

Bad Faith Exception to Prosecutorial Immunity for *Brady* Violations

By Bennett L. Gershman¹

Introduction: *Imbler v. Pachtman* Thirty-Four Years Later

For those of us who teach and write about the conduct of prosecutors, reading *Imbler v. Pachtman*² thirty-four years later is a profoundly disturbing experience. *Imbler* is the linchpin for the doctrine that affords prosecutors absolute immunity from civil liability for actions that violate a defendant's constitutional rights. Despite its revisionist history and dubious policy, *Imbler* is one of the Supreme Court's most durable precedents, having been reaffirmed several times,³ including as recently as last Term.⁴

The Court in *Imbler* viewed the prosecutor as a “quasi-judicial” official, much like a judge or a grand juror, for whom absolute immunity is vital to protect the judicial process from harassment and intimidation.⁵ Thus, according to *Imbler*, when a prosecutor initiates a prosecution and pursues a criminal case, the prosecutor is cloaked with absolute immunity from civil liability to allow the prosecutor to make discretionary decisions fairly and fearlessly without the distraction of a flood of civil lawsuits by disgruntled defendants.⁶ The Court acknowledged the hard choice between the evils inherent in either alternative but, quoting Judge Learned Hand, concluded that it is “in the

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² 424 U.S. 409 (1976).

³ See *Kalina v. Fletcher*, 522 U.S. 118 (1997) (reaffirming *Imbler* and holding that prosecutor is protected by absolute immunity for preparing and filing charging documents, but not entitled to absolute immunity for execution of certification for determination of probable cause); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (reaffirming *Imbler*, but holding that prosecutor is not entitled to absolute immunity in investigating whether boot print at scene of crime was left by suspect, and not entitled to absolute immunity for allegedly false statements made during press conference); *Burns v. Reed*, 500 U.S. 478 (1991) (reaffirming *Imbler* and holding that prosecutor is absolutely immune for participation in probable cause hearing, but not entitled to absolute immunity for giving legal advice to police).

⁴ See *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009) (reaffirming *Imbler* and holding that absolute immunity applies to administrative functions of district attorney and chief supervisory prosecutor for allegedly failing to institute supervision and training programs for assistants).

⁵ *Imbler*, 424 U.S. at 423–29.

⁶ *Id.* at 423–26.

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.”⁷

As an open question thirty-four years ago, *Imbler*’s choice to afford prosecutors absolute immunity for advocacy functions was not entirely unreasonable. Although the Court invented a specially tailored common law history for absolute immunity, and concocted a public policy to spare prosecutors from having to defend civil lawsuits, *Imbler*’s accommodation is not without contextual justification. Civil rights litigation thirty-four years ago was much less hospitable to prosecutors; qualified immunity was not nearly as protective of prosecutors as it is today.⁸ Moreover, alternative sanctions for misconduct, such as criminal prosecution and professional discipline, were not clearly unavailable or ineffective; the Court was making an educated guess that these checks might serve as an effective deterrent to misconduct.⁹ Further, the Court’s attempt to classify a prosecutor’s conduct into functional categories such as advocacy, investigation, and administration, while not seamless and easily applied, seemed rational. In any event, as the Court acknowledged, these attempts may present close questions requiring line-drawing in future cases.¹⁰ Most importantly, however, the Court did not discuss the larger problem of prosecutorial misconduct, particularly as it relates to the prosecutor’s duty to disclose exculpatory evidence; the subject was not nearly as complex and controversial as it is today.¹¹

Thus, as the edifice for the doctrine that has spawned hundreds of decisions immunizing prosecutors from civil liability for acts of willful misconduct—misconduct

⁷ *Id.* at 428 (quoting *Gregoire v. Biddle*, 177 F. 2d 579, 581 (2nd Cir. 1949)).

⁸ See *infra* notes 186–191 and accompanying text.

⁹ See *infra* notes 153–185 and accompanying text.

¹⁰ See *Imbler*, 424 U.S. at 431 n.33.

¹¹ See *infra* Part I.

that occasionally resulted in innocent defendants being convicted and punished¹²—*Imbler* appears in retrospect to have been a gratuitous experiment in judicial administration, that not only failed to protect the judicial process but skewed the balance of power in the criminal justice system more heavily toward prosecutors.¹³ Moreover, by removing a deterrent to abuse of power by prosecutors, *Imbler* encouraged dishonest prosecutors to hit below the belt and discouraged honest prosecutors from doing the right thing.

Although *Imbler*'s perverse analysis of incentives and disincentives applies to the conduct of prosecutors across the board, there is one area of prosecutorial misconduct in which *Imbler*'s adoption of absolute immunity for prosecutors applies with special force: the prosecutor's decision to conceal from defendants exculpatory evidence that in some cases could be used to prove the defendant's innocence. That is the subject of this Article: why prosecutors should no longer enjoy absolute immunity from civil liability for deliberately suppressing exculpatory evidence, and why the Supreme Court, or Congress, should create an exception to absolute immunity for the deliberate suppression of exculpatory evidence. As this Article demonstrates, a prosecutor's nondisclosure of exculpatory evidence is the most pervasive type of misconduct, involves misconduct that is the least capable of being discovered and punished, and involves conduct that contributes more than any other type of misconduct to the conviction and incarceration of innocent persons. This Article therefore proposes an exception to *Imbler*'s doctrine of absolute immunity for a prosecutor's deliberate bad faith suppression of exculpatory evidence.

¹² See *infra* note 54 and accompanying text.

¹³ Several commentators have proposed abolishing absolute prosecutorial immunity entirely. See Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHAR. L. REV. 1 (2009); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53 (2005); Douglas J. McNamara, *Buckley, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to its Absolute Means*, 59 ALB. L. REV. 1135 (1996).

Part I of this Article describes the rule from *Brady v. Maryland*,¹⁴ which requires a prosecutor to provide a defendant with exculpatory evidence that might assist the defendant in obtaining an acquittal, and discusses the ease with which prosecutors are able to evade the rule and the difficulty of enforcing compliance. Part II discusses *Imbler*'s adoption of absolute immunity for prosecutors for conduct related to their advocacy activities and the extension of absolute immunity to a prosecutor who violates his disclosure duty under *Brady*. Part III discusses a prosecutor's accountability for *Brady* violations and examines why, in the absence of civil liability, the other potential sanctions to deter and punish prosecutors for willful violations of *Brady* are insufficient. Part IV argues that in the absence of any meaningful sanctions to make prosecutors accountable for *Brady* violations, either the courts or Congress should adopt a bad faith exception to absolute immunity when prosecutors deliberately violate *Brady*.

I. The *Brady* Rule: Easily Evaded and Virtually Unenforceable

Of all the constitutional rules in criminal procedure that impose limits on a prosecutor's conduct, the rule of *Brady v. Maryland*¹⁵ is unique in many ways. In all other areas of criminal procedure a prosecutor is commanded by the Constitution, statutes, and ethics rules to refrain from striking foul blows.¹⁶ *Brady* alone imposes on the prosecutor a positive duty of fairness. By tempering the prosecutor's traditional role of a zealous advocate with that of a neutral minister of justice, *Brady* promised to transform the U.S. criminal adversary system from a competitive sporting event into a

¹⁴ 373 U.S. 83 (1963).

¹⁵ *Id.*

¹⁶ *See, e.g.,* *Berger v. United States*, 295 U.S. 78, 88 (1935) (although prosecutor "may strike hard blows, he is not at liberty to strike foul ones"); *United States v. Myerson*, 18 F.3d 153, 162 n.10 (2d Cir. 1994) (prosecutor has "special duty not to mislead").

more balanced and objective search for the truth.¹⁷ As the Court in *Brady* observed, “society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”¹⁸ Further, in all other areas of constitutional criminal procedure in which an error has prejudiced a defendant, it is typically the prosecution that bears the burden of proving that the error was harmless.¹⁹ Under *Brady*, however, it is the defendant who bears the burden to establish that the prosecution’s suppression of favorable evidence was harmful.²⁰ Also, in all other areas of constitutional criminal procedure, the commission of a constitutional error requires the prosecution to meet a much more stringent burden by proving that there is no reasonable possibility that the violation would have altered the

¹⁷ The prosecutor’s *Brady* duty is contained in FED. R. CRIM. P. 16(a)(1)(E)(i) (upon defendant’s request, prosecutor must disclose evidence if “the item is material to preparing the defense”). There are widely inconsistent approaches in the U.S. courts as to what constitutes *Brady* evidence, the specific types of information required to be disclosed, when it must be disclosed, and the sanctions for noncompliance. See LAURAL L. HOOPER ET AL., FED. JUDICIAL CTR., TREATMENT OF BRADY V. MARYLAND MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS’ RULES, ORDERS, AND POLICIES (2004), available at [http://www.fjc.gov/public/pdf.nsf/lookup/BradyMat.pdf/\\$file/BradyMat.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/BradyMat.pdf/$file/BradyMat.pdf). Rule 16 does not explicitly require a prosecutor to disclose all exculpatory information to the defense. In 2006, the Advisory Committee on the Rules of Criminal Procedure voted eight to four to forward an amendment to the Standing Committee on Rules of Practice and Procedure recommending an amendment to Rule 16 requiring a prosecutor to disclose to the defense all exculpatory information. See Advisory Committee on Criminal Rules, Minutes from Teleconference (Sept. 5, 2006), available at <http://www.uscourts.gov/rules/Minutes/CR09-2006-min.pdf>. The Department of Justice strongly opposed the amendment and argued that changes in the United States Attorneys’ Manual dealing for the first time with a prosecutor’s disclosure obligations and establishing guidelines for disclosure would make such an amendment unnecessary. See U.S. Dep’t of Justice, United States Attorneys’ Manual 9-5.000 (2010), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrim.htm. But see *United States v. Jones*, 620 F. Supp. 2d 163, 171 (D. Mass. 2009) (noting that the change in the U.S. Attorneys’ Manual “was not an unprompted effort by the Department of Justice to address a problem that it perceived and acknowledged” but “part of an ardent and, to date, successful effort of the Department to defeat a possible amendment to the Federal Rules of Criminal Procedure”).

¹⁸ *Brady*, 373 U.S. at 87. *Brady* elaborated on this theme, alluding to the inscription on the walls of the Justice Department: “The United States wins its point whenever justice is done its citizens in the courts.” *Id.*

¹⁹ See *Chapman v. California*, 386 U.S. 18, 24 (1967) (harmless error rule “put[s] the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment”).

²⁰ See *United States v. Bagley*, 473 U.S. 667, 685 (1985) (White, J., concurring) (“I agree with the Court that respondent is not entitled to have his conviction overturned unless he can show that the evidence withheld by the Government was ‘material’”); *id.* at 701 (Marshall, J., dissenting) (criticizing standard that requires defendant to “shoulder the heavy burden of proving how [the undisclosed evidence] would have affected the outcome”).

verdict.²¹ When a prosecutor violates due process by suppressing evidence under *Brady*, however, the defendant must prove that had it not been for the prosecutor's suppression, there is a reasonable probability that the jury's verdict would have been different.²² A reasonable probability, according to the Court, is a probability "sufficient to undermine confidence in the outcome."²³

Rather than producing a fundamental change in the criminal justice system, however, *Brady* became an illusory protection that is easily evaded and virtually unenforceable.²⁴ *Brady* represents a contradiction within the operation of the U.S. criminal adversary system. The prosecutor is at once encouraged to be a zealous advocate charged with the responsibility of winning convictions against people who break the law, but at the same time is encouraged to be a neutral minister of justice with the duty to provide the defendant with exculpatory evidence that might assist the defendant in obtaining an acquittal.²⁵ Although *Brady* does not require a prosecutor to provide the defense with open-ended discovery,²⁶ *Brady* does require a prosecutor to sift

²¹ See *Fahy v. Connecticut*, 375 U.S. 85, 86–87 (1963) ("The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."); *Chapman*, 386 U.S. at 24 ("There is little, if any, difference between our statement in *Fahy v. State of Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.").

