 649 F.2d 1193, 1201 (5th Cir. 1981) (same).
A. The Broad Grant of Absolute Immunity to Protect Prosecutorial Function

*Imbler v. Pachtman*\(^{123}\) was the first case in which the Supreme Court decided a question of immunity for prosecutors under § 1983. *Imbler* created a broad rule of absolute immunity.\(^{124}\) According to the Court, absolute immunity should be granted to a prosecutor for activities "intimately associated with the judicial phase of the criminal process."\(^{125} \) The Court did not delineate the precise boundaries of the "judicial phase," but explained that it was any action the prosecutor might undertake in her role as advocate for the state.\(^{126}\) The Court reserved judgment on the immunity that should apply to a prosecutor's administrative or investigative actions.\(^{127}\) The Court interpreted *Tenney*'s holding that § 1983 existed in harmony with general principles of common law tort immunities and defenses to mean that prosecutors should have immunity for all trial-related conduct.\(^{128}\) The only absolute immunities available to prosecutors at common law, however, were those for malicious prosecution and defamation.\(^{129}\) *Imbler* expanded the category of prosecutorial misconduct covered by absolute immunity.\(^{130}\)

The Court presented several justifications for its preservation of absolute immunity. First, the court reasoned, if prosecutors could be sued, they would not be able to expend their full attention and energy to their public duties as ministers of justice.\(^{131}\) Second, suits that survived pleadings would bestow on the prosecutor the enormous burden of proving "good faith," often for acts done in the distant past.\(^{132}\) Third, fear of liability would stop prosecutors from trying cases to the utmost of their abilities.\(^{133}\) The Court also addressed the lack of redress available to truly wronged plaintiffs due to prosecutorial immunity for § 1983 actions. The Court concluded that the value of prosecutorial freedom outweighed the rights of the persons they injured.\(^{134}\)

---

\(^{123}\) 424 U.S. 409 (1976).

\(^{124}\) See *id.* at 431.

\(^{125}\) See *id.* at 430.

\(^{126}\) See *id.* at 431 & n.33.

\(^{127}\) See *id.* at 431 n.33.

\(^{128}\) See *id.* at 418.

\(^{129}\) See *Burns v. Reed,* 500 U.S. 478, 485 (1991); Rose, *supra* note 81, at 1025-26. The Supreme Court of Indiana was one of the first American courts to award a prosecutor absolute immunity from civil suit. See *Griffith v. Slinkard* 44 N.E. 1001, 1002 (Ind. 1896). The United States Supreme Court first held a prosecutor absolutely immune from civil actions for malicious prosecution in 1927. See *Yaselli v. Goff,* 275 U.S. 503 (1927) (per curiam), affg 12 F.2d 396 (2d Cir. 1926).

\(^{130}\) See *supra* note 129.


\(^{132}\) See *id.* at 425-26.

\(^{133}\) See *id.* at 426 & nn.23-24.

\(^{134}\) See *id.* at 428.
prosecutorial misconduct could be addressed, such as professional discipline.\textsuperscript{135}

B. The Application of Qualified Immunity to Investigative Function

Fifteen years after \textit{Imbler}, the Court refined its approach to prosecutorial immunity. In \textit{Burns v. Reed},\textsuperscript{136} the Court focused on the nature of the act, not the job title held by the actor.\textsuperscript{137} The Court addressed whether immunity was applicable to two different scenarios: (1) a prosecutor’s participation in a probable cause hearing that led to the issuance of a search warrant, and (2) a prosecutor’s giving legal advice to the police regarding the use of hypnosis and the existence of probable cause.\textsuperscript{138} In regard to the first issue, the Court found that because the probable cause hearing was “intimately associated with the judicial phase of the criminal process,” the prosecutor should be entitled to absolute immunity for any conduct therein.\textsuperscript{139} As to the second issue, the Court held that advising the police in the investigative phase of a criminal case was an investigative function and thus entitled to qualified immunity only.\textsuperscript{140} The Court further explained that common law did not provide absolute immunity for advising the police.\textsuperscript{141}

\textit{Buckley v. Fitzsimmons}\textsuperscript{142} further developed the functional test. In \textit{Buckley}, the Court reiterated that prosecutors should receive absolute immunity for acts done in preparation for or during a judicial proceeding.\textsuperscript{143} The Court, distinguishing these adversarial acts from those that were investigative or administrative, held that prosecutors should receive only qualified immunity for investigative or administrative functions.\textsuperscript{144} The Court was closely divided on how to classify specific behavior: five justices agreed that the prosecutor’s acquisition of expert witness testimony was an investigative function.\textsuperscript{145} The majority of the Court concluded that a prosecutor should not consider herself to be an advocate before she has probable cause to arrest anyone.\textsuperscript{146}

\begin{thebibliography}{9}
\bibitem{135} See \textit{id.} at 429.
\bibitem{136} 500 U.S. 478 (1991). In \textit{Burns}, the Court opined that “qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties” and that the Court had been “quite sparing” in its recognition of absolute immunity. \textit{Id.} at 486-87. The Court reasoned that its role was not “to make a free-wheeling policy choice, but rather to discern Congress’ likely intent in enacting \S 1983.” \textit{Id.} at 494.
\bibitem{137} See \textit{id.} at 495-56.
\bibitem{138} See \textit{id.} at 487.
\bibitem{139} \textit{Id.} at 493.
\bibitem{140} See \textit{id.}
\bibitem{141} See \textit{id.}
\bibitem{142} 509 U.S. 259 (1993).
\bibitem{144} See \textit{id.} at 273.
\bibitem{145} See McNamara, \textit{supra} note 101, at 1151.
\bibitem{146} See \textit{Buckley}, 509 U.S. at 274.
\end{thebibliography}
Because of the holdings in Imbler, Burns, and Buckley, judges face an unwieldy task, namely, to label a prosecutor's function.\textsuperscript{147} Although Buckley purports to create a "bright-line test,"\textsuperscript{148} courts' holdings vary widely in their assignment of function.\textsuperscript{149} The Supreme Court indicated that probable cause was the dividing line between investigative and advocacy functions.\textsuperscript{150} Before probable cause exists, a prosecutor functions as an investigator; after probable cause exists, a prosecutor functions as an advocate. The existence of probable cause, however, is not always demarcated so clearly.

C. Examples

Since Imbler, courts have awarded immunity to prosecutors for a range of behavior for which ordinary citizens and other state actors suffer civil and criminal reproach. In applying broad grants of prosecutorial immunity, courts reason that the defense of civil lawsuits would divert prosecutors from their duty to fearlessly enforce the criminal law and weaken the ultimate fairness of the criminal justice system.\textsuperscript{151} Cases in which prosecutors receive immunity for alleged misconduct that would otherwise violate an individual's civil rights reflect the message delivered by the Supreme Court in Imbler: in a balance between the smooth functioning of the justice process and one individual's civil rights, the interests of the prosecutor and the public outweigh the vindication of her civil rights.\textsuperscript{152} As the Court announced in Imbler, "[I]t 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."\textsuperscript{153}

1. Alleged Prosecutorial Misconduct that Receives Absolute Immunity

Prosecutors have received absolute immunity for alleged misconduct in a great number of areas. For example, some courts have granted prosecutors absolute immunity for alleged post-trial misconduct. In Guzman-Rivera v. Rivera-Cruz,\textsuperscript{154} the plaintiff, who had been arrested, convicted, and imprisoned for a murder he did not

