A CHINK IN THE ARMOR? THE PROSECUTORIAL IMMUNITY SPLIT IN THE SEVENTH CIRCUIT IN LIGHT OF *WHITLOCK*.

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For U.S. citizens whose constitutional rights have been violated by government officials, 42 U.S.C. § 1983 provides a powerful form of punishment against the wrongdoer. Wrongful convictions due to prosecutorial misconduct, such as withholding Brady *material or fabricating evidence, should theoretically allow victims of these erroneous convictions to sue the prosecuting attorney. Yet, the answer is not this simple because the Supreme Court's prosecutorial immunity doctrine bars Section 1983 suits against prosecutors in certain instances. In 2012, the Seventh Circuit examined two prosecutorial immunity cases, but, somewhat perplexingly, arrived at two different answers. This Note examines the Seventh Circuit's split on prosecutorial immunity and the reasoning behind each case's result, after laying the backdrop to Section 1983, the immunity doctrine, and policy rationale for prosecutorial immunity in particular. Using economic principles, this Note argues that prosecutorial immunity doctrine should be reformed to promote prosecutorial autonomy and criminal justice system efficiency, while more effectively deterring prosecutor misconduct. This Note seeks to balance the needs of the criminal justice system with a citizen's right to a remedy by recommending broader discovery disclosure rules and criminal sanctions to prevent prosecutor misconduct. Finally, the Note examines the lack of available data and empirical studies on effective deterrence methods and provides suggestions for what future studies should examine.*

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I. INTRODUCTION

"If he has a right, and that right has been violated, do the laws of his country afford him a remedy?"[1] Chief Justice Marshall, wrestling with this question over 200 years ago, answered in the affirmative,[2] even though Mr. Marbury was to be without one.[3]

The current split within the Seventh Circuit—and between circuits—regarding the reach of prosecutorial immunity is a similar battle: do citizens whose constitutional rights are violated by prosecutors have a remedy against them in a federal civil suit? Just as *Marbury v. Madison* was influenced by policy and political considerations,[4] so too are the decisions of courts with regard to the scope of immunity of prosecutors from civil liability.[5]

The Fourteenth Amendment reads in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[6] Passed in the wake of the Civil War and the abolition of slavery, the Fourteenth Amendment can be regarded in many respects chiefly as an affirmation of the rights of all citizens.[7] To add remedial teeth to the Fourteenth Amendment, in 1871, Congress passed the Ku Klux Klan Act of 1871,[8] from which we have 42 U.S.C. § 1983[9]:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . causes to be subjected, any . . . person . . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party . . . except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity . . . .[10]

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1. Marbury v. Madison, 5 U.S. 137, 162 (1803).

2. *Id.* at 166 ("But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.").

3. *Id.* at 176 ("The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution. . . ."). Of course, *Marbury* was likely influenced heavily by political and policy considerations. For a discussion of these underpinnings, see Dean Alfange, Jr., Marbury v. Madison *and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 349–72 (1993).

4. *See* Alfange, *supra* note 3, at 349–72.

5. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 424 (1976) ("We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983.").

6. U.S. CONST. amend. XIV, § 1.

7. *See* Eric Foner, *The Original Intent of the Fourteenth Amendment: A Conversation with Eric Foner*, 6 NEV. L.J. 425, 428–30 (2006).

8. An Act to Enforce the Provision of the Fourteenth Amendment to the Constitution of the United States, and Other Purposes, 17 Stat. 13–15 (1871) (codified at 42 U.S.C. § 1983 (2006)).

9. *See* Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After* Iqbal, 14 LEWIS & CLARK L. REV. 279, 284 n.22 (2010).

10. 42 U.S.C. § 1983 (2006) (stating in full "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, except that in any action brought against a judicial officer for an act or omission taken in such officer's

While the language of Section 1983 is broad and seemingly provides a heavy stick with which persons can seek remedies against state actors, immunity from Section 1983 liability limits this remedy.[11] The judicial officer exception of Section 1983 has been applied to prosecutors, and as such, they are usually immune from Section 1983 claims.[12] Claims often occur in situations where a person was wrongfully convicted of a crime, usually due to the prosecution withholding exculpatory evidence or using fabricated evidence.[13] When such a violation is discovered, and the convicted person is subsequently exonerated, the acquitted person then frequently sues the parties involved—the state, the municipality, and local actors, such as police and prosecutors—through Section 1983.[14] But again, prosecutors are normally immune from these claims.[15] Why? In most cases, as courts have defined it, a prosecutor is acting within her "judicial capacity" for carrying out the duties normally associated with those of a prosecutor.[16]

Where immunity becomes contested is when a prosecutor wears multiple hats: acting both outside and inside of their "judicial capacity," such as at first assisting the police in the investigation, and then later as the prosecuting attorney in court. The conceptual framework from which the courts have determined the immunity question in such instances is not always congruous, and has recently resulted in an internal split within the Seventh Circuit regarding a prosecutor's immunity from these Section 1983 claims.[17] In *Whitlock v. Brueggemann*, a panel of the Seventh Circuit held that prosecutors were not immune from suit for introducing fabricated evidence at trial during the judicial phase, when the same prosecutor was involved in the fabrication of evidence before the judicial phase.[18] Only months prior, in *Fields v. Wharrie*, another Seventh Circuit panel held the opposite: a prosecutor was immune from a Section 1983 claim in similar circumstances.[19]

judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia").

11. *See* Joseph R. Weeks, *No Wrong Without A Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 871–78 (1997).

12. Martin A. Schwartz & Robert W. Pratt, *Wrongful Conviction Claims Under Section 1983*, 27 TOURO L. REV. 221, 222–23 (2011).

13. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the suppression of evidence favorable to an accused violates due process); *see also* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 692–99 (2006).

14. *See, e.g.*, Fields v. Wharrie, 672 F.3d 505, 509 (7th Cir. 2012).

15. Schwartz & Pratt, *supra* note 12, at 222–23.

16. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). The term "judicial capacity" refers to the prosecutor's adjudicative role, and either phrase is used to describe the same thing: whether or not absolute or qualified immunity applies to a prosecutor's actions. *See id.* (describing prosecutorial absolute immunity based on "adjudicative functions").

17. *See* Whitlock v. Brueggemann, 682 F.3d 567, 580–81 (7th Cir. 2012); *Fields*, 672 F.3d at 513–14.

18. 682 F.3d at 580.

19. 672 F.3d at 513–14. Similar to *Whitlock*, the attorney was involved in the investigation in the prejudicial phase, but was still held absolutely immune due to the timing of the suppression of evidence during judicial phase. *Id.* at 516 ("Though a charged unconstitutional act, Wharrie's alleged

What explains this difference? The conceptual legal framework that the courts applied pointed them inevitably in opposite directions in deciding prosecutorial immunity. The *Whitlock* court, using a tort law causation analysis, determined that the fabrication of evidence for the purpose of securing a wrongful conviction was the but-for and proximate cause of the constitutional tort—a due process violation—and was therefore not shielded by immunity, even though the evidence was not used until trial, where prosecutors normally have absolute immunity.[20] The *Fields* court, using a constitutional rights analysis, determined that since there is no constitutional right to exculpatory or fabricated evidence during the investigatory phase of a criminal proceeding, the duty to the wrongfully convicted was not breached until the adjudicative phase.[21] But by the adjudicative phase, the prosecutor is afforded absolute immunity.

This divergence in the conceptual legal approach, and the outcome, confronts two conflicting and important policy rationales behind these decisions: (1) providing strong immunity for state advocates from Section 1983 claims for fear of over deterrence and (2) narrowing immunity powers to deter gross prosecutorial misconduct.

Given these two important policy rationales, can the seemingly contradictory analytical approaches be reconciled, as both purposes ostensibly serve important functions in the legal system? Must one approach be sacrificed for the other, or can we have our cake and eat it too? To answer these questions, it is important to understand how we arrived at this predicament.

Part II of this Note analyzes the legal landscape of constitutional torts, specifically Section 1983, the *Brady* doctrine, and the history and current state of immunity for prosecutors from Section 1983 claims. Part III then analyzes the cases at issue, comparing similar cases where circuit splits have evolved.[22] Part III also covers the policy rationale behind both decisions, and what the developing literature and research says as to the merits of the oft-cited policy considerations for having prosecutorial immunity. Part III discusses proposed solutions to prosecutorial misconduct based on deterrence and efficiency rationales. Part IV provides possible solutions based on deterrence and efficiency rationales given the current state of immunity doctrine, and also suggests the next steps of empirical analysis that should be undertaken—namely, comparing different circuits, states, and federal courts to determine how differing immunity, discovery, and remedy rules affect prosecutors' effectiveness and the deterrence of misconduct. Finally, Part V concludes.

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suppression in this case was intimately associated with the judicial phase of the criminal process and is, therefore, immune from civil suit.") (citation omitted).

20. *Whitlock*, 682 F.3d at 582–83.

21. *Fields*, 672 F.3d at 513–14.

22. McGhee v. Pottawattamie Cnty., 547 F.3d 922, 933 (8th Cir. 2008); Zahrey v. Coffey, 221 F.3d 342, 356 (2d Cir. 2000). *Contra* Buckley v. Fitzsimmons, 20 F.3d 789, 794 (7th Cir. 1994).

II. BACKGROUND

First, Section A will cover the history and current state of Section 1983 to provide an understanding of the statute's importance as the first real constitutional "sword." Second, Section B compares the right created in *Brady v. Maryland* to the remedy Section 1983 provides for this right. Next, Section C discusses the law of prosecutorial immunity and the two recent Seventh Circuit cases that illustrate the split and why this matters given the growing awareness of prosecutorial misconduct and exonerated citizens. Finally, putting together this knowledge of Section 1983, *Brady*, and immunity case law, the opposing approaches in Seventh Circuit case law and the policy underpinnings will be explored.

A. 42 U.S.C. § 1983

Section 1983 is probably the most powerful offensive remedy available for private persons wronged by government misconduct.[23] The statute is the basis for which countless important cases against the government by private actors have arisen, including *Brown v. Board of Education*.[24]

1. Historical Underpinnings

Originally "An Act to Enforce the Provision of the Fourteenth Amendment to the Constitution of the United States, and Other Purposes,"[25] or commonly known as the third Ku Klux Klan Act,[26] Section 1983 was passed at a time when federal law provided far fewer protections for individuals against state action than it does today.[27] In fact, before Section 1983 was created as a remedy for violations of rights, the Constitution was seen as "provid[ing] a shield rather than a sword."[28] Most of the important constitutional questions in early Supreme Court jurisprudence were defendants asserting constitutional protection to avoid liability, rather than plaintiffs seeking remedies for constitutional rights violations.[29]

The decade surrounding Section 1983's enactment saw a dramatic shift in Congress from pre-Civil War conceptions of federalism and lim-

23. *See* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 20–21, 27–29 (1985) (discussing the *importance* of Section 1983 claims for vindicating rights).

24. *See id*. at 19.

25. An Act to Enforce the Provision of the Fourteenth Amendment to the Constitution of the United States, and Other Purposes, 17 Stat. 13–15 (1871) (codified at 42 U.S.C. § 1983 (2006)).

26. Summary of Constitutional Amendments and Major Civil Rights Acts passed by Congress, OFFICE OF HISTORY AND PRESERVATION, *available at* http://baic.house.gov/historical-data/civil-rights-acts-and-amendments.html.

27. For example, at the time Section 1983 was passed, the Bill of Rights had not yet been incorporated to apply to state governments, only applying to the federal government. *See* United States v. Cruikshank, 92 U.S. 542, 553 (1875); Barron v. City of Baltimore, 32 U.S. 243, 247 (1833).

28. Blackmun, *supra* note 23, at 3.

29. *See, e.g.*, Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 300 (1851); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 2 (1824); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 317 (1819).

ited federal oversight to a much more expansive and protective role of the federal government.[30] But given the limited interpretation of the Fourteenth Amendment and state action by the Supreme Court at the time,[31] Section 1983 was essentially written out of use until the middle of the twentieth century.[32]

In the 1940's, the Supreme Court began expanding the scope of Section 1983's "under color of" language using the Court's interpretation of the same language in a criminal analog statute[33] to include actions by state officials that were not authorized by state law or policy.[34] Following these cases, the current doctrine of Section 1983 law was established under *Monroe v. Pape*, *Monell v. Department of Social Sciences*, and *Connick v. Thompson*.

2. Current Section 1983 Doctrine

In 1961, the Supreme Court decided *Monroe v. Pape*.[35] There, the Court held that Chicago police officers could be held liable under Section 1983 for conducting an unconstitutional search and arrest—even though their actions were not authorized by state law or policy—essentially applying the criminal statutory interpretation of "under color of state law" from *Screws v. United States* and *United States v. Classic*.[36] Surveying the history of Section 1983, the Court found it "abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and . . . the Fourteenth Amendment might be denied by the state agencies."[37]

Next, the Court expanded liability under Section 1983 to include municipalities,[38] but not so broadly as to impose liability under a *re-*

30. *See* Mitchum v. Foster, 407 U.S. 225, 238–42 (1972); Blackmun, *supra* note 23, at 4–7.