²² *Bagley*, 473 U.S. at 682 ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

²³ *Id.*

²⁴ See Stephanos Bibas, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in *CRIMINAL PROCEDURE STORIES* 154, 154 (Carol S. Steiker ed., 2006) ("Ultimately, though, our proceduralized adversarial model has rendered *Brady*, if not a dead letter, not a very vigorous one either. Judges are too weak, prosecutors are too partisan, enforcement is too difficult, discovery is too limited, and plea bargains are too widespread for *Brady* to influence many cases. *Brady* remains an important symbol but in some ways a hollow one.").

²⁵ *Bagley*, 473 U.S. at 696–97 (Marshall, J., dissenting) ("[F]or purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case.").

²⁶ See *United States v. Agurs*, 427 U.S. 97, 106 (1976) (prosecutor has "no duty to provide defense counsel with unlimited discovery"). But see Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *FORDHAM L. REV.* 1511, 1522 (2000) ("Some defense attorneys are fortunate to practice in jurisdictions that have 'open-file' discovery practices and thus receive the material early in the case.").

through her files in a conscientious effort to identify any favorable evidence that might assist in proving a defendant's innocence. Given “this obviously unharmonious role” for a prosecutor,²⁷ *Brady* exemplifies a remarkable faith of the Supreme Court in the capacity of prosecutors to subordinate their moral values, personal biases, and competitive instincts to the overriding objective of the pursuit of truth in the service of justice. When prosecutors “play the game to win,” as they typically do,²⁸ carefully analyzing the evidence, reexamining the hypothesis of guilt, and identifying defects and inconsistencies are undertaken not by “minister[s] of justice,”²⁹ but by ardent partisans who keep score of their convictions, are motivated by the rewards of winning, and are unlikely to sacrifice the conviction of guilty defendants to an abstract principle of justice. The *Brady* rule runs counter to these considerations.

Brady's counter-intuitiveness is based not only on general observations of the interests and incentives of a prosecutor within the criminal adversary system; *Brady* compliance also runs counter to more nuanced considerations of the psychology of a prosecutor preparing for adversarial combat. Any prosecutor preparing for trial almost certainly believes the defendant to be guilty and has assembled a cache of evidence to prove the defendant's guilt. There may be evidence in the government's files that

²⁷ *Bagley*, 473 U.S. at 697 (Marshall, J., dissenting).

²⁸ See Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 289–90 (2001) (observing that prosecutors readily admit that winning is important and that district attorneys offices keep track of “batting averages” of prosecutors); Ken Armstrong & Maurice Possley, *Trial & Error: Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at N1 (describing prosecutorial culture “where prosecutors recite conviction rates like boxers touting win-loss records”).

²⁹ See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1983) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1981) (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”); ABA STANDARDS FOR CRIMINAL JUSTICE: Prosecution Function and Defense Function, Standard 3-1.2(c) (3d ed. 1993) (“The duty of the prosecutor is to seek justice, not merely to convict.”); NAT'L PROSECUTION STANDARDS § 1.1 (Nat'l Dist. Attorneys Ass'n, 2d ed. 1991) (“The primary responsibility of prosecution is to see that justice is accomplished.”).

contradicts guilt and that a rational prosecutor may view as favorable to the defendant and subject to *Brady* disclosure, but a rational prosecutor who has carefully analyzed her proof in preparation for trial reasonably might view this contradictory evidence as irrelevant, unpersuasive, or unreliable and certainly not of such probative value to reach the high threshold of materiality that is required for disclosure under *Brady*.³⁰ To be sure, a prosecutor has no discretion under *Brady* to refuse to search for materially favorable evidence, but a prosecutor has unfettered discretion to decide whether any of that evidence must be disclosed. Given the mindset of prosecutors preparing for trial, it is very likely that prosecutors are predisposed to view their disclosure obligations quite narrowly.³¹

Leaving aside intuitive judgments about a prosecutor’s mental state and so-called “conviction mentality,” it is increasingly recognized by specialists in cognitive psychology that a prosecutor’s predisposition is to ignore *Brady*. Experts who study the existence and impact of various cognitive biases on prosecutors recognize that prosecutors ordinarily make professional decisions based on their personal beliefs, values, and incentives, and that these decisions may result in the subversion of justice, even unintentionally.³² These studies have examined the capacity of prosecutors to

³⁰ See *infra* notes 39–48 and accompanying text.

³¹ See Randolph N. Jonakait, *The Ethical Prosecutor’s Misconduct*, 23 CRIM. L. BULL. 550, 559 (1977) (prosecutors are convinced that the defendant is guilty and view contradictory evidence as “irrelevant or petty incongruity”); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 690 n.24 (2006) (citing anecdotal evidence confirming prosecutors’ restrictive view of *Brady* obligation). For a recent example of this prosecutorial mindset in a highly publicized prosecution of a United States Senator, see Transcript of Hearing on Motion to Dismiss at 4–7, *United States v. Stevens*, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 08-231 (EGS)). The district judge identified at least twelve instances where the prosecution team “was caught making false representations and not meeting its discovery obligations.” *Id.* As the court listed the violations, it noted the government’s responses: “testimony was immaterial”; government acted in “good faith”; “just a mistake”; “mistaken understanding”; evidence was “immaterial”; nondisclosure was “inadvertent”; nondisclosure was “unintentional”; documents were “immaterial”; complaint by FBI agent against prosecutors for their misconduct had “no relevancy” and could be adequately addressed by the Office of Professional Responsibility.

³² See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 296–307 (2006) (describing case studies in tunnel vision by prosecutors that

maintain the neutrality and objectivity that compliance with *Brady* requires and have described the kinds of pressures and biases that operate on virtually all of the discretionary decisions that prosecutors make, including the ability to maintain an open mind.³³ For instance, a prosecutor who is convinced of a defendant’s guilt—and what prosecutor is not convinced?—may exhibit so-called “tunnel vision” whereby she ignores, overlooks, or dismisses evidence that might be favorable to a defendant as being irrelevant, incredible, or unreliable.³⁴ Similar kinds of cognitive biases that operate on a prosecutor’s decision-making include “confirmation bias” that credits evidence that confirms one’s theory of guilt and discounts evidence that disconfirms that theory,³⁵ “selective information processing” that inclines one to weigh evidence that supports one’s belief in the defendant’s guilt more heavily than evidence that contradicts those beliefs,³⁶ “belief perseverance” that describes a tendency to adhere to one’s chosen theory even though new evidence comes to light that completely undercuts that theory’s evidentiary basis,³⁷ and “avoidance of cognitive dissonance” under which a person tends to adjust her beliefs to conform to her behavior.³⁸ All of these biases plainly are impediments to rational decision-making and make it perfectly understandable that a prosecutor, wearing the mantle of a zealous advocate seeking to win a conviction, is likely to overestimate the strength of her case and underestimate the probative value of

subverted justice).

³³ See Alafair S. Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006) (describing prosecutorial decision-making as often “irrational” because of cognitive biases). Having served as a prosecutor for several years, and as a long-time observer of prosecutorial conduct, I am inclined to agree with much of Professor Burke’s commentary.

³⁴ See Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 How. L. J. 475 (2006); Findley & Scott, *supra* note 32.

³⁵ See Burke, *supra* note 33, at 1594–96.

³⁶ *Id.* at 1596–99.

³⁷ *Id.* at 1599–1602.

³⁸ *Id.* at 1601–02.

evidence that contradicts or undermines her case. This latter evidence is precisely the kind of evidence that a prosecutor is required to identify and disclose under *Brady*.

Finally, apart from the adversarial pressures on prosecutors that discourage *Brady* compliance, compounded by the cognitive biases that make compliance even more unlikely, the judiciary's permissive interpretation of the prosecutor's duty under *Brady* affords prosecutors a virtual license to evade *Brady* with impunity. *Brady*, as originally understood, required a prosecutor to make a prospective, pretrial determination as to the probative value of certain evidence in her possession that might be materially favorable to the accused and to immediately disclose that evidence.³⁹ However, this prospective duty of the prosecutor mutated into a retrospective, post-conviction determination by an appellate court as to whether the prosecutor's nondisclosure, in the context of the entire record at trial, makes it reasonably probable that, had the evidence been disclosed, the defendant would have been found not guilty.⁴⁰ By adopting this retrospective, post-trial standard to define the scope of the defendant's constitutional right to certain evidence prior to trial, the Court has made it easier for prosecutors to evade their *Brady* duty

³⁹ See *United States v. Coppa*, 267 F.3d 132, 141 (2d Cir. 2001) (suggesting that Court in *Brady* “appears to be using the word ‘material’ in its evidentiary sense, i.e., evidence that has some probative tendency to preclude a finding of guilt or lessen punishment”).

⁴⁰ *United States v. Bagley*, 473 U.S. 667, 699–700 (1985) (Marshall, J., dissenting) (*Brady* duty defined “not by reference to the possible usefulness of the particular evidence in preparing and presenting the case, but retrospectively, by reference to the likely effect the evidence will have on the outcome of the trial”). See *Coppa*, 267 F.3d at 142:

The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty has shifted from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made. To put it another way, *Bagley* makes the *extent* of the disclosure required by *Brady* dependent on the anticipated *remedy* for violation of the obligation to disclose: the prosecutor must disclose evidence if, without such disclosure, a reasonable probability will exist that the outcome of a trial in which the evidence had been disclosed would have been different

(emphasis in original).

simply by claiming that they believed it inconceivable that any evidence they possessed would create a reasonable probability that the defendant would be found not guilty. What rational prosecutor would ever reach such a conclusion?⁴¹ Under this perverse standard of constitutional due process, a prosecutor is encouraged to play games,⁴² to “gamble” and “play the odds,”⁴³ to “bury [his] head [] in the sand,”⁴⁴ to play “hide” and “seek” with the accused,⁴⁵ and require the accused to undertake a scavenger hunt for hidden *Brady* clues.⁴⁶ Further emboldening a prosecutor to evade *Brady* with impunity is the knowledge that the undisclosed evidence probably will remain hidden forever,⁴⁷ and even

⁴¹ Consider Professor Scott Sundby’s tongue-in-cheek rumination about a hypothetical “ethical” prosecutor’s mental process in deciding whether a particular piece of evidence is material under *Brady* and therefore must be disclosed:

This piece of evidence is so exculpatory in nature that it actually undermines my belief that a guilty verdict would be worthy of confidence. Under *Brady*, therefore, I need to turn this evidence over to the defense. Then, once I turn the evidence over and satisfy my constitutional obligation, I can resume my zealous efforts to obtain a guilty verdict that I have just concluded will not be worthy of confidence.

See Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 653 (2002) (emphasis omitted).

⁴² *See* Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007).

⁴³ *Bagley*, 473 U.S. at 701 (Marshall, J., dissenting) (*Brady* standard of materiality “invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive”).

⁴⁴ *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990). *See* Gershman, *supra* note 42, at 551 (“The prosecutor’s claim of ignorance as an excuse for compliance with *Brady* resembles a defendant’s claim of ignorance as an excuse to avoid criminal liability.”). *But see* David Luban, *Contrived Ignorance*, 87 GEO. L. J. 957, 976 (1999) (“[I]n legal ethics, unlike criminal law, there is no willful blindness doctrine.”).

⁴⁵ *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (“A rule thus declaring ‘prosecution may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendant due process.”).

⁴⁶ *Id.* at 695 (“Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.”).