\textsuperscript{147} See infra Part III.C.
\textsuperscript{148} The Court explained that a prosecutor's actions were advocacy functions only after the existence of probable cause. See Buckley, 509 U.S. at 274.
\textsuperscript{149} See McNamara, supra note 101, at 1160.
\textsuperscript{150} See Buckley, 509 U.S. at 274.
\textsuperscript{152} See Imbler, 424 U.S. at 428. The state of mind of the prosecutor is irrelevant. Immunity applies regardless of whether the prosecutor's behavior is in good faith, negligent, reckless, wanton, or malicious. See id. at 427.
\textsuperscript{153} Id. at 428 (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).
\textsuperscript{154} 55 F.3d 26 (1st Cir. 1995); see Reid v. New Hampshire, 56 F.3d 332, 338 (1st Cir. 1995).
commit, sued the prosecutors because they failed to take action to overturn his murder conviction after new evidence surfaced that indicated that he was innocent. The court held that post-trial dismissal decisions fit within the same tradition of immunity as charging decisions and, therefore, are also entitled to absolute immunity. If they were not, the court reasoned, a § 1983 plaintiff could simply reword a complaint for malicious prosecution, which is covered by absolute immunity, as a complaint for failure to dismiss. As the court observed, "Even if it were shown that the defendants reviewed the evidence, found [the person] innocent, and did nothing, their decision withal [sic] not to dismiss his criminal case lies at the heart of the prosecutorial function.”

Prosecutors receive absolute immunity for failing to disclose exculpatory evidence. After being retried and acquitted of a crime for which he had spent almost four years in jail, the plaintiff in Carter v. Burch filed a § 1983 suit against a Virginia prosecutor for failing to disclose statements by the alleged victim that suggested that the victim had framed the plaintiff. The court held that failing to disclose the evidence—whether such failure occurred before, during, or after trial—constituted an advocacy function and, thus, was entitled to absolute immunity.

Courts have also granted absolute immunity to prosecutors who allegedly fabricate and present false evidence to the grand jury. In Hill v. City of New York, the plaintiff sued a New York Assistant District Attorney under § 1983 for violations of her Fourth and Fourteenth Amendment rights. The gravamen of her complaint was that

155. See Guzman-Rivera, 55 F.3d at 31. The evidence consisted of interviews with three of the real murder's co-conspirators who unanimously stated Guzman-Rivera was innocent. See id. at 28.
156. See id. at 31.
157. See id.
158. Id.
160. 34 F.3d 257.
161. See id. at 259-60.
162. See id. at 262.
163. See, e.g., Moore v. Valder, 65 F.3d 189, 194 (D.C. Cir. 1995) (concluding that absolute immunity insulated the prosecutor for allegedly manipulating and concealing evidence before the grand jury); Pinaud v. County of Suffolk, 52 F.3d 1139, 1149 (2d Cir. 1995) (holding that a prosecutor was entitled to absolute immunity for misstatements); Fields v. Soloff, 920 F.2d 1114, 1120 (2d Cir. 1990) (finding that a prosecutor was protected by absolute immunity in the grand jury context); see also Burns v. Reed, 500 U.S. 478, 490 n.6 (1991) (dictum). The Supreme Court has made clear, however, that fabrication of evidence must occur after the existence of probable cause, that is, after the prosecutor has made a decision to indict, for it to be considered an advocacy function and thus covered by absolute immunity. See Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993).
164. 45 F.3d 653 (2d Cir. 1995).
165. See id. at 659.
the prosecutor fabricated evidence, presented the fabricated evidence to the grand jury, and failed to inform the grand jury that exculpatory evidence existed. While investigating a child abuse claim, the prosecutor had coerced a child to implicate his mother in a videotaped interview, although the child consistently had implicated his foster brother in a prior videotaped interview with the prosecutor. Without informing the grand jury that exculpatory evidence existed, the prosecutor presented only the second videotape to seek the indictment.

The Second Circuit held that absolute immunity barred the plaintiff's claims that the prosecutor presented and conspired to present false evidence to the grand jury. Absolute immunity also protected the prosecutor's failure to present exculpatory evidence to the grand jury. The court expressed its disgust that it was bound by precedent to grant the prosecutor's behavior immunity. The court found insufficient information to determine if the prosecutor was entitled to absolute immunity from the fabrication of evidence claim, because it was unclear if the prosecutor obtained the video in which the boy implicated his mother in an investigative or advocacy role.

Courts have granted absolute immunity to prosecutors who present false evidence at trial. The prosecutor in Spurlock v. Whitley allegedly assured a witness of his release from jail in exchange for falsely implicating the plaintiff in a homicide. The witness first said he merely saw the plaintiff with blood on his shirt the night of the murder. The prosecutor allegedly influenced the witness to say that he actually had seen the killing by promising the witness reward money. The prosecutor allegedly presented this false testimony at trial and encouraged a police officer to make false statements during

166. See id. at 656-58.
167. See id.
168. See id. at 658. Hill was unable to post bail. See id. She remained incarcerated for almost eight months. See id. During this time, her children were placed in foster care. See id. at 657. Hill gave birth to another child while shackled to a hospital bed. See id. This infant was also taken from her care and placed in a foster home. See id. The prosecutor filed two statements with the New York courts, claiming that no exculpatory material existed. See id. at 658. Hill found out about the first tape when the prosecutor responded to a request for the tape used in the grand jury by accidentally sending the first tape to Hill's lawyer. See id. The indictment was ultimately dismissed on December 18, 1991, over 10 months after Hill first discovered that her son had been abused at his foster home. See id.
169. See id. at 661-62.
170. See id.
171. See id. at 656.
172. See id. at 663.
174. Id. at 1171.
175. See id.
176. See id.
trial to bolster the credibility of the witness.\footnote{Spurlock was convicted of murder and sentenced to life in prison, despite the absence of non-fabricated evidence linking him to the crime. See id. at 1172. Five years after the conviction, the real killers confessed to the crime. See id. at 1173. Spurlock's conviction was vacated. See id.}

Spurlock filed a § 1983 suit against a prosecutor based on violations of his First, Sixth, and Fourteenth Amendment rights.\footnote{See id. at 1169.} The prosecutor received absolute immunity both for presenting false evidence at trial and conspiring to do so.\footnote{See id. at 1187.}

Absolute immunity protects prosecutors who try to influence witness testimony or prepare perjured testimony. In Stokes v. Chicago,\footnote{660 F. Supp. 1459 (N.D. Ill. 1987).} the district court held that the assistant state's attorney's attempts to induce witnesses to commit perjury, even though the "attempts" allegedly involved bribery, were protected by absolute immunity.\footnote{See id. at 1461.} The court explained that preparation of witness testimony was a function intimately associated with the judicial phase of the criminal process.\footnote{See id.}

Besides these examples, there are many more instances of prosecutorial misconduct that courts have construed as advocacy and therefore absolutely immune from suit. These include: deciding whether or not to prosecute,\footnote{See id. at 331, 344 & n.8 (3d Cir. 1989); Fullman v. Grad-} initiating a prosecution without probable cause,\footnote{See id. at 559 (11th Cir. 1984).} creating and proffering perjured testimony,\footnote{See Pinaud v. County of Suffolk, 52 F.3d 1139, 1149 (2d Cir. 1995).} making and then breaching plea bargaining agreements,\footnote{See id. at 1187.} offering defendants re-
lease-dismissal agreements,\textsuperscript{187} mishandling or refusing to handle an appeal or other post trial proceedings,\textsuperscript{188} carrying out incomplete factual investigations necessary to prepare a case,\textsuperscript{189} submitting false statements in applications for search and arrest warrants,\textsuperscript{190} and conspiring with a judge to predetermine the outcome of a case.\textsuperscript{191}