31. *See* Civil Rights Cases, 109 U.S. 3, 23–25 (1883); United States v. Harris, 106 U.S. 629, 638–39 (1883); United States v. Cruikshank, 92 U.S. 542, 554–55 (1875); Slaughter-House Cases, 83 U.S. 36, 77 (1872).

32. For a discussion of the limited role Section 1983 played until its rebirth in the 1940's, see Blackmun, *supra* note 23, at 8–12.

33. 18 U.S.C. § 242 (2006) ("Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . .").

34. *See* Screws v. United States, 325 U.S. 91, 110 (1945) ("*United States v. Classic* is, therefore, indistinguishable from this case so far as 'under color of' state law is concerned.") (involving police misconduct); United States v. Classic, 313 U.S. 299, 325–26 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.") (involving election misconduct and voter fraud).

35. 365 U.S. 167 (1961).

36. *Id.* at 187 ("We conclude that the meaning given 'under color of' law in the *Classic* case and in the *Screws* and *Williams* cases was the correct one; and we adhere to it.").

37. *Id.* at 180.

38. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 (1978) ("[W]e now overrule *Monroe v. Pape*, *supra*, insofar as it holds that local governments are wholly immune from suit under § 1983.") (footnote omitted).

spondeat superior theory.[39] The Court found local government to be a "person" under Section 1983 and held that local governments could be liable via government "custom," "even though such a custom has not received formal approval through the body's official decision making channels . . . 'such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law.'"[40] But the Court's recent decision in *Connick v. Thompson* has since limited municipal liability.[41]

Still, current Section 1983 doctrine by itself provides for broad protections: any citizen or person,[42] who has been deprived of a legal protection by another person,[43] has the ability to sue for compensatory and possibly punitive damages.[44] Important to keep in mind, though, is that Section 1983 does not create its own rights or obligations. The availability of Section 1983 as a remedy is only as powerful as the Court's interpretations of rights afforded by our Constitution and laws, and a plaintiff must prove that the defendant's conduct was the cause-in-fact of the plaintiff's legal deprivation to meet a *prima facie* cause of action.[45] In other words, there must exist a right before plaintiffs have a remedy.

B. Brady v. Maryland

1. The Right

In the landmark case *Brady v. Maryland*, the Court found a constitutional right for defendants to receive favorable evidence from the prosecution in a criminal proceeding.[46] The Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[47] This expanded upon earlier rulings, in which the Court found that knowingly presenting material false evidence, or failing to correct material evidence known to be false, or obtaining convictions by

39. *Id.* at 691 ("[W]e conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.").

40. *Id.* (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 167–68 (1970)).

41. Connick v. Thompson, 131 S. Ct. 1350, 1360 (2011) (holding that four *Brady* violations in a prosecutor's office over ten years was not enough notice to meet the deliberate indifference standard of failure to train to meet a prima facie Section 1983 claim).

42. This includes corporations, aliens, and labor unions, but not states or local governments. 1 SHELDON NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, at § 1:12-14 (4th ed. 2012).

43. In addition to private parties, this includes cities, counties and local governments. *See id.* at § 1:15-20.

44. *Id.* at § 4:41.

45. *Id.* at § 2:1.

46. 373 U.S. 83, 87 (1963) (holding that the suppression of evidence favorable to an accused upon request violates due process).

47. *Id.*

intimidation violated due process,[48] which is recognized universally by courts.[49]

The scope of "suppression" of evidence under *Brady* has also come to include a prosecutor's failure to investigate the background of their witness and the apparently false testimony given by their witness,[50] shielding a witness from knowledge of an agreement between the prosecutor and the witness's lawyer,[51] failing to preserve favorable evidence from loss or destruction,[52] and evidence disclosed too late to be useful at trial.[53] While *Brady* material must be disclosed in time to be used at trial, there is no established right to *Brady* material pretrial.[54] Also, it is unsettled if favorable evidence must be disclosed under *Brady* during plea negotiations and guilty pleas.[55]

The most important aspect of determining a *Brady* violation is whether the evidence was "material" to either guilt or punishment.[56] Since *Brady*, the Supreme Court has defined evidence as material where there exists a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[57] The Court later modified this standard so that the evidence's disclosure would not necessarily result in a different outcome.[58] Still, the burden of showing materiality rests on the defendant.[59]

Where a court finds a suppression of material evidence that would prejudice the accused, the wronged individual's conviction is vacated.[60] But in the years since *Brady*, the doctrine has not shaped criminal discovery as much as the *Brady* Court may have envisioned.[61]

48. Napue v. Illinois, 360 U.S. 264, 272 (1959); Pyle v. Kansas, 317 U.S. 213, 216 (1942); Mooney v. Holohan, 294 U.S. 103, 112 (1935).

49. Dominguez v. Hendley, 545 F.3d 585, 589 (7th Cir. 2008) ("There was and is no disputing that such conduct violates clearly established constitutional rights.") (referring to the conduct of fabricating evidence).

50. N. Mariana Islands v. Bowie, 243 F.3d 1109, 1117 (9th Cir. 2001).

51. Hayes v. Brown, 399 F.3d 972, 977–81 (9th Cir. 2005) (en banc).

52. Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988).

53. Leka v. Portuondo, 257 F.3d 89, 100 (2d Cir. 2001).

54. Madsen v. Dormire, 137 F.3d 602, 605 (8th Cir. 1998); United States *ex rel.* Lucas v. Regan, 503 F.2d 1, 3 n.1 (2d Cir. 1974).

55. *See* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 958 (1989). For an in-depth discussion on *Brady* requirements, see Gershman, *supra* note 13, at 694–715.

56. Gershman, *supra* note 13, at 686.

57. United States v. Bagley, 473 U.S. 667, 682 (1985).

58. Kyles v. Whitley, 514 U.S. 419, 434 (1995) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

59. *Bagley*, 473 U.S. at 682–83 (majority opinion); *see also id.* at 701 (Marshall, J., dissenting).

60. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 696 (1987) (noting that *Brady* violations "require reversal of a defendant's conviction on a finding that suppressed or falsified evidence was material"); *see Kyles*, 514 U.S. at 422 (holding that the criminal defendant was entitled to a new trial).

61. Gershman, *supra* note 13, at 686–87.

2. The Problem

If *Brady* was originally viewed as granting a constitutional right to discovery in criminal proceedings,[62] it has since become a much different right.[63] Given the current standard for finding a *Brady* violation, "[t]he evidence at issue must be favorable to the accused . . . [;] that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[64] This is arguably a much higher materiality standard than *Brady*'s original language implied,[65] making *Brady* a post-trial remedy for misconduct rather than a pretrial discovery right.[66]

Other disclosure requirements of prosecutors may support this interpretation of *Brady*. Notably, the Federal Rules of Criminal Procedure do not require disclosure of certain kinds of favorable evidence to the accused.[67] Also, the Supreme Court has found that there is no pretrial *Brady* right to certain favorable evidence at the plea bargain or guilty plea stage.[68] Given that ninety percent or more of criminal cases end with a plea,[69] this severely limits *Brady*'s impact. Where the convicted successfully shows favorable evidence was suppressed, a reviewing appeals court may still deem the suppression "harmless error."[70] Given this higher materiality standard to determine *Brady* violations, one scholar has argued that an ethical prosecutor should *never* be in the position of turning over *Brady* material if they were going to proceed to trial anyway, since knowingly having such exculpatory evidence would likely lead a prosecutor to dismiss the case.[71]

While *Brady* creates a constitutional right to exculpatory evidence, given the development of the doctrine in the Supreme Court, it is unclear when this right vests, and to what evidence. Clearly, the current doctrine relies on a case by case analysis after the fact,[72] which will become important to remember as the policy purposes of immunity are discussed. But in the case where a wrongfully convicted person does prove a *Brady* violation, and has their conviction subsequently vacated, it is at this point that they could then sue the state and local actors, office, and municipali-

62. Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 643 (2002).

63. *Id.* at 644.

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

65. *See* Gershman, *supra* note 13, at 714–16; Sundby, *supra* note 62 at 647.

66. Sundby, *supra* note 62, at 647.

67. Gershman, *supra* note 13, at 726.

68. United States v. Ruiz, 536 U.S. 622, 629 (2002) ("First, impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* . . . .").

69. LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING, 1 (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

70. Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 58–62 (2005).

71. Sundby, *supra* note 62, at 644.

72. Gershman, *supra* note 13, at 690 ("[G]iven this retrospective, ad hoc, fact-intensive, and wholly speculative factual and doctrinal analysis required to determine the 'materiality' of suppressed evidence . . . .").

ty involved in the violations pursuant to Section 1983 in a civil suit.[73] This is also where the prosecutorial immunity defense is raised.[74]

C. Immunity

Immunity from civil liability for certain governmental officials traces back to English and colonial common law.[75] While Section 1983 does not mention immunity in the statute,[76] nor does the legislative history of the original act,[77] the Supreme Court applied common law immunity to Section 1983 claims, finding that Congress did not expressly attempt to destroy common law immunities through the creation of a federal civil remedy.[78]

Prosecutorial immunity for Section 1983 claims was first recognized by the Supreme Court in *Imbler v. Pachtman*, holding that prosecutors should be shielded by absolute immunity for prosecutorial actions.[79] The Court found that prosecutors should be immune from civil liability for the same reasons judges and jurors were historically granted immunity for acting within the scope of their duties.[80] As in the past, the Court found persuasive the concerns for the administration of justice: "that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust."[81]

At common law, an injured party could try to seek redress against a prosecutor for initiating a proceeding through the tort of malicious prosecution.[82] Immunity from such claims was first noted by a state court in 1896,[83] and the Supreme Court directly addressed and affirmed the immunity from malicious prosecution claims in 1927.[84] Still, as a matter of original interpretation, it is contested whether this immunity applied to prosecutors at the time Section 1983 was first adopted in 1871.[85] But in 1976, the Court was persuaded by the rationale for prosecutorial immunity from common law torts as applied to a Section 1983 claim, and so

73. *See, e.g.*, Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011); Imbler v. Pachtman, 424 U.S. 409, 414–16 (1976).

74. *Imbler*, 424 U.S. at 416.

75. For a discussion of the historical roots of immunity, see *id.* at 421–24; Pierson v. Ray, 386 U.S. 547, 553–56 (1967); Tenney v. Brandhove, 341 U.S. 367, 372–78 (1951); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 74–79 (2005).

76. *See* 42 U.S.C. § 1983 (2006).

77. David Achtenberg, *Immunity Under 42 U.S.C. S 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 502–11 (1992).

78. *Imbler*, 424 U.S. at 421, 427; *Pierson*, 386 U.S. at 554; *Tenney*, 341 U.S. at 376.

79. 424 U.S at 424–26.

80. *Id.* at 422–23, n.20.

81. *Id.* at 423.

82. *Id.* at 421.

83. *See* Griffith v. Slinkard, 44 N.E. 1001, 1002 (Ind. 1896).

84. *Imbler*, 424 U.S. at 422 (referencing the Supreme Court's decision, Yaselli v. Goff, 275 U.S. 503 (1927)).

85. *See* Johns, *supra* note 75, at 107–22 (arguing that "the historical argument for absolute prosecutorial immunity is . . . unsupported").

prosecutorial immunity for Section 1983 was first adopted by the Court.[86] Given the similarities to common law tort immunities and Section 1983 claims, the Supreme Court had previously reasoned that "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them."[87]

The Court was careful to note, however, that the granting of immunity was limited to "initiating a prosecution and in presenting the State's case,"[88] and reserved judgment "whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate."[89]

The further development of prosecutorial immunity case law has resulted in the current regime of absolute immunity and qualified immunity. The determination of absolute or qualified immunity is based on the type of conduct involved, and the time during the case that it occurred.[90]

1. Absolute Immunity

Prosecutors enjoy absolute immunity from Section 1983 claims for "acts undertaken . . . in the course of his role as an advocate for the State."[91] As the Supreme Court noted when first deciding prosecutorial immunity from Section 1983 claims, "[a]lthough the precise contours of [the Courts of Appeals'] holdings have been unclear at times, at bottom they are virtually unanimous that a prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties."[92]

The Supreme Court has identified relative boundaries to determine advocacy, related to the functional role the prosecutor is playing at the time of the violation,[93] and also at what stage of the case the violation

86. *Imbler*, 424 U.S at 424 ("We now must determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983. We think they do.").

87. Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1994) (internal quotation marks omitted) (citing Pierson v. Ray, 386 U.S. 547, 554–555, (1967)); *see id.* (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)) ("[H]owever, we held that Congress did not intend § 1983 to abrogate immunities 'well grounded in history and reason.'").

88. *Imbler*, 424 U.S. 431.

89. *Id.* at 430–31 ("The purpose of the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status was to distinguish and leave standing those cases, in its Circuit and in some others, which hold that a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's.").