⁴⁷ *Imbler v. Pachtman*, 424 U.S. 409, 443–44 (1976) (White, J., concurring) (“The judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface.”); *United States v. Alvarez*, 86 F.3d 901, 905 (9th Cir. 1996) (“[T]he government’s failure to turn over exculpatory information in its possession is unlikely to be discovered and thus largely unreviewable.”); *United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984) (“[W]e are left with the nagging concern that material favorable to the defense may never emerge from secret government files.”), *vacated sub nom.* *United States v. Pflaumer*, 473 U.S. 922 (1985). *See also* Elizabeth Napier Dewar, *A Fair Trial Remedy for Brady Violations*, 115 YALE L. J. 1450, 1455 (2006) (“Defendants only rarely unearth suppressions.”); Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORHAM L. REV. 1537, 1579 (2000) (arguing that in most cases “withheld evidence will never see the light of day”); *Bibas*, *supra* note 24, at 142 (“Because *Brady* material is hidden in

if the evidence ever does surface, the obstacles to a defendant successfully using it are daunting.⁴⁸

Thus, given a prosecutor's predisposition and incentives to evade *Brady*, it should come as no surprise that *Brady* violations are serious, pervasive, and rarely subject to sanctions of any kind. The ease with which *Brady* evidence may be concealed and kept hidden may lead one to surmise that the documented violations represent only a fraction of the total number of *Brady* violations. Moreover, since no records or statistics are kept by courts, prosecutor offices, or other government agencies of the incidence of prosecutorial misconduct, the effort to document and measure misconduct is difficult. Nevertheless, a large and growing body of empirical and anecdotal evidence exists suggesting that *Brady* violations are the most common type of prosecutorial misconduct.⁴⁹ This evidence suggests that violations often occur in the same prosecutor's

prosecutors' and police files, defense lawyers probably will never learn of its existence. Most defendants lack the investigative resources to dig up *Brady* material.”).

⁴⁸ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (imposing stringent pleading requirements under which plaintiff needs to show that claim is facially plausible and contains sufficient factual content that allows court to draw reasonable inference that defendant is liable for misconduct).

⁴⁹ See JOHN F. TERZANO ET AL., THE JUSTICE PROJECT, IMPROVING PROSECUTORIAL ACCOUNTABILITY – A POLICY REVIEW 9 (2009) (“Suppression of exculpatory evidence is the most widespread and common form of prosecutorial misconduct.”).

office,⁵⁰ are often committed by the same prosecutor,⁵¹ occur disproportionately in capital cases,⁵² and, tragically, have been a principal cause of convictions of innocent persons.⁵³

The documentation of widespread violations of *Brady* is striking. A 1999 national study by the *Chicago Tribune* of 11,000 homicide convictions between 1963 and 1999 found that courts reversed 381 of these convictions for *Brady* violations.⁵⁴ Sixty-seven of these defendants had been sentenced to death,⁵⁵ many of whom were subsequently exonerated.⁵⁶ A 2003 report by the Center for Public Integrity analyzed 11,452 post-1970 convictions that appellate courts reviewed for prosecutorial misconduct and found reversible misconduct in 2,012 cases, the majority of them for *Brady* violations.⁵⁷ A 2000 Columbia Law School study of error rates in capital cases found

⁵⁰ See STEVE WEINBERG, CTR. FOR PUBLIC INTEGRITY, *BREAKING THE RULES: WHO SUFFERS WHEN A PROSECUTOR IS CITED FOR MISCONDUCT?* 3-4 (2003) (analyzing 11,451 cases since 1970 in which charges of prosecutorial misconduct were reviewed by appellate courts and finding that in many instances the misconduct occurred in the same office, often by the same prosecutor); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U.D.C. L. REV. 275, 281-282 (2004) (noting seventy-two reported cases of prosecutorial misconduct from the Bronx District Attorney's Office between 1975-1996, eighteen of which involved reversals of convictions based on prosecutorial suppression of exculpatory evidence).

⁵¹ See WEINBERG, *supra* note 50, at 3 (study finds many "recidivist prosecutors" around the country had "bent or broken the rules multiple times").

⁵² See JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* 5 (2000), available at http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (noting that prosecutorial suppression of exculpatory evidence accounted for 16% to 19% of reversible errors); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23-24, 57 (1987) (finding that thirty-five of 350 wrongful capital convictions resulted from prosecutorial suppression of exculpatory evidence). Most of the post-*Brady* decisions of the U.S. Supreme Court addressing a prosecutor's nondisclosure of exculpatory evidence occurred in capital cases.

⁵³ See Weinberg, *supra* note 50, at 2 (noting that in twenty-eight cases involving thirty-two defendants, misconduct by prosecutors, including suppression of exculpatory evidence, led to the conviction of innocent persons); *United States v. Jones*, 620 F. Supp. 2d 163, 170 (D. Mass. 2009) (noting that "in response to a disturbing number of wrongful convictions resulting in death sentences, in 2002 the Illinois Commission on Capital Punishment recommended that the Illinois Supreme Court 'adopt a rule defining 'exculpatory evidence' in order to provide guidance to counsel in making appropriate disclosures.'"); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 688 n.18 (2006) (listing several cases in which a prosecutor's suppression of exculpatory evidence led to the conviction of innocent persons).

⁵⁴ Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 3.

⁵⁵ *Id.*

⁵⁶ *Id.* Six months after the *Chicago Tribune* series was published, several more people convicted of murder received new trials based on a finding that prosecutors failed to disclose evidence favorable to the defense. See Maurice Possley and Ken Armstrong, *Historic Case Sent Ripples Through Legal Community*, CHI. TRIB., June 6, 1999, at 1.

⁵⁷ See 1 WEINBERG, *supra* note 50, at 2.

that, apart from errors relating to incompetent counsel, the most frequent basis for reversible error in capital cases was *Brady* violations.⁵⁸ A report by the California Commission on the Fair Administration of Justice examined 2,130 state cases that raised claims of prosecutorial misconduct over a ten-year period ending in 2006.⁵⁹ Misconduct was found in 443 of these cases, or 21 percent. Violations of *Brady* were one of the most common forms of misconduct. An examination by the *Pittsburgh Post-Gazette* in 1998 of over 1,500 cases found that *Brady* violations were pervasive and that courts hardly ever reversed convictions.⁶⁰

In addition to these empirical studies, the widespread incidence of *Brady* violations is also a matter of increasing concern to the courts. Dozens of cases in the federal courts since 2007 have found serious *Brady* violations.⁶¹ In an extraordinary

⁵⁸ See LIEBMAN ET AL., *supra* note 52, at 5.

⁵⁹ See CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON REPORTING MISCONDUCT 3 (2007) (“The most common forms of misconduct found were failing to disclose exculpatory evidence and improper argument.”).

⁶⁰ See Bill Moushey, *Win at All Costs*, PITTSBURGH POST-GAZETTE, Nov. 24, 1998, available at <http://www.post-gazette.com/win> (study of over 1,500 cases nationwide during past decade found hundreds of cases in which prosecutors intentionally concealed exculpatory evidence).

⁶¹ For recent cases in the U.S. Supreme Court involving *Brady* violations, see *Cone v. Bell*, 129 S. Ct. 1769 (2009) (remanded for hearing into prosecutor’s suppression of evidence regarding seriousness of defendant’s drug problem); *Youngblood v. West Virginia*, 547 U.S. 867 (2006) (suppression of evidence indicating that testimony of key witness was false).

For recent *Brady* cases (not an exhaustive list) in which the Circuit Courts of Appeals granted relief or criticized prosecutors for nondisclosures, see *United States v. Robinson*, 583 F.3d 1265 (10th Cir. 2009) (nondisclosure of mental health records of confidential informant requires vacating conviction); *Simmons v. Beard*, 581 F.3d 158 (3d Cir. 2009) (suppression of evidence discrediting key witness violates due process); *Montgomery v. Bagley*, 581 F.3d 440 (6th Cir. 2009) (suppression of police report undermining credibility of key witness violates due process); *United States v. Lee*, 573 F.3d 155 (3d Cir. 2009) (nondisclosure of back of hotel registration card suggesting defendant had registered in hotel required vacating conviction); *United States v. Burke*, 571 F.3d 1048 (10th Cir. 2009) (court greatly concerned that prosecutor’s belated disclosure “encourages gamesmanship” and “creates dangerous incentives [to misconduct]” but defendant did not show material prejudice); *United States v. Torres*, 569 F.3d 1277 (10th Cir. 2009) (failure to disclose that confidential informant had been retained by government on two previous occasions required vacating conviction); *United States v. Price*, 566 F.3d 900 (9th Cir. 2009) (nondisclosure of extensive criminal history of key government witness requires vacating conviction); *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009) (suppression of deal with key witness violates due process); *United States v. Mauskar*, 557 F.3d 219, 232 (5th Cir. 2009) (court “deeply concerned” at prosecutor’s belated disclosure of key evidence and at prosecutor’s justification which is “beneath a member of the Bar representing the United States before this Court” but defendant failed to prove prejudice); *United States v. Gibson*, 328 F. App’x 860 (4th Cir. 2009) (new trial ordered on some counts based on prosecutor’s discovery violation); *Harris v. Lafler*, 553 F.3d 1028 (6th Cir. 2009)

decision last May in *United States v. Jones*,⁶² United States District Judge Mark L. Wolf castigated the federal prosecutor for her “egregious” *Brady* violation, stating that “this case extends a dismal history of intentional and inadvertent violations of the government’s duties to disclose in cases assigned to this court.”⁶³ Judge Wolf appended appellate and federal district court decisions in which the courts vacated convictions for

(suppression of evidence that key witness promised substantial benefits for his testimony); *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149 (2d Cir. 2008) (new trial ordered based on prosecutor’s “inexplicably withholding” material exculpatory and impeachment evidence); *United States v. Aviles-Colon*, 536 F.3d 1 (1st Cir. 2008) (nondisclosure of DEA reports materially prejudicial and new trial ordered); *United States v. Lopez*, 534 F.3d 1027 (9th Cir. 2008) (prosecutor’s *Brady* violation “troubling” but motion for new trial denied); *D’Ambrosio v. Bagley*, 527 F.3d 489 (6th Cir. 2008) (suppression of several items of exculpatory evidence that substantially contradicts testimony of state’s only eyewitness); *United States v. Rittweger*, 524 F.3d 171, 180 (2d Cir. 2008) (court “troubled” and “disappointed” by prosecutor’s belated disclosure of exculpatory evidence; prosecutor’s argument that evidence not material disingenuous but defendant failed to show prejudice); *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008) (prosecutor’s “unconscionable,” “willful,” and “bad faith” violation of discovery obligations and “flagrant” misrepresentations to court justified mistrial); *United States v. Zomber*, 299 F. App’x 130 (3d Cir. 2008) (prosecutor’s discovery violation requires reversal of conviction and new trial); *United States v. Garcia*, 271 F. App’x 347 (4th Cir. 2008) (prosecutor’s failure to disclose key impeachment evidence not prejudicial because defendant’s counsel uncovered information day before witness testified); *United States v. Butler*, 275 F. App’x 816 (11th Cir. 2008) (suppression of impeachment evidence but no new trial); *United States v. White*, 492 F.3d 380 (6th Cir. 2007) (remanded for hearing on *Brady* violation but court observes that given conflicting statements “United States Attorney’s word is worth considerably less”); *Jackson v. Brown*, 513 F.3d 1057 (9th Cir. 2008) (suppression of evidence of cooperation agreement with key witness); *United States v. Jernigan*, 492 F.3d 1050 (9th Cir. 2007) (en banc) (prosecutor suppresses evidence that other similar bank robberies were committed by someone after defendant’s arrest who bore striking resemblance to defendant); *United States v. Garner*, 507 F.3d 399 (6th Cir. 2007) (belated disclosure of evidence used to impeach government’s key witness violates due process); *United States v. Velarde*, 485 F.3d 553 (10th Cir. 2007) (suppression of evidence undermining credibility of key witness violates due process); *United States v. Rodriguez*, 496 F.3d 221 (2d Cir. 2007) (remanded for *Brady* hearing after prosecution witness admits lies in initial interviews and prosecutor seeks to avoid disclosure by not taking notes); *Trammel v. McKune*, 485 F.3d 546 (10th Cir. 2007) (in theft prosecution, suppression of receipts linking third party to theft violated due process); *United States v. Chases*, 230 F. App’x 761 (9th Cir. 2007) (no reversal but court admonishes prosecution for “shocking sloppiness” in carrying out its disclosure duty); *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006) (nondisclosure of recantation by key government witness was “blatant” and “so outrageous” as to undermine defendant’s guilty plea); *United States v. Risha*, 445 F.3d 298 (3d Cir. 2006) (suppression of evidence discrediting testimony of key witness violates due process).