2. Alleged Prosecutorial Misconduct that Receives Qualified Immunity

Courts have found a wide range of activity by prosecutors to be protected by qualified immunity. For instance,\textit{Hart v. O'Brien}\textsuperscript{192} provides an example of prosecutorial misconduct that involves a prosecutor's investigative role.\textsuperscript{193} In \textit{Hart}, the plaintiff sued a prosecutor under § 1983 for providing incorrect information about plaintiff's identity for an affidavit supporting a search warrant.\textsuperscript{194} The prosecutor confused the plaintiff with the wife of a well-known drug dealer and subsequently failed to alert arresting officers that he had mistaken the identity of the target of the warrant.\textsuperscript{195} The prosecutor did not intervene before plaintiff's arrest, even when he realized his mistake.\textsuperscript{196} The court awarded qualified immunity to all of the prosecutor's actions and stated it could find no controlling case law that imposed an affirmative constitutional duty on a prosecutor assisting in a search "to inform law enforcement officers of his doubts that [a] warrant should be executed as written."\textsuperscript{197}

Similarly, courts have awarded qualified immunity to prosecutors who failed to take steps to protect or warn witnesses who were in danger because of their decision to testify at trial.\textsuperscript{198} In \textit{Piechowicz v. United States},\textsuperscript{199} the survivors of several murder victims, who had been prosecution witnesses, brought actions under \textit{Bivens} against an Assistant United States Attorney ("AUSA").\textsuperscript{200} The plaintiffs alleged that the decedents had been threatened by a defendant against whom they

\textsuperscript{187} These agreements refer to the dropping of criminal charges in exchange for the defendant's dismissal of related civil rights actions. See Schloss v. Bouse, 876 F.2d 287, 290-91 (2d Cir. 1989); McGruder v. Necaise, 733 F.2d 1146, 1148 (5th Cir. 1984).
\textsuperscript{188} See Guzman-Rivera v. Rivera-Cruz, 55 F.3d 26, 31 (1st Cir. 1995).
\textsuperscript{189} See Grant v. Hollenbach, 870 F.2d 1135, 1138-39 (6th Cir. 1989); Mullinax v. McElhenney, 817 F.2d 711, 715 (11th Cir. 1987).
\textsuperscript{190} See Burns v. Reed, 500 U.S. 478, 486-87 (1991).
\textsuperscript{191} See Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986) (en banc).
\textsuperscript{192} 127 F.3d 424 (5th Cir. 1997).
\textsuperscript{193} See id.
\textsuperscript{194} See id. at 434.
\textsuperscript{195} See id. at 433.
\textsuperscript{196} See id. at 449-50.
\textsuperscript{197} Id. at 450.
\textsuperscript{198} See Ying Jing Gan v. City of New York, 996 F.2d 522, 534-35 (2d Cir. 1993); Barbera v. Smith, 836 F.2d 96, 101-02 (2d Cir. 1987).
\textsuperscript{199} 685 F. Supp. 486 (D. Md. 1988).
\textsuperscript{200} See id. at 488-89.
were scheduled to testify. They further alleged that the AUSA, when informed about the threats, told the decedents not to worry and to testify truthfully. Despite the fact that the AUSA knew that the defendant had threatened to harm a prosecution witness in an earlier proceeding against him, and had subsequently harmed that witness, the AUSA took no further action concerning the threats or any possible danger to the witnesses. The witnesses testified at trial and were "gunned down gangland style" several weeks later by an agent of the defendant. The court held that the plaintiffs failed to allege that the defendants violated any clearly established principle of constitutional law. The court dismissed the claims against the prosecutor in his individual capacity based on qualified immunity.

Courts have granted prosecutors qualified immunity for leaking allegedly false and defamatory information about defendants to the media. In Aversa v. United States, an Assistant United States Attorney was investigating Aversa for structuring bank deposits. Aversa explained to the AUSA that he had acquired the money contained in the deposits in a legitimate real estate venture and was trying to hide it from his wife, whom he was about to divorce. The legitimacy of Aversa’s money was well-documented, but the AUSA implied to local and national news media that Aversa was involved in drug dealing and money laundering. The prosecutor knew these implications were false. The statements “caused irreparable harm to Aversa’s personal and business reputations,” and Aversa was socially stigmatized. He was discharged from his job and prevented from finding further employment as an accountant. Aversa sued the AUSA under Bivens based on the AUSA’s public statements. While the court deplored the AUSA’s press statements, which it categorized as “false, misleading, self-serving, unjust, and unprofessional,” it could

201. See id. at 488.
202. See id.
203. See id.
204. Id. at 489.
205. See id. at 493.
206. See id.
207. 99 F.3d 1200 (1st Cir. 1996).
208. See id. at 1204.
209. See id.
210. See id. at 1204-05.
211. See id. at 1204.
212. Id. at 1206.
213. See id. at 1205-06.
214. See id. at 1206.
215. See id.
216. See id. at 1216.
do nothing because the AUSA was personally protected by qualified immunity.\textsuperscript{217}

The circuit and district courts have also considered the following actions investigative and thus protected by qualified immunity: illegal wiretapping,\textsuperscript{218} participating in illegal searches and seizures of property,\textsuperscript{219} altering a trial transcript,\textsuperscript{220} directing the police to pursue investigations without regard to significant exculpatory evidence,\textsuperscript{221} participating in a search or arrest for which no probable cause exists,\textsuperscript{222} and withholding of exculpatory evidence by prosecutors not involved with the pending appeal.\textsuperscript{223}

Broad grants of immunity leave wronged individuals without redress. Thus, civil remedial schemes, such as § 1983 and \textit{Bivens} actions, are ineffective as methods of regulating prosecutors. As a result of absolute and qualified immunities, a paucity of civil suits against prosecutors reach a full trial on the merits. Thus, factual questions about a prosecutor's alleged misconduct are never resolved, and doubts about the propriety of the prosecutor's conduct are never publicly addressed. \textit{Imbler} purported to address this shortcoming in the civil law's treatment of prosecutors, and it reasoned that civil remedial schemes were not needed to assist in the regulation of prosecutors because the availability of professional discipline would adequately punish and deter prosecutorial misconduct. Part IV discusses why \textit{Imbler}'s promise was a false one.

\textbf{IV. \textit{Imbler}'s False Premise}

This part examines why \textit{Imbler}'s premise that professional discipline adequately protects the public from prosecutorial misconduct

\textsuperscript{217} For a similar situation, see \textit{Schrob v. Catterton}, 948 F.2d 1402 (3d Cir. 1991). The prosecutor initiated a forfeiture proceeding to seize property under the Comprehensive Drug Abuse Prevention and Control Act. See id. at 1405. The prosecutor seized the wrong person's business and subsequently made statements in the press linking the person and the business to drug activities although neither the person nor the business were ever implicated or investigated for the underlying crime. See id. at 1417 n.15. In spite of several requests by plaintiff, federal officials never issued any retraction statements to correct the error in public. See id. Plaintiff filed a \textit{Bivens} action, but the prosecutor was protected by qualified immunity. See id. at 1420.

\textsuperscript{218} See \textit{Powers v. Coe}, 728 F.2d 97, 103 (2d Cir. 1984).

\textsuperscript{219} See \textit{Mullinax v. McElhenney}, 817 F.2d 711, 715 (11th Cir. 1987).

\textsuperscript{220} See \textit{Slavin v. Curry}, 574 F.2d 1256, 1264-65 (5th Cir. 1978).

\textsuperscript{221} See \textit{Manetta v. Macomb County Enforcement Team}, 141 F.3d 270, 275 (6th Cir. 1998); \textit{Rhodes v. Smithers}, 939 F. Supp. 1256, 1264 (S.D.W. Va. 1995). In \textit{Rhodes}, a prosecutor advised the police to target a correctional officer in a prison contraband investigation based on witness statements that were false and misleading, obtained by coercion, and contrary to earlier (non-coerced) reports that exculpated the officer. See id. at 1262-63. The court awarded the prosecutor qualified immunity for these actions. See id. at 1264.


was flawed. This part demonstrates that Imbler's premise was incorrect for several reasons: some prosecutorial misconduct is unconstitutional but not unethical or illegal, some unconstitutional prosecutorial behavior is unethical, but enforcement of the applicable ethics rule is uneven and erratic, and prosecutors who engage in misconduct are rarely subject to the criminal law.