90. *Buckley*, 509 U.S. at 269 ("In determining whether particular actions of government officials fit within a common-law tradition of absolute immunity, or only the more general standard of qualified immunity, we have applied a 'functional approach,'. . . .").

91. *Id.* at 273.

92. *Imbler*, 424 U.S. at 420. For a summarization of the Courts of Appeals' cases analyzing absolute prosecutorial immunity, see *id.* at 420 n.16.

93. Van de Kamp v. Goldstein, 555 U.S. 335, 342–43 (2009) (noting Supreme Court precedent in determining prosecutorial immunity).

occurred.[94] In terms of time frame, the Court noted that a prosecutor is not an advocate "before he has probable cause to have anyone arrested."[95]

As for the functional test, a prosecutor is absolutely immune from Section 1983 liability for their conduct "when a prosecutor . . . appears in court to present evidence in support of a search warrant application"[96] and in "initiating a prosecution and in presenting the State's case."[97] In contrast, the Court has determined that a number of other functions do not qualify for absolute immunity, namely "givi[ng] advice to police during a criminal investigation, . . . mak[ing] statements to the press, or when a prosecutor acts as a complaining witness in support of a warrant application."[98]

The rationale for absolute immunity stems from historical considerations and fears of over deterrence.[99] If absolute immunity only provided immunity from liability at trial, as opposed to immunity from suit, Section 1983 lawsuits might overdeter by chilling prosecutors from pursuing cases for fears of being embroiled in lawsuits against the state.[100] So even where the plaintiff's constitutional rights were clearly violated, and done maliciously, a prosecutor who is successful in asserting absolute immunity can dismiss the suit at the pleading stage.[101]

2. Qualified Immunity

Where a prosecutor is not granted absolute immunity, he may still be provided protection from suit under qualified immunity, which protects other government officials such as police officers.[102] Qualified immunity arises when prosecutors are not afforded absolute immunity, usually for one or some of the reasons stated above.[103] This immunity is identified more for what it does not protect than what it does. Acts that "violate clearly established statutory or constitutional rights of which a reasonable person would have known" are not protected by qualified immunity.[104]

To evaluate a qualified immunity defense, a court must determine first if the "facts that a plaintiff has alleged or shown make out a violation of a constitutional right," and secondly, if "the right was 'clearly es-

94. *Buckley*, 509 U.S. at 274.
95. *Id.*
96. *Van de Kamp*, 555 U.S. at 343.
97. *Imbler*, 424 U.S. at 431.
98. *Van de Kamp*, 555 U.S. at 343 (citations omitted).
99. *Imbler*, 424 U.S. at 423 n.9.
100. *See* Nahmod, *supra* note 9, at 286.
101. *Id.*
102. The first case to establish qualified immunity for police officers was Pierson v. Ray, 386 U.S. 547, 557 (1967). *See* Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1004 (1990).
103. *See supra* Part II.B.1.
104. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

tablished' at the time of [the] . . . misconduct" such that a reasonable person would know.[105]

Qualified immunity from Section 1983 claims originally contained a "good faith" subjective element, and only protected against liability, not from suit.[106] Over the years, however, the qualified immunity standards have arguably been adjusted to more closely resemble absolute immunity.[107] For example, in 1982, in *Harlow v. Fitzgerald*, the Court replaced the good faith requirement with the objective "clearly established" test and instructed lower courts to decide the issue before discovery.[108] In *Mitchell v. Forsyth*, the Court allowed interlocutory appeals from district court denials of qualified immunity motions to dismiss or at summary judgment before discovery.[109] In each of these decisions, the Court was concerned with the over deterrence effect of prosecutors defending against frivolous claims.[110] This marked a shift from concerns of fault-based compensation to the same concerns underlying absolute immunity.[111]

3. The Split: Fields *and* Whitlock

The split within the Seventh Circuit and between other circuits lies where the courts differ in determining the immunity afforded when a prosecutor's misconduct spans the functional qualified-absolute immunity gap, between prejudicial (nonprosecutorial) and post-judicial (prosecutorial) conduct. This split is exemplified in two Seventh Circuit cases, *Fields* and *Whitlock*, both decided in 2012.

In 1986, Nathson Fields was convicted of two counts of murder.[112] Fields alleged that the prosecutors solicited false testimony and then used the testimony at trial to convict him.[113] Fields was eventually given a new trial in 2009, where he was acquitted by the jury and received his certificate of innocence.[114] On acquittal, Fields sued the assistant state attorneys under Section 1983 for "suppressing exculpatory evidence and coercing witnesses to provide false evidence."[115] Writing for the Seventh Circuit panel, Judge Flaum held that the assistant state attorneys were absolutely immune from the Section 1983 claims for using fabricated evidence before the original trial and at retrial, and for withholding exculpa-

105. Pearson v. Callahan, 555 U.S. 223, 232 (2009) (citations omitted) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). Courts have discretion in applying both tests, the order they apply them, or if only one is necessary to determine the matter. *Id*. at 236 ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory.").

106. *See Pierson*, 386 U.S. at 557–58; Nahmod, *supra* note 9, at 286.

107. *See* Nahmod, *supra* note 9, at 287.

108. 457 U.S. at 817–19.

109. 472 U.S. 511, 530 (1985).

110. *Id.* at 526–27; *Harlow*, 457 U.S. at 816–19.

111. Nahmod, *supra* note 102, at 1005–06.

112. Fields v. Wharrie, 672 F.3d 505, 508 (7th Cir. 2012).

113. *Id.* at 508–09.

114. *Id.* at 509.

115. *Id.*

tory evidence because the conduct was "intimately associated with the judicial phase of the criminal process,"[116] and therefore the attorneys were acting within their prosecutorial capacities.[117]

In 1987, Herbert Whitlock was convicted of murdering a woman in Paris, Illinois.[118] He then spent twenty-one years in prison, until his conviction was overturned by a state appellate court in post-conviction proceedings due to numerous *Brady* violations.[119] He was released from prison on January 8, 2008.[120] On release, Whitlock sued the state prosecutor under Section 1983 for fabricating evidence that helped secure his conviction, and, on an interlocutory appeal, the Seventh Circuit decided *Whitlock v. Brueggemann*.[121] The court determined that the fabrication of evidence for the purpose of securing a wrongful conviction was the but-for and proximate cause of the constitutional tort and was therefore not shielded by immunity, even though the evidence was not used until trial, where prosecutors normally have absolute immunity.[122]

4. Have We Been Here Before?

The divergent approaches of *Fields* and *Whitlock* are not the first time courts have struggled with the scope of prosecutorial immunity under these circumstances.[123] In fact, the Supreme Court was poised to answer this question in *McGhee v. Pottawattamie County*.[124] In *McGhee*, two men, McGhee and Harrington, were convicted for murder, but based on the discovery of *Brady* violations had their convictions vacated almost twenty-five years later.[125] McGhee and Harrington then filed Section 1983 claims against the prosecutors for the use of perjured and fabricated testimony, and for withholding exculpatory evidence.[126] Just as in *Whitlock*, the county attorneys were heavily involved in the investigation, with one attorney "participating in witness interviews and canvassing the neighborhood near the crime scene."[127]

At the District Court, the county attorneys argued the same *Fields* rationale, that their conduct did not violate McGhee and Harrington's rights until the fabricated evidence was used at trial, which afforded them

116. *Id.* at 516. The alleged misconduct occurred after probable cause and during the direct appeal phase, which does not end the prosecutors' role until a final decision is made, thus maintaining prosecutors' "judicial capacity." "As the original prosecutor on the case, Wharrie had a continuing *Brady* obligation to reveal material evidence to the defense until Fields' conviction became final, as the ongoing judicial process continued to evolve." *Id.*

117. *See supra* Part II.C.1.

118. Whitlock v. Brueggemann, 682 F.3d 567, 570 (7th Cir. 2012).

119. *Id*.

120. *Id*. at 573.

121. *Id.* at 570–71.

122. *Id*. at 583.

123. See *supra* note 22 for examples of circuit splits on this issue.

124. 547 F.3d 922 (8th Cir. 2008) (cert granted, Pottawattamie Cnty v. McGhee, 556 U.S. 1181 (2009)).

125. *Id.* at 925.

126. *Id.*

127. *Id.* at 926.

prosecutorial absolute immunity for their "judicial" actions.[128] The court rejected this argument and denied the county attorneys qualified immunity, applying the same reasoning as the *Whitlock* court, finding that "it would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty."[129] The Eighth Circuit summarily upheld the denial of qualified immunity for the county attorneys.[130] Noting that this reasoning was in line with the Second Circuit's *Zahrey* decision,[131] but at odds with the Seventh Circuit's *Buckley* decision,[132] the Eighth Circuit squared up the decision for the Supreme Court. The Supreme Court granted certiorari,[133] but the case was dismissed[134] after full briefing and oral argument, reportedly due to a $12 million dollar settlement by Iowa.[135]

Yet when the Supreme Court had a second chance for a bite at the apple, it declined, denying certiorari of *Whitlock*.[136] Has the Court decided that the stakes at issue are not high enough?

5. What's the Big Deal?

Given the legal split on the doctrine of immunity, how important are the implications of the divide? For a number of reasons, they are very important. First, civil liability is expensive: prosecutorial and municipality misconduct that results in wrongful convictions can cost millions of dollars for the wrongful conviction of a single plaintiff.[137]

Second, wrongful convictions are a serious problem: a study of capital cases from 1973–1995 found that 68% of capital cases contained prejudicial error, requiring reversal of 2370 death sentences.[138] State courts that overturned capital judgments found that 82% of those cases on retrial deserved a lesser sentence and in 7% of the cases, defendants were found innocent of the capital crime.[139] Another study found 340 exonerations of wrongfully convicted people from 1989–2003, with each person

128. *See id.* at 932.
129. McGhee v. Pottawattamie Cnty., 475 F. Supp. 2d 862, 907 (S.D. Iowa 2007).
130. *McGhee*, 547 F.3d at 933.
131. *Id.* at 932 (citing Zahrey v. Coffey, 221 F.3d 342, 344, 349 (2d Cir.2000)).
132. *Id.* at 932–33 (citing Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir.1994)).
133. Pottawattamie Cnty v. McGhee, 556 U.S. 1181 (2009).
134. Pottawattamie Cnty. v. McGhee, 558 U.S. 1103 (2010).
135. *Boundaries of Prosecutorial Immunity to Be Tested in Upcoming Supreme Court Case*, N. CAL. INNOCENCE PROJECT, Summer 2010, at 16, *available at* http:// law.scu.edu/ncip/file/NCIP_ Newsletter_Summer2010_web.pdf (reporting that McGhee was settled for $12 million for two wrongfully convicted men).
136. McFatridge v. Whitlock, 133 S. Ct. 981 (2013).
137. *See, e.g.*, Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499, 1533 n.206 (2010).
138. JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at i–ii (2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.
139. *Id*. at ii.

spending, on average, more than ten years in prison before being exonerated.[140]

Third, a number of these convictions may be the result of prosecutorial misconduct. In a study examining over 4000 California cases from 1997–2009 that alleged prosecutorial misconduct, the courts found misconduct in 707 cases.[141] Another study by USA Today, focused on federal prosecutors, found 201 documented cases of misconduct from 1997–2010.[142]

So where does immunity fit in? In many cases of prosecutor misconduct, a *Brady* violation is a likely reason behind the misconduct, and whether the prosecutor is immune from liability may play a role in deterring the prosecutor from misconduct. Also, civil liability provides compensation to those wrongfully convicted due to misconduct, serving a corrective justice rationale.[143]

In light of Section 1983's remedies, immunity law, and *Brady*, Part III analyzes the *Whitlock* and *Fields* decision from the Seventh Circuit, highlighting the causation and constitutional approaches to immunity and their divergent outcomes. The legal and policy rationale and justifications for each position will be considered, and through a lens of deterrence and efficiency, alternative proposed solutions to deter misconduct will be analyzed.

III. ANALYSIS

First, Section A discusses the recent Seventh Circuit decision in *Fields v. Wharrie*, which represents a traditional "constitutional" approach to determining immunity claims. Next, Section B analyzes *Whitlock v. Brueggemann*, the landmark case decided only months after *Fields*,[144] to highlight the causation approach and the marked differences in theory and outcome. Section C compares the doctrinal approaches in an attempt to reconcile the competing outcomes with a legal framework that resolves both concerns. Section D then looks beyond the legal doctrine to the underlying policy rationale and purpose of Section 1983 and

140. Samuel R. Gross et. al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523–24 (2005).

141. KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, SANTA CLARA SCH. OF LAW, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, at 2 (2010), *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs.

142. Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA TODAY (Sept. 23, 2010, 1:31 PM), http:// www.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm.