For recent cases in the district courts (not an exhaustive list) where relief was granted based on *Brady* violations, see *United States v. Shaygan*, 661 F. Supp. 2d 1289 (S.D. Fla. 2009); *United States v. Stevens*, 593 F. Supp. 2d 177 (D.D.C. 2009); *United States v. Jones*, 620 F. Supp. 2d 163 (D. Mass. 2009); *United States v. Fitzgerald*, 615 F. Supp. 2d 1156 (S.D. Cal. 2009); *Cardoso v. United States*, 642 F. Supp. 2d 251 (S.D.N.Y. 2009); *Hernandez v. City of El Paso*, 662 F. Supp. 2d 596 (W.D. Tex. 2009); *United States v. Quinn*, 537 F. Supp. 2d 99 (D.D.C. 2008); *United States v. Freeman*, No. 07-CR-843, 2009 WL 2748483 (N.D. Ill. Aug. 26, 2009) (prosecutor’s misconduct in allowing witness’s false testimony to materially prejudice defendants requires new trial); *Sykes v. United States*, 897 A.2d 769 (D.C. 2006).

⁶² 620 F. Supp. 2d 163 (D. Mass. 2009).

serious *Brady* violations.⁶⁴ In two recent highly-publicized prosecutions—the Duke lacrosse case and the federal trial of then-Senator Ted Stevens—*Brady* violations were discovered that were so serious as to result in the criminal contempt conviction and disbarment of the Duke prosecutor, Michael Nifong,⁶⁵ and the vacating of Stevens’ conviction by the federal district court, the dismissal of the charges, and the commencing of criminal contempt proceedings against six prosecutors for obstruction of justice.⁶⁶ What is so disconcerting about the misconduct by the prosecutors in the Duke lacrosse and Stevens cases is the realization that if a prosecutor is willing to violate *Brady* in a case of such high public visibility and media scrutiny, this suggests that a prosecutor will violate *Brady* with impunity in the thousands of cases involving anonymous and invisible defendants.

II. Imbler’s Adoption of Absolute Prosecutorial Immunity

Thirty-four years ago, the issue of whether prosecutors were entitled to immunity from civil liability for *Brady* violations—indeed, whether prosecutors enjoyed any immunity at all for their misconduct—had not been decided by the Supreme Court. *Imbler v. Pachtman* answered these questions. Paul Imbler was convicted in 1961 of robbing and murdering Morris Hasson, the operator of a market in Los Angeles, California, and was sentenced to death.⁶⁷ The prosecution’s key witness was Alfred

⁶³ *Id.* at 165.

⁶⁴ *Id.* at 185–193.

⁶⁵ See Duff Wilson, *Hearing Ends in Disbarment For Prosecutor in Duke Case*, N.Y. TIMES, June 17, 2007, at 21; Shaila Dewan, *Duke Prosecutor Is Jailed; Students Seek Settlement*, N.Y. TIMES, Sept. 8, 2007, at A8. See Amended Findings of Fact, Conclusions of Law and Order of Discipline, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm’n of the N.C. State Bar July 31, 2007), available at <http://www.ncbar.gov/Nifong%20Final%20Order.pdf>.

⁶⁶ See Transcript of Hearing on Motion to Dismiss, *United States v. Stevens*, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 08-231 (EGS)) (district court appoints special prosecutor to investigate and prosecute the matter). *Id.* at p. 46–47.

⁶⁷ *Imbler v. Pachtman*, 424 U.S. 409, 411–12 (1976). An alleged accomplice in the Hasson killing, Leonard Lingo, was himself killed ten days later while attempting a robbery in Pomona, California. A subsequent investigation led by the Los Angeles District Attorney determined that Lingo was involved in the Hasson

Costello, who positively identified Imbler as the gunman.⁶⁸ Imbler raised an alibi defense.⁶⁹ After the state supreme court affirmed the conviction and sentence, the trial prosecutor, Deputy District Attorney Richard Pachtman, wrote to the Governor of California describing new witnesses who corroborated Imbler's alibi as well as new evidence that undermined Costello's credibility.⁷⁰ Imbler thereupon filed a state habeas corpus petition based on this new evidence but, after a hearing, the writ was denied.⁷¹ For unrelated reasons, Imbler's death sentence was overturned.⁷² A few years later Imbler filed a federal habeas corpus petition raising the same grounds that were rejected by the state court.⁷³ Deciding the petition on the written record without holding a hearing, the federal district court found eight instances of misconduct at Imbler's trial whose cumulative effect warranted issuance of the writ.⁷⁴

According to the district court, the misconduct consisted of six instances during Costello's testimony in which the prosecutor elicited false and misleading testimony from

killing and that Imbler killed Hasson.

⁶⁸ *Id.* at 412. The prosecution also introduced several other eyewitnesses whose testimony supported Costello.

⁶⁹ *Id.* Imbler claimed he spent the night of the killing bar hopping with several persons and that he met Lingo for the first time the morning before the Pomona robbery. A witness corroborated his alibi.

⁷⁰ *Id.* Pachtman's letter described newly discovered corroborating witnesses for Imbler's alibi as well as new revelations about Costello's background, which indicated that he was less trustworthy than he had represented originally to Pachtman and in his testimony. The letter was dated August 17, 1962. Imbler's execution, which was originally scheduled for September 12, 1962, was stayed.

⁷¹ *Id.* at 413. A referee was appointed to conduct the hearing at which Costello was the "main attraction." He recanted his trial identification of Imbler and admitted embellishing his background during his trial testimony. The corroborating witnesses uncovered by Pachtman also testified. Imbler's counsel described Pachtman's post-trial investigation as "in the highest tradition of law enforcement and justice" and a premier example of "devotion to duty." However, he also charged that Pachtman knowingly used Costello's false testimony at Imbler's trial. In a thorough opinion by Justice Roger Traynor, the California Supreme Court unanimously rejected these contentions and denied the writ. *See In re Imbler*, 387 P.2d 6, 10-14 (Cal. 1963). The California court agreed with the referee's finding that Costello's recantation lacked credibility compared to his original identification, and that the new corroborating witnesses who testified at the hearing were unreliable. *Id.*

⁷² *Imbler*, 424 U.S. at 414.

⁷³ *Id.*

⁷⁴ *See Imbler v. Craven*, 298 F. Supp. 795, 812 (C.D. Cal. 1969).

Costello about “his criminal background, his education, and his current income.”⁷⁵

Although Pachtman lacked actual knowledge of the falsity, according to the district court, he had “cause to suspect” it.⁷⁶ The other two instances of misconduct were suppressions of evidence by a police fingerprint expert who testified at the trial,⁷⁷ and by a police investigator who altered an artist’s sketch to resemble Imbler more closely.⁷⁸ The Ninth Circuit Court of Appeals affirmed, finding that the district court had merely reached different conclusions than the state court in applying federal constitutional standards to the facts.⁷⁹ The state chose not to retry Imbler and he was released.⁸⁰

Imbler thereafter filed a civil rights lawsuit under 42 U.S.C. § 1983 against Pachtman and various officers of the Los Angeles police department alleging a conspiracy to deprive him of his liberty in violation of due process.⁸¹ Imbler’s complaint essentially tracked the district court’s opinion in alleging that Pachtman intentionally and negligently allowed Costello to give false testimony; that Pachtman was chargeable with the fingerprint expert’s suppression; that Pachtman knew that a lie detector test had cleared Imbler; and that Pachtman had used at trial the altered artist’s sketch.⁸² The district court granted Pachtman’s motion to dismiss the complaint, holding that public prosecutors repeatedly had been afforded immunity from civil liability for “acts done as part of their traditional official functions.”⁸³ The Court of Appeals for the Ninth Circuit

⁷⁵ *Imbler*, 424 U.S. at 414 n.8 (referring to district court’s finding that Costello had “lied flatly” about his criminal record, education, and current income).

⁷⁶ *Id.*

⁷⁷ *Id.* at 414–15.

⁷⁸ *Id.* at 415–16.

⁷⁹ *Imbler v. California*, 424 F.2d 631, 632 (9th Cir. 1970).

⁸⁰ *Imbler*, 424 U.S. at 415.

⁸¹ *Id.* at 415–16.

⁸² *Id.* at 416.

⁸³ *Id.*

affirmed, finding that Pachtman's acts were committed during prosecutorial activities that were "an integral part of the judicial process."⁸⁴

The Supreme Court granted certiorari to consider the "important and recurring issue of prosecutorial liability" under § 1983 of the Civil Rights Act of 1871.⁸⁵ The Court acknowledged at the outset that § 1983, the statutory remedy for the deprivation of constitutional rights caused by an official's abuse of power,⁸⁶ contains no immunities for prosecutors.⁸⁷ The Supreme Court assumed, however, that Congress did not intend to abrogate all of the immunities that existed at common law, and the Court identified those immunities that were available for certain parties at common law.⁸⁸ Thus, according to the Court, absolute immunity was available at common law for judges,⁸⁹ legislators,⁹⁰

⁸⁴ *Imbler v. Pachtman*, 500 F.2d 1301, 1302 (9th Cir. 1974) (quoting *Marlowe v. Coakley*, 404 F.2d 70 (9th Cir. 1968)).

⁸⁵ *Imbler*, 424 U.S. at 417.

⁸⁶ See *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Section 1983 of the U.S. Code, originally enacted as part of the Civil Rights Act of 1971, states:

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

42 U.S.C. § 1983 (2006).

⁸⁷ *Imbler*, 424 U.S. at 417. Indeed, in 1871, when § 1983 was enacted, public prosecutors did not exist in their modern form and criminal prosecutions ordinarily were instituted by private citizens. See *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring) (noting that at common law private citizens typically performed the functions currently delegated to public prosecutors); *Burns v. Reed*, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in part and dissenting in part) (noting that "prosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial"). It was twenty-five years after the date noted by Justice Scalia that a state court would address for the first time a prosecutor's immunity from civil liability. See *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896) (holding prosecutor absolutely immune in civil action alleging that prosecutor maliciously and without probable cause added plaintiff's name to grand jury bill after grand jury refused to indict plaintiff and which resulted in plaintiff's arrest and incarceration).

⁸⁸ *Imbler*, 424 U.S. at 417–19. The Court cited *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), for the conclusion that "immunities 'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of § 1983."

⁸⁹ *Imbler*, 424 U.S. at 418, 423 n.20 ("The immunity of a judge for acts within his jurisdiction has roots extending to the earliest days of the common law.").

⁹⁰ *Id.* at 418 ("Regardless of any unworthy purpose animating their actions, legislators were held to enjoy under this statute their usual immunity when acting 'in a field where legislators traditionally have power to

grand jurors,⁹¹ and other government officials such as assessors, highway officers, and members of township boards.⁹² In addition, absolute immunity, referred to as “defamation immunity,” was available to any person for statements that were made in the course of judicial proceedings.⁹³ However, absolute immunity was not afforded to other government officials; only a qualified immunity, referred to at common law as “quasi-judicial immunity,” was afforded.⁹⁴ Qualified immunity was available to government officials such as governors,⁹⁵ other executive branch officials,⁹⁶ and police officers.⁹⁷

With respect to a prosecutor’s immunity at common law, *Imbler* concluded, as had several lower courts, that it was “well settled” that a prosecutor enjoyed absolute immunity when he acted within the scope of his prosecutorial duties.⁹⁸ This created inconsistencies within the *Imbler* opinion. Prosecutors are members of the executive branch and, as the Court noted, executive branch officials such as governors and police officers at common law received only qualified immunity.⁹⁹ *Imbler* also referred to a prosecutor as a “quasi-judicial” official and, at common law, absolute immunity was not

act.”) (quoting *Tenney v. Brandhove*, 341 U.S. at 379).

