Turn It Over Or Else: Removing Absolute Immunity for Prosecutors Who Fail To Disclose Exculpatory Evidence

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Introduction

On December 29, 2018, Leon Haughton was returning from an extended vacation in Jamaica when Customs agents detained him and searched his baggage.[1] The agents discovered three plastic containers labeled "Honey."[2] The agents performed a field drug test on the substance inside the containers, which came up positive for methamphetamines.[3] Based on the drug test, Haughton was arrested and charged with felony and misdemeanor drug crimes.[4] As he was a permanent resident alien, Haughton was placed on an Immigrations and Customs Enforcement (ICE) detainer and denied bail.[5] In January, the Maryland State Police laboratory tested the substance from Haughton's containers and found no trace of any controlled dangerous substance.[6] These test results were sent to William Katcef, the prosecutor in charge of the case against Haughton.[7] Despite this, Haughton was not released from detention until March 21, 2019, when Katcef entered a *nolle prosequi* to the final charge against Haughton.[8]

Haughton filed suit against Katcef, alleging Katcef knew he was innocent of the charges against him but maintained the prosecution to

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1 Haughton v. Katcef, No. 223, 2022 Md. App. LEXIS 137, at *1 (App. Feb. 24, 2022). Thanks to the Institute for Justice for highlighting this case. *See Prosecutorial Immunity*, Inst. for Justice, https://ij.org/immunity-for-prosecutorial-conduct/ (last visited Jan. 7, 2023).

2 *Haughton*, 2022 Md. App. LEXIS 137, at *2.

3 *Id.* at *2–3.

4 *Id.* at *3.

5 *Id.*

6 *Id.*

7 *Id.* at *1, *3.

8 Haughton v. Katcef, No. 223, 2022 Md. App. LEXIS 137, at *4 (App. Feb. 24, 2022). *Nolle prosequi* is "a legal notice that a lawsuit or prosecution has been abandoned." *Nolle prosequi*, Black's Law Dictionary (11th ed. 2019).

keep the ICE detainer in place.[9] Katcef moved to dismiss the complaint, arguing he was immune from liability under the doctrine of absolute prosecutorial immunity.[10] Under the common law doctrine of absolute prosecutorial immunity, Katcef would be immune from liability for any decision made in a criminal prosecution.[11] The Maryland Court of Special Appeals held that Katcef's decision to continue prosecuting Haughton fell under his role in the judicial process, and he was therefore entitled to absolute immunity.[12] As a result, the complaint against Katcef was dismissed, and Haughton was left without recourse for his eighty-three-day-long detention.[13]

Haughton v. Katcef was decided under Maryland common law,[14] but the result would have been the same under federal law. In *Brady v. Maryland*, the Supreme Court held that it is a due process violation for a prosecutor to suppress evidence favorable to the accused.[15] In *Imbler v. Pachtman*, however, the Supreme Court unanimously held that 42 U.S.C. § 1983, the federal statute that holds state officials civilly liable for violating constitutional rights, implicitly incorporated the common law doctrine of absolute prosecutorial immunity.[16] And federal courts have repeatedly held that prosecutors who suppress favorable evidence are entitled to absolute immunity from civil suits.[17]

This Comment will argue that the extension of absolute prosecutorial immunity to *Brady* violations has left due process rights insufficiently protected, and has left many wrongfully accused or convicted people without compensation. Part I will discuss the origins and current status of the prosecutorial duty of disclosure, and the doctrine of absolute prosecutorial immunity. Part II will discuss why current penalties are not sufficient to deter prosecutors from withholding exculpatory evidence. Part III will advocate for the removal of absolute

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9 *Haughton*, 2022 Md. App. LEXIS 137, at *4–6.

10 *Id.* at *6.

11 *Id.* at *8.

12 *Id.* at *23.

13 *See id.* at *1–4, *23.

14 *See id.* at *8.

15 Brady v. Maryland, 373 U.S. 83, 87 (1963).

16 Imbler v. Pachtman, 424 U.S. 409, 427 (1976); 42 U.S.C.S. § 1983 (LexisNexis 2022).

17 *See* Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under* Imbler*: Providing a Compromise Approach to Claims of Prosecutorial Misconduct*, 48 GONZ. L. REV. 219, 236–37, 237 n.92 (listing Federal Court of Appeals decisions granting absolute prosecutorial immunity for *Brady* violations).

prosecutorial immunity for *Brady* violations, and explore the consequences of such removal.

BACKGROUND

I. THE HISTORY OF PROSECUTORIAL IMMUNITY AND THE DUTY OF DISCLOSURE

The prosecutorial duty of disclosure and the doctrine of absolute prosecutorial immunity both developed primarily in the mid-to-late-twentieth century.[18] The Supreme Court first established criminal discovery in 1946,[19] and the Court declared that prosecutors have a constitutional duty to turn over evidence favorable to the defense in 1963.[20] Absolute prosecutorial immunity has its origins in state common law developed in the 1890s,[21] but the Supreme Court first applied absolute immunity to federal § 1983 lawsuits against prosecutors in 1976.[22] The doctrines developed independently, but they combine to create an often devastating result: a victim of unconstitutionally withheld evidence may have no civil remedy against the prosecutor who failed to turn over that evidence.[23]

A. *The Duty of Disclosure*

Until the mid-twentieth century, there was almost no discovery in criminal cases.[24] Although civil discovery had already expanded greatly by that point, it was generally understood that courts had little inherent power to order disclosure in criminal cases,[25] and any expansion of criminal discovery was controversial.[26] Unlike civil discovery, which was equally available to both sides of the litigation, criminal discovery

18 *See* infra Part I.

19 *See* Eugene Cerruti, *Through the Looking-Glass at the* Brady *Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 220 (2006).

20 *See Brady*, 373 U.S. at 86.

21 *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 111 (2005).

22 *See Imbler*, 424 U.S. at 410.

23 *See id.* at 427–28.

24 *See* Cerruti, *supra*, note 19, at 218.

25 *See id.* at 220–21.

26 *See id.* at 218.

would be substantially more useful to a defendant than the prosecution.[27] Critics of discovery in criminal cases feared that allowing a defendant to review the prosecution's evidence before trial would compound with other structural advantages given to criminal defendants and allow guilty people to walk free.[28] Proponents of criminal discovery argued that prosecutors had greater resources and investigative powers, and defendants needed access to some of their evidence to level the playing field and develop the whole truth.[29]

The shift to a prosecutorial duty of disclosure began in the 1940s.[30] In 1944, the Supreme Court first promulgated the Federal Rules of Criminal Procedure, which went into effect in 1946.[31] Rule 16 authorized a federal court, upon motion by the defendant, to order the prosecution to make available papers or tangible objects that might be material to a defense.[32] Originally, Rule 16 only applied to items seized from the defendant or obtained from others by seizure or by process.[33] Rule 16 was a step towards greater transparency, but proponents of criminal discovery argued that more disclosure was necessary.[34]

Then, in 1963, in the landmark case *Brady v. Maryland*, the Supreme Court declared that withholding evidence favorable to the defense before trial was a violation of the Due Process Clause of the Fourteenth Amendment.[35] Brady was charged with first-degree murder that occurred during a robbery, but it was unclear whether the actual killing had been done by Brady or an accomplice.[36] Before trial, Brady's attorney asked the prosecution to allow him to examine the accomplice's extrajudicial statements, but the prosecution withheld a

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27 *See id.* at 218–19.

28 *See id.* at 219–20; *see also* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (arguing against requiring prosecution to turn over materials to defense).

29 *See* Cerruti, *supra* note 19, at 222–23.

30 *See id.* at 220.

31 Lester B. Orfield, *The Federal Rules of Criminal Procedure*, 26 NEB. L. REV. 570, 570–71 (1947). Congress authorized the Supreme Court to lay down the Federal Rules of Criminal Procedure by statute. *Id.* at 570 n.1.

32 *Id.* at 588; *see also* FED. R. CRIM. P. 16(a)(1)(E).