143. This Note will not focus on the corrective justice rationale for compensating prosecutorial misconduct, but for a discussion of the issue, see Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903 (2001); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

144. *Fields* was decided February 28, 2012, while *Whitlock* was decided May 30, 2012. Fields v. Wharrie, 672 F.3d 505 (7th Cir. 2012); Whitlock v. Brueggemann, 682 F.3d 567 (7th Cir. 2012).

immunity, and proposes solutions to deter the "perverse rationale" that courts have struggled with.[145]

A. The Fields *Analysis*

The outcome in *Fields* is not particularly surprising under prosecutorial absolute immunity doctrine, given that alleged misconduct was found at all times to be during the judicial phase of the case and was prosecutorial conduct.[146] It is the court's analysis of the immunity implications if the coercion of the falsified testimony was outside the judicial phase[147] that underlies the real tension between the constitutional and causation approaches.

1. The Investigator—Prosecutor Loophole

The *Fields* court went one step beyond the facts before it and considered the following: what if Wharrie (one of the assistant state attorneys) had not been acting as a prosecutor when he obtained falsified testimony, but in an investigative phase, akin to a police officer?[148] A police officer, and Wharrie, would only be afforded qualified immunity for their acts at this stage.[149] The court noted that had Wharrie—after coercing falsified evidence in an investigatory phase—decided to prosecute the case as the attorney, he would be absolutely immune from a 1983 claim.[150]

Why? First, as courts applying the constitutional approach have reasoned, there must be a constitutional duty and violation for the Section 1983 remedy to exist; however, simply fabricating evidence, or having exculpatory evidence, before trial, does not cause a due process violation.[151] The violation only occurs when the falsified evidence is used in court, or when the material exculpatory evidence is not disclosed to the defense during the trial.[152] At this point, Wharrie would have been acting within his "judicial capacity"[153] at the time of the *Brady* violation; thus, the decision to use the evidence would be protected by absolute immunity.[154]

The court also considered if Wharrie had only obtained the falsified evidence as an investigator, and then handed it off to the other assistant

145. McGhee v. Pottawattamie County, 475 F. Supp. 2d 862, 907 (S.D. Iowa 2007).

146. *Fields*, 672 F.3d at 515–16.

147. *Id.* at 516.

148. *Id*. at 516–17.

149. *See* Jones v. City of Chicago, 856 F.2d 985, 993–95 (7th Cir. 1988).

150. *Fields*, 672 F.3d at 517.

151. Buckley v. Fitzsimmons, 20 F.3d 789, 796 (7th Cir. 1994) (citation omitted) ("Just as there is no common law tort without injury, there is no constitutional tort without injury.").

152. *Fields*, 672 F.3d at 517.

153. See *supra* Part II.C. for a discussion on the timing and functional tests the courts have created to determine whether or not a prosecutor's actions were within her "judicial capacity," to determine whether absolute or qualified immunity would apply.

154. *Buckley*, 20 F.3d at 795 ("*Obtaining* the confession is not covered by immunity but does not violate any of Buckley's rights; *using* the confession could violate Buckley's rights but would be covered by absolute immunity.").

state attorney.[155] Based on previous Seventh Circuit case law, a police officer who supplies information to prosecutors that leads to a wrongful conviction would be liable even though the injury did not occur until trial.[156] The *Fields* court noted that Wharrie would then likely be liable if the other assistant state attorney was unaware of the true nature of the evidence and its use resulted in a violation.[157] Also, the constitutional approach implies that Wharrie would not be liable if the prosecuting assistant state attorney in this example *knew* of the violating nature of Wharrie's evidence, and decided to use it anyway.[158] Applying proximate cause principles, if the prosecutor is aware of the nature of the evidence and still decides to use the evidence, that in effect creates an intervening cause, severing liability for the investigator.[159] This is the prosecutor loophole: where a first party (whether a police officer, or another attorney) would be liable for knowingly providing false evidence or withholding exculpatory evidence from the trial prosecutor, when the trial prosecutor is *both* the investigator and prosecutor, they may knowingly cause constitutional violations at trial based on their investigatory conduct and be absolutely immune.

2. "A Balance of Evils"

Prosecutorial immunity is an imperfect solution, and courts have long recognized this tradeoff. Judge Learned Hand once noted:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.[160]

The argument for maintaining strong immunity protections for prosecutors is grounded in two rationales. One rationale is for the administration of justice. Without such immunity, prosecutors' time and energy would be diverted from their prosecutorial duties to having to de-

155. *Fields*, 672 F.3d at 517.

156. Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988) ("[A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision.").

157. *Fields*, 672 F.3d at 517 ("Assuming, for the sake of argument, that we answer this question affirmatively, Wharrie would be subject to financial liability only if Kelley did not know that he had asked Hawkins to lie and would not have retried the case had he been aware of that information.").

158. *See id.* ("Although he does not explicitly state that [the prosecuting ASA] knew that Wharrie asked Hawkins to lie, he strongly implies that he did. Therefore, the alleged constitutional harm occurred as [the prosecuting ASA] exercised his prosecutorial duties at trial and resulted from his prosecutorial discretion regarding how to try his case."); *Buckley*, 20 F.3d at 797 (noting that "[t]hings would be different, we implied, if the prosecutors had known the truth and proceeded anyway" in regards to immunity from a 1983 claim).

159. *See Buckley*, 20 F.3d at 797.

160. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949). While Judge Hand was speaking of prosecutorial immunity from malicious prosecution claims, his reasoning applies equally here.

fend themselves.[161] Given the limited time and resources of prosecutors, this burden could substantially hinder prosecutors' efforts to do their jobs. The second rationale is that the actual effectiveness of the justice system would suffer, as the prosecutor would be making decisions based on potential consequences stemming from his or her own liability.[162] Given that the number of trials and indictments that a prosecutor may handle yearly can be in the hundreds, there is a real threat that prosecutors would be faced with essentially reopening and retrying cases from previous years.[163]

The Supreme Court, in *Imbler v. Pachtman*, voiced these exact concerns when it decided that prosecutors should be granted absolute immunity from Section 1983 claims instead of qualified immunity.[164] Given that the purpose of absolute immunity is protection from the Section 1983 claim itself, not a defense to the claim, qualified immunity would essentially defeat the underlying purpose of immunity for prosecutors.[165] Because qualified immunity involves questions of fact and law that are case specific,[166] under qualified immunity, Section 1983 claims would likely need to proceed to discovery, and possibly trial, to determine whether qualified immunity should be granted.[167] This defeats the policy purposes of absolute immunity, namely, the administration of justice and not deterring effective advocacy of prosecutors by the threat of constant litigation. [168] Given these arguments, it seems unlikely to find a middle ground of protecting both the rationale behind absolute immunity and closing the loophole of abusive prosecutors. Analyzing *Whitlock* shows another court's attempts to do both.

B. The Whitlock *Analysis*

1. Closing the Loophole

In *Whitlock*, the Seventh Circuit began its analysis by finding that the prosecutor's actions pre-arrest warrant only merited qualified immunity,[169] using the functional test in *Buckley v. Fitzsimmons*.[170] The

161. Peter A. Joy & Kevin C. McMunigal, *Do Two Wrongs Protect A Prosecutor?*, 25 CRIM. JUST. 23, 24 (2010).

162. Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976) ("The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.").

163. *Id.* at 425.

164. *Id*. at 424–27.

165. *See supra* Part II.C.1.

166. *See supra* Parts II.B.2, II.C.2.

167. *See Imbler*, 424 U.S. at 424–27.

168. *Id*.

169. Whitlock v. Brueggemann, 682 F.3d 567, 578–79 (7th Cir. 2012) ("The fact that McFatridge eventually proceeded with this prosecution does not wipe away his involvement in the investigation at its earliest stages. He went to the scene of the crime and the hospital shortly after the murders, long before probable cause supported any arrests or anyone had sought his advice as a lawyer.").

170. 509 U.S. 259, 274, (1994) ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.").

court addressed qualified immunity by first examining if a violation of constitutional rights had occurred.[171] Finding that manufacturing false evidence used to secure a conviction is a clear constitutional violation,[172] the court then attacked the investigator-prosecutor loophole created in *Fields*: "It would be 'incongruous,' to hold a police officer liable for fabricating evidence but hold that the prosecutor has not committed any violation for taking the same action in the same capacity."[173]

McFatridge, the prosecutor in *Whitlock*, argued he should be absolutely immune because the constitutional injury did not occur until trial, at which point he enjoyed absolute immunity.[174] The *Whitlock* court agreed on one point: "McFatridge is correct that the alleged constitutional violation here was not complete until trial."[175] Yet, unlike *Fields*, the court in *Whitlock* denied the prosecutor qualified immunity and declined to review the absolute immunity issue as improper at the interlocutory phase, as there were unresolved factual determinations to be made.[176]

The court, viewing the constitutional violation through a tort lens, reasoned that fabricating evidence to deprive someone's liberty can be both a but-for and proximate cause of the violation.[177] This line of reasoning follows a previous Seventh Circuit decision, *Jones v. City of Chicago*, which found police officers liable for such conduct.[178] But previous Seventh Circuit decisions had not attempted to close the prosecutor-investigator loophole.[179] Here, the *Whitlock* court did: "That a prosecutor has absolute immunity for conduct taken in his advocacy role is beside the point for this purpose: 'there is no common-law tradition of immunity for [investigatory conduct], whether performed by a police officer or prosecutor."[180]

From this reasoning, the court rejected the loophole by finding that: "there is no supervening cause that breaks the chain from his fabrication as an investigator to the constitutional violation. McFatridge was one of the officials who allegedly fabricated evidence. One's own conduct cannot be an intervening cause sufficient to defeat a finding of causation."[181]

171. *Id*. at 580 ("[W]e will take up first the question whether the plaintiffs have identified a violation of their constitutional rights . . . .") (citing Saucier v. Katz, 533 U.S. 194 (2001)).

172. *Id*.

173. *Id*. at 580–81 (citation omitted) (quoting Burns v. Reed, 500 U.S. 478, 495 (1991)).

174. *Id*. at 582.

175. *Id*.

176. *Id*. at 577–586. This does not affect the analysis so long as the lower court were to find that the prosecutor was involved in the constitutional violation during the investigative, prejudicial phase, where qualified immunity would be the only protection afforded.

177. *Id*. at 583.

178. Buckley v. Fitzsimmons, 20 F.3d 789, 796–97 (7th Cir. 1994) ("A prosecutor would have received absolute immunity, but the police who bilked the prosecutor were liable for the injury their deceit caused.") (citation omitted) .

179. *See, e.g.*, *id.* at 797 ("Things would be different, we implied, if the prosecutors had known the truth and proceeded anyway, or if the prosecutors themselves had concocted the evidence, for then the immunized prosecutorial decisions would be the cause of the injury.").

180. *Whitlock*, 682 F.3d at 583 (quoting Buckley v. Fitzsimmons, 509 U.S. 259, 274 n.5 (1994)).

181. *Id*. at 584.

The court acknowledged that in normal circumstances, if a prosecutor knew the nature of the evidence but decided to use it anyway,[182] this may function as "a superseding or supervening cause of the violation."[183] Interestingly, Judge Flaum, who wrote the *Fields* opinion, was also on the panel that later decided *Whitlock*, yet there was no dissent in *Whitlock*.[184] How did the panel resolve this apparent conflict? The panel noted that the actual violations in *Fields* were during the assistant state attorneys' roles as prosecutors and did not approach the *Fields* court hypothetical that supported the loophole.[185]

2. Shifting the "Balance"

The *Whitlock* decision clearly addresses the prosecutor loophole by finding liability for a prosecutor who initiates the due process violation before they are acting within their judicial capacity.[186] This makes logical sense; the prosecutor should be held to the same standard as the police officer if the prosecutor is in the same role. But, will this not undermine the rationale behind absolute immunity? Prosecutors are frequently involved in the investigatory stage of a case.[187] If prosecutors are not granted absolute immunity for their actions in court based upon the actions before trial, but instead qualified immunity, claims against prosecutors would likely need to proceed to discovery or trial to determine the facts of how the prosecutor was involved preprobable cause.[188] This would defeat the purpose of immunity to suit and the rationales advanced by courts.

In response, recent scholarly literature has argued that the "balance of evils" is not really a balance at all, as prosecutorial misconduct abounds and the original rationale behind absolute immunity is not justified in the current era.[189] Essentially, the argument is that limiting immunity, as the *Whitlock* court did, actually draws a new line that restores a balance that was lost.[190] The proponents of the causation approach argue that allowing absolute immunity would lead to unjust results: "There is almost no violation that a prosecutor could commit during an investigation, other than physically abusing a suspect, which would cause sub-

182. *Id.* at 583 ("The causal link between a police officer's fabrication and the victim's injury may be broken if that police officer tells a prosecuting attorney before trial about the fabrication.").

183. *Id*.

184. Judge Flaum wrote the *Fields* opinion and sat on the panel of *Whitlock*. *See Whitlock*, 682 F.3d at 570; Fields v. Wharrie, 672 F.3d 505, 508 (7th Cir. 2012).

185. *Whitlock*, 682 F.3d at 579–80.

186. *Id.* at 580.

187. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 734 n.50 (2001).

188. *See* Imbler v. Pachtman, 424 U.S. 409, 424–28 (1976).

189. Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 16–17 (2009).