⁹¹ *Imbler*, 424 U.S. at 423 n.20 (noting that the immunity of grand jurors enjoys “an almost equally venerable common law tenet” as that of judges).

⁹² For discussion of these immunities, see *Burns v. Reed*, 500 U.S. at 499–500 (Scalia, J., concurring in part and dissenting in part). According to Justice Scalia, “prosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial (wherefore they are entitled to *qualified* immunity under § 1983).” *Id.* at 500 (emphasis in original).

⁹³ *Imbler*, 424 U.S. at 426 n.23 (“In the law of defamation, a concern for the airing of all evidence has resulted in an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding. In the case of lawyers the privilege extends to their briefs and pleadings as well.”).

⁹⁴ *Id.* at 420, 423 n.20 (referring to grand jurors and prosecutors as “quasi-judicial” officers); *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part) (noting that quasi-judicial immunity afforded an official only qualified immunity); *Kalina*, 522 U.S. at 132 (Scalia, J., concurring) (noting that at common law, the discretionary decisions of public officials that did not involve actual adjudication were protected by “quasi-judicial” immunity, which is “more akin to what we now call ‘qualified,’ rather than absolute immunity”).

⁹⁵ *Imbler*, 424 U.S. at 419. See also *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

⁹⁶ *Imbler*, 424 U.S. at 419. See also *Scheuer*, 416 U.S. at 247.

⁹⁷ *Imbler*, 424 U.S. at 418–19. See also *Pierson v. Ray*, 386 U.S. 547, 555–57 (1967).

⁹⁸ *Imbler*, 424 U.S. at 424, 424 n.21 (citing cases).

⁹⁹ *Id.* at 418–19.

available to quasi-judicial officials.¹⁰⁰ Nonetheless, *Imbler* emphasized the prosecutor’s “functional comparability” to judges and grand jurors to the extent that all of these parties make discretionary decisions on the basis of evidence presented to them in court.¹⁰¹

Despite these analytical gaps and inconsistencies, *Imbler* extrapolated from the common law two broad categories in which absolute immunity for prosecutors would be available: first, suits for malicious prosecution,¹⁰² and second, suits alleging courtroom misconduct that involves the examination of witnesses and arguments to the jury.¹⁰³

Imbler, however, extended a prosecutor’s absolute immunity beyond these two categories. Relying on public policy, *Imbler* reasoned that if a prosecutor was constrained in making “every decision” by the threat of a civil lawsuit, the public trust in the prosecutor’s office might be compromised.¹⁰⁴ *Imbler* speculated that lawsuits against prosecutors “could be expected with some frequency,”¹⁰⁵ and as a consequence would divert the prosecutor’s energy and attention to her work.¹⁰⁶ *Imbler* further argued, but did not elaborate, that affording prosecutors only qualified immunity would have an adverse effect on the criminal justice system because a prosecutor would face “greater difficulty” in meeting the standard of qualified immunity than other executive or administrative

¹⁰⁰ See *supra* note 94 and accompanying text.

¹⁰¹ *Imbler*, 424 U.S. at 423 n.20 (“Courts that have extended the same immunity to the prosecutor have sometimes remarked on the fact that all three officials—judge, grand juror, and prosecutor—exercise a discretionary judgment on the basis of the evidence presented to them. It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as ‘quasi-judicial’ officers, and their immunities being termed ‘quasi-judicial’ as well.”) (citations omitted).

¹⁰² *Id.* at 422–24.

¹⁰³ *Id.* at 426 n.23.

¹⁰⁴ *Id.* at 424–25 (“A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. 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.”).

¹⁰⁵ *Id.* at 425.

¹⁰⁶ *Id.* (“[I]f the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law”).

officials.¹⁰⁷ Moreover, a prosecutor might be discouraged from presenting evidence whose accuracy might be questionable, or from making arguments about that evidence, if the use of and arguments about that evidence exposed her to personal liability.¹⁰⁸ In sum, according to *Imbler*, “the ultimate fairness of the operation of the system itself would be weakened by subjecting prosecutors to § 1983 liability.”¹⁰⁹

Although *Imbler* recognized that a genuinely wronged defendant would be without a civil remedy against a malicious and dishonest prosecutor, the *Imbler* Court believed that the alternative would disserve the broader public interest.¹¹⁰ It surmised that a defendant might even be prejudiced if she were able to pursue a § 1983 lawsuit against a prosecutor because a court that reviewed the prosecutor’s conduct might skew its decision to protect the prosecutor from potential civil liability.¹¹¹ Moreover, *Imbler* asserted, alternative sanctions to civil lawsuits against prosecutors were available to deter a prosecutor’s malicious and dishonest behavior. The availability of criminal charges against a prosecutor,¹¹² as well as the availability of professional discipline by bar associations,¹¹³ the Court suggested, would “not leave the public powerless.”¹¹⁴ “These checks,” said the Court, “undermine the argument that the imposition of civil liability is

¹⁰⁷ *Id.* (“It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials.”). The Court noted that prosecutors operate under “serious constraints of time and even information,” but did not explain why other executive and administrative officials who receive qualified immunity but who operate under similar constraints would not face the same burdens as prosecutors). *Id.*

¹⁰⁸ *Id.* at 426 (noting that “[t]he veracity of witnesses in criminal cases frequently is subject to doubt,” and “[i]f prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence”).

¹⁰⁹ *Id.* at 427.

¹¹⁰ *See supra* note 5 and accompanying text.

¹¹¹ *Id.* at 428 (qualifying a prosecutor’s immunity “often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice”); *Id.* at 428 n.27 (“consideration of the habeas petition could well be colored by an awareness of potential prosecutorial liability”).

¹¹² *Id.* at 429.

¹¹³ *Id.*

¹¹⁴ *Id.*

the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.”¹¹⁵

Imbler did not demarcate precisely the scope of absolute immunity that it afforded prosecutors. *Imbler* used various formulations to describe the extent of a prosecutor’s immunity, stating that absolute immunity would be available for prosecutors in “initiating a prosecution,”¹¹⁶ “presenting the state’s case,”¹¹⁷ performing activities that are “an integral part of the judicial process,”¹¹⁸ performing activities that are “intimately associated with the judicial phase of the criminal process,”¹¹⁹ and performing functions as an “advocate,”¹²⁰ although noting that an advocate’s duties may also include actions preliminary to the initiation of a prosecution as well as actions outside the courtroom.¹²¹ *Imbler* cautioned that absolute immunity would not necessarily be afforded to prosecutors for administrative and investigative activities and concluded that “[d]rawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.”¹²²

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 431, 421.

¹¹⁷ *Id.* at 431.

¹¹⁸ *Id.* at 430 (quoting *Imbler v. Pachtman*, 500 F.2d 1301, 1302 (9th Cir. 1974)).

¹¹⁹ *Id.* at 430.

¹²⁰ *Id.* at 431, 431 n.33.

¹²¹ *Id.* at 431 n.33.

¹²² *Id.* The Supreme Court has not decided whether absolute immunity extends to a prosecutor’s post-conviction functions, such as prosecuting an appeal, opposing habeas petitions, or reviewing newly discovered evidence. Circuit Courts of Appeal have reached different conclusions. Compare *Warney v. Monroe County*, 587 F.3d 113 (2d Cir. 2009) (prosecutors entitled to absolute immunity for post-conviction review and testing of DNA evidence) and *Carter v. Burch*, 34 F.3d 257 (4th Cir. 1994) (absolute immunity for handling direct appeal and post-conviction motions) with *Yarris v. County of Delaware*, 465 F.3d 129 (3d Cir. 2006) (no absolute immunity unless prosecutor personally involved as state’s advocate in post-conviction proceedings) and *Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992) (no absolute immunity where prosecutor did not personally prosecute appeal). For a discussion on prosecutorial conduct in the post-conviction context, see Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004) (explaining prosecutorial resistance to post-conviction claims of innocence as attributable to personal incentives to maintaining convictions, logistical barriers to confronting innocence claims, and political consequences in responding to such claims).

Imbler did not explicitly address whether absolute immunity extends to a prosecutor who violates his constitutional duty to disclose material exculpatory evidence to a defendant under *Brady v. Maryland*.¹²³ *Imbler*'s lawsuit against Pachtman was based almost entirely on allegations that Pachtman knowingly allowed a key eyewitness at *Imbler*'s capital murder trial to testify falsely without correcting that testimony.¹²⁴ *Imbler* included counts charging suppression of evidence by the police and claimed that Pachtman was vicariously responsible for that suppression.¹²⁵ The Supreme Court discussed *Imbler*'s *Brady* claim in a lengthy footnote at the end of its opinion, largely in response to Justice White's concurring opinion, joined by Justices Brennan and Marshall, which argued against extending absolute immunity to *Brady* violations.¹²⁶

Justice White did not disagree that absolute immunity would be appropriate when a prosecutor is sued civilly for knowingly eliciting and using false testimony to prove a defendant's guilt. Justice White drew this conclusion based on his understanding that a prosecutor's absolute immunity at common law extended to two kinds of lawsuits: suits for malicious prosecution¹²⁷ and suits for defamatory remarks made during judicial proceedings.¹²⁸ As to the immunity for malicious prosecution, Justice White observed that this immunity was necessary to protect the judicial process because, absent immunity, prosecutors might be afraid to bring proper charges against a defendant for

¹²³ 373 U.S. 83 (1963).

¹²⁴ *Imbler*, 424 U.S. at 416.

¹²⁵ *Id.*

¹²⁶ *Id.* at 431 n.34.

¹²⁷ *Id.* at 438 (White, J., concurring) ("I agree with the majority that, with respect to suits based on claims that the prosecutor's decision was malicious, and without probable cause . . . the judicial process is better served by absolute immunity than by any other rule.").

¹²⁸ *Id.* at 440 (noting that function of a judicial proceeding is "to determine where the truth lies," and that those parties involved in judicial proceedings should be encouraged to make full disclosure of all relevant information).

fear of being sued if the defendant was acquitted.¹²⁹ As to the immunity for statements made in court, Justice White observed that this immunity was also necessary to protect the judicial process by encouraging those persons involved in judicial proceedings to make complete and candid disclosures of all relevant information without fear of being sued for false and defamatory testimony and arguments.¹³⁰ Indeed, Justice White observed that it is precisely the function of a judicial proceeding to determine the truth, and since it is often impossible for attorneys to be absolutely certain of objective truth and falsity, a prosecutor should be given every incentive to submit the testimony of witnesses to the crucible of the judicial process without being subjected to liability based on the claim that he knew or should have known that the testimony of the witness was false.¹³¹

However, according to Justice White, the majority extended to prosecutors an immunity that was not available at common law: immunity for the suppression of exculpatory evidence.¹³² Rather than protecting the judicial process, affording a prosecutor absolute immunity for such conduct in fact undermines the judicial process by removing an incentive to prosecutors to disclose material evidence that is favorable to the defendant.¹³³ Accusing the majority of an illogical extension of immunity, Justice White explained that whereas it is sensible to afford defamation immunity to prosecutors to

¹²⁹ *Id.* at 438 (“If suits for malicious prosecution were permitted, the prosecutor’s incentive would always be not to bring charges.”).

¹³⁰ *Id.* at 439.

¹³¹ *Id.* at 440 (“I agree with the majority that history and policy support an absolute immunity for prosecutors from suits based solely on claims that they knew or should have known that the testimony of a witness called by the prosecution was false.”). Justice White appended a clarifying footnote that absolute immunity should not apply to independent claims that the prosecutor withheld facts tending to demonstrate the falsity of the witness’s testimony in constitutionally material respects. *Id.* at 440 n.5.

¹³² *Id.* at 441 (“I disagree with any implication that the absolute immunity extends to suits charging unconstitutional suppression of evidence.”).