33 *See* Orfield, *supra* note 31, at 588.

34 *See* Cerruti, *supra* note 19, at 227.

35 *See* Brady v. Maryland, 373 U.S. 83, 86 (1963); Jonathan Abel, *"Brady's" Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 752 (2015).

36 *Brady*, 373 U.S. at 84–85.

confession in which the accomplice admitted to the actual homicide.[37] Brady was tried first and convicted of first-degree murder.[38] When given the option to sentence Brady to life imprisonment or death, the jury sentenced him to death.[39] The Supreme Court held that the accomplice's confession was material to Brady's punishment, and he was therefore entitled to a new trial on the issue of punishment.[40]

The holding of *Brady* was initially somewhat suspect.[41] Neither party had presented the question of prosecutorial disclosure to the Court. The Maryland Court of Appeals had already held that Brady was entitled to a new trial on the issue of punishment, and he appealed only the denial of a new trial on the issue of guilt.[42] There was no cross-petition by the State, and the State did not challenge the granting of a new trial on the issue of punishment.[43] Despite this, in addition to holding that the denial of a new trial on the issue of guilt was justified under state law,[44] the Supreme Court went on to hold that granting a new trial on the issue of punishment was necessary under the Due Process Clause.[45]

Although the authority of the Supreme Court to issue the due process ruling was doubtful, the ruling was applied in subsequent cases, and *Brady* became a turning point in the history of criminal discovery.[46] The holding of *Brady* was unanimously confirmed in *Giglio v. United States*, which further held that the prosecution is required to turn over favorable impeachment evidence.[47] In *United States v. Bagley*, the Supreme Court held that a new trial must be granted if there is a "reasonable probability" a different result would have been reached

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37 *Id.* at 84.

38 *Id.*

39 *See id.* at 84–85.

40 *Id.* at 87.

41 *See* Cerruti, *supra* note 19, at 229–30.

42 *See Brady*, 373 U.S. at 92 (Harlan, J., dissenting).

43 *Id.* at 91 (White, J., concurring).

44 *See id.* at 90. Brady was accused of felony murder, which occurred during the commission of a robbery, and thus evidence would tend to prove his guilt if it showed that either he or his accomplice committed the actual killing. *See* Cerruti, *supra* note 19, at 228.

45 *See Brady*, 373 U.S. at 86.

46 *See* Cerruti, *supra* note 19, at 230.

47 *See* Giglio v. United States, 405 U.S. 150, 154–55 (1972) (Justices Powell and Rehnquist did not take part in the decision); Abel, *supra* note 35, at 752. As a result of *Giglio* decision, impeachment evidence favorable to the defense is sometimes called "*Giglio* evidence." *See, e.g.*, Alvarez v. City of Brownsville, 904 F.3d 382, 413 (5th Cir. 2018) (Costa, J., dissenting).

if withheld evidence was disclosed to the defense.[48] This standard remains the same, whether or not the defense requests disclosure.[49] The "reasonable probability" standard requires less of the prosecution than disciplinary rules such as the ABA Standards for Criminal Justice, which call for the disclosure of any evidence "tending to exculpate or mitigate."[50]

In *Kyles v. Whitley*, the Supreme Court held that the prosecutor's duty to disclose is not limited to evidence known to the prosecutor.[51] Instead, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[52] The Court also held that when considering whether a conviction should be overturned, courts should consider "the cumulative effect of all [evidence favorable to the defense] suppressed by the government."[53] More recently, in *United States v. Ruiz*, the Supreme Court unanimously held that prosecutors are not required to disclose impeachment material before a guilty plea.[54] Even after *Ruiz*, however, most circuit courts have still held that prosecutors have a duty to disclose exculpatory evidence before a guilty plea.[55]

Despite the controversial origins of criminal discovery and the duty of disclosure, today most legal scholars, courts, and commentators agree that the rule announced in *Brady* is an important principle that helps protect innocent people from wrongful convictions.[56] Most modern criticism of the *Brady* doctrine centers around its perceived

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[48] *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (plurality opinion); *id.* at 685 (White, J., concurring).

[49] *See id.* at 682 (plurality opinion).

[50] Kyles v. Whitley, 514 U.S. 419, 437 (1995) (citing ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d. ed. 1993)).

[51] *See id.* at 437.

[52] *Id.*

[53] *Id.* at 421.

[54] *See* United States v. Ruiz, 536 U.S. 622, 625 (2002).

[55] *See* Alvarez v. City of Brownsville, 904 F.3d 382, 413–14 (5th Cir. 2018) (Costa, J., dissenting) (contrasting the Fifth Circuit with many other circuit decisions requiring the disclosure of exculpatory evidence before pleas).

[56] *See, e.g.*, Abel, *supra* note 35, at 745 (recounting various news stories about *Brady* violations); Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1535 (2010); Cerruti, *supra* note 19, at 211; Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 430–31 (2001); Corinna Barrett Lain, *Accuracy Where it Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 22 (2002); Riley E. Clafton, Comment, *A Material Change to* Brady*: Rethinking* Brady v. Maryland, *Materiality, and Criminal Discovery*, 110 J. CRIM. L. & CRIMINOLOGY 307, 309 (2020).

deficiencies.[57] Scholars have argued that "[p]rosecutors have violated [*Brady*'s] principles so often that it stands more as a landmark to prosecutorial indifference and abuse than a hallmark of justice,"[58] and that *Brady* "has never actually required the prosecutor to do what is so manifestly the right thing to do."[59]

Various measures have been proposed to improve prosecutorial compliance with the duty of disclosure, or to widen the duty of disclosure to include more evidence. Some scholars propose structural changes, such as the creation of Public Information Departments to educate the public and empower it to hold prosecutors encounter through disciplinary measures,[60] or the establishment of Prosecutor Review Boards to randomly review prosecution offices to deter misconduct.[61] Other scholars propose rule changes that would apply in individual criminal cases, such as lowering the standard to overturn a conviction to remove probabilistic weighing,[62] allowing courts to admit evidence of *Brady* violations as relevant evidence of the weakness of the prosecution's case,[63] or even dismissing cases with prejudice where a *Brady* violation was the result of willful misconduct.[64] And a number of scholars argue that prosecutors should simply be required to maintain open files and disclose all relevant evidence to the defense.[65]

B. *Absolute Prosecutorial Immunity*

Early in American history, prosecutors were sometimes civilly liable for prosecuting someone in bad faith.[66] Eventually, however, state

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57 *See, e.g.*, Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007); Cerruti, *supra* note 19, at 211.

58 Gershman, supra note 57.

59 Cerruti, *supra* note 19, at 211.

60 *See* Davis, *supra* note 56, at 400.

61 *See id.*; Medwed, *supra* note 56, at 1549–50.

62 *See* Clafton, *supra* note 56, at 347.

63 *See* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 454–55 (2010).

64 Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 304 (2010).

65 *See, e.g.*, Medwed, *supra* note 56, at 1557; Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 484 (2009); Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOKLYN L. REV. 1329, 1334 (2012).

66 *See* Johns, *supra* note 21, at 111–13.

courts developed the common law doctrine of prosecutorial immunity, by which public prosecutors could escape liability for acts committed in furtherance of their official duties.[67] This common law doctrine of prosecutorial immunity was later imported to civil cases under 42 U.S.C. § 1983, [68] where it continues to protect prosecutors from liability for failure to disclose exculpatory evidence.

1. Common Law Prosecutorial Immunity

In seventeenth-century colonial America, the vast majority of criminal prosecutions were conducted by private parties, usually the victim of the crime.[69] By the early national period, most states had some form of a hybrid system where some crimes were prosecuted by private prosecutors, and some by public prosecutors bringing cases on the victim's behalf.[70] In the years leading up to the Civil War, far more crimes were prosecuted by public prosecutors than private prosecutors.[71] Many states began to provide for the democratic election of District Attorneys, responsible for bringing criminal prosecutions on the people's behalf.[72]

Throughout this period, private prosecutors were regularly held liable through the common law tort of malicious prosecution.[73] A plaintiff bringing an action for malicious prosecution was required to prove: (1) the action terminated in his favor; (2) there was no probable cause; and (3) the defendant acted with malice.[74] Although there are no actual decisions on point, case law suggests that public prosecutors could also be held liable for malicious prosecution.[75] Until at least the 1890s, there was no recognized doctrine of prosecutorial immunity.[76] As public prosecutors became more common, however, state courts

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67 *See id.* at 114.