190. *Id.* at 36 ("The pendulum on prosecutorial misconduct has swung too far.").

stantial harm until and unless the information was used in the course of the prosecution."[191]

Proponents of absolute immunity, including the courts, have argued that additional means of enforcing against misconduct exist where absolute immunity shields from Section 1983 claims: "immunity . . . does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law."[192]

Another check on prosecutorial misconduct could also involve professional discipline. Before turning to solutions outside of the Seventh Circuit's approaches, is it possible to legally reconcile the two opinions?

C. Are the Constitutional and Causation Approaches Irreconcilable?

The *Fields* court's constitutional analysis seems to directly conflict with the causation analysis employed by the *Whitlock* court. The constitutional analysis focuses on the timing of the constitutional injury as one of the determinative factors to the investigator-prosecutor loophole,[193] while the causation analysis examines only but-for and proximate causation and the rules of intervening causes.[194] Attempts to reconcile these two theoretical approaches will lend more insight into potential remedies that can address the dueling concerns.

1. Timing

The main logical support for the constitutional analysis is that because there is no duty or due process right under *Brady* for a defendant to receive exculpatory evidence or prohibit falsified evidence (or other acts that may result in a due process violation at trial) before probable cause, there is no violation of a constitutional right, and, therefore, there can be no injury at that point.[195] Thus, the timing of the injury determines the immunity afforded. Because the injury in these cases occurs at trial,[196] the prosecutor is afforded absolute immunity from the violation, even if the prosecutor was involved in a prejudicial role that created the

191. *Id.* at 35.

192. *Imbler*, 424 U.S. at 428–29.

193. *See* Buckley v. Fitzsimmons, 20 F.3d 789, 794 (7th Cir. 1994) ("The Supreme Court established a temporal line for absolute immunity: a prosecutor is not functioning as an advocate, and hence does not have absolute immunity, 'before he has probable cause to have anyone arrested.'").

194. *See* Whitlock v. Brueggemann, 682 F.3d 567, 578–79 (7th Cir. 2012).

195. Joy & McMunigal, *supra* note 161, at 25 ("When the same prosecutor creates fabricated evidence during an investigation and then uses it at trial, Judge Easterbrook placed the 'location' of the constitutional violation in the advocacy phase of the case and thus subject to absolute immunity."). "[T]he claims are unlikely to be cognizable under § 1983, since petitioner cites, and I am aware of, no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." Buckley v. Fitzsimmons, 509 U.S. 259, 281 (1993) (Scalia, J., concurring).

196. *See Whitlock*, 682 F.3d at 581–82 ("McFatridge is correct that the alleged constitutional violation here was not complete until trial.").

eventual violation.[197] To hold otherwise, under the constitutional approach, one would need to find a *Brady* right or similar disclosure right to targets of investigations before they have even been charged with a crime.[198]

Proponents argue that this disclosure would place undue burdens on investigators or harm the criminal process.[199] The logic goes, that if a court adopts the rule that fabricating evidence during the investigative phase violates due process under *Brady* (to close the loophole), then this also forces investigators to disclose such evidence, long before trial, and perhaps before probable cause.[200]

The causation approach, by not focusing on timing, seeks to avoid this result. By assuming that the injury does not happen until trial, it avoids the conclusion of requiring disclosure before any warrants have even been applied for and obtained.[201] Using tort theories of but-for and proximate causation, the causation approach assumes that the prosecutor's fabrication of evidence would only happen if it were to be used in trial, and therefore the timing of the actual injury at trial is not important to determine whether immunity exists.[202] For a causation analysis, intervening cause plays a more important role.

2. Intervening Cause

The constitutional approach clashes more directly with the causation approach in analyzing the intervening cause. This causation approach argument extends the logic of *Buckley* and *Jones*, in that a prosecutor who knowingly causes a *Brady* violation is an intervening act, even if the *same prosecutor* was the investigator responsible for the initial source of the violation.[203] Under the constitutional approach, because the prosecutor knows of the nature of the evidence and decides to use it at trial, that constitutes an intervening act to then shield the prosecutor from their earlier conduct as an investigator.[204]

197. *See id.* at 581; Joy & McMunigal, *supra* note 161, at 25.

198. *See Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

199. Andrew Smith, Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1962–62 (2008).

200. For example, in *Buckley*, Scalia noted in concurrence that the plaintiff did not even state a cognizable injury, since "no authority for the proposition that the mere preparation of false evidence . . . violates the Constitution." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring). The reverse of this logic would hold that a constitutional duty to pre-adjudicative exculpatory evidence would be required to have a valid constitutional or Section 1983 claim. *See also* Fields v. Wharrie, 672 F.3d 505, 516–17 (7th Cir. 2012) ("We explained that fabricating evidence, including in the form of testimony, is not an actionable constitutional wrong.").

201. *See Whitlock*, 682 F.3d at 581–82 (agreeing that the "alleged constitutional violation" at issue was "not complete until trial").

202. *See, e.g.*, McGhee v. Pottawattamie County, 475 F. Supp. 2d 862, 907 (S.D. Iowa 2007).

203. Buckley v. Fitzsimmons, 20 F.3d 789, 797 (7th Cir. 1994) ("Things would be different, we implied, if the prosecutors had known the truth and proceeded anyway, or if the prosecutors themselves had concocted the evidence, for then the immunized prosecutorial decisions would be the cause of the injury.").

204. *Id.*

Such a result may be logically sound, but is an affront to common sense. The causation approach realizes this and removes the loophole, a prosecutor cannot become his own intervening act. As the Second Circuit noted,"[i]t would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty."[205]

Of course, underlying these decisions are the primary concerns of Section 1983 and immunity: compensation and deterrence. Relying on when probable cause existed or the prosecutor's role in investigations might defeat the purpose of absolute immunity altogether, which is to protect the right to be free from suit, not just liability. Based on the legal analysis of the opinions above, there does not seem to be a simple solution that will address both concerns based on a "middle" ground in immunity rules applied by the courts without a serious expansion of a defendant's constitutional rights to *Brady* material in the prejudicial phase.[206]

This legal split does not address what approach courts should adopt to deter prosecutorial misconduct. Those who argue that changing immunity liability to close a loophole—that a few bad apples may take advantage of—will lead to throwing out the baby with the bathwater, voice a legitimate concern.[207] If courts are concerned with deterrence of such egregious conduct, then an analysis that focuses on efficiency and deterrence to a number of proposed approaches—including civil liability—is required to determine what may work best while maintaining protections for prosecutors from the threat of constant litigation.

D. Deterrence, Cost, and Proposed Solutions

Any approach to deterring prosecutor misconduct needs to balance two main concerns: how effectively, if at all, will the proposed action deter misconduct, and at what cost? To properly answer those questions, a more detailed understanding of how deterrence will be defined is in order. First, who is the target of the deterrence? What is likely to provide a strong deterrence? How will that deterrence be effectuated? Once a more complete construction of deterrence is formulated, and the relevant costs considered, proposed solutions will provide clearer answers.

205. Zahrey v. Coffey, 221 F.3d 342, 353 (2d Cir. 2000).

206. *Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

207. *See* Warren Diepraam, *Prosecutorial Misconduct: It Is Not the Prosecutor's Way*, 47 S. TEX. L. REV. 773 (2006).

1. Defining Deterrence

a. Who's Responsible?

There is a deceptively simple answer to who we are trying to deter: the prosecutors responsible for the misconduct. But are the prosecutors solely responsible, or is their misconduct the result of an office, municipal, or statewide culture and practice? How the target of deterrence is defined shapes the desired deterrence.

One method of deterrence, under a top-down theory, assumes that prosecutors are more likely acting under supervision and based on the culture, policy, or practices of their office.[208] This suggests that the target of deterrence should be at the office level, where more publicly visible and accountable supervisors can effectuate more sweeping changes affecting the entire staff.[209] Essentially, top-down theory posits that deterrence efforts focused at the top will be more efficient, and that punishing a single government official is unfair or arbitrary if he or she is simply responding to bureaucratic pressures or from a lack of training or supervision.[210] Because the policy making or higher level officials are also more likely to be politically visible and able to change policy and practices, top-down theory predicts that deterrence mechanisms that target supervisors are more effective at implementing change.[211]

Bottom-up deterrence theory takes the approach that those who commit the misconduct are not deterred by indirect supervisory policy but by direct deterrence to the individual's cost-benefit evaluation.[212] Given that there are approximately 25,000 assistant state prosecutors and 2100 chief prosecutors across the country[213] in over 2300 offices,[214] and that prosecutor turnover rate may be very high[215] as a means of moving on to more lucrative jobs,[216] bottom-up theory may be more salient then top-down theory predicts. Assuming that assistant prosecutors are re-

208. Levinson, *supra* note 143, at 408.

209. *Id.* at 350–53; Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. ILL. L. REV. 147, 185.

210. Kinports, *supra* note 209, at 185; Levinson, *supra* note 143, at 408.

211. *See* PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS xvii–xviii (1983) (noting that "supervisory or policymaking officials tend to be more visible, financially capable of satisfying a judgment, and well positioned to change official policy").

212. *See* Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 64–65 (2005) ("[E]ffective attempts to deter prosecutorial misconduct must focus on influencing the individual cost-benefit calculus of the low-level, transitory prosecutor.").

213. STEVEN W. PERRY & DUREN BANKS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2007 - STATISTICAL TABLES 4 (2011), *available at* http://bjs.gov/content/pub/pdf/psc07st.pdf.

214. *Id.* at 1.

215. *See* Ronald Wright & Marc Miller, *The Screening / Bargaining Tradeoff*, 55 STAN. L. REV. 29, 63 (2002) ("This level of experience comes at a premium in New Orleans, where the turnover among prosecuting attorneys is quite high. The average tenure of an ADA in the NODA office is around two years.").

216. *See* Dunahoe, *supra* note 212, at 59 ("Another equally plausible argument posits that state prosecutors seek to maximize *professional* gain. This distinction is not purely semantic. The office of State Assistant District Attorney is frequently but one pit stop on the highway to private sector employment.").

sponsible for a high percentage of misconduct may not be unreasonable: legal scholars highlighted four reasons in particular: (1) the large number of assistant prosecutors compared to supervisors, (2) less training and experience in criminal prosecutions than supervisors, (3) indirect accountability to the public for prosecutorial misconduct unlike supervisors who answer directly to the public, and (4) the difficulty of close supervision, especially in large offices.[217] Therefore, assistant prosecutors may have less supervision and more discretion over their caseloads than top-down theory assumes.

b. What Deters?

How does top-down or bottom-up theory approach the relevant government unit to be deterred, and what mechanisms does each theory recommend? Top-down theory focuses on the supervisor, and therefore the office as the unit to be deterred, while bottom-up theory focuses on the individual actors within offices. A top-down deterrence approach has historically focused on the office as a single entity, and when applying deterrence rationale, implicitly assumes that the government responds to deterrence incentives similarly to private actors.[218]

A critique of this rationale is its assumption that a government office will respond to deterrence incentives the same way that private market actors do, which may be unfounded and unrealistic.[219] In reality, prosecutor's offices may not respond to economic incentives via damages like private market actors, especially given how government budgets are legislatively determined.[220] A government office's main commodity is votes, not dollars, and thus are more likely to respond to political incentives instead of market.[221] Still, a top-down theory of deterrence provides potentially powerful and simple deterrent solutions by publicizing the wrongdoing of those who are most politically visible, such as supervisors or heads of departments.[222] But if leaving the deterrence of misconduct solely up to the political process and the public seems unwise, bottom-up theory provides additional ideas.

Bottom-up theory focuses on individual actors, using a simple model of behavior, that assumes rational actors try to maximize their person-

217. *Id.* at 62–63.

218. *See, e.g.*, City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) ("[T]he damages a plaintiff recovers contributes [sic] significantly to the deterrence of civil rights violations in the future."); Levinson, *supra* note 143, at 345 ("This substitution takes place routinely in discussions of constitutional remedies such as just compensation for takings, damages for constitutional torts, and the liability or property rule represented by the constitutional prohibition against federal 'commandeering' of state governments.").

219. *See* Levinson, *supra* note 143, at 345–47; Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants As Private Attorneys General*, 88 COLUM. L. REV. 247, 286 (1988).

220. *See* Dunahoe, *supra* note 212, at 99–100.

221. Levinson, *supra* note 143, at 345 ("Government actors respond to *political* incentives, not *financial* ones—to votes, not dollars.").

222. *See* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 860 (2001).

al utility.[223] In the case of prosecutors, there is a strong argument to be made that they are trying to maximize their professional gain.[224] This may mean that economic and political incentives may not deter misconduct but possibly even create perverse incentives.[225] Therefore, deterrence mechanisms that directly affect the individual actor and deter their opportunities for professional gain may provide the best methods for deterring misconduct. Focusing on individual deterrence studies in criminal law literature may provide insight into effective deterrence solutions.

c. How to Deter?

In an important article on deterrent effects in criminal law, Professors Robinson and Darley made a number of key observations based on empirical studies as to what variables actually affect deterrence for a population.[226] Given the focus of criminal deterrence on individual actors, this may prove particularly helpful to any bottom-up theory of deterrence of prosecutors, but also provides insights into top-down methods.