A. Some Prosecutorial Misconduct Is Unconstitutional but Not Unethical or Illegal

Ethics rules for prosecutors do not address much of the prosecutorial misconduct that plaintiffs allege in civil suits against prosecutors. The rules that pertain to lawyers generally do not consider prosecutors' duties, which are different from those of other lawyers. Ethical Consideration 7-13 states that the prosecutor's duty is to "seek justice, not merely to convict." Ethical Consideration 7-13 states that the prosecutor's duty is to "seek justice, not merely to convict." Model Rule 3.8 and Model Code DR 7-103 provide amorphous instructions to prosecutors based on this do-justice mandate. To the extent that a prosecutor may determine what constitutes justice with regard to her constituents, she may rationalize almost any conduct.

1. Prosecutorial Misconduct that Is Beyond the Scope of Ethics Rules and Criminal Law

Imbler's premise depends on the assumption that the behavior for which courts grant prosecutors immunity from civil action will be considered unethical in the rules framework. As this section demonstrates, some of the alleged behavior of which plaintiffs complained in the civil suits in part III is unconstitutional and actionable under § 1983 and Bivens, but it is neither unethical nor illegal.

Model Rule 3.8, along with state rules imposing special responsibilities on prosecutors, applies to a narrow range of conduct in which only prosecutors engage. Prosecutor-specific rules cover only a fraction of prosecutorial actions. Ethics rules that apply to lawyers generally,
such as Model Rules 3.3 and 3.4, apply to a broader range of conduct, but a significant portion of conduct in which prosecutor's engage is also outside the scope of these rules.

The ethics rules and criminal law do not condemn a prosecutor who fails to advise arresting officers that the person whom they are about to arrest is not the target of the arrest warrant. Ethical rules do not recognize an affirmative duty to apprise law enforcement officers of mistakes of material facts: Model Rule 3.3(a)(2) imposes an affirmative duty on lawyers to apprise the court of material facts only if a failure to do so would assist the perpetration of a crime or fraud upon the court or an opposing party. The ethics rules and criminal law do not contemplate a prosecutor's participation in investigations. Prosecutorial misconduct involving advising the police, or participating in a search or arrest, is not unethical under any reading of the ethics rules.

Ethics rules do not address a prosecutor's failure to protect witnesses for the prosecution who have been threatened by defendants. Neither the ethics rules imposing special responsibilities on prosecutors nor the ethics rules applicable to lawyers generally address the prosecutor's duty to warn or protect witnesses who may place themselves in danger by testifying for the prosecution.

Ethics rules do not adequately address prosecutors' false and defamatory statements to the media that overtly or implicitly link an individual, who is presumed innocent, to a serious crime, such as drug dealing, money laundering, or racketeering. In 1994, the ABA amended Model Rule 3.8 to include subparagraph (g), which prohibits prosecutors from making extra-judicial statements that "have a substantial likelihood of heightening public condemnation of the accused." This rule could pertain to a prosecutor's false and defamatory statements to the press, but it has not been adopted by
denomination of the accused, and (7) subpoena a lawyer as a witness only in extreme circumstances. See Model Rules of Professional Conduct Rule 3.8. Not all states have adopted all of these provisions. See Trial Conduct: Prosecutors, Laws. Man. on Prof. Conduct (ABA/BNA) 61:602-05 (Apr. 30, 1997). Most state rules imposing special responsibilities on prosecutors require that a prosecutor: (1) refrain from prosecuting a charge the prosecutor knows is not supported by probable cause and (2) make timely disclosure to the defense of all evidence that tends to negate the guilt of the accused. See id.

228. See supra notes 193-98 and accompanying text; Model Rules of Professional Conduct.

229. See Model Rules of Professional Conduct Rule 3.3.

230. See supra notes 218-23 and accompanying text.

231. See supra notes 199-200 and accompanying text; Model Rules of Professional Conduct.


233. Model Rules of Professional Conduct Rule 3.8(g).
any jurisdiction except the District of Columbia.\textsuperscript{234} Thus, it is ineffective as a regulatory tool. Model Rule 3.6(d) also governs trial publicity.\textsuperscript{235} It prohibits government lawyers from making extra-judicial statements that will have a substantial likelihood of materially prejudicing an adjudicative matter.\textsuperscript{236} Model Rule 3.6 was also amended in 1994 in response to a case in which the Supreme Court held that Nevada’s version of the pre-1994 version of the rule was unconstitutionally vague.\textsuperscript{237} Most states’ versions of the trial publicity rule, however, are based on the ABA’s pre-1994 rule. Thus, in practice, ethics rules provide no clear guidance as to when a prosecutor has said too much about a defendant or ongoing investigation.

Furthermore, the ethics rules do not regulate a prosecutor’s duty to diligently investigate the existence of probable cause before seeking an arrest or indictment. Model Rule 3.8 and all state ethics rules require that a prosecutor refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.\textsuperscript{238} This rule, however, does not provide guidance concerning the amount or extent of investigation that should precede a prosecutor’s conclusion that probable cause exists. The rules and law are also silent about a prosecutor’s post-trial obligations to re-open cases when she becomes aware of uncontroverted evidence that the person convicted is innocent of the crime.\textsuperscript{239}

No universally accepted guidelines address the ethical problems unique to the prosecutor’s tripartite role as fact finder, justice seeker, and advocate for the government.\textsuperscript{240} The rules provide no instructions for balancing the pursuit of a conviction with an individual’s civil rights. Legal ethicists claim that the primary value of disciplinary rules lies in the “guidance they provide” and “their effect in encouraging lawyers to restrain their own conduct.”\textsuperscript{241} The generality of the “do justice” mandate leaves the prosecutor with a concept of a role she must play, “minister of justice,” but gives no guidance as to the interpretation of the meaning of justice or the conduct it embodies.

\textsuperscript{235} See Model Rules of Professional Conduct Rule 3.6.
\textsuperscript{236} See id.
\textsuperscript{239} See supra notes 154-58 and accompanying text; Model Rules of Professional Responsibility.
\textsuperscript{240} See Roberta K. Flowers, A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors, 37 B.C. L. Rev. 923, 925-26 (1996).
\textsuperscript{241} See Zacharias, Structuring, supra note 226, at 107.
The ethics rules are not more specific for prosecutors partly because stakeholders in the legal community have little incentive to write them. Bar associations have no motivation to draft rules that address specific prosecutorial functions. Ethics codes draw their strength and legitimacy from the "perception among lawyers that [they are] about adherence to shared moral norms that define . . . the profession." Ethics rules are a shared narrative of desirable behavior; they describe the bar's vision of itself and its role in society. Prosecutors, however, claim that they are essentially unrepresented in the ABA. Rules written by bar associations that address civil rights violations by prosecutors, therefore, would not represent the consensus of the entire legal community.

Even if some parts of the legal profession found such rules to be acceptable, more detailed prosecutorial rules could be seen as an attempt by the bar to micro-manage prosecutorial function, which would likely generate controversies similar to those surrounding the ABA's "no contacts" and "attorney-subpoena" provisions. For nearly a decade, the DOJ has contended that federal prosecutors are not subject to state ethics rules concerning ex parte contact with represented persons. In 1994, the DOJ issued a regulation that attempted to exempt federal lawyers from states' versions of Model Rule 4.2 or Model Code DR 7-104(A)(1). The regulation was declared invalid in United States ex rel. O'Keefe v. McDonnell Douglas Corp.