¹³³ *Id.* at 442 (“[O]ne would expect that the judicial process would be protected and indeed its integrity enhanced by denial of immunity to prosecutors who engage in unconstitutional conduct”).

encourage prosecutors to elicit all relevant information to assist the fact-finder in arriving at the truth, “it would stand this immunity rule on its head” to apply it to a prosecutor who withholds relevant information from the fact-finder and thereby prevents the fact-finder from arriving at the truth.¹³⁴ Thus, according to Justice White, immunizing a prosecutor for not disclosing exculpatory evidence to the defendant encourages nondisclosure and discourages disclosure.¹³⁵ Denying immunity to a prosecutor for withholding evidence encourages disclosure and discourages nondisclosure.¹³⁶ Justice White acknowledged that denying absolute immunity to a prosecutor for failing to disclose exculpatory evidence might encourage a prosecutor to disclose more evidence than *Brady* required,¹³⁷ but such broader disclosure, he argued, “would hardly injure the judicial process.”¹³⁸ “Indeed, it [would] help it.”¹³⁹

Moreover, according to Justice White, constitutional violations that are committed by prosecutors in open court—such as improper summations, introduction of hearsay testimony in violation of the Confrontation Clause, and knowingly presenting false testimony—are clearly integral parts of the judicial process.¹⁴⁰ Justice White suggested that such violations may be corrected by the judicial process. However, in his opinion, there is no way that the judicial process can correct a prosecutor’s suppression of exculpatory evidence, for such conduct is hidden from the judicial process and the suppressed evidence may never be discovered.¹⁴¹ It is therefore all the more important,

¹³⁴ *Id.* at 442–43.

¹³⁵ *Id.* at 443.

¹³⁶ *Id.*

¹³⁷ *Id.* (“A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required.”).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 443–44 (“[T]he judicial process has no way to prevent or correct the constitutional violation of suppressing evidence [since] the judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface.”).

he argued, to deter such violations by permitting § 1983 damage actions in those cases where violations are exposed.¹⁴² “The stakes are high,” Justice White observed,¹⁴³ citing *Hilliard v. Williams*,¹⁴⁴ in which the prosecutor’s suppression of exculpatory evidence resulted in the conviction and punishment of an innocent defendant. The injury to the judicial process from allowing prosecutors to evade civil liability for such misconduct is easy to identify, according to Justice White.¹⁴⁵ However, he added, it is “virtually impossible” to identify any injury to the judicial process from permitting such suits.¹⁴⁶

The majority saw no difference in principle between a prosecutor knowingly presenting false testimony and a prosecutor suppressing evidence that would demonstrate that falsity. “The distinction is not susceptible of practical application,” the majority contended.¹⁴⁷ Moreover, the majority argued, to require a prosecutor to make a “full disclosure” of potentially exculpatory evidence to obtain absolute immunity would place upon the prosecutor a duty that might far exceed the disclosure requirements of *Brady*.¹⁴⁸ Further, the majority claimed, denying immunity to the prosecutor would “weaken the adversary system” as well as “interfere with the legitimate exercise of prosecutorial discretion.”¹⁴⁹

¹⁴² *Id.* at 444.

¹⁴³ *Id.*

¹⁴⁴ 465 F.2d 1212 (6th Cir. 1972) (no absolute immunity for prosecutor in civil complaint charging prosecutor with deliberate suppression of exculpatory evidence), *cert. denied*, 409 U.S. 1029 (1972). On remand, the Sixth Circuit vacated its prior decision and remanded to the district court. *Hilliard v. Williams*, 540 F.2d 220, 221 (6th Cir. 1976) (prosecutor absolutely immune from civil liability for suppressing exculpatory police report and instructing witness to testify falsely).

¹⁴⁵ *Imbler*, 424 U.S. at 444–45 (White, J., concurring).

¹⁴⁶ *Id.* (“Where the reason for the rule extending absolute immunity to prosecutors disappears, it would truly be ‘monstrous to deny recovery.’”) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

¹⁴⁷ *Id.* at 431 n.34 (majority opinion) (“A claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested.”).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* The majority suggested that there was no principled distinction between a prosecutor knowingly using perjured testimony and knowingly suppressing information demonstrating the falsity. *Id.* (“As a matter of principle, we perceive no less an infringement of a defendant’s rights by the knowing use of perjured testimony than by the deliberate withholding of exculpatory information.”). However, the majority likely was aware that the distinction was neither unprincipled nor abstract. As the Court would

In sum, *Imbler* adopted a broad rule of absolute immunity when prosecutors engage in advocacy activities related to the adjudicative process. Particularly with respect to a prosecutor’s nondisclosure of exculpatory evidence, *Imbler* viewed the prosecutor’s conduct as within this broad spectrum of advocacy conduct. *Imbler* did not recognize the uniqueness of the *Brady* rule, did not take into account the mindset of prosecutors that invites them to hide exculpatory evidence, and failed to appreciate the ease with which prosecutors are able to violate *Brady*. *Imbler* was concerned that a civil action against a prosecutor would dampen the prosecutor’s “courage,” “independence,” and “energy,”¹⁵⁰ and that an “honest” prosecutor would have greater difficulty in defending himself from “error” and “mistaken judgment” than other officials cloaked with qualified immunity.¹⁵¹ Moreover, although Pachtman was accused of *Brady* violations, the Court appeared to view his conduct at most as an error, as a mistake of judgment, or as negligent rather than as willful misconduct. Given the record in that case, it is neither surprising nor counterintuitive that *Imbler* chose to minimize the need for a civil remedy with respect to a prosecutor’s conduct generally, and with respect to a prosecutor’s *Brady* violations in particular. It is also noteworthy that the Court focused on the prosecutor’s conduct in open court and the advocacy decisions that a prosecutor makes before and during a trial that are subject to judicial review. The Court lumped together all of the conduct of a prosecutor that is related to the trial, including all actions undertaken before trial, in secret, shielded from public scrutiny, and not subject to

hear in oral arguments the following month and decide later that Term in *United States v. Agurs*, 427 U.S. 97 (1976), a prosecutor’s knowing use of false testimony and a prosecutor’s suppression of exculpatory evidence were distinct violations. *Id.* at 103–04. Moreover, in contrast to *Imbler*, the Court in *Agurs* described the prosecutor’s duty to disclose exculpatory evidence as grounded in elementary notions of fairness to serve the cause of justice rather than as a function of a prosecutor’s role as an advocate seeking to win a conviction. *Id.* at 111 (noting “prosecutor’s obligation to serve the cause of justice”).

¹⁵⁰ *Imbler*, 424 U.S. at 423, 425.

¹⁵¹ *Id.* at 425, 427.

judicial oversight, such as *Brady* decisions. To the extent that the Court assumed that a prosecutor's duty under *Brady* to disclose evidence is undertaken as an "advocate" rather than as a "minister of justice," the Court lost sight of the special responsibilities assigned to the prosecutor by *Brady*. By removing the sanction of civil liability from such misconduct, *Imbler* gave prosecutors a further incentive to disregard their constitutional responsibilities.

IV. Accountability of Prosecutors for *Brady* Violations

Imbler acknowledged that, by creating the immunity, it left a wronged defendant without a civil remedy.¹⁵² However, the Court added, this absence "does not leave the public powerless to deter misconduct or to punish that which occurs."¹⁵³ According to *Imbler*, the policy considerations that mandate civil immunity for prosecutors do not place prosecutors beyond the reach of the criminal law, suggesting that prosecutors would be subject to criminal prosecution for willful criminal acts.¹⁵⁴ *Imbler* also observed that a prosecutor, who "stands perhaps unique, among officials whose acts could deprive persons of constitutional rights," would be subject to professional discipline by bar associations.¹⁵⁵ "These checks," *Imbler* asserted, "undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime."¹⁵⁶

¹⁵² *Id.* at 427 ("To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.").

¹⁵³ *Id.* at 429.

¹⁵⁴ *Id.* ("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. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights The prosecutor would fare no better for his willful acts.").

¹⁵⁵ *Id.* (suggesting that a prosecutor is "perhaps unique . . . in his amenability to professional discipline by an association of his peers").

¹⁵⁶ *Id.*

Imbler's confidence that prosecutors would face both criminal and professional sanctions for their misconduct has proven to be dramatically mistaken. One of the central themes in criminal procedure and professional ethics since *Imbler* has been the lack of accountability of prosecutors for their misconduct, especially that which involves the

deliberate suppression of exculpatory evidence.¹⁵⁷ As noted above,¹⁵⁸ a significant body of empirical and anecdotal evidence demonstrates that *Brady* violations are becoming the norm rather than the exception. Yet paradoxically, despite this systemic malfunction, there also appears to be a systemic inability to fix the problem.

¹⁵⁷ See JOHN F. TERZANO ET AL., THE JUSTICE PROJECT, IMPROVING PROSECUTORIAL ACCOUNTABILITY: A POLICY REVIEW (2009), available at <http://www.thejusticeproject.org/wp-content/uploads/pr-improving-prosecutorial-accountability1.pdf> (describing prevalence of prosecutorial misconduct, absence of significant restraints on misconduct, and recommending ways to improve accountability); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 756–762, 774 (2001) (noting rarity of discipline against prosecutors); Ellen Yaroshesky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 277 (2004) (professional discipline for prosecutor’s misconduct “is often nil”); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998) (“[T]here is a notable absence of disciplinary sanctions against prosecutors, even in the most egregious cases.”); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1596 (2003) (noting that existing rules of ethics fail to regulate large areas of prosecutors’ professional conduct); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (“[D]isciplinary charges have been brought infrequently and meaningful sanctions [have been] rarely applied.”); 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, 898 (1997) (noting that disciplinary process “has been almost totally ineffective in sanctioning even egregious *Brady* violations”); Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 282 (2007) (describing the disciplinary process as “woefully inadequate in holding prosecutors accountable for misconduct”). See also Armstrong & Possely, *supra* note 54 (1999 study of 381 cases in which courts dismissed homicide convictions based on *Brady* violations revealed that not one prosecutor was publicly sanctioned by a state disciplinary authority or criminally prosecuted for withholding evidence or presenting false evidence); WEINBERG, *supra* note 50, at 79 (finding only 44 cases of professional discipline of prosecutors out of 2,012 cases reversed since 1970 due to misconduct; of the 44 cases, seven resulted in dismissal of the complaint, 20 in a reprimand or censure, 12 in a suspended license, two in disbarment, 24 in a fine, and three in remand for further proceedings); Mike Zapler, *State Bar Ignores Errant Lawyers*, SAN JOSE MERCURY NEWS, Feb. 12, 2006, at 1 (finding that of 1,464 lawyer discipline cases published in the California Bar Journal between 2001 and 2005, only one case involved disciplinary action against a prosecutor for misconduct).

Professional discipline by the U.S. Justice Department’s Office of Professional Responsibility (OPR) also has been criticized as inadequate. See DAVID BURNHAM, ABOVE THE LAW: SECRET DEALS, POLITICAL FIXES AND OTHER MISADVENTURES OF THE U.S. DEPARTMENT OF JUSTICE 331 (1996) (“The systemic failure of this tiny, extremely passive unit to confront directly the misconduct of Justice Department officials must be considered one of the most serious lapses in the department’s recent history.”); Greg Rushford, *Watching the Watchdog: Veteran Justice Department Ethics Officer Faces Questions About His Own Actions*, LEGAL TIMES, Feb. 5, 1990, at 1 (criticizing effectiveness of Office of Professional Responsibility). See also United States v. Hastings, 461 U.S. 499, 522 (1983) (Brennan, J., concurring in part and dissenting in part) (“Prior experience, for example, might have demonstrated the futility of relying on Department of Justice disciplinary proceedings.”); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 16 n.75 (2009) (noting that OPR oversight of federal prosecutors is “uncertain”). In the aftermath of his dismissal of the conviction of then-Senator Ted Stevens of Alaska based on the prosecutors’ withholding exculpatory evidence, Federal District Judge Emmet G. Sullivan appointed a

Imbler's expectation that prosecutors who violate the law would face criminal penalties seemed extreme at the time, and the prospect seems even more farfetched today. To support its view of the likelihood of criminal prosecutions against prosecutors, *Imbler* cited a California case, *In re Branch*,¹⁵⁹ and stated that "California also appears to provide for criminal punishment of a prosecutor who commits some of the acts ascribed to respondent by petitioner."¹⁶⁰ The Court's extrapolation of a general principle from a case that does not even support that principle¹⁶¹ was illogical then and is even more unsupportable today. In fact, criminal sanctions against a prosecutor are hardly ever enforced, in California or anywhere else in the United States.¹⁶² An extensive search

special prosecutor to investigate whether the six Justice Department prosecutors should face criminal charges for their misconduct. The judge expressed little confidence that the Office of Professional Responsibility would conduct a proper and effective inquiry. See Transcript of Hearing on Motion to Dismiss at 45–46, *United States v. Stevens*, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 08-231 (EGS)) (expressing obvious lack of confidence in OPR's claim, made six months earlier, to conduct an investigation, and that to date, "the silence has been deafening"; court also finds "shocking but not surprising" the lack of response by then-U.S. Attorney General Michael Mukasey to numerous letters from defense counsel urging commencement of formal investigation of prosecutors).