The first finding in that study was a positive correlation with the probability of punishment, meaning that a higher likelihood of punishment produced a higher deterrence effect, which also had a much greater deterrence effect than the severity of punishment.[227] Increasing the severity of punishment does less to deter than increasing the likelihood of being caught, even though to a rational actor, the deterrence effect should be the same.[228] This may have important implications on prosecutors as well, given that other forms of deterrence may have a small likelihood of success.[229]

The second important finding discussed was delay, where the greater the delay between a violation and punishment, the less of a deterrent effect, because the threat of the punishment was more heavily discounted, and because the individuals decoupled the punishment from the violation as a threat for future violation.[230]

223. *See* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976).

224. *See* Dunahoe, *supra* note 212, at 59.

225. Levinson, *supra* note 143, at 370 ("So long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will *never* deter a majoritarian government from violating constitutional rights, because the majority of citizens will gain more from the benefits of government activity than they lose from the taxes necessary to finance compensation payments to victims.").

226. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 992–95 (2003).

227. *Id.* at 992–94.

228. For example, to a rational actor, a ten percent chance to be caught for burglary with a penalty of ten years of jail time should provide the same deterrent effect as a fifty percent chance to be caught for burglary with a two year sentence, since the outcome for both equals one.

229. *See, e.g.*, Weeks, *supra* note 11, at 878 ("But the reporters reflect only a single case in which a prosecutor has been found guilty of a violation of this statute for a *Brady* violation."); Zacharias, *supra* note 187, at 744–45.

230. Robinson & Darley, *supra* note 226, at 994.

The last finding was the amount of punishment.[231] Interestingly, the authors noted that the time duration effect had very little deterrent effect, and studies seemed to suggest that the deterrent effect of punishment is much more closely tied with intensity, at peak and also at the end of punishment.[232]

Taking these findings into account, for any proposed mechanism of deterrence to maximize effectiveness, it should have a high probability of action for any violation, with little delay between the violation and punishment, and the punishment should not be based on duration but on intensity. The effectiveness of deterrence is not the only criteria we are concerned with; the costs of deterrence imposed also matter, or else the Supreme Court would not have been so concerned with prosecutorial immunity in the first place.

2. Efficiency Costs

This section will discuss the costs the immunity rules impose on the entire system through efficiency arguments. The argument for efficiency is simple: if a proposed method of deterrence is more efficient, resulting in an optimal level of deterrence, more total resources will be available.[233] Traditional law and economics measures efficiency based on two models: Pareto and Kaldor-Hicks.[234] A Pareto efficiency exists where any transaction or reallocation would make one person better off and no one worse off.[235] Under the Kaldor-Hicks model, efficiency is achieved where any gains to the beneficiaries are greater than the losses.[236] Thus, it seems the Kaldor-Hicks model provides more flexibility and is better suited to the realities of competing interests in immunity rules and prosecutor misconduct.

When applying economics to deterrence of prosecutor misconduct, we assume that the misconduct occurs because the expected benefits exceed the expected costs, whether tangible or not. Therefore, an economically efficient theory of deterrence should strive to impose only those costs necessary to deter the undesirable behavior, also known as "optimal deterrence."[237]

The optimal level of deterrence would be one that induces a prosecutor to act ethically and avoid misconduct, but does not reduce the level of desirable prosecutorial activity, zealously pursuing criminal proceedings.[238] Otherwise, the sanction will produce inefficiency on both sides. For example, if the sanction imposes very large fines, the threat of the fine will cause rational individuals to "'avoid lawful behavior at the edge

231. *Id*. at 994–96.
232. *Id*. at 994–95.
233. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 12–13 (6th ed. 2003).
234. *See id.*
235. *See id.* at 12.
236. *See id.* at 13.
237. Dunahoe, *supra* note 212, at 55.
238. *Id.* at 55–56.

of the 'forbidden zone' in order to minimize the probability of being falsely accused and convicted of the offense.'"[239] Another form of economic inefficiency is deadweight loss, where a form of sanction creates more total cost where a different from of sanction would deter equally.[240]

Applying the insight of prosecutor's incentives to maximize personal gain from above,[241] the possible solutions to deterrence, including money damages inherent in Section 1983 claims, will be analyzed to determine their likely effect on prosecutorial misconduct.

3. Proposed Solutions

a. Broadening Disclosure Rules

One solution is to broaden discovery rules, where defendants and their counsel have increased access to the prosecutor's evidence. Some argue the defense should have the ability to examine all evidence that will be used against them at trial,[242] while others propose essentially adopting the original *Brady* requirements into discovery,[243] beyond the standard of disclosure required by Rule 16 of the Federal Rule of Criminal Procedure.[244] Broader discovery has the obvious benefit of avoiding *Brady* violations before they can occur by forcing the discovery of exculpatory evidence prior to any harm. With access to investigative records, the defense has a better opportunity to find and pursue avenues to lead to the discovery of *Brady* material.[245] This also may lessen the institutional and political pressures for prosecutors to push weak cases to trial, or conversely, for defendants to proceed to trial when the prosecution has very strong evidence.[246] Given that current disclosure rules are criti-

239. *Id*. at 56–57 (2005) (quoting Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 636–37 (1982)).

240. For an example of this, see Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 636 (1982).

241. *See supra* Part III.D.1.c.

242. *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 306–09 (2008).

243. Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 111–12 (2004).

244. For example, Rule 16 requires disclosure of documents when "the item is material to preparing the defense; the government intends to use the item in its case-in-chief at trial; or the item was obtained from or belongs to the defendant." FED. R. CRIM. P. 16 (a)(1)(E).

245. Ephraim Unell, *A Right Not to Be Framed: Preserving Civil Liability of Prosecutors in the Face of Absolute Immunity*, 23 GEO. J. LEGAL ETHICS 955, 967–68 (2010) ("With access to the complete investigation records, defense counsel can identify alternative suspects ignored by the investigation, questionable identifications, or obtain exculpatory evidence.").

246. Smith, *supra* note 199, at 1961–62; *see also* Don DeGabrielle & Mitch Neurock, *Federal Criminal Prosecutions: A View from the Inside of the U.S. Attorney's Office*, HOUS. LAWYER, (Nov./Dec. 2005), http://www.thehoustonlawyer.com/aa_nov05/page32.htm ("This open discovery process frequently impels defendants to opt for a guilty plea rather than trial.").

cized for actually encouraging prosecutors to withhold potential *Brady* material,[247] enhanced discovery could play a powerful deterrent.

A key criticism of broader discovery is that it assumes that prosecutors either do not engage in *Brady* violations out of bad faith, or, when they do, do so because of pressures outside of their control, such as supervisors, upcoming elections, or victims themselves.[248] While this may be the case, this criticism does not address the loophole and fails to recognize that prosecutors are usually involved in the investigatory phase of the case.[249] Another criticism is that broader discovery will reveal too much information, which could compromise the investigative process, the safety of witnesses, and the prosecutor's adversarial role and effectiveness.[250]

Remedies to these criticisms could involve allowing prosecutors to withhold disclosure upon a showing of cause to a court,[251] providing legislative requirements for discovery, and increased liabilities for prosecutors in state law.[252] Enhancing disclosure requirements and liabilities may lead to fewer due process violations by prosecutorial misconduct, but the success of such measures heavily relies on state legislative efforts to impose such requirements.[253] Otherwise, such office policies may only provide another layer of reliance that leads to a defendant's detriment when a prosecutor acts in bad faith.

Requiring more extensive disclosure may avoid the immunity question altogether. By providing full disclosure, courts could find that the functional aspect of the prosecutor would still be given absolute immunity, even if engaged in the activity in *Whitlock*, because the disclosure would act as an intervening cause, shifting the burden to the defense. This assumes, however, that prosecutors acting in bad faith would disclose such evidence. Given that withholding evidence under an open-file regime would still occur during the judicial phase, the constitutional and causal theories still seem to create different results in liability for prosecutors.

From a deterrence aspect, adopting broad discovery rules could be effective, depending on the punishment. Violations of legally mandated discovery that impose personal punishment upon the prosecutors would be required. For example, public censure, fines or criminal sanction of a prosecutor are likely to affect a prosecutor's personal gain calculus for violating such discovery rules by decreasing their reputation and impos-

247. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 439 (1992) ("Thus, by avoiding any inquiry into the prosecutor's culpability, and focusing entirely on the materiality of the evidence, the Court encourages prosecutors, even ethical prosecutors, to withhold evidence.").

248. Smith, *supra* note 199, at 1961.

249. For a discussion on the pressures of prosecutors to be involved in the investigatory phase, and how this can lead to misconduct, see Brink, *supra* note 189, at 33–34.

250. Smith, *supra* note 199, at 1962–63.

251. *Id.*

252. *Id.* at 1964–66. Unell, *supra* note 245, at 968 ("If full open-file discovery was the law in every American jurisdiction, then there might not be much need for the enhancement of other mechanisms to reduce prosecutorial misconduct.").

253. *See id.* at 968–69.

ing personally intense punishments.[254] This form of punishment would be especially useful if violations of discovery rules were not indemnified by the government,[255] as opposed to Section 1983 claims, which are almost always indemnified by the government.[256] How such violations would be policed is also extremely important, as the diligence of imposing sanctions will directly affect the deterrence effect through the probability function previously discussed.[257]

But broadening discovery rules could prove inefficient. If the government is required to disclose all materials, more cases may end up at trial, resulting in fewer resources for prosecutors to pursue other cases.[258] Additionally, such a discovery rule would apply to *all* prosecutors, not just to those engaged in misconduct such as withholding exculpatory evidence or fabricating evidence. This brings us back to the simplest criticism of incorporating a *Brady* standard in disclosure rules: why codify *Brady* disclosures when they already are required?[259] Would codification provide additional incentives for prosecutors to avoid misconduct who are intentionally acting in bad faith? A functional immunity doctrine would still shield such prosecutors. But, adopting enhanced disclosure rules as a means of deterrence is only as effective as its enforcement.

b. Disciplinary Actions

Another potential source of deterrence is disciplinary action, based on state adopted American Bar Association rules.[260] These systems normally involve a hearing committee that receives complaints by individuals, which may result in an investigation, notice, and a hearing.[261] If the committee finds the conduct is serious, a disciplinary board will issue sanctions.[262] Yet disciplinary actions have not always acted as a meaningful check. A number of studies focusing on the rates of disciplinary actions against public prosecutors found these rates to be incredibly small compared to the number of prosecutors and cases that are brought each year.[263] One study found only forty-four cases since 1970 where the prosecutor was disciplined for misconduct that infringed on due process or

254. *See* Dunahoe, *supra* note 212, at 57–71 (2005).

255. For example, New York City's municipal law § 50-k does not indemnify employees for actions that were "in violation of any rule or regulation of his agency at the time the alleged damages were sustained." N.Y. GEN. MUN. LAW § 50-k(3) (McKinney).

256. *See* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987).

257. *See supra* Part III.D.1.c.

258. *But see* Smith, *supra* note 199, at 1961–62.

259. This would be based upon the defendant adjusting their perceived odds of being successful in court. This is analogous to litigants deciding to settle versus go to trial. For an analysis of the effects of information on bargaining, see ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 391–403 (6th ed. 2012).

260. Rosen, *supra* note 60, at 708–09, 715.

261. *Id*. at 716–17.

262. *Id*.

263. Zacharias, *supra* note 187, at 744–45; Neil Gordon, *Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct*, THE CTR. FOR PUB. INTEGRITY (Aug. 4, 2011 3:06 PM), http://www.publicintegrity.org/2003/06/26/5532/misconduct-and-punishment.

the overall fairness of the trial.[264] In total, the prosecutor was either suspended or disbarred in only fourteen cases.[265]

There are numerous reasons for why disciplinary actions are so low. Some suggest that because prosecutors do not have clients, which would be the normal method of filing a complaint, there is no check against misconduct.[266] Others also opine that the relationship prosecutors have with defense attorneys and judges may increase the hesitancy of their colleagues to file complaints.[267] Fears of interfering with the judicial process also may inhibit disciplinary authorities from taking action.[268]

As a deterrent mechanism, the probability of sanction seems to be the largest barrier to disciplinary actions' effectiveness. Given the lack of clients and regular checks to enforce disciplinary actions against prosecutors, and the uncertainty of punishment by disciplinary boards, this method would not seem to provide a strong deterrent effect.[269] Even if disciplinary actions were vigorously enforced, without clear standards as to what conduct would result in which sanction, this could also create inefficient deterrence, either by overdeterring legitimate prosecutor work or underdeterring prosecutor misconduct.[270]

c. Compensation

The primary remedial mechanism of Section 1983 is monetary compensation, along with other statutory remedies compensating those exonerated for wrongful convictions.[271] Thus, prior to filing a Section 1983 claim, a number of jurisdictions provide a monetary compensation mechanism for exoneration alone,[272] though there are typically substantial hurdles to overcome to win this kind of compensation.[273]

The primary arguments in favor of compensation are the deterrence effects on prosecutorial misconduct and providing fair redress for the wronged party.[274] By imposing significant costs on the state for the wrongful convictions, internalizing this cost will to pressure prosecutors to avoid convictions based on such mistakes or bad faith.[275]

Criticisms of compensation as punishment are that such schemes must be adopted on a state-by-state basis, similar to the discovery solution, and to deter conduct must be implemented effectively to provide

264. Gordon, *supra* note 263.
265. *Id*.
266. Brink, *supra* note 189, at 26.
267. *Id*.
268. *Id.*
269. *See id.* at 28.
270. Zacharias, *supra* note 187, at 754.
271. Unell, *supra* note 245, at 968.
272. Adam I. Kaplan, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 234 (2008) ("Currently, twenty-two states, the District of Columbia, and the federal government have enacted statutes establishing a claim against the government for wrongful conviction and incarceration.").
273. *Id*. at 234–35.
274. *Id.* at 240–46.
275. *Id*. at 240–41.

the needed amount of compensation without undue burdens.[276] Furthermore, since these costs are imposed on the state and not the individual prosecutor, monetary compensation may not provide effective deterrence on the real wrongdoer.[277] Considering rogue prosecutors acting in bad faith coupled with the fact that prosecutorial misconduct amounting to *Brady* violations often goes undiscovered, requiring states to pay monetary compensation may not provide a strong enough deterrent to remedy the prosecutor-investigator loophole.