In addition, there is little incentive for prosecutors' offices to draft rules that delineate specifically how prosecutors should act in both advocacy and investigative functions. Undoubtedly, district attorneys' and U.S. Attorneys' offices want to maintain good press and a strong reputation in the legal community for achieving justice, but one need

---

242. See Bowman, supra note 20, at 768.
243. See id. at 764.
244. See id. at 770.
247. See id.
248. 132 F.3d 1252, 1257 (8th Cir. 1998).
look no further than the Thornburgh Memorandum\textsuperscript{250} to understand the inherent propensity of prosecutorial agencies to protect their own. Prosecutorial agencies possess insight and expertise when it comes to law enforcement needs, but they lack comparable expertise when they evaluate the gravity of civil rights violations in the service of the larger good, protecting the public from crime.\textsuperscript{251} Indeed, "[p]rosecutors engaged in the competitive enterprise of gathering incriminating evidence cannot objectively determine how much weight to give the respective interest of the government and the individual and how the balance should be struck."\textsuperscript{252}

Ethics scholars have suggested that prosecutors' offices have practical reasons for maintaining vague seek-justice ethical standards.\textsuperscript{253} Specific, complex, and far-reaching ethical rules that prohibited the types of behavior that would deprive defendants of constitutional rights may cause prosecutors to feel restrained by the rules and thus convict at a lower rate.\textsuperscript{254} In addition, some of the actions necessary to avoid violating ethics rules might delay trials.\textsuperscript{255} This would affect the productivity of the office. District attorneys and United States Attorneys are unlikely to allow their offices to appear "soft on crime" simply to discipline prosecutors for behavior that receives immunity in the courtroom.

B. Some Unconstitutional Prosecutorial Misconduct Is Unethical, But Enforcement of the Applicable Ethics Rule Is Uneven and Erratic

Imbler's premise depends on the assumption that existing professional norms will be enforced. In some situations, however, unconstitutional conduct violates ethics rules, but the rules are not enforced. This section discusses prosecutorial behavior that, if true as alleged, is unconstitutional and prohibited by an ethics rule, but the appropriate rule is unevenly and erratically enforced against prosecutors.

\textsuperscript{250} This, of course, refers to attempts by the DOJ to promulgate regulations for federal prosecutors concerning contacts with unrepresented parties. The Thornburgh memorandum refers to an internal document written by then Attorney General Thornburgh saying that United States Attorneys and Assistant United States Attorneys were subject to DOJ no-contact rules only and could thus ignore any state regulations on the subject as well as Model Rule 4.2. See Little, \textit{supra} note 245, at 362 & n.29.

\textsuperscript{251} See Green, \textit{Whose Rules}, \textit{supra} note 29, at 487.

\textsuperscript{252} See \textit{id}.

\textsuperscript{253} See Zacharias, \textit{Structuring}, \textit{supra} note 226, at 108.

\textsuperscript{254} See \textit{id}.

\textsuperscript{255} See \textit{id}.
1. Examples of Ethics Rules that Apply to Prosecutorial Misconduct, but Are Not Often Enforced Against Prosecutors

Many civil claims against prosecutors involve clear violations of ethics rules, but no enforcement of the rule follows dismissal of the civil suit. One frequent charge in civil suits against prosecutors is that the prosecutor failed to disclose exculpatory evidence. Non-disclosure of evidence favorable to an accused may be a due process violation. It is also a clear violation of Model Rule 3.8(d). The ethics rules impose a greater duty on prosecutors than does the constitutional Brady doctrine. The ethics rules do not condition the duty of disclosure on request by the defense or on the significance of the evidence. Unlike the constitutional duty, the ethical duty is broad and self-activating. The non-disclosure ethics rule, however, is rarely enforced against prosecutors. In civil actions against prosecutors, non-disclosure of exculpatory evidence receives absolute immunity. This grant of immunity, coupled with the infrequent enforcement against prosecutors of the non-disclosure ethics rule, leaves a potentially significant deprivation of constitutional rights without redress and unregulated.

Thus, even in cases where clear ethical rules are violated, Imbler's premise founders. For example, following Carter v. Burch, in which a prosecutor received absolute immunity for failing to disclose exculpatory evidence that would have prevented the defendant's spending four years in jail for a crime he did not commit, the Virginia bar brought a disciplinary action against the prosecutor for violating Virginia's version of the exculpatory evidence disclosure rule. The court, however, declined to endorse the bar's findings. As a result, the prosecutor was never publicly disciplined.

---

256. See supra notes 160-62 and accompanying text.
258. Non-disclosure of exculpatory evidence also violates Model Code provision DR 7-103(B) and various internal procedure provisions. See Department of Justice Manual § 9-11.233 (Supp. 1992).
260. See id.
261. See id.
262. See infra note 297 and accompanying text.
263. See supra notes 159-62 and accompanying text.
264. 34 F.3d 257 (4th Cir. 1994).
265. See McNamara, supra note 101, at 1188 & n.433.
266. See id. At the time of this writing, William T. Burch remains a prosecutor in Loudon County, Virginia. Search of WESTLAW, West Legal Directory File (Dec. 1, 1998).
A subparagraph of the candor rule, Model Rule 3.3(a)(4), prohibits the presentation of false evidence to the grand jury. Similarly, Model Rule 3.4(b), which regulates fairness to opposing party and counsel, prohibits the fabrication of evidence and the subornation of perjury before the grand jury. It is unclear whether professional conduct standards require prosecutors to present exculpatory evidence to the grand jury. Some states have interpreted their versions of Model Rule 3.3(d) to apply in the grand jury context. The comment to Model Rule 3.8 indicates that ex parte proceedings include grand jury proceedings. There is no constitutional requirement, however, that a prosecutor present even substantial exculpatory evidence to the grand jury. Courts classify a prosecutor’s actions in front of the grand jury as a function “intimately associated with the judicial phase of the criminal process.” Thus, the presentation of false evidence and the failure to present exculpatory evidence to the grand jury—even if done knowingly—receive absolute immunity against § 1983 and Bivens actions. Some courts, such as the Second Circuit, have held that absolute immunity extends as far as the suboration of perjury and the fabrication of evidence before the grand jury.

A prosecutor may, without civil liability, present false evidence, fail to present exculpatory evidence, suborn perjury, and fabricate evidence for use before the grand jury. All of these actions are also unethical under Model Rule 3.3 and Model Rule 3.4. Prosecutors,


268. Model Rule 3.4(b) states: “A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.” Id. Rule 3.4(b).


270. Model Rule 3.3(d) states: “In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.” Model Rules of Professional Conduct Rule 3.3(d).


277. See supra Part III.C.1.

CIVIL REGULATION OF PROSECUTORS

however, are rarely subject to professional discipline for violations of these rules. It is likely that knowledge of this fact, together with the availability of absolute immunity for grand jury conduct, provides an incentive for prosecutors to disregard professional norms before the grand jury.

For example, the prosecutor's presentation of false evidence to the grand jury in *Hill v. City of New York*, if true as alleged, is a violation of Model Rule 3.4. Model Rule 3.4 does not have an explicit knowledge requirement, but some states have interpreted Model Rule 3.4 to include a requirement that the lawyer act knowingly. In *Hill*, the prosecutor coerced a child to implicate his mother in a child abuse charge in two videotaped interviews. The child implicated his foster brother in the first interview and his mother in the second. Though the prosecutor created two videotapes, he presented only one videotape to the grand jury, thus, he clearly knew that one was false. According to the plaintiff's complaint, the prosecutor also knew that the boy had implicated his foster brother in the abuse claim in a discussion with the doctor who treated his abuse-related injuries. Thus, the prosecutor violated Model Rule 3.4, even if it includes a knowledge requirement. There is no record of public disciplinary action taken against the prosecutor. The *Imbler* court either did not anticipate this situation in its decision, or affirmatively excluded it from its analysis. It is difficult to reconcile *Imbler*'s reasoning with the result in *Hill*.