¹⁵⁸ See *supra* notes 49–66 and accompanying text.

¹⁵⁹ 449 P.2d 174 (Cal. 1969).

¹⁶⁰ *Imbler*, 424 U.S. at 429 n.29. The Court's reference to *Branch* is perplexing and somewhat disingenuous. *Branch* reviewed a habeas petition by a California inmate convicted of possessing deadly weapons in his cell, who claimed that his attorney failed to conduct an adequate investigation that other prisoners had committed the same offense. The attorney at a hearing stated that he refused to act upon the petitioner's request because he had good reason to believe that the proposed testimony would be perjured. The appellate court noted that "an attorney may not knowingly allow a witness to testify falsely," and that "an attorney who attempts to benefit his client through the use of perjured testimony may be subject to criminal prosecution." *Branch*, 449 P.2d at 181. Thus, *Branch* did not involve the prosecution of a prosecutor, as the Court's citation would lead one to believe, nor did *Branch* suggest that a prosecutor would be subject to criminal charges, or that any prosecutor had ever been prosecuted in California for suborning perjury. Indeed, of the many hundreds of reported cases in California and the U.S. in which prosecutors were found to have knowingly elicited false testimony, not one of those prosecutors as far as I have been able to determine has ever been subjected to criminal prosecution for suborning perjury.

¹⁶¹ *Branch*, 449 P.2d at 181.

¹⁶² See Brink, *supra* note 12 at 27 ("[L]eveling of criminal charges against a prosecutor for conduct occurring in the course of a prosecution is all but unheard of"); Andrew Smith, *Brady Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1969–70 (2008) (arguing that prosecutors could be charged criminally with violating 18 U.S.C. § 242, the criminal analogue to § 1983, and noting one case in which a local prosecutor was convicted in federal court under § 242 for violating *Brady*). See *In re Brophy*, 442 N.Y.S.2d 818 (N.Y. App. Div. 1981) (Brophy convicted of § 242 misdemeanor and sentenced to pay a fine of \$500; in light of his contention that his violation was "inadvertent," and his previously unblemished record, court believed a censure would be an appropriate disciplinary sanction).

using LexisNexis and Westlaw databases located not a single instance in California since *Imbler* in which a prosecutor has been criminally prosecuted for acts related to his prosecutorial duties.¹⁶³ A nationwide search for instances of criminal charges against prosecutors in the last twenty-five years turned up two criminal prosecutions stemming from highly publicized criminal cases in which prosecutors were charged with crimes related to their deliberate violations of *Brady*. In 1999 in Chicago, a special prosecutor charged county prosecutor Thomas L. Knight with obstruction of justice, perjury, and conspiracy for his suppression of “obviously exculpatory” evidence that put an innocent man on death row in the murder of a ten-year-old girl.¹⁶⁴ Knight was acquitted. In 2007 in Detroit, the U.S. Department of Justice charged federal prosecutor Richard Convertino with conspiracy, obstruction of justice, and making false statements in connection with his suppression of evidence in a high-profile terrorism trial in 2003.¹⁶⁵ Convertino was acquitted. Of the hundreds of cases involving *Brady* violations alluded to above,¹⁶⁶ many of which were intentional, egregious, and easily provable as an obstruction of justice, no criminal action was brought against the prosecutor even though the prosecutor in many of these cases caused the conviction and lengthy incarceration of an innocent person.¹⁶⁷ If *Imbler*’s prediction were even remotely accurate, one might have expected to see

¹⁶³ It goes without saying that a criminal prosecution against a prosecutor for any reason, and especially for crimes related to his prosecutorial function, would be a newsworthy event. The failure to uncover a single instance of a criminal prosecution, while not dispositive, strongly supports the conclusion.

¹⁶⁴ See Andrew Bluth, *Prosecutor and 4 Sheriff’s Deputies Are Acquitted of Wrongfully Accusing a Man of Murder*, N.Y. TIMES, June 5, 1999, at A9.

¹⁶⁵ See Joe Swickard & Christina Hall, *Terror Case Prosecutor Acquitted of Rigging Trial; Jury: Convertino and Agent Didn’t Hide Evidence*, DETROIT FREE PRESS, NOV. 1, 2007, at A1.

¹⁶⁶ See *supra* notes 49–66 and accompanying text.

¹⁶⁷ See, e.g., WEINBERG, *supra* note 50, at 1 (finding that of the 2,012 cases in which courts reversed convictions based on prosecutorial misconduct since 1970, reversals often attributable to *Brady* violations, 32 defendants were found to be innocent); Gershman, *supra* note 53, at 688 n.18 (identifying several cases in which a prosecutor’s violation of *Brady* contributed to the conviction and incarceration of an innocent person).

criminal charges brought against at least some of those prosecutors. But this has not happened.

Imbler also confidently predicted that a prosecutor would be subject to professional discipline by bar associations.¹⁶⁸ As with *Imbler*'s prediction of criminal prosecutions, the imposition of professional discipline against prosecutors has also been extraordinarily rare. Although state bar associations, grievance committees, and the Justice Department's Office of Professional Responsibility have regulatory authority over prosecutors and have the power to discipline prosecutors for violations of rules of professional ethics, virtually every commentator has criticized the absence of professional discipline of prosecutors, even in cases of obvious and easily provable violations and even in cases in which a court issued a stinging rebuke of the prosecutor.¹⁶⁹ The absence of professional discipline is particularly glaring in cases involving intentional *Brady* violations. Of all the ethical rules relating to a prosecutor's professional conduct, the ethics rule governing a prosecutor's suppression of evidence is the most explicit and easiest to enforce.¹⁷⁰ Nonetheless, although one might reasonably expect that professional disciplinary bodies would view such conduct as unethical and even dangerous, these bodies for a variety of reasons typically maintain a hands-off approach.¹⁷¹ From an examination of the numerous instances of serious *Brady* violations

¹⁶⁸ *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

¹⁶⁹ See *supra* note 157 and accompanying text.

¹⁷⁰ See MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2004); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (2004); ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 3-3.11(a) (1992), reprinted in PROFESSIONAL RESPONSIBILITY, STANDARDS, RULES & STATUTES 1146 (John S. Dzienkowski ed., 2001). See also *Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."); *Kyles v. Whitely*, 514 U.S. 419, 437 (1995) (noting that *Brady* "requires less of the prosecution than the ABA Standards").

¹⁷¹ See *supra* note 157 and accompanying text. Occasionally, an offending prosecutor is punished by a disciplinary body, and the event often elicits media attention. See, e.g., Jeffrey Toobin, *Killer Instincts: Did a Famous Prosecutor Put the Wrong Man on Death Row*, THE NEW YORKER, Jan. 17, 2005, at 54

noted above, very few of the offending prosecutors were ever subjected to professional discipline or even investigated by disciplinary bodies.

Given this regulatory vacuum by professional disciplinary bodies, several lower courts have begun to take a much more aggressive stand against prosecutorial abuses in an effort to make prosecutors accountable for their misconduct. This is especially noticeable in cases where prosecutors have committed serious *Brady* violations. In *United States v. Stevens*, which involved the high-profile prosecution and conviction of then-Senator Ted Stevens of Alaska, Federal District Judge Emmet G. Sullivan dismissed with prejudice the charges against the defendant after finding that the prosecution had suppressed material exculpatory evidence.¹⁷² Judge Sullivan appointed a special counsel to investigate the conduct of the offending trial prosecutors and their supervisors in the Justice Department and to consider criminal contempt and obstruction of justice charges for violating the court's order to turn over to the defense all material exculpatory evidence.¹⁷³ Similarly, in *United States v. Shaygan*,¹⁷⁴ after finding that the prosecution had violated *Brady*, Federal District Judge Alan S. Gold in Florida granted the defendant a monetary award under the Hyde Amendment of \$601,795,¹⁷⁵ imposed individual

(discussing a county prosecutor who was disbarred for deliberately presenting a witness's false testimony in two death penalty trials); Wilson, *supra* note 65 (discussing the case of District Attorney Michael Nifong, prosecutor in the Duke lacrosse case, who was disbarred for suppressing exculpatory evidence).

¹⁷² See Transcript of Hearing on Motion to Dismiss at 3, *United States v. Stevens*, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 08-231 (EGS)) (“In nearly 25 years on the bench, I’ve never seen anything approaching the mishandling and misconduct that I’ve seen in this case.”).

¹⁷³ *Id.*

¹⁷⁴ 661 F. Supp. 2d 1289 (S.D. Fla. 2009).

¹⁷⁵ The Hyde Amendment was enacted by Congress in 1998 and is located in a statutory note to 18 U.S.C. § 3006A. It provides in relevant part that courts may award attorney's fees and other litigation expenses to prevailing criminal defendants “where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make the award unjust.” Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997), *reprinted in* 18 U.S.C. § 3006A (2006). Since its enactment, prevailing criminal defendants applied for Hyde fees in approximately 200 reported cases, and were successful in less than 10 percent of those cases. Courts struggle to define the operative terms. See *United States v. Gilbert*, 198 F.3d 1293, 1298–99 (11th Cir. 1999) (finding that “vexatious” means “without . . . probable cause” or “without foundation, even though not brought in subjective bad faith”; “frivolous” means “groundless” and “with little prospect of success” brought primarily “to embarrass or

sanctions against the two Assistant United States Attorneys, and ordered the United States Attorney to establish procedures to improve the supervision of attorneys in the office. The conduct of the prosecutors, according to Judge Gold, raised “disturbing” and “troubling” questions about the “integrity of those who wield enormous power over the people they prosecute.”¹⁷⁶ Judge Gold added that the U.S. Attorney General must create a culture where a “‘win-at-any-cost’ prosecution is not permitted,” and that courts must impose sanctions for substantial prosecutorial abuses in order to “make the risk of non-compliance too costly.”¹⁷⁷

Finally, in *United States v. Jones*,¹⁷⁸ Federal District Judge Mark L. Wolf in Massachusetts found that “[t]he egregious failure of the government to disclose plainly material exculpatory evidence in this case extends a dismal history of intentional and inadvertent violations of the government’s duties.”¹⁷⁹ In a separate opinion addressing whether sanctions should be imposed,¹⁸⁰ Judge Wolf stated that the conduct of the prosecutor “reflects a fundamentally flawed understanding of her obligations, or a reckless disregard of them, despite many years of experience as a prosecutor, substantial training by the Department of Justice, and an explanation of her obligations by this Court.”¹⁸¹ Judge Wolf warned that he would institute criminal contempt proceedings

annoy the defendant”; and “bad faith” is “the conscious doing of wrong because of dishonest purpose,” or “a furtive design or ill will,” requiring more than “bad judgment or negligence”). According to Judge Gold, “the position taken by [Assistant United States Attorney] Cronin [the prosecution] in filing the superseding indictment; initiating and pursuing the collateral investigation based on unfounded allegations; suppressing information about the roles of two key government witnesses as cooperating witnesses in the collateral investigation; and attempting to secure evidence from the collateral investigation that would have jeopardized the trial and severely prejudiced the defendant, constitute bad faith.” *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1321 (S.D. Fla. 2009).