68 *See id.*

69 *See* Jonathan Barth, *Criminal Prosecution in American History: Private or Public?*, 67 S. D. L. REV. 119, 124–26 (2022) (describing references to private and public prosecutors in early colonial America).

70 *See id.* at 145–46.

71 *See id.* at 156.

72 *See id.*

73 *See* Johns, *supra* note 21, at 111–12.

74 *Id.* at 111.

75 *See* Parker v. Huntington, 68 Mass. (2 Gray) 124 (1854) (holding district attorney liable for malicious prosecution); Johns, *supra* note 21, at 113.

76 *See* Johns, *supra* note 21, at 114.

began to shield public prosecutors with absolute immunity, no matter how malicious their motives.[77] Under the common law doctrine of prosecutorial immunity, a prosecutor would be immune from liability for malicious prosecution if he was acting "in the discharge of his official duties."[78]

The common law doctrine of prosecutorial immunity was justified on the grounds that constant unfounded litigation would distract prosecutors from their responsibilities to the public, and the threat of liability would shade prosecutors' decisions and cloud their judgment.[79] For instance, as the California Second District Court of Appeal stated in 1935:

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. Not only would the prosecutor himself be subjected to groundless suits, but his deputies likewise would be accused. The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement.[80]

This same reasoning was later used to justify absolute prosecutorial immunity under 42 U.S.C. § 1983.[81]

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[77] *See id.* at 114–15.

[78] *See* Yaselli v. Goff, 12 F.2d 396, 406 (2d. Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927); *see also Watts v. Gerking*, 222 P. 318, 321–22 (Or. 1924) (holding that complaint against prosecutor should not be dismissed because sufficient facts were alleged to show that the defendant was not acting in his official capacity); *Griffith v. Slinkard*, 44 N.E. 1001, 1002 (Ind. 1896) (holding that prosecutor was immune from liability because he was performing duties of a judicial nature).

[79] *See* Imbler v. Pachtman, 424 U.S. 409, 422–23 (1976).

[80] Pearson v. Reed, 44 P.2d 592, 597 (Cal. Dist. Ct. App. 1935).

[81] *See Imbler*, 424 U.S. at 423–24, 427 (quoting *Pearson*, 44 P.2d at 597) (establishing the doctrine of absolute prosecutorial immunity for suits under 42 U.S.C. § 1983).

The doctrine of common law prosecutorial immunity still exists in state courts today.[82] For example, in *Haughton*, the prosecutor was granted immunity based on Maryland common law.[83] Similarly, in *Renenger v. State*, the Montana Supreme Court applied both federal case law and Montana common law to deny a common law malicious prosecution claim against a prosecutor.[84] And in *Knapper v. Connick*, the Louisiana Supreme Court decided to follow federal common law to hold that a prosecutor who withheld exculpatory evidence was immune from a common law malicious prosecution claim.[85] Where state courts have failed to give redress to victims of prosecutorial misconduct, federal courts may provide a solution.

2. Prosecutorial Immunity Under 42 U.S.C. § 1983

Shortly after the Civil War, Congress adopted the Fourteenth Amendment,[86] which provided in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[87]

To enforce these provisions of the Fourteenth Amendment and protect the rights of formerly enslaved people, Congress passed the Ku Klux Klan Act of 1871, currently codified at 42 U.S.C. § 1983.[88] Section 1983 provides, in pertinent part:

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

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82 *See, e.g.*, Haughton v. Katcef, No. 223, 2022 Md. App. LEXIS 137, at *8 (App. Feb. 24, 2022); Renenger v. Montana, 426 P.3d 559, 564 (Mont. 2018); Knapper v. Connick, 681 So. 2d 944, 950 (La. 1996).

83 *See Haughton*, 2022 Md. App. LEXIS 137, at *8, *11, *23.

84 *See Renenger*, 426 P.3d at 564–66, 569.

85 *See Knapper*, 681 So. 2d at 950.

86 *See* Johns, *supra* note 21, at 73.

87 U.S. CONST. amend. XIV, § 1.

88 *See* Johns, *supra* note 21, at 72–73, 73 n.143.

> shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .[89]

Section 1983 fell into disuse for nearly a century after its enactment.[90] Then, in 1961, the Supreme Court essentially revived § 1983 by holding that thirteen police officers could be liable under § 1983 for searching a family's home without a warrant.[91]

In the 1976 case of *Imbler v. Pachtman*, however, the Supreme Court unanimously ruled that a state prosecutor acting within the scope of his duties is not liable in a suit under § 1983.[92] Paul Imbler was accused of attempting to rob a Los Angeles market, killing the shopkeeper and fleeing the scene.[93] At trial, Imbler claimed he had spent the night of the killing bar-hopping with several other people, and therefore he could not possibly have been the killer.[94] Despite this, the jury found Imbler guilty, and sentenced him to death.[95] On appeal, the Supreme Court of California unanimously affirmed the conviction.[96] Shortly after the appeal, the lead prosecutor on the case wrote to the Governor of California to disclose various pieces of evidence he had discovered after trial.[97] This evidence included impeachment material on the State's primary identification witness and various corroborating witnesses for Imbler's alibi.[98]

Following this revelation, Imbler filed habeas petitions, first in state and then federal court.[99] Eventually, the U.S. District Court for the Central District of California ordered that Imbler be released unless the State of California retried him within 60 days.[100] The Ninth

89 42 U.S.C. § 1983. Alex Reinert recently brought to light that the 1871 Act, as originally enacted, contained a clause between "shall" and "be liable," stating, "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CAL. L. REV. 201, 235 (2023); Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. However, this clause was not included in the 1874 Revised Statutes of the United States and is not positive law. Reinert, *supra*, at 237–38.

90 Johns, *supra* note 21, at 73.

91 *See* Monroe v. Pape, 365 U.S. 167, 168–69, 192 (1961); Johns, *supra* note 21, at 73.

92 *See* Imbler v. Pachtman, 424 U.S. 409, 410 (1976).

93 *Id.* at 410–11.

94 *See id.* at 412.

95 *Id.*

96 *Id.*

97 *Id.*

98 Imbler v. Pachtman, 424 U.S. 409, 411–12 (1976).

99 *Id.* at 413–15.

100 *See id.* at 414–15.

Circuit Court of Appeals affirmed, and the Supreme Court denied certiorari.[101] The State chose not to retry Imbler and he was finally released in 1970, eight years after the Supreme Court of California had affirmed his conviction.[102] After his release, Imbler filed suit under 42 U.S.C. § 1983 against various state actors responsible for his conviction, including the lead prosecutor on his case.[103]

In construing § 1983, the Supreme Court acknowledged that "[t]he statute . . . creates a species of tort liability that on its face admits of no immunities."[104] Despite this acknowledgement, the Court stated that when Congress passed § 1983 in 1871 it intended to include "those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials."[105] The Supreme Court analyzed various common law cases on prosecutorial immunity and concluded that "[t]he common law rule of [prosecutorial] immunity is . . . well settled."[106] The Court determined that the same public policy considerations that supported the common law rule also supported absolute immunity under § 1983, specifically rejecting a form of qualified immunity for prosecutors.[107] The Supreme Court then decided the lead prosecutor in Imbler's case was entitled to immunity and affirmed the dismissal of the case against him.[108]

In the 1993 case of *Buckley v. Fitzsimmons*, the Supreme Court clarified that prosecutorial immunity protects prosecutors from liability for actions within their function as advocates.[109] This includes administrative duties, preparation for the initiation of a prosecution, and preparation for trial.[110] In contrast, prosecutors are not protected when they perform investigatory functions normally performed by the police, such as searching for clues or executing a raid.[111] The act of

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101 *Id.* at 415.