Model Rule 3.3(a) prohibits a prosecutor from knowingly presenting false evidence at trial and conspiring to present false evidence. The Supreme Court has held that all trial conduct is advocacy in function and thus protected by absolute immunity. Absolute immunity insulates a prosecutor for knowingly presenting false evidence at trial for conspiring to present false evidence at trial. By applying absolute immunity to trial-related misconduct, the courts have again immunized prosecutors for behavior that is unethical but for which prosecutors are not often subject to disciplinary review.

279. See 45 F.3d 653 (2d Cir. 1995).
280. See, e.g., *In re Shannon*, 876 P.2d 548, 560 (Ariz. 1994) (holding that because a lawyer did not know that answers to interrogatories were false, he did not violate Arizona Ethical Rule 3.4(b), which is analogous to Model Rule 3.4(b)).
281. See *Hill*, 45 F.3d at 657-58.
282. See id.
283. See id.
284. See id.
290. See *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994).
Model Rule 3.3(a)(1) prohibits a prosecutor from making false statements to obtain warrants.\textsuperscript{291} Courts have granted prosecutors absolute immunity from federal civil suits for submitting false statements to judges to obtain warrants\textsuperscript{292} and testifying falsely in warrant hearings.\textsuperscript{293} In a like manner, Model Rule 3.4(b)\textsuperscript{294} prohibits a prosecutor from assisting or illegally inducing a witness to testify falsely. Absolute immunity protects prosecutors who try to influence witness testimony or prepare perjured testimony.

2. The Legal Community Has Little Incentive to Enforce Clear Ethics Rules Against Prosecutors

There is little incentive for the stakeholders in the legal community to discipline prosecutors for violations of clear ethics rules. Although state disciplinary authorities frequently make lofty pronouncements about self-policing and the requirement that their attorneys conform to high standards of professionalism, the reality is that state authorities rarely discipline prosecutors for misconduct.\textsuperscript{295} When state authorities discipline prosecutors, they do so in private.\textsuperscript{296} Thus, they provide no public accountability that could deter future misbehavior by prosecutors.\textsuperscript{297} According to a recent Chicago Tribune survey, although 381 homicide defendants since 1963 have received new trials because prosecutors had engaged in misconduct such as withholding evidence or suborning perjury, no prosecutor received a public sanction by a state disciplinary authority or other agency for such misbehavior.\textsuperscript{298} In addition, no prosecutor was disbarred for securing a conviction while engaging in misconduct.\textsuperscript{299}

The lack of disciplinary proceedings brought by state disciplinary authorities may be due, in part, to the fact that the agencies never learn of most cases in which prosecutorial misconduct has allegedly

\textsuperscript{291.} See Model Rules of Professional Conduct Rule 3.4(b).

\textsuperscript{292.} See Burns v. Reed, 500 U.S. 478, 487 (1991); West v. City of Parsons, 983 F. Supp. 1027, 1031 (D. Kan. 1997); cf. Kalina v. Fletcher, 522 U.S. 118, 131 (1997) (awarding the prosecutor absolute immunity for preparing and filing a motion for an arrest warrant, but only qualified immunity for swearing to the truth of the facts in a certification that accompanied the other motion documents).

\textsuperscript{293.} See Burns, 500 U.S. at 489-91; Schrob v. Catterson, 948 F.2d 1402, 1416-17 (3d Cir. 1991).

\textsuperscript{294.} See supra notes 272-74 and accompanying text.

\textsuperscript{295.} See McNamara, supra note 101, at 1187 n.422.

\textsuperscript{296.} See supra notes 272-74 and accompanying text.

\textsuperscript{297.} See Green, supra note 26, at 88-89; Morton, supra note 45, at 1107-08.

\textsuperscript{298.} See supra notes 272-74 and accompanying text.

\textsuperscript{299.} See id.
Prosecutors do not have clients to report wrongdoing—as would a private attorney who defrauded a civil litigant. Defense lawyers and judges, who are the only individuals other than witnesses and defendants likely to view prosecutorial misbehavior, rarely report disciplinary allegations.\(^{301}\)

Furthermore, some state authorities rely on referrals by prosecutors' offices for evidence in disciplinary proceedings.\(^{302}\) Overtly pursuing prosecutors to discipline themselves would ruin these relationships.\(^{303}\) Moreover, disciplinary agencies may be reluctant to redress ethical complaints against prosecutors that are launched by resentful defendants or political opponents.\(^{304}\)

Some state authorities may be reluctant to discipline prosecutors for misconduct because they believe that prosecutors are accountable to the public through the political process. While most state and local prosecutors are elected officials, and theoretically can be voted out of office, voters do not always know about a prosecutor's misconduct.\(^{305}\) Appeals courts that are reviewing a prosecutor's misconduct rarely name prosecutors in their written opinions, even when the court finds the prosecutor's conduct deplorable.\(^{306}\) Many states publish only a small number of their appellate disciplinary opinions.\(^{307}\) Furthermore, even if voters are aware of a prosecutor's misconduct, there is no guarantee that voters will repudiate the offending prosecutor.\(^{308}\) For example, Ray Whitley,\(^{309}\) the prosecutor in *Spurlock v. Whitley* who had allegedly encouraged witnesses to lie and presented false testimony at trial, was re-elected in August 1998 to his post as chief prosecutor of Sumner County, Tennessee.\(^{311}\)

State authorities may further assume that prosecutors are adequately policed through judicial mechanisms such as suppression, exclusion, or dismissal.\(^{312}\) On the federal level, these judicial mechanisms are known as the courts' supervisory powers.\(^{313}\) Because courts are interested in conducting criminal trials within the appropriate bounds of legal ethics and in ensuring an appearance of fairness, courts reserve the power to dismiss cases and suppress evidence on
their own motion. \textsuperscript{314} Judges may also find offending prosecutors in contempt of court. According to the Supreme Court, courts may use their supervisory powers to implement a remedy for violation of recognized rights, to preserve judicial integrity and ensure that a conviction rests on appropriate considerations, and to deter illegal conduct. \textsuperscript{315} The scope of supervisory powers to remedy prosecutorial misconduct has been narrowed significantly by a number of recent Supreme Court cases. \textsuperscript{316} Thus, courts may invoke their supervisory powers only to enforce or remedy a breach of standards articulated by Congress or the Supreme Court. The test is particularly high in the grand jury arena. Only violations of constitutional rights and federal statutes are proper bases for the dismissal of indictments. \textsuperscript{317} Thus, a judge has no power to dismiss an indictment solely because the prosecutor violated a state ethical rule. \textsuperscript{318} In addition, supervisory and contempt powers work only when the judge discovers a prosecutor's misbehavior during trial. They are useless in situations where a prosecutor's civil rights or torts violations come to light after the proceeding is over.