From a bottom-up or top-down approach, both Section 1983 and exoneration statutes providing compensation underdeter as the system is currently applied. Because most prosecutors are indemnified from civil liability,[278] and a prosecutor office's budget may not be affected by the sanction, there is likely to be little deterrent effect, since prosecutors are unlikely to suffer much personal gain or pressure from supervision.[279] Ways to incorporate compensation that are better able to deter misconduct involve changing indemnification rules, and possibly reincorporating fault-based determinations in qualified immunity.[280]

From an efficiency standpoint, monetary sanctions are preferable to criminal sanctions, since there is no deadweight loss problem of having to pay for both jail and a replacement prosecutor. But while money damages may be superior from an efficiency standpoint, there does not appear to be a strong argument in favor of its deterrent power.

d. Criminal Sanctions

A solution previously discussed, one that may provide a very strong specific deterrent effect on prosecutors, is to enhance and expand the use of criminal sanctions for *Brady* violations.[281] Such a remedy already exists, codified at 18 U.S.C. §§ 241, 242, which holds any government agent criminally liable for depriving someone of their constitutional rights, or conspiring to create such a deprivation.[282]

Criminal prosecutions may provide a strong deterrence effect on prosecutors for fear of being prosecuted themselves.[283] As Section 242 is a criminal statute, a claim cannot be brought by anyone; only other prosecutors may bring such actions.[284] This also addresses one of the primary concerns of dissolving absolute immunity for prosecutors; anything less

276. Unell, *supra* note 245, at 968.
277. *Id*.
278. *See* Eisenberg & Schwab, *supra* note 256, at 686.
279. Dunahoe, *supra* note 212, at 100.
280. *Id.* at 104–05.
281. *See* Smith, *supra* note 199, at 1966–71.
282. 18 U.S.C. § 241 (2006); 18 U.S.C. § 242 (2006). Section 241 is a criminal conspiracy statute for the deprivation of rights, while section 242 is a criminal statute for the actual deprivation of rights.
283. Smith, *supra* note 199, at 1971.
284. *Id.* at 1968.

may result in constant litigation against prosecutors and hinder their ability to do their job.[285]

An obvious conflict arises, though, under this proposal. Section 242 relies on prosecutors prosecuting their own. If prosecutors decline to take such measures, this mechanism breaks down.[286] Also, criminal prosecutions seem to be very infrequent.[287] One scholarly article noted that it had found only one case of a prosecutor being found guilty under Section 242.[288] Given the infrequent use of Section 242, even with oversight from the federal government into state prosecutors' actions, such remedies are unlikely to be used effectively.[289]

But while the scholarly literature has found very few instances of Section 242 cases brought against prosecutors, the Federal Justice Statistics Resource Center ("FJSRC") data sets, which were publicly available until recently,[290] contain all Section 241 and 242 cases decided in federal court from 2006–2009, and are likely to paint a more accurate picture.[291] Examining this data points to a higher usage of Section 242, although whether these charges were brought against prosecutors or other law enforcement officials is unknown.[292]

For approximately 95,000 criminal defendants whose cases were decided between 2006–2009, eighty-four defendants were charged under Section 241, Section 242, or both.[293] The outcomes for these defendants are represented in the graph below:

285. Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976).

286. Smith, *supra* note 199, at 1968.

287. *Id.* at 1966–67.

288. Weeks, *supra* note 11, at 878 ("But the reporters reflect only a single case in which a prosecutor has been found guilty of a violation of this statute for a *Brady* violation.").

289. Smith, *supra* note 199, at 1971 n.200.

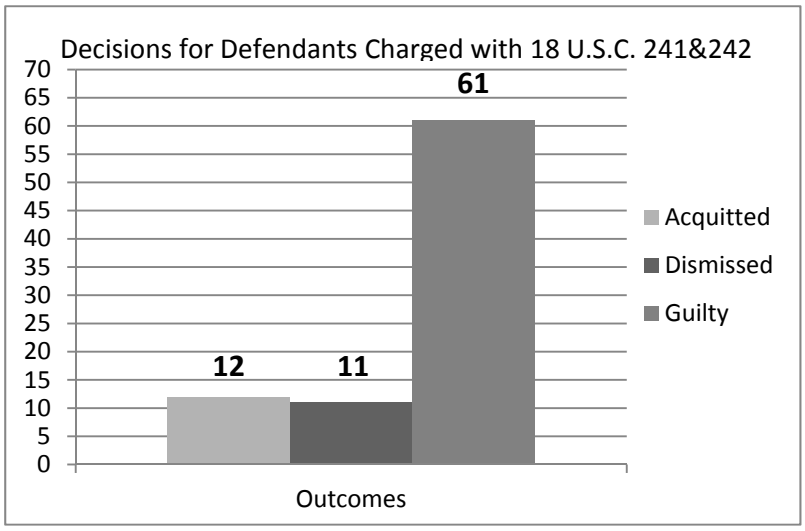
290. Federal Justice Statistics Resource Center a project of the Bureau of Justice Statistics, URBAN INSTITUTE, http://fjsrc.urban.org/index.cfm. The information is now hosted at the Federal Justice Statistics Program: Linking Data file, 1994–2005 [United States], NATIONAL ARCHIVES OF CRIMINAL JUSTICE DATA (2010), http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/24821/version/2.

291. Data on file with author.

292. The data was made anonymous so there was no way to verify who the defendants were.

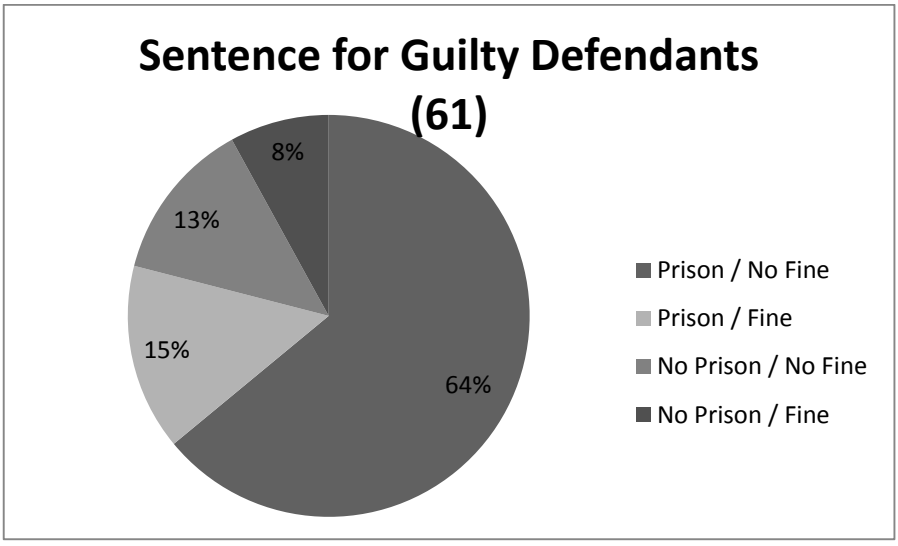
293. Data on file with author.

GRAPH 1: OUTCOMES OF DEFENDANTS CHARGED UNDER 18 U.S.C. §§ 241, 242.[294]



Based on this data, of the eighty-four defendants charged under Sections 241 and 242, seventy-three percent of defendants were found guilty, either through plea bargaining or trial.[295] The outcomes for those found under Sections 241 and 242 are displayed below:

GRAPH 2: SENTENCING OUTCOMES FOR DEFENDANTS GUILTY OF 241 & 242.[296]



294. Data on file with author.
295. Data on file with author.
296. Data on file with author.

Out of the 61 defendants found guilty, seventy-nine percent served prison time.[297] The average prison sentence was 73 months, the median 57 months, with the shortest length of time served being one month, and the longest 300 months.[298] twenty-three percent of defendants fined faced an average fine of $3,364, with the median being $2250, the smallest $1, and the largest fine amounting to $12,500.[299]

The penalties for violating Sections 241 and 242 are certainly severe, but the question remains: how many of these defendants were prosecutors? Still, the FJSRC data shows that these statutory criminal remedies are being used by prosecutors, and on average, the outcomes for those charged do not favor the defendants.[300]

From a deterrence standpoint, public criminal sanctions could provide one of the strongest possible deterrents to individual prosecutor misconduct.[301] Given the severity of a possible felony with substantial prison time and fines, this is likely to provide a credible threat to misconduct. Also, because Sections 241 and 242 require intent, these provisions are more likely to target prosecutors who commit the most egregious violations. An intent requirement may also make it difficult to succeed in such cases.[302] For criminal sanctions to be effective, the probability of punishment, based on the effectiveness of self-policing by prosecutors, will determine the remedy's effectiveness.

Unfortunately, evaluations of criminal sanctions' effectiveness do not indicate that the lack of disciplinary or criminal actions brought against prosecutors is because the rate of violations is too low to warrant action.[303] More likely, justifications for such low usage only support the idea that disciplinary actions and criminal charges are underutilized, which seems to provide ammunition for maintaining civil liability and adopting a causation immunity doctrine. But given the likely ineffective deterrence of monetary compensation on prosecutors, is that a bad option, or do the political realities make it the better of two evils?

IV. RESOLUTION

As many of the proposed solutions above are not likely to prevent prosecutorial misconduct alone in the short term, what should the Seventh Circuit hearing a case of prosecutorial immunity do? I propose using every tool they have, but that applying a causation immunity rule is not the best solution for deterring misconduct, except in "failure to train" cases. Thinking long term, how should the legal system try to deter misconduct to achieve greater efficiency? I propose that broadening discov-

297. Data on file with author.
298. Data on file with author.
299. Data on file with author.
300. Data on file with author.
301. Dunahoe, *supra* note 212, at 84–85.
302. *Id.* at 85.
303. *Id.* at 83–89.

ery rules and increasing criminal sanctions provide the best options, with changing qualified immunity standards for prosecutors as a possible last resort in conjunction with the proposed solutions. Last, with the increased research and focus on exonerations and prosecutor misconduct, what empirical projects should be done next to shed light on solutions to deter misconduct? I reason that comparative studies of jurisdictions with differing rules of rights and remedies will provide meaningful data and advance our understanding of deterrence of prosecutors and government agents in general.

A. What's a Seventh Circuit Judge to Do?

Throw the book at prosecutorial misconduct, specifically the individual prosecutor. If an exonerated individual sues a prosecutor under Section 1983 for withholding *Brady* material in a situation similar to *Whitlock*, a judge may likely be dealing with a prosecutor acting in bad faith, who knew exactly what he or she was doing. In that case, the judge should take all steps to lower the expected—or at this point, actualized—benefits that the prosecutor may have received, and increase the costs. Taking a bottom-up approach to deterrence, this includes public censure of the prosecutor by the judge,[304] recommending the prosecutor for disciplinary sanctions to the bar,[305] and even recommending a criminal investigation. Because no one method is likely to exceed the expected benefits due to the low probability of successful enforcement,[306] combining multiple methods will increase the probability of a successful sanction, thereby increasing the costs of misconduct.[307]

Changing immunity doctrine to increase the odds of compensatory damages being awarded is not likely to provide a strong deterrent, especially for individual prosecutors, under a bottom-up deterrent theory.[308] In fact, the decision to change the prosecutorial immunity doctrine is mostly justified by theories of corrective justice, and therefore justices should hesitate to change immunity rules if they believe it will deter individual prosecutors. Judges that maintain the constitutional approach of immunity doctrine while using every other tool at their disposal are likely to provide more deterrence than changing immunity liability alone.[309]

There is an area of Section 1983 litigation, however, where compensatory damages and immunity rules may play an important role under top-down theory: failure to train claims.[310] Because failure to train claims are based on the patterns of misconduct within an entire office based on policy or custom,[311] top-down theory would recommend compensatory

304. *Id.* at 72–76.
305. *Id.* at 76–83.
306. *Id.* at 87–88.
307. *Id.* at 109–10.
308. Levinson, *supra* note 143, at 370.
309. *See supra* Part III.A, B.2, D.3.
310. *See, e.g.*, Connick v. Thompson, 131 S. Ct. 1350 (2011).
311. *See id*. at 1359.

damages assessed against the office to provide a general deterrence mechanism. This is not to say that other methods should not be employed. In fact, given the greater public visibility of supervisors who will be subject to failure to train cases, censure and recommendations to disciplinary bars are likely to provide just as powerful deterrent incentives as they do in a bottom-up rationale.[312] Looking beyond the short term, broadening discovery rules and increasing criminal sanctions provide the best long term solutions, but if all else fails, changing qualified immunity standards for prosecutors could be a possible last resort.