102 The Supreme Court of California affirmed Imbler's conviction on May 17, 1962. *See* People v. Imbler, 371 P.2d 304, 308 (1962). Imbler was not released until after the Supreme Court denied certiorari on October 19, 1970. *See* California v. Imbler, 400 U.S. 865 (1970); *Imbler*, 424 U.S. at 415.

103 *Imbler*, 424 U.S. at 415.

104 *Id.* at 417.

105 *Id.* at 417–18.

106 *Id.* at 424.

107 *Id.*

108 *Id.* at 430.

109 Buckley v. Fitzsimmons, 509 U.S. 259, 272–73 (1993).

110 *Id.*

111 *Id.* at 273–74.

withholding exculpatory evidence is considered preparation for trial, and therefore is protected under absolute immunity.[112]

The modern doctrine of absolute prosecutorial immunity is often criticized by scholars. The distinction between investigatory and advocatory conduct has been criticized as arbitrary and confusing.[113] Critics often point out that absolute immunity currently allows prosecutors to get away with egregious civil rights violations.[114] Most critics recognize the merit of some of the justifications for prosecutorial immunity, including the possibility of a wave of lawsuits distracting prosecutors from their duties.[115] Therefore, most proposed solutions are a middle ground between maintaining absolute prosecutorial immunity in its current form and opening up prosecutors to full personal liability for all civil rights violations. For example, scholars have suggested that prosecutors should be entitled to qualified immunity rather than absolute immunity;[116] defendants subject to meritless prosecution should be able to recover attorney's fees from the prosecution;[117] or states should create an insurance regime to protect prosecutors from ultimate liability while still providing indemnification to victims of malicious prosecution.[118] All these proposals have various benefits and drawbacks.

II. THE INSUFFICIENCY OF CURRENT BRADY REMEDIES

Current legal avenues other than § 1983 suits against prosecutors are not effective mechanisms to secure the *Brady* rights of criminal defendants. There are a few sanctions that might apply to prosecutors who fail to disclose exculpatory evidence, and a few remedies that might be available to defendants. A prosecutor may be penalized in

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112 *See* Van de Kamp v. Goldstein, 555 U.S. 335, 339 (2009); *see also* Haughton v. Katcef, No. 223, 2022 Md. App. LEXIS 137, at *11 (App. Feb. 24, 2022).

113 *See* John P. Taddei, *Beyond Absolute Immunity: Alternative Protections for Prosecutors Against Ultimate Liability for § 1983 Suits*, 106 NW. U. L. REV. 1883, 1896–97 (2012).

114 *See, e.g.*, Samantha M. Caspar & Artem M. Joukov, *The Case for Abolishing Absolute Prosecutorial Immunity on Equal Protection Grounds*, 49 HOFSTRA L. REV. 315, 324 (2021).

115 *See, e.g.*, Yuri R. Linetsky, *A Rule 11 for Prosecutors*, 87 TENN. L. REV. 1, 36 (2019); Taddei, *supra* note 113, at 1923 (noting criticisms for alternative systems to protect individual prosecutors from ultimate liability from civil suits).

116 Daniel Woislaw, Comment, *Absolute Immunity: Applying New Standards for Prosecutorial Accountability*, 26 GEO. MASON U. C.R.L.J. 349, 375–77 (2016).

117 Linetsky, *supra* note 115, at 5.

118 Taddei, *supra* note 113, at 1923.

the criminal case for failing to turn over exculpatory evidence,[119] and a conviction may be overturned based on a newly-discovered *Brady* violation.[120] Outside the criminal case, a prosecutor could potentially face professional discipline,[121] or even criminal charges.[122] And a victim of unconstitutionally withheld evidence can theoretically seek damages from another source, such as the municipality where the prosecutor works.[123] In practice, however, none of these sanctions meaningfully deters prosecutors from withholding evidence, and none of these avenues for relief reliably provides compensation to victims.

A. *Sanctions Within the Criminal Case*

Federal Rule of Criminal Procedure 16(d)(2) outlines four sanctions a federal court may impose on a party who fails to comply with the discovery and inspection granted by Rule 16:

> [T]he court may (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.[124]

Yet these sanctions apply only to Rule 16 discovery—a significant amount of potential *Brady* material is not included in the discovery required under Rule 16.[125] And there is no federal rule addressing *Brady* violations in and of themselves: "No federal district imposes

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[119] *See* Gershman, *supra* note 57, at 535.

[120] *See* Kyles v. Whitley, 514 U.S. 419, 421–22 (1995) (granting criminal defendant new trial based on withheld evidence).

[121] *See* Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 590–91 (2017).

[122] 18 U.S.C. § 242 (criminalizing "the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States"); Brophy v. Comm. on Pro. Standards, Third Jud. Dep't, 442 N.Y.S.2d 818, 819 (N.Y. App. Div. 1981) (censuring prosecutor for violation of § 242 based on *Brady* violation). As of 2011, *Brophy* was the only case in which a prosecutor had ever been convicted under § 242. *See* Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 520 (2011).

[123] *See* Connick v. Thompson, 563 U.S. 51, 71–72 (2011) (citing City of Canton v. Harris, 489 U.S. 378, 395 (1989) (opinion of O'Connor, J.)).

[124] FED. R. CRIM. P. 16(d)(2).

[125] *See* Gershman, *supra* note 57, at 543 (noting that prosecutors typically only disclose what is required by discovery, not what is required by *Brady*).

sanctions or remedies for a prosecutor's nondisclosure or untimely disclosure of *Brady* evidence."[126]

All states provide remedies for prosecutorial disclosure that track the federal Rule 16, and many do impose sanctions for *Brady* violations.[127] The problem with all these sanctions remains the same: ultimately, it is up to the prosecutor to disclose exculpatory evidence, and concealed evidence may never be uncovered.[128] Most often, *Brady* evidence comes to light through investigation by the defendant or by pure chance.[129] Because it is difficult for a defendant to discover the evidence independently, prosecutors often have an incentive to hide exculpatory evidence, especially if they find it after the close of discovery where they face a potential sanction.[130]

The penalty for failing to disclose *Brady* evidence following conviction is even less threatening. Failure to disclose exculpatory evidence opens up a potential avenue to attack a conviction, but recent statutory law and case law have made it much more difficult to challenge convictions based on nondisclosure. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) included significant reforms to habeas corpus proceedings in federal courts,[131] which are the principal method used to challenge state or federal convictions based on unconstitutional nondisclosure.[132] AEDPA requires that a habeas applicant "has exhausted the remedies available in the courts of the State" and that the judgment of a State court "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States."[133] AEDPA also requires that, if a habeas motion is based on newly discovered facts, the motion must be filed within one year of the date on which the facts supporting the claim or

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[126] *Id.* at 535.

[127] *Id.*

[128] *See* Davis, *supra* note 56, at 412.

[129] *See* Gershman, *supra* note 57, at 536–37; Rachel E. Barkow, *Organizational Guidelines For the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2093–94 (2010) ("In most cases, it is entirely fortuitous that a violation comes to light.").

[130] *See* Davis, *supra* note 56, at 432 (discussing how defense counsel often lacks resources to conduct extensive investigations).

[131] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 101–108, 110 Stat. 1214, 1217–26.

[132] *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 421 (1995) (reviewing habeas motion on grounds of prosecutorial nondisclosure); Imbler v. Craven, 298 F. Supp. 795, 812 (C.D. Cal. 1969) (releasing defendant on federal habeas motion on the basis of prosecutorial nondisclosure).