Prosecutorial agencies rarely discipline prosecutors for misconduct. For example, in the Department of Justice, OPR investigates allegations of AUSA misconduct and makes recommendations for discipline. \textsuperscript{319} Supervisors of offending AUSAs actually impose sanctions. \textsuperscript{320} The supervisors are not bound by OPR's determinations and may impose any sanction they believe is appropriate or none at all. \textsuperscript{321} Until December 1993, \textsuperscript{322} OPR conducted all of its investiga-

\textsuperscript{314} See id.
\textsuperscript{315} See McNabb v. United States, 318 U.S. 332, 341 (1943).
\textsuperscript{316} See United States v. Williams, 504 U.S. 36, 55 (1992) (holding that a district court may not dismiss an otherwise valid indictment because the government failed to disclose to the grand jury that it possessed substantial exculpatory evidence); Bank of Nova Scotia v. United States, 487 U.S. 250, 254-55 (1988) (holding that a federal court may not use supervisory powers to dodge the harmless-error inquiry of the Federal Rules of Criminal Procedure and that a district court may not dismiss an indictment because of prosecutorial misconduct unless the misconduct was so great as to deny the defendant a fair trial); United States v. Mechanik, 475 U.S. 66, 72-73 (1986) (upholding petit jury's verdict despite "any conceivable error in the charging decision that might have flowed from [prosecutorial misconduct]"). These cases addressed the use of supervisory powers in the grand jury context, but their effect is felt throughout the trial process.
\textsuperscript{317} See Bank of Nova Scotia, 487 U.S. at 254-55.
\textsuperscript{318} See United States v. Lopez, 4 F.3d 1455, 1464 (9th Cir. 1993); United States v. Page, 828 F.2d 1476, 1480 (10th Cir. 1987).
\textsuperscript{319} See Office of Prof'l Responsibility, Department of Justice, Fiscal Year 1996 Annual Report 1 [hereinafter DOJ, 1996 Report].
\textsuperscript{320} See id.
\textsuperscript{321} See id.
Because OPR did not publicize its DOJ investigations, it did not provide prosecutors with a guide to appropriate conduct. Today, OPR has a policy of making its findings public when misconduct has been found or the investigated prosecutor requests disclosure after being exonerated. As of January 1999, only seventeen reports have been released to the public. One such report addressed the fate of the offending AUSA in *Aversa v. United States*. After finding intolerable levels of misbehavior by the prosecutor, the court referred the case to OPR. The prosecutor's conduct, as alleged, violated DOJ regulations concerning "Media Relations." OPR, however, concluded that there was "no support for the allegation that [the prosecutor] . . . made inappropriate statements to the press"; OPR's ultimate finding was that the prosecutor did not engage in professional misconduct. Consequently, the AUSA was never publicly disciplined.

324. See Green, *Policing*, supra note 26, at 85.
325. See id. at 86.
326. Telephone Interview with unnamed employee, Office of Professional Responsibility (Feb. 8, 1999). In fiscal year 1996, the most recent for which data is available, OPR opened a total of 121 matters, all of which involved allegations of misconduct by Department Attorneys. See DOJ, 1996 Report, supra note 319, at 4. This number was a 37% decrease from the 192 attorney related matters opened in fiscal year 1995. See id. OPR closed a total of 144 matters in fiscal year 1996. See id. at 6. Allegations of professional misconduct were substantiated in 15, or 11%, of the 139 attorney matters closed. See id. The misconduct complaints received in fiscal year 1996 were quantified and classified as follows: abuse of prosecutorial or investigative authority—34 complaints; unauthorized release of information—16 complaints; conflicts of interest—15; misrepresentation to the court—14; failure to perform duties properly, negligence—10; failure to disclose exculpatory, impeachment, or discovery material—9; improper oral or written remarks to the grand jury or court—6; criminality—6; unprofessional behavior—6; improper contacts with represented parties—2; other (including unauthorized practice of law and violation of civil rights)—3. See id. at 5.
327. See supra notes 207-17 and accompanying text.
328. See supra notes 216-17 and accompanying text; see also Office of Prof'l Responsibility, Department of Justice, Summary of the Investigation by the Office of Professional Responsibility into the Conduct of Assistant United States Attorney Paul Kanter in *United States v. Van Engel* 5-6 (n.d.) (on file with the *Fordham Law Review*) (finding that the AUSA did not engage in professional misconduct although the court stated that the "legal foundation for the government's investigation was virtually nonexistent"); Letter from Jo Ann Harris, Assistant Attorney General, United States Department of Justice, to the Honorable James M. Ideman, District Court Judge, United States District Court for the District of Los Angeles 1-2 (May 2, 1994) (on file with the *Fordham Law Review*) (explaining that OPR concluded that an AUSA had not intentionally made misrepresentations to the district court, although the district court had referred the case to OPR because the AUSA should have turned prior inconsistent testimony over to the defense).
That prosecutors may on some occasions put convictions ahead of justice, and therefore lack incentive to regulate themselves, is further evident in some prosecutors' disregard of *Batson v. Kentucky.*331 In *Batson,* the Supreme Court held that when prosecutors exercise peremptory challenges based on race, they violate the Equal Protection Clause of the Fourteenth Amendment.332 Judges give prosecutors wide deference when enforcing *Batson:* prosecutors are thus left to regulate themselves. Despite the clarity of *Batson*’s holding, prosecutors attempt to circumvent it by lying to judges and fabricating non-racial pretexts for race-based peremptory challenges.333 Some district attorneys’ offices have conducted training sessions on how to avoid *Batson* challenges and to encourage the use of race as a reason for peremptory challenges.334

C. Criminal Enforcement of Prosecutorial Misconduct Is Rare

Even when a prosecutor’s misconduct is arguably a criminal act such as suborning perjury or obstructing justice, enforcement against prosecutors is rare. The Chicago Tribune examination of homicide cases over the past thirty-six years uncovered 381 homicide convictions nationwide that have been reversed because prosecutors engaged in misconduct such as using false evidence or withholding exculpatory evidence.335 Not a single prosecutor in those cases, however, was ever brought to trial for the misconduct.336 According to the Tribune, only two of those cases resulted in charges being filed and in both instances, the charges were dismissed before trial.337 The Tribune search found only six prosecutors in this century who have faced criminal charges alleging concealment of evidence or using false evidence.338

In the balance of civil regulation of prosecutors and prosecutorial function, the Supreme Court has heretofore sided with prosecutorial function. Some entity, therefore, must ensure that prosecutors are not

332. See id. at 84.
334. See, e.g., Michael Matza, Jury’s Out on Whether Ethics Were Violated, Phila. Inquirer, Apr. 2, 1997, at 33 (detailing the disclosure of a controversial decade-old training videotape, which was full of racial stereotyping and race-based strategies for picking juries, created by a former Philadelphia prosecutor).
336. See id.
337. See id.
338. See id. One of the prosecutors who faced criminal charges was Patrick Brophy, who had conspired with sheriff’s officials to hide evidence and persuaded witnesses to lie against organized crime figures. See id. Brophy was convicted of a single misdemeanor count for eliciting perjury and suppressing evidence and was fined $500. See id.
violating their mandate to do justice by using unjust means. While the Court may invoke the preservation of justice overall as the reason for favoring prosecutorial function over the civil regulation of prosecutors and the vindication of one plaintiff's civil rights, the numerous civil rights violations facilitated by the availability of broad immunity for prosecutors undermines the very notion of justice the Court purports to protect. Though most prosecutors act in good faith, broad grants of immunity give some prosecutors too much license to violate civil rights. The violation of even one individual's civil rights is contrary to the concept of justice. Some entity in the legal community, therefore, must reinforce the concept that it is not just for prosecutors to violate constitutional and civil rights in the pursuit of convictions at all costs. The legal community must not seek to saddle prosecutors with mountains of civil liability and restrictions, but must stop violations of constitutional rights before they occur. Part V offers several methods to approach these problems.