B. Long Term Solutions

1. Broaden Discovery and Enforce it

Of the proposed methods discussed above, broadening discovery may provide the best deterrence and also decrease the dead-weight loss to innocent defendants from wrongful convictions.[313] As discussed previously, if discovery rules adopted *Brady* requirements to a more open-file system, as some jurisdictions do,[314] this would alert defendants to possible *Brady* material, taking the decision whether or not to disclose out of the hands of prosecutors, and increasing the costs of misconduct. But where broadening discovery rules plays an important deterrence role is in its enforcement.

Unless violations of discovery are enforced, prosecutors acting in bad faith will still be shielded from civil liability under absolute immunity for not disclosing information. Therefore, violations of disclosure should be enforced by the appropriate government, and governments should withhold indemnification for disclosure violations as acting outside the scope of their duties. Unfortunately, arguing that the government would adequately enforce disclosure violations does not seem realistic given the historical lack of self-policing.[315]

In that case, another solution is for the government to allow private litigants to sue for discovery violations, similar to *qui tam* suits through the False Claims Act.[316] This would allow a private litigant to bring a discovery violation suit where the government both declines and allows the private suit.[317] This may essentially allow defendants to get around the Section 1983 immunity doctrine and impose sanctions against the individual, or mandate disclosure, or both.

The government already allows similar actions in employment discrimination claims through the Equal Employment Opportunity Commission ("EEOC") and in environmental law statutes, where the gov-

312. *See supra* notes 289–90 and accompanying text.
313. *See supra* Part III.D.3.a.
314. Gershman, *supra* note 13, at 726.
315. *See supra* Part III.D.3.d.
316. 31 U.S.C. § 3730 (1994); Gilles, *supra* note 205, at 877–78.
317. Gilles, *supra* note 222, at 877.

ernment may enforce or allow private citizens to sue.[318] This kind of joint public-private enforcement of disclosure rules would greatly increase the probability of enforcement, which will provide the greatest cost to prosecutors engaging in misconduct. A party who is currently a defendant at trial would not be allowed to bring suits, since this would likely become a delaying tactic for any and all defendants. Assuming this creates a higher enforcement rate, the penalties for disclosure violations could be adjusted to avoid dead-weight loss, while including a range of monetary or nonmonetary sanctions, such as public censure, disciplinary proceedings, and possible monetary compensation. Compensation would only be effective, however, if the prosecutor were not indemnified under state or municipal law.[319]

2. Criminal Sanctions

Criminal sanctions provide perhaps the harshest but most effective deterrence. When it comes to egregious prosecutorial misconduct, where the beneficial utility may be zero and there is no suboptimal level of deterrence due to the severe nature of the harm,[320] criminal sanctions may be the best means of stopping the "bad apple" prosecutor from malicious misconduct.

Additionally, due to the intent requirement under Sections 241 and 242, the statute already filters honest but mistaken prosecutors from those acting maliciously or purposefully to violate the rights of criminal defendants.[321] Thus, potential concerns of overdeterrence are less applicable because the type of prosecutorial conduct at issue is likely to have zero social benefit[322] and the standard for finding criminal intent will probably create the barrier necessary to separate egregious crimes from honest prosecutorial discretion.

While criminal sanctions impose economic dead-weight loss,[323] the long delay between violation and punishment is likely to cause some amount of underdeterrence for any of the aforementioned sanctions.[324] Therefore, an intense punishment may help offset the delay effects.[325] Of course, probability will be the most important determinate of effectiveness and there will need to be significant strides made in enforcement mechanisms, but as shown above, there may already be a greater likelihood to prosecute under Sections 241 and 242 than previously realized.[326]

318. Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1418–20 (2000).

319. *See* Dunahoe, *supra* note 212, at 64–65 (2005); *see, e.g.*, N.Y. GEN. MUN. LAW § 50-k(3) (McKinney) (not indemnifying state employees for actions that were "in violation of any rule or regulation of his agency").

320. Levinson, *supra* note 143, at 367–68.

321. *See* 18 U.S.C. § 241 (2012); 18 U.S.C. § 242 (2012).

322. *See* Levinson, *supra* note 143, at 368–69.

323. *See supra* Part III.D.3.d.

324. *See supra* Part III.D.1.c.

325. *See* Robinson & Darley, *supra* note 226, at 994–95.

326. *See supra* Part III.D.3.d.

Courts also must make sure that criminal sanctions are made public, as increased public awareness of criminal sanctioning of prosecutors is likely to have a general deterrent effect.[327] Given the concerns of probability and publicity, criminal sanctions of prosecutors is still probably the most single effective form of bottom-up deterrence on individual prosecutors.

3. Incorporate Fault into Qualified Immunity for Prosecutors

If enforcement for discovery violations and criminal sanctions do not become a reality or focus in the future, or if the deterrence effects turn out to be comparatively weak, another remedy could be to reincorporate fault into qualified immunity for prosecutors. Before *Harlow v. Fitzgerald*, qualified immunity contained a good faith subjective element.[328] The subjective element required that the prosecutor "*knew or reasonably should have known* that the action he took . . . would violate the constitutional rights of the [plaintiff], *or* . . . took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury."[329] This would require the Supreme Court to revisit qualified immunity for prosecutors, but given the federal common law nature of Section 1983 immunity,[330] there is no reason (beyond *stare decisis*) why the Court could not revert qualified immunity to its original formula.[331]

Qualified immunity, as applied to prosecutors, could be tailored specifically, mimicking the current qualified immunity doctrine used for police officers. Reinstating the good faith subjective test in qualified immunity would close the loophole that the *Whitlock* court tried to eliminate.[332] By applying the malicious intent prong of the good faith element, the qualified immunity doctrine would likely catch prosecutors such as those in *Whitlock*—it would be hard to argue that a prosecutor knowingly fabricated false evidence and then brought that same evidence to trial to convict someone of murder, and yet lacked any sort of malicious intent. This also has the benefits of closing the loophole under the *functional* standard of the *Fields* court because the malicious intent question would be gauged at the time of the fabrication, and the timing of the injury would be irrelevant because the prosecutor would fail qualified immunity before any determination of absolute immunity would occur.[333]

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327. *See supra* Part III.D.1.b.

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

329. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

330. *See* Imbler v. Pachtman, 424 U.S. 409, 422–23, 423 n.20 (1976).

331. *See, e.g.*, Ilya Shapiro & Nicholas Mosvick, *Stare Decisis After* Citizens United*: When Should Courts Overturn Precedent*, 16 NEXUS: CHAP. J.L. & POL'Y 121, 123 (2011) ("Ultimately, while stare decisis plays an important part in the Court's decision-making, it is not 'an inexorable command' but rather a 'principle of policy.'").

332. *See supra* Part III.B.1.

333. For an argument that Section 1983 already requires a fault element, see John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998).

Concerns over efficiency losses due to increased litigation and discovery from Section 1983 claims are valid, but if this standard increased the probability of sanctions on a prosecutor, it may also deter and decrease the rate of prosecutorial misconduct.

To determine the actual impacts of any of the proposed solutions, legal scholarship needs increased empirical research into these deterrence methods. Luckily, natural experiments already exist in federal courts, and some of the data is already being collected.

C. Empirical Investigations

While many articles theorize what methods of deterrence will be effective,[334] no article has obtained the comprehensive data needed to conduct empirical tests of scholarly hypotheses. There are a number of studies on criminal exonerations,[335] prosecutorial misconduct,[336] error rates in capital cases,[337] and large and comprehensive datasets of criminal cases in federal courts,[338] but there has not been any work combining the proposed methods of deterrence with empirical data.

The biggest hurdle to this research is the lack of data and the complexity of the issue. Any empirical work on the case outcomes involving prosecutorial misconduct and the remedies and rights afforded in a jurisdiction will provide complicated, and perhaps weak, correlations; however, there may be some low-hanging fruit. For example, some federal district courts, such as those in Massachusetts, have adopted much broader disclosure requirements that essentially enforce *Brady* and create a more open-file discovery regime after witnessing years of misconduct.[339] If the national federal criminal case dataset were available, and if an analogous civil docket dataset existed, and neither were anonymous (to a point), it would be possible to compare those specific federal courts in Massachusetts to similar federal courts, ideally only differing in their discovery rules. Then, if other remedies and rules were held similar, (such as amount of court censure, criminal sanctions brought, bar disciplinary actions, and prosecutor's office internal rules regarding disclosure), researchers could evaluate the potential effects of varying discovery rules on the amount of prosecutor misconduct, exonerated individuals, reversal rates of sentences imposed, successful conviction rates, and Section 1983 claims against prosecutors for misconduct involving *Brady* material.

334. *See, e.g.*, Dunahoe, *supra* note 212, at 50; Gilles, *supra* note 222, at 848–49; Kaplan, *supra* note 272, at 230–31; Levinson, *supra* note 143, at 367–73; Unell, *supra* note 245, at 968.

335. *See, e.g.*, Gross, *supra* note 140.

336. RIDOLFI & POSSLEY, *supra* note 127, at 2.

337. LIEBMAN ET AL., *supra* note 138, at i–ii.

338. Bureau of Justice Statistics, U.S. Dep't Justice, *Federal Justice Statistics Program: Linking Data file, 1994 - 2005 [United States]*, NAT'L ARCHIVE OF CRIM. JUST. DATA (Mar. 8, 2011), http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/24821/version/2.

339. Gershman, *supra* note 13, at 726.

So far, the data has been gathered in numerous localities, such as California, on a number of these issues already.[340] Given that Sections 241 and 242 are criminal statutes, the criminal national data set should be released to the public, and civil proceedings, which are all public, could then be analyzed to determine rates of Section 1983 claims in jurisdictions as well.

Another possible comparative study would be on the effects of the differing immunity rules involved in *Whitlock* and *Fields* themselves. While the Seventh Circuit historically has applied functional immunity doctrine,[341] the Second and Eighth Circuits follow the same reasoning as *Whitlock*.[342] In theory, there should be federal courts on either side of the split circuits with similar discovery rules, and comparative rates of other remedial measures and internal prosecutor office procedure, which could provide a potential ground for better isolating and studying the effects of the immunity rules. This should also allow for a simple comparison between relevant rates of misconduct, *Brady* violations, successful conviction rates, and liability imposed overall. Such comparisons are significant: results could finally provide an empirical answer to the question of whether the *Whitlock* or *Fields* court provided the correct deterrence justification to prosecutorial misconduct.

V. CONCLUSION

Section 1983 is an important tool for citizens to protect their rights from government misconduct. Accordingly, it may serve important corrective justice issues as well as possible deterrence remedies to misconduct through monetary compensation. Section 1983 litigation raises serious concerns, however, around the administration of the justice system. In response, the courts have granted prosecutors immunity from certain liability as a rough method of protecting against overdeterrence. But from this immunity regime, loopholes have been created that any prosecutor, if they chose to, could take advantage of to unjustly convict and rob citizens of a fair trial.

With increasing awareness of exonerations of wrongfully convicted individuals and the empirical work highlighting the rate of prosecutorial misconduct and error rates in capital cases, courts have tried to reshape the immunity doctrine to provide what is assumed to be underdeterrence of prosecutors from engaging in misconduct. The courts and legal scholars, however, are missing the connection between empirical research to their theories of deterrence to determine whether these proposed deterrence methods are ineffective, inadequate, or inefficient.

Given the serious issues at stake, one can understand why courts apply the causation analysis to close what they consider to be a glaring

340. RIDOLFI & POSSLEY, *supra* note 127, at 2.

341. *See* Buckley v. Fitzsimmons, 20 F.3d 789, 794 (7th Cir. 1994).

342. McGhee v. Pottawattamie Cnty., 547 F.3d 922, 933 (8th Cir. 2008); Zahrey v. Coffey, 221 F.3d 342, 356–57 (2d Cir. 2000).

loophole in the criminal justice system. While these efforts certainly increase remedial opportunities for those wrongfully convicted, when balanced with the policy considerations of prosecutorial immunities, more research and empirical work must be done to determine if the changes in immunity doctrine serve the deterrence goals, and if not, what does. Only then can we really know if *Whitlock* got it right.