[133] Antiterrorism and Effective Death Penalty Act § 104.

claims presented could have been discovered through the exercise of due diligence.[134]

The overall effect of AEPDA is that habeas petitions, especially in the area of *Brady* violations, are much more difficult, time-consuming, and expensive to win.[135] A recent Fifth Circuit decision interpreted AEPDA so expansively that it held a prisoner must show "factual innocence" for a habeas motion to be granted, regardless of whether prosecutors violated the Constitution.[136] The extreme difficulty of succeeding on a habeas motion further incentivizes unethical prosecutors to withhold exculpatory evidence, knowing that post-trial the defendant faces an uphill battle to overturn her conviction—if the evidence is ever discovered. Overall, current sanctions within the criminal case, and in post-conviction proceedings, are not sufficient to deter prosecutors from withholding evidence.

B. *Criminal and Professional Consequences for Prosecutors*

In theory, the legal profession's rules of professional conduct apply to prosecutors, and failure to disclose exculpatory evidence in a timely manner can result in professional sanctions.[137] In addition to general rules against dishonest behavior, the American Bar Association's Model Rules of Professional Conduct includes Rule 3.8, titled "Special Responsibilities of a Prosecutor."[138] Among other responsibilities, Rule 3.8 specifies that prosecutors shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[139] Although the Model Rules themselves are not binding in any courts, most state and federal courts have rules of professional conduct based on the Model Rules.[140] Prosecutors are also often subject to internal

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[134] *Id.* at 1220.

[135] *See* Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 96 (2012) (surveying available empirical data on AEDPA's application in habeas cases and concluding that AEDPA "has gradually and systemically infected and undermined the federal habeas infrastructure").

[136] *See* Crawford v. Cain, 55 F.4th 981, 995 (5th Cir. 2022).

[137] *See* Medwed, *supra* note 56, at 1538–39; Sarma, *supra* note 121, at 610–11.

[138] MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2022).

[139] MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2022).

[140] *See* Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3443–45 (1999).

regulations; for instance, the Department of Justice ("DOJ") has an ethical standards section in its manual for attorneys and has its own system for reporting and investigating ethical violations.[141]

Nevertheless, most studies of prosecutorial misconduct "agree that courts rarely discipline prosecutors for misconduct."[142] For example, in a study of 11,000 alleged instances of prosecutorial misconduct in criminal proceedings, prosecutors were disciplined in 44 instances.[143] A 2010 study of the DOJ found 201 examples of prosecutorial misconduct, but only a single example of a prosecutor being disbarred in the span of twelve years.[144] And "[a] Mercury News review of nearly 1,500 state disciplinary actions over a five-year period found that just one of them involved prosecutorial misconduct."[145] The evidence is clear: "prosecutors are disciplined less frequently than private attorneys."[146] This trend is the result of a number of factors, including poorly equipped bar associations and an inability to gather evidence against prosecutors suspected of misconduct.[147] In addition, the furthest extent of professional sanctions is disbarment, and the sanction may come long after a prosecutor has already retired—especially if the prosecution is based on suppressed evidence that came to light many years later.[148]

In addition to professional liability, prosecutors may be subject to criminal liability, by statute, for egregiously illegal conduct, including withholding exculpatory evidence.[149] Such prosecutions of prosecutors

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141 *See id.* at 3445; Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 893 (2015).

142 *See* Sullivan & Possley, *supra* note 141, at 890.

143 *See id.* at 891–92.

144 *See id.* at 892.

145 Mike Zapler, *State Bar Ignores Errant Lawyers*, SAN JOSE MERCURY NEWS (Feb. 1, 2007), http://www.mercurynews.com/taintedtrials/ci_5136869.

146 Sullivan & Possley, *supra* note 141, at 892.

147 *See id.* at 893, 895.

148 *See* Sarma, *supra* note 121, at 611. There are various real-life examples of prosecutors being "disbarred" after they have already retired. *See, e.g.*, Tim Prudente, *Retired Harford State's Attorney Cassilly disbarred over handling of 'Memorial Day Murders.' His reaction: 'Oh, whatever'*, BALT. SUN (Oct. 22, 2021), https://www.baltimoresun.com/2021/10/22/retired-harford-states-attorney-cassilly-disbarred-over-handling-of-memorial-day-murders-his-reaction-oh-whatever/; Marie Fazio, *Ex-Prosecutor Who Withheld Evidence in Murder Case Gives Up Law License*, N.Y. TIMES (May 18, 2021), https://www.nytimes.com/2021/05/18/us/rick-jackson-disbarred-texas.html; Pamela Colloff, *Time and Punishment*, TEX. MONTHLY (Aug. 2015), https://www.texasmonthly.com/articles/time-and-punishment/ (describing disbarment of seventy-year-old retired prosecutor).

149 *See* Williams, *supra* note 140, at 3442.

do occasionally happen.[150] To date, however, only one prosecutor has even been sentenced to jail for misconduct that led to a wrongful conviction—a sentence of merely ten days.[151] Criminal prosecutions have the potential to be better resourced than bar association disciplinary committees,[152] but criminal-law-based solutions have the fundamental problem that they rely on prosecutors policing and prosecuting each other.[153] Although most prosecutors likely believe purposeful withholding of exculpatory evidence is wrong, many could be unwilling to prosecute someone they view as a colleague.[154] As a result of all these factors, both professional and criminal sanctions are insufficient to properly incentivize prosecutors to disclose exculpatory evidence.

C. *Municipal Liability*

Even in the absence of civil liability for prosecutors, it might be possible to encourage disclosure and compensate victims of nondisclosure by suing municipalities when a prosecutor in that municipality commits a *Brady* violation. Victims of nondisclosure could recover damages, and the municipality would have an incentive to better train prosecutors and encourage disclosure. Unfortunately, current judicial interpretations of § 1983 make it extremely difficult to hold municipalities liable for civil rights violations.

In *Monell v. Department of Social Services*, the Supreme Court held that local governments could be held liable under § 1983 for civil rights violations, but *only* when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance,

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150 *See id.* at 3442–43 (giving the example of the indictment of the "Du Page Seven").

151 *See* Daniele Selby, *Only One Prosecutor Has Ever Been Jailed for Misconduct Leading to a Wrongful Conviction*, INNOCENCE PROJECT (Nov. 11, 2020), https://innocenceproject.org/ken-anderson-michael-morton-prosecutorial-misconduct-jail/.

152 *See* Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 89, 94–95 (1995).

153 Sarma, *supra* note 121, at 607 ("There may be a strong norm in prosecuting agencies against using the power to prosecute against one of their own - similar to the blue code of silence observed in some police forces.").

154 *See* Green, *supra* note 152, at 85 ("One might reasonably anticipate . . . that attorneys in the Office of Professional Responsibility lack neutrality and detachment when judging the conduct of fellow members of the Department of Justice, both because they identify and sympathize with their colleagues and because they want the Department to appear to be relatively free of wrongdoing.").

regulation, or decision officially adopted and promulgated by that body's officers."[155] Later, in *City of Canton v. Harris*, the Supreme Court held that municipalities could be liable for inadequate training of employees, but "[o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality."[156] In future cases, the Court held that "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train."[157] Thus, if a plaintiff seeks to hold a municipality liable for a *Brady* violation under § 1983, she must prove the municipality had either a policy of withholding exculpatory evidence or a pattern of repeated *Brady* violations.[158]

The standard for municipal liability has proved difficult to meet in cases involving *Brady* violations. In *Connick v. Thompson*, prosecutors failed to disclose a blood test that would have ruled out John Thompson as a suspect, and Thompson spent eighteen years in prison as a result.[159] The Supreme Court held that because there was no pattern of similar constitutional violations before Thompson's injury, the prosecutor's office was not aware its training program was deficient and could not be held liable for inadequate training.[160] In dissent, Justice Ginsburg pointed out that there was a string of *Brady* violations in Thompson's case alone, and the office provided no *Brady* training at all for prosecutors.[161] Despite these problems, Thompson could not recover damages from the prosecutor's office for his unconstitutional conviction.[162] Other plaintiffs seeking compensation from municipalities for *Brady* violations have similarly failed.[163] For example, in *Mansfield v. Williamson County*, a prosecutor withheld evidence that the alleged victim in a sexual misconduct case had made statements contradicting her identification of Mansfield as the perpetrator.[164] Just like in *Connick*,

155 Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

156 City of Canton v. Harris, 489 U.S. 378, 389 (1989).

157 Connick v. Thompson, 563 U.S. 51, 62 (2011) (quoting Board of Comm'rs of Bryan City v. Brown, 520 U.S. 397, 409 (1997)).