V. WHAT CAN BE DONE: RECOMMENDATIONS TO FILL THE VOID

This part proposes several ways to fill the void created by broad grants of immunity for alleged prosecutorial misconduct and the dearth of regulatory follow-up. Possible solutions include: (1) a district court reporting mechanism that causes prima facie civil rights violations by prosecutors to trigger parallel disciplinary investigation by state disciplinary authorities, (2) greater rule specificity for prosecutors, and (3) the shift in the level of immunity granted to prosecutors from absolute immunity for advocacy functions and qualified immunity for investigative functions to qualified immunity, regardless of function.

A. Reporting Procedures and Parallel Disciplinary Review

District courts should develop a reporting mechanism that causes prima facie violations of § 1983 and Bivens to trigger parallel disciplinary investigations by state disciplinary authorities. One interpretation of Imbler suggests that district courts may be obligated to report prosecutorial wrongdoing to state disciplinary agencies and that those agencies are obligated to initiate proceedings against errant prosecutors.339

State disciplinary authorities are the best entity to conduct investigations of prosecutorial misconduct because state bodies have an interest in maintaining the integrity of the practice of law within the state's borders, regardless of whether the prosecutors are admitted to practice there. Prosecutors' offices would seem to know best what

prosecutors do, but they may be inherently too biased to ensure fair disciplinary review.\textsuperscript{340}

While a reporting mechanism and parallel review would address prosecutorial misconduct that violates existing disciplinary rules, it would not take care of behaviors for which there are no rules exactly on point. Therefore, more specific rules for prosecutors are also necessary to deter prosecutorial misconduct.

B. Specific Ethical Rules for Prosecutors

The American Bar Association should collaborate with the judiciary, the Department of Justice, and local prosecutors' offices to draft more specific\textsuperscript{341} ethical rules for prosecutors that include explicit guidelines for the types of behavior most often engaged in by prosecutors. The rules should consider the expanding role of the prosecutor in investigations, as well her more traditional identity as advocate and minister of justice. The rules should address tortious conduct and civil rights violations.\textsuperscript{342} They should detail the parameters of acceptable behavior for prosecutors during trial, during investigations, questioning witnesses, obtaining warrants, presenting evidence, and addressing the grand jury. Ethical rules for prosecutors must also explicitly prohibit, in pertinent part, the fabrication of evidence, the knowing presentation of false evidence at trial, and the knowing presentation of false evidence to a grand jury.

Prosecutors are lawyers, but unlike other lawyers, they are not just advocates.\textsuperscript{343} As advocates for the government, prosecutors are endowed with great power.\textsuperscript{344} With this great power comes the great responsibility of doing justice. Opponents of rule specificity claim that specific, narrowly tailored rules would hinder the prosecutor's pursuit of justice by giving her just another set of regulations to worry about.\textsuperscript{345} On the contrary, detailed rules that explain what is and is not acceptable behavior would enhance the prosecutor's role as justice-seeker by giving well-meaning prosecutors a barometer of what

\textsuperscript{340} See supra notes 318-33 and accompanying text.

\textsuperscript{341} The term "specific" in this Note refers to specificity in the scope of conduct the rule covers and particularity of the acts the rule prohibits. See Fred C. Zacharias, \textit{Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics}, 69 Notre Dame L. Rev. 223, 239-40 (1993) [hereinafter Zacharias, \textit{Specificity}].

\textsuperscript{342} A disciplinary rule could mirror § 1983 and \textit{Bivens}. Perhaps prima facie violations of 1983 and \textit{Bivens} (i.e., where, if it were not for immunity awarded prosecutors, plaintiffs would be entitled to relief) should act as a red flag that triggers a parallel disciplinary review. The mechanics of this must be flushed out. There is no guarantee that a new rule or rules would be any more effective in addressing ethics violations by prosecutors than the present rule system, but at least stakeholders in the legal community would publicly address the impropriety of prosecutors' civil rights violations.

\textsuperscript{343} See supra notes 21-26 and accompanying text.

\textsuperscript{344} See supra notes 21-26 and accompanying text.

\textsuperscript{345} See Bowman, \textit{supra} note 20, at 770-80.
should and should not be done. Specific ethical rules would remind prosecutors that discretion does not give them a free pass to violate the tenets of the Constitution or to commit tortious acts. More specific rules for prosecutors would give prosecutors what the Model Code and Model Rules have given lawyers generally—guidance in choosing from among several permissible courses of conduct.

Specific rules for prosecutors are especially necessary considering the court's insulation of prosecutors from civil liability. Twenty-three years of civil cases after *Imbler* suggest that prosecutors need guidance that balances respect for civil rights with the pursuit of convictions. Indeed, insulation from civil liability creates a natural incentive for prosecutors to take the unethical path when convictions are on the line.

The task of drafting specific rules of ethics for prosecutors must be a collaborative effort involving the ABA, state and federal courts, and state and federal prosecutors' offices. A unilateral creation of rules would result in the rules being ignored or viewed as suspect by the non-rule-drafting stakeholders. This would lead to unproductive controversies such as those surrounding the "no contacts" and "attorney subpoena" provisions of the Model Rules.

C. Qualified Immunity Only

To further address prosecutorial misconduct, the Supreme Court should reduce the immunity available to prosecutors as a defense to § 1983 and *Bivens* claims. Some immunity is clearly necessary to protect prosecutors from the frivolous suits of disgruntled defendants, but the Supreme Court has significantly enlarged the prosecutorial immunity available at common law. What was once mere absolute immunity against malicious prosecution and defamation has snowballed into absolute immunity for all actions "intimately associated with the judicial phase of the criminal process" and qualified immunity for all investigative and administrative functions. The Supreme Court's functional test causes lower courts to label prosecutors' actions inconsistently because the existence of probable cause is often difficult to discern from the record. Standard grants of qualified immunity for all

---

348. See *id.* at 284.
349. See *id.* at 284.
350. See *id.* Rule 3.8(f).
prosecutorial functions would save the courts from having to spend time labeling prosecutorial functions.\textsuperscript{352}

Qualified immunity is sufficient to protect the integrity of the judicial process. Qualified immunity would continue to protect the well-intentioned prosecutor from liability, but would hold liable those who willfully violate federal statutory or constitutional rights.\textsuperscript{353} Furthermore, the default preference of the Court is for qualified immunity.\textsuperscript{354}

**Conclusion**

To address the deficiencies in Imbler's premise, the legal community can respond in one of two overarching ways: it can truncate the immunity awarded to prosecutors, or it can revise the regulatory process as it pertains to prosecutors. Because the Supreme Court seems firmly wedded to its tradition of granting prosecutors broad immunity from civil suit, the most prudent response in the short term is the revision of the regulatory process as it pertains to prosecutors. This should include the development of reporting procedures in district courts, which would trigger parallel disciplinary review, and greater rule specificity for prosecutors. Regardless of what is done, the means must be a collaborative effort and the end must be not to saddle prosecutors with mountains of civil liability, but to provide prosecutors with a barometer of acceptable behavior. The message must be this: certain behaviors, such as fabricating evidence, failing to disclose exculpatory evidence, and lying to obtain warrants—even if used in pursuit of a worthy justice-seeking goal—are in themselves contrary to the concept of justice and thus antithetical to the prosecutor's mission—to pursue justice, not merely to convict.

\textsuperscript{352} See supra notes 147-50 and accompanying text. One person writing on the subject of prosecutorial immunity has suggested that the Supreme Court should maintain a narrow definition of a prosecutor's advocate role to avoid frustrating the purpose of § 1983 claims. See Anthony Meier, Note, Prosecutorial Immunity: Can § 1983 Provide an Effective Deterrent to Prosecutorial Misconduct?, 30 Ariz. St. L.J. 1167, 1169 (1998). This solution, however, does not avoid the problem of determining which function applies in the way abolishing absolute immunity for prosecutors altogether would.

\textsuperscript{353} See supra notes 103-22 and accompanying text.

\textsuperscript{354} See id.