158 *See id.* at 62.

159 *See id.* at 54–55.

160 *See id.* at 62–63.

161 *See id.* at 84–86, 93 (Ginsburg, J., dissenting).

162 *See id.* at 71–72.

163 *See, e.g.*, Mansfield v. Williamson Cnty., 30 F.4th 276, 280–81 (5th Cir. 2022); Greene v. City of N.Y., 742 Fed. App'x 532, 537 (2d Cir. 2018); D'Ambrosio v. Marino, 747 F.3d 378, 388 (6th Cir. 2014).

164 *See Mansfield*, 30 F.4th at 277–78.

the Fifth Circuit held that Mansfield had failed to establish a pattern of misconduct and dismissed his suit.[165] There are multiple reasons why it is extremely difficult to establish municipal liability for a *Brady* violation. Exonerations for *Brady* violations are relatively infrequent,[166] and so a "pattern" of misconduct may be difficult to establish even if one exists. It is time-consuming, difficult, and expensive for a § 1983 plaintiff to gather such evidence outside of his own case.[167] And even when a pattern arguably exists, the court may decide that the incidents are not similar enough.[168] Given all these limitations, municipal liability is not a viable avenue to provide compensation to victims of *Brady* violations or to push municipalities to adopt better training and hiring practices for prosecutors.

ANALYSIS

III. THE CASE FOR REMOVING ABSOLUTE IMMUNITY FOR BRADY VIOLATIONS

Congress should amend § 1983 to explicitly remove absolute immunity from prosecutors who knowingly withhold exculpatory evidence, or who remain willfully ignorant of such evidence. Removing absolute immunity for knowing violations of *Brady* would improve

165 *See id.* at 280–81.

166 Joseph L. Hoffmann and Nancy J. King, *Rethinking The Federal Role In State Criminal Justice*, 84 N.Y.U. L. REV. 791, 811 (2009) ("[B]ecause grants of habeas relief are so infrequent, and often occur long after the trial is over, they cannot possibly pose a meaningful deterrent for state actors in noncapital cases."). As of January 4, 2024, the National Registry of Exonerations reports 1,753 exonerations involving withheld exculpatory evidence since 1989. NAT'L REG. OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Jan. 29, 2024).

167 This is the reason a similar requirement was eliminated when a defendant intends to show racism in the dismissal of minority jurors during voir dire. *See* Batson v. Kentucky, 476 U.S. 79, 92–93 (1986) (noting that requiring "proof of repeated striking of blacks over a number of cases" was a "crippling burden of proof" and made prosecutors' use of peremptory challenges "largely immune from constitutional scrutiny"). Similarly, plaintiffs raising selective enforcement claims against traffic stops during the 1990s—prior to *Whren v. United States*, 517 U.S. 806—needed to bring extensive observational studies to demonstrate a pattern of racial profiling. *See* Bradley R. Haywood, *Ending Race-Based Pretextual Stops: Strategies for Eliminating America's Most Egregious Police Practice*, 26 RICH. PUB. INT. L. REV. 47, 55–57 (2023).

168 *See* Connick v. Thompson, 563 U.S. 51, 62–63 (2011) (stating that although Thompson presented evidence of four convictions overturned for *Brady* violations prior to his case, "[n]one of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind").

due process rights and provide redress for *Brady* violations. Based on recent cases, a Supreme Court decision overturning *Imbler* and abrogating absolute immunity is unlikely.[169] Congress can and should pass a statutory remedy to fix the hole in § 1983 caused by absolute prosecutorial immunity. Complete abolition of absolute prosecutorial immunity would have strong deterrent and remedial effects, but a limited change focused on knowing *Brady* violations would be a more practical first step and still have a significant impact.

A. *The Effectiveness of Removing Absolute Immunity*

Removing absolute immunity for *Brady* violations would protect the constitutional rights of defendants and hold prosecutors accountable better than all current procedures. Criminal defendants have a unique incentive to bring lawsuits against a prosecutor who has withheld exculpatory evidence because the criminal defendant may recover money in the civil suit; other prosecutors and disciplinary bodies do not have a similar incentive.[170] Municipal liability in its current form is ineffective at granting relief to victims of *Brady* violations, but even if municipal liability were reformed, it would not impact prosecutors directly. In contrast, removing absolute immunity would change prosecutors' incentives. The question is thus to what extent absolute prosecutorial immunity should be abolished.

Some scholars have suggested that absolute prosecutorial immunity should be abolished, but none have meaningfully dealt with the standard that should replace absolute immunity. For example, one author argues that in the absence of absolute immunity, prosecutors will automatically be entitled to qualified immunity, which "strikes a balance between providing a remedy for egregious misconduct and protecting the honest prosecutor from liability."[171] Another author

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[169] *See, e.g.*, Thompson v. Clark, 596 U.S. 36, 39 (2022) (implicitly upholding absolute prosecutorial immunity); *Connick*, 563 U.S. at 54 (holding prosecutor's office immune from liability); Van de Kamp v. Goldstein, 555 U.S. 335, 338 (2009) (holding prosecutor entitled to absolute immunity).

[170] In addition to the ability to recover damages, § 1983 includes incentives such as "attorney's fees for prevailing plaintiffs; the ability to bring claims in federal court rather than in state court or in a state claims tribunal; a potentially longer statute of limitations; a potentially more generous measure of damages (including the possibility of punitive damages); and the inapplicability of various state procedural impediments." Jack M. Beermann, Why Do Plaintiffs Sue Private Parties under Section 1983?, 26 CARDOZO L. REV. 9, 14–15 (2004).

[171] Johns, *supra* note 21, at 54.

argues that in the absence of absolute immunity, a lawsuit against a prosecutor would still require the prosecutor to have "a culpable state of mind."[172] She argues that a prosecutor who merely knows about exculpatory evidence and fails to act on it would not be liable under § 1983 unless they acted maliciously.[173]

Although qualified immunity for prosecutors would be preferable to the status quo, if absolute immunity is to be overturned by the courts or by statute, it is worth considering the system of liability that will replace it. A system of liability that allows a prosecutor to get away with knowingly withholding potentially exculpatory evidence, so long as the prosecutor believes she is not required to turn it over, would encourage poor training and record-keeping and leave many victims of constitutional violations without compensation. Alternatively, a system of strict liability would leave prosecutors liable for not turning over evidence outside of their knowledge or control.

Under *Brady* and subsequent cases, a prosecutor has a duty to learn of any favorable evidence known to any government actor in the case, including the police.[174] If the prosecutor fails to disclose such evidence, the defendant's constitutional rights have been violated.[175] The defendant may then seek a penalty for the prosecution in the criminal case,[176] or to have his conviction overturned through a habeas petition.[177] In the context of a criminal trial, it makes sense to penalize the prosecution for the failures of another government actor because those sanctions are directed towards the government and not the prosecutor as an individual. In the context of civil liability, where the prosecutor is being sued in her individual capacity, it does not make as much sense to hold a prosecutor responsible when the police negligently or intentionally concealed evidence from the prosecutor. Therefore, the threshold to hold a prosecutor civilly liable for withholding exculpatory evidence should be stricter than the standard for a *Brady* violation in the criminal context.

172 Ariba Ahmad, Comment, *The Next Step in Civil Rights: Abolish Absolute Prosecutorial Immunity so Prosecutors Cannot Use Their Power to Violate Others' Constitutional Rights*, 72 CASE W. RES. L. REV. 839, 866–67 (2022).

173 *Id.*

174 *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995).

175 *See id.* at 432.

176 *See* Gershman, *supra* note 57, at 535 (describing state penalties for *Brady* violations).

177 *See Kyles*, 514 U.S. at 431.

Prosecutors should be civilly liable when they knowingly fail to turn over exculpatory evidence to the defense in a timely fashion. Under this standard, a prosecutor would also be liable when she keeps herself in a state of intentional ignorance—for example, by maintaining a policy of not seeking evidence that the police do not voluntarily turn over to the prosecution. Otherwise, a cunning prosecutor might purposefully ask the police to hand over only evidence tending to incriminate the defendant, thereby never exposing the prosecutor to exculpatory evidence. Holding prosecutors liable for willful ignorance encourages prosecutors to seek out any exculpatory evidence in the possession of other government actors, including the police, and turn over any potentially exculpatory evidence in their possession.

There are two prongs to this "knowing" analysis. The first is whether the prosecutor knows the evidence exists, and the second is whether the prosecutor knows the evidence is potentially exculpatory. To facilitate full disclosure and fully protect the constitutional rights of defendants, the second prong should impose a more stringent burden on prosecutors. If there is a reasonable question about whether a piece of evidence must be turned over under *Brady*, the prosecutor should be held liable for failure to disclose that evidence when it is later determined to be exculpatory under *Brady*. So long as the prosecutor knew the exculpatory evidence existed, he should be required to err on the side of disclosure.

Critics might argue that holding prosecutors responsible for turning over any evidence that might be exculpatory is too great a burden, and would overly distract prosecutors from their duties.[178] That is incorrect. Many modern prosecutor's offices maintain an "open file" policy, where a defendant's attorney can view all evidence related to the case upon request, with a few exceptions such as the prosecution's work product.[179] Maintaining an open file policy would not absolve prosecutors of their duty to seek out exculpatory evidence held by other government actors, but it would prevent a prosecutor from being held liable for withholding exculpatory evidence he knew was in his possession but did not think was exculpatory. The feasibility of such a policy is proven by the offices that currently maintain open files.

178 *See* arguments in favor of absolute prosecutorial immunity *supra* Part I.B.2.

179 Gershman, *supra* note 57, at 542–44.

B. *The Need for a Legislative Remedy*

The Supreme Court is highly unlikely to abolish or meaningfully change absolute prosecutorial immunity in the near future. *Imbler*, the case that established absolute prosecutorial immunity in § 1983 suits, was a unanimous opinion,[180] making it an especially strong precedent. Subsequent cases on prosecutorial immunity, such as *Buckley*, continue to uphold prosecutorial immunity under § 1983.[181]

In *Thompson v. Clark*, a recent Supreme Court case on prosecutorial liability under § 1983, the Court opened up prosecutors to slightly more liability.[182] Even so, the Supreme Court upheld the overall doctrine of absolute prosecutorial immunity.[183] In *Thompson*, Larry Thompson's sister-in-law called 911 and falsely claimed that Thompson was sexually abusing his one-week-old daughter.[184] Police and EMTs forcibly entered Thompson's apartment, and although no signs of abuse were found, Thompson was arrested and charged with "obstructing government administration and resisting arrest."[185] Immediately before trial, the prosecutor moved to dismiss the charges without explanation.[186] The judge then dismissed the case.[187] Thompson sued the prosecutor under 42 U.S.C. § 1983, asserting a Fourth Amendment claim for malicious prosecution.[188]

To prevail on a malicious prosecution claim under existing Second Circuit precedent, Thompson had to show that his criminal case ended "with some affirmative indication of his innocence."[189] Dismissal alone was not an affirmative indication of innocence—a dismissal could be "on any number of procedural or jurisdictional grounds" and does not

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180 Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

181 *See* Buckley v. Fitzsimmons, 509 U.S. 259, 261, 267–68 (1993) (stating that prosecutorial immunity is implicitly incorporated into § 1983); Van de Kamp v. Goldstein, 555 U.S. 335, 344 (2009) (holding that prosecutors involved in supervision and training are entitled to absolute immunity).

182 *See* Thompson v. Clark, 596 U.S. 36, 49 (2022) (5-4 decision) (holding that acquittal in a criminal case is not required to hold a prosecutor liable under § 1983).

183 *See id.*

184 *Id.* at 40.

185 *Id.*

186 *Id.*

187 *Id.*

188 *See* Thompson v. Clark, 596 U.S. 36, 40 (2022).

189 *Id.* at 41.

necessarily indicate that the defendant is factually innocent.[190] As the charges against him were dismissed without explanation, the Second Circuit held that Thompson could not meet his burden.[191] The Supreme Court reversed, holding that an affirmative indication of innocence was not required for a malicious prosecution claim under § 1983 and allowing Thompson's suit to proceed.[192]

The Supreme Court's reasoning in *Thompson* is significant. The Court began by explaining its method of analysis:

> To determine the elements of a constitutional claim under §1983, this Court's practice is to first look to the elements of the most analogous tort as of 1871 when §1983 was enacted, so long as doing so is consistent with "the values and purposes of the constitutional right at issue."[193]

The Supreme Court determined that the most analogous tort was malicious prosecution, and went on to analyze nineteenth-century malicious prosecution case law.[194] The Court held that "[b]ecause the American tort-law consensus as of 1871 did not require a plaintiff in a malicious prosecution suit to show that his prosecution ended with an affirmative indication of innocence," § 1983 claims for malicious prosecution also do not require an affirmative indication of innocence—they only require that the prosecution end without conviction.[195]

The reasoning of *Thompson* is highly reminiscent of the reasoning used to establish absolute prosecutorial immunity in *Imbler*. In *Imbler*, the Supreme Court held that the Reconstruction Congress intended to incorporate common law immunities into 42 U.S.C. § 1983.[196] After analyzing nineteenth-century common law, the *Imbler* Court determined that the doctrine of absolute prosecutorial immunity barred the plaintiff's lawsuit.[197] Critics have since pointed out that many of the cases analyzed in *Imbler* were decided after § 1983 was passed, and therefore could not have been considered by the Reconstruction

190 Lanning v. City of Glens Falls, 908 F.3d 19, 28 (2d Cir. 2018), abrogated by Thompson v. Clark, 596 U.S. 36 (2022).

191 *Thompson*, 596 U.S. at 41.

192 *Id.* at 49.

193 *Id.* at 43.

194 *Id.* at 43–44 (2022).

195 *Id.* at 48.

196 *See* Imbler v. Pachtman, 424 U.S. 409, 417–18 (1976).

197 *Id.* at 431.

Congress.[198] By interpreting § 1983 based on nineteenth-century common law in *Thompson*, however, the Supreme Court signaled that it still subscribes to the reasoning of *Imbler*: that § 1983 incorporates nineteenth-century common law, including common law immunities.[199] Given that even the narrow Supreme Court majority willing to limit prosecutorial immunity in *Thompson* relied on the reasoning underlying *Imbler* to do so, the modern Supreme Court is highly unlikely to abolish absolute prosecutorial immunity.[200]

If the Supreme Court is unwilling to abolish absolute prosecutorial immunity, Congress must step up and pass a law removing absolute immunity for knowing *Brady* violations. As the decision in *Imbler* was based on the Supreme Court's interpretation of a statute,[201] Congress can overrule *Imbler* by statute.[202] Congress should pass an amendment to § 1983 that explicitly exposes prosecutors to liability under the two prongs discussed in Part III: knowing *Brady* violations, or *Brady* violations that occur as a result of intentional ignorance. The language of such a statute would look something like this:

> In an action for damages against a prosecutor under 42 U.S.C. § 1983, the prosecutor may not claim immunity for violation of his or her duty of disclosure under *Brady v. Maryland* if (1) the prosecutor knew of the potentially exculpatory evidence and did not disclose it, or (2) the prosecutor intentionally avoided seeking out potentially exculpatory evidence from other government actors involved in the criminal prosecution.

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198 Johns, *supra* note 21, at 54–55; Reinert, *supra* note 89, at 207 (arguing the "Notwithstanding Clause," originally included in § 1983 but omitted from the Revised Statutes, shows Congress intended to supersede state immunity doctrines).

199 *See Imbler*, 424 U.S. at 417–18.

200 The only other Supreme Court case on prosecutorial liability since *Thompson* is *Chiaverini v. City of Napoleon*, 602 U.S. 556, 561 (2024), in which the Court explicitly relied on *Thompson* to hold that another malicious prosecution claim could proceed.

201 *Id.* at 417.

202 *See* AT&T Corp. v. Hulteen, 556 U.S. 701, 705 (2009) (holding Congress had superseded Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) with the passage of the Pregnancy Discrimination Act, which clarified that discrimination on the basis of pregnancy is discrimination based on sex under Title VII). Similarly, in *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court ruled that the Food and Drug Administration (FDA) did not have authority to regulate tobacco products under the Food, Drug, and Cosmetic Act. 529 U.S. 120, 125–26 (2000). Subsequently, Congress passed the Family Smoking Prevention and Tobacco Control Act (TCA), which explicitly allows the FDA to regulate tobacco products. Big Time Vapes, Inc. v. FDA, 963 F.3d 436, 438 n.2 (5th Cir. 2020) (stating the TCA "legislatively abrogated" *Brown & Williamson Tobacco*); 21 U.S.C. § 387(a).

This language would overturn *Imbler* in the narrow field of *Brady* violations, while leaving the potential for the Supreme Court to abrogate absolute prosecutorial immunity in other areas in future cases.

C. *The Justification for a More Limited Approach to Overruling* Imbler

Some scholars argue that absolute prosecutorial immunity should be abolished or limited in all cases, not just in cases involving *Brady* violations.[203] But supporters of absolute prosecutorial immunity argue that repeal of absolute immunity would lead to a "flood of civil litigation" that "would divert energy, attention, and resources from the performance of prosecutorial functions."[204] This concern is mitigated if liability is limited to a smaller class of especially egregious conduct, such as *Brady* violations. A plaintiff would not be able to bring a serious lawsuit against a prosecutor merely because he is angry about being prosecuted—at a minimum, he would have to allege that the prosecutor withheld exculpatory evidence in his case.

Limiting reform to *Brady* violations also prevents § 1983 liability from negatively impacting prosecutorial discretion. Supporters of absolute immunity argue that the threat of civil liability would "shade" a prosecutor's decision making and he would be unable to "exercise[e] the independence of judgment required by his public trust."[205] This argument is strongest when a prosecutor is deciding whether or not to bring charges in a given case.[206] It might also be relevant when a prosecutor is deciding whether to make a plea offer, and what kind of offer to make.[207] Both of these decisions are matters of discretion—a

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203 Ahmad, *supra* note 172, at 856–57; Caspar & Joukov, *supra* note 114, at 322; Woislaw, *supra* note 116, at 379–80.

204 Johns, *supra* note 21, at 81–82 (citing *Imbler*, 424 U.S. at 425); Caspar & Joukov, *supra* note 114, at 352 ("In *Imbler*, the Court suggested that abolishing absolute immunity would lead to a floodgate of litigation against prosecutors.").

205 *Imbler*, 424 U.S. at 423.

206 *See, e.g.*, Wood v. City of Santa Ana, No. 8:18-00643 SVW (ADS), 2021 U.S. Dist. LEXIS 157187, at *13 (C.D. Cal. 2021) (holding prosecutors immune from liability for decision to charge); Wilkerson v. LaWall, No. CV-19-00360-TUC-EJM, 2019 U.S. Dist. LEXIS 211565, at *12 (D. Ariz. 2019) (holding prosecutor immune from liability for decision not to charge).

207 *See, e.g.*, Casertano v. Kerwin, No. 3:09-cv-1853 (CFD), 2010 U.S. Dist. LEXIS 82377, at *8 (D. Conn. 2010) (holding prosecutor immune from liability where plea offer not "plainly beyond" his jurisdiction); Sam v. County of Wayne, No. 2:10-CV-10332, 2010 U.S. Dist. LEXIS 76785, at *14 (E.D. Mich. 2010) (holding prosecutors immune from liability where plea bargain fell within purview as "advocates").

prosecutor might have legitimate reasons for bringing what appears to be a weak case, or refusing to make a plea offer to a sympathetic defendant. But there is no legitimate reason for a prosecutor to knowingly withhold exculpatory evidence—*Brady* established that prosecutors have a constitutional duty to turn exculpatory evidence over to the defense.[208] To the extent opening up prosecutors to civil liability for *Brady* violations "shades" their judgment, it only does so in favor of fulfilling their constitutional obligation.

Constrained reform is also less politically controversial than a complete overrule of *Imbler*. Proposed reform bills on criminal justice issues often face intense backlash.[209] Politicians often fear being viewed as "soft on crime" during elections, and therefore tend to avoid making it more difficult for police and prosecutors to apprehend criminals.[210] More modest reform to prosecutorial immunity would be much more attractive to politicians concerned with reelection, especially those in competitive districts. In addition, because withholding exculpatory evidence is viewed negatively by most scholars and the general public,[211] reform targeted at prosecutors who violate the duty of disclosure is likely to be palatable to both politicians and voters.

Another benefit of more limited reform is that if the repeal of absolute prosecutorial immunity for *Brady* violations does not lead to drastic negative consequences, then opponents of absolute prosecutorial immunity will stand on firmer ground. Further repeal will become much more feasible. Alternatively, if opening prosecutors up to liability for *Brady* violations does cause frivolous litigation that meaningfully distracts prosecutors from their jobs, the damage is far less substantial than it would be from a complete repeal of absolute immunity. Because the change is smaller, municipalities will be able to shift funds around

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208 Brady v. Maryland, 373 U.S. 83, 87 (1963).

209 *See* Akela Lacy, *Democratic Backlash to "Defund The Police" Jeopardizes Popular Reforms*, THE INTERCEPT (Dec. 7, 2020, 6:00 AM), https://theintercept.com/2020/12/07/defund-police-qualified-immunity/ (describing the backlash against police reform efforts following the 2020 "defund the police" protests).

210 Jonathan Allen & Sahil Kapur, *Democrats Try to Pre-Empt the GOP's 'Soft on Crime' Attacks. It May Not Work.*, NBC NEWS (Oct. 9, 2022, 7:30 AM), https://www.nbcnews.com/politics/2022-election/democrats-tried-pre-empt-gops-soft-crime-attacks-may-not-work-rcna51023 (describing efforts by Democrats to appear pro-police prior to the 2022 midterm election); David Freedlander, *The Democratic Fight That's Hurting Hochul*, N.Y. MAG. (Oct. 31, 2022), https://nymag.com/intelligencer/2022/10/how-the-bail-reform-fight-stung-kathy-hochul.html (describing political backlash to bail reform efforts in New York).

211 *See* discussion *supra* Part I.A.

more easily to account for the increase in litigation that will naturally occur when § 1983 is expanded. Under a complete repeal, even just the increase in meritorious litigation might be too great for the justice system to handle. Subjecting prosecutors to civil liability gradually, starting with *Brady* violations, is a much less extreme change and is less likely to be immediately repealed in the face of backlash.

CONCLUSION

Removing absolute prosecutorial immunity for *Brady* violations will not immediately ensure full compliance with prosecutors' duty of disclosure. But removing absolute immunity when prosecutors knowingly or violate the duty of disclosure has far more potential benefits than harms. Fewer innocent people will be convicted, and more of those who were wrongfully convicted will be able to receive some recompense for their unjust imprisonment.

There could be unintended consequences if prosecutors take a more active role in turning over *Brady* material, and potential *Brady* material, to defendants. For example, police officers might hide exculpatory evidence from prosecutors because they know the prosecutor will turn it over to the defense. If a prosecutor would have hidden that evidence in the status quo, this is not a net negative for defendants. But if this issue occurs, Congress can remedy it through future legislation. The cost of addressing issues with reform of § 1983 is insubstantial compared to the consequences of allowing our constitutional rights to fester. *Brady v. Maryland* announced an essential principle of due process. It is time we meaningfully protect it.