¹⁷⁶ *Id.* at 1292.

¹⁷⁷ *Id.* (“It is equally important that the courts of the United States must let it be known that, when substantial abuses occur, sanctions will be imposed to make the risk of non-compliance too costly.”).

¹⁷⁸ 609 F. Supp.2d 113 (D. Mass. 2009).

¹⁷⁹ *Id.* at 119.

¹⁸⁰ *United States v. Jones*, 620 F. Supp. 2d 163 (D. Mass. 2009).

¹⁸¹ *Id.* at 167.

against offending prosecutors in future cases and would publicly name these prosecutors in published decisions.¹⁸² Finally, pointing to the repeated violations by prosecutors in his court, Judge Wolf expressed dismay that it could no longer rely on the Department of Justice training programs, and therefore would arrange for its own training program to educate prosecutors on their discovery responsibilities in criminal cases.¹⁸³

In sum, the Court in *Imbler* believed that protecting the honest prosecutor from civil liability was a “lesser evil” than affording a civil remedy to a defendant wronged by a dishonest prosecutor.¹⁸⁴ Nevertheless, the Court assured the public that it would not be unprotected because prosecutors who abused their power would be subject to criminal prosecution and professional discipline. Today, thirty-four years later, it is abundantly

¹⁸² See Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS. L. REV. 1059 (2009). Commentators have proposed other remedies to improve prosecutorial accountability. See, e.g., Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L. J. 1509 (2009); Tracy L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

¹⁸³ Apparently the stinging rebukes by the federal district judges in *Stevens*, *Shaygan*, and *Jones* did not go unnoticed by the Department of Justice. On January 4, 2010, Deputy Attorney General David W. Ogden issued three memoranda to United States Attorneys, Department Prosecutors, and Heads of Department Litigating Components providing guidance in handling criminal discovery. Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep’t of Justice, to Department Prosecutors (Jan. 4, 2010), available at <http://www.justice.gov/dag/discovery-guidance.html> (“The guidance is intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences adverse to the department’s pursuit of justice.”). The Memorandum to Department Prosecutors specifically provides guidance to the “prosecution team” on where to look for *Brady* evidence, what to review, how to conduct the evidence review, and the scope, timing, and form of disclosures. The guidance is intended to supplement the United States Attorneys Manual dealing with disclosure. See U.S. Dep’t of Justice, United States Attorneys’ Manual 9-5.001 (2010), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrmm.htm. Guidance is also provided by a designated criminal discovery coordinator in their office, as well as a full-time discovery expert who will be detailed to Washington from the field. See Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep’t of Justice, to Department Prosecutors (Jan. 4, 2010) (Guidance for Prosecutors Regarding Criminal Discovery), available at <http://www.justice.gov/dag/dag-memo.html>; Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep’t of Justice, to Heads of Dep’t Litig. Components Handling Criminal Matters and All U.S. Attorneys (Jan. 4, 2010) (Requirement for Office Discovery Policies in Criminal Matters), available at <http://www.justice.gov/dag/dag-to-usa-component-heads.html>.

¹⁸⁴ *Imbler v. Pachtman*, 424 U.S. 409, 427–28 (1976). The Court, citing Judge Learned Hand’s opinion in *Yaselli v. Goff*, 12 F.2d 396, 404 (2d Cir. 1926), noted that “the answer must be found in a balance between the evils inevitable in either alternative [but] it has been thought 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.”

clear that *Imbler*'s assurance was misguided and mistaken. Indeed, the only effective sanction – enabling the injured party to sue the wrongdoer directly – was discarded.

V. Bad Faith Exception to Absolute Prosecutorial Immunity for *Brady* Violations

The extension of *Imbler* to a prosecutor's willful violation of *Brady* was an unjustified extension of absolute immunity thirty-four years ago and appears much more unwarranted today. As I have already demonstrated, *Imbler* provides tenuous support for absolute immunity for prosecutors with respect to their misconduct in general. But in view of the widespread occurrences of *Brady* violations and the lack of effective sanctions to deter such misconduct, *Imbler*'s protection of prosecutors is even more unjustified. *Imbler*'s decision to protect prosecutors not only prevents a wronged person from redressing constitutional harms caused by dishonest prosecutors; it also disserves the judicial process by undermining its integrity and fairness.

Given that *Imbler* is a longstanding precedent that has been repeatedly reaffirmed by the Court, it is unlikely that the Court will reconsider its decision to afford absolute immunity to prosecutors with respect to their advocacy functions generally. However, there are several compelling reasons that might persuade the Court or Congress to make an exception to absolute immunity when prosecutors willfully suppress material exculpatory evidence. Such an exception would likely appear more acceptable today than when *Imbler* was decided. For one thing, the framework of § 1983 litigation has changed dramatically since *Imbler*, especially with respect to the continuing need by prosecutors for absolute immunity. As the Court observed in *Burns v. Reed*,¹⁸⁵ the qualified immunity standard is far more protective of officials today than it was when *Imbler* was decided: “[qualified immunity] provides ample protection to all but the

¹⁸⁵ 500 U.S. 478, 494–95 (1991).

plainly incompetent or those who knowingly violate the law.”¹⁸⁶ The Court since *Imbler* has “completely reformulated qualified immunity”¹⁸⁷ by replacing the common law subjective standard with an objective standard that allows liability only where the official violates “clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁸⁸ This change was specifically designed to protect the honest and conscientious official from the kinds of frivolous, harassing, and disruptive complaints that are made by disgruntled defendants, particularly as these complaints relate to a prosecutor’s judgment calls and discretionary decisions, about which *Imbler* was critically concerned.¹⁸⁹ Moreover, the Court has further narrowed a prosecutor’s exposure to civil liability by foreclosing civil complaints entirely unless the defendant was successful in obtaining a dismissal or acquittal of the criminal charges, further undercutting the Court’s concern that prosecutors would be subjected to a constant flood of lawsuits that would drain their energy and attention.¹⁹⁰

Additionally, one of the hallmarks of the *Imbler* jurisprudence has been an attempt by the Court to ensure parity in the treatment of officials engaged in the same functions.¹⁹¹ Although *Imbler* did not demarcate precisely the scope of a prosecutor’s absolute immunity, it did recognize that the scope of absolute immunity extended to a

¹⁸⁶ *Id.* at 495 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

¹⁸⁷ *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

¹⁸⁸ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹⁸⁹ *See Malley*, 475 U.S. at 341 (change in qualified immunity “specifically designed to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment”). *See also* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1216 (noting that the developments in criminal litigation since *Imbler* “provide adequate protections for prosecutors without the need for absolute immunity”).

¹⁹⁰ *See Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994) (holding that, to recover damages under § 1983, a defendant who alleges that he was unconstitutionally convicted or imprisoned “must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus”).

¹⁹¹ *See Buckley v. Fitzsimmons*, 509 U.S. 259, 288 (1993) (“[O]ne of the unquestioned goals of our § 1983 immunity jurisprudence is ensuring parity in treatment among state actors engaged in identical functions”) (Kennedy, J., concurring in part and dissenting in part).

prosecutor’s “advocacy” functions, which covers trial and pre-trial decisions, including *Brady* decisions. But this does not necessarily include non-advocacy functions, such as investigative functions. This distinction was made in *Buckley v. Fitzsimmons*,¹⁹² in which the Court observed that when a prosecutor performs investigative functions normally performed by police officials, and as to which functions the police would enjoy only qualified immunity, “it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.”¹⁹³ Ensuring parity also was addressed in *Burns v. Reed*,¹⁹⁴ where the Court considered whether a prosecutor enjoyed absolute immunity for giving legal advice to the police. The Court concluded that “it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following that advice.”¹⁹⁵ Moreover, in *Van de Kamp v. Goldstein*,¹⁹⁶ which considered a supervisory prosecutor’s immunity for the supervision and training of trial prosecutors, the Court emphasized the “practical anomalies” of affording a trial prosecutor absolute immunity for his intentional misconduct but affording supervisors only qualified immunity for their negligence in training and supervising that prosecutor.¹⁹⁷

The Court’s concern with parity would appear to apply equally to *Brady* violations. It is well-established that a prosecutor’s disclosure duty extends to evidence in the possession of the police, even if the prosecutor is unaware of that evidence.¹⁹⁸ To

¹⁹² 509 U.S. 259 (1993).

¹⁹³ *Id.* at 273 (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973)).

¹⁹⁴ 500 U.S. 478 (1991).

¹⁹⁵ *Id.* at 495.

¹⁹⁶ 129 S. Ct. 855 (2009).

¹⁹⁷ *Id.* at 863.

¹⁹⁸ *Kyles v. Whitley* 514 U.S. 419, 437 (1995) (noting that a prosecutor has “a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police”).

be sure, for *Brady* purposes the police are considered an “arm of the prosecutor”¹⁹⁹ and, as virtually every circuit has concluded, have a derivative duty under *Brady* to turn over to the prosecutor potentially exculpatory evidence.²⁰⁰ Thus, if the police hide exculpatory evidence from the prosecutor, they violate their *Brady* duty and are subject to civil liability under § 1983, for which violation they receive at most only qualified immunity.²⁰¹ Thus, just as it would be incongruous to afford prosecutors absolute immunity for engaging in investigative misconduct for which police enjoy qualified immunity, and for giving bad advice to the police for which the police would receive qualified immunity if they mistakenly relied on that advice, it would seem just as incongruous to afford prosecutors absolute immunity for failing to disclose exculpatory evidence to the defendant but afford the police only qualified immunity for failing to turn that same evidence over to the prosecutor.

Finally, just as the Court has created exceptions for bad faith conduct by prosecutors that violate the constitutional rights of defendants, so too could the Court create an exception to absolute immunity for bad faith violations of *Brady*. A violation of *Brady* does not require that a prosecutor act in bad faith; the *Brady* rule reflects a “no-fault” principle that focuses on “the character of the evidence, not the character of the

¹⁹⁹ See *Walker v. Lockhart*, 763 F.2d 942, 958 (8th Cir. 1985) (“Police are treated as an arm of the prosecution for *Brady* purposes.”).

²⁰⁰ See *Moldowan v. City of Warren*, 578 F.3d 351, 381 (6th Cir. 2009) (“[V]irtually every other circuit has concluded either that the police share in the state’s obligations under *Brady*, or that the Constitution imposes on the police obligations analogous to those recognized in *Brady*.”); *Brady v. Dill*, 187 F.3d 104, 114 (1st Cir. 1999) (“[A] police officer sometimes may be liable [under § 1983] if he fails to apprise the prosecutor or a judicial officer of known exculpatory information.”); *Hart v. O’Brien*, 127 F.3d 424, 446–47 (5th Cir. 1997) (“[A] plaintiff states a section 1983 claim against a police officer who, after learning of ‘patently exculpatory evidence,’ deliberately fails to disclose it to the prosecutor.”); *McMillian v. Johnson*, 88 F.3d 1554, 1569 (11th Cir. 1996) (“Our case law clearly established that an accused’s due process rights are violated when the police conceal exculpatory or impeachment evidence.”); *Walker v. City of New York*, 974 F.2d 293, 299 (2d Cir. 1992) (“The police satisfy their obligations under *Brady* when they turn exculpatory evidence over to the prosecutors.”).

²⁰¹ *Moldowan*, 578 F.3d at 377 (police officers receive only qualified immunity for violation of same legal norm underlying due process recognized in *Brady*); *Geter v. Fortenberry*, 882 F.2d 167, 171 (5th Cir. 1989) (affirming denial of qualified immunity for police officer who failed to disclose exculpatory evidence).

prosecutor.”²⁰² A *Brady* violation could be committed by a conscientious prosecutor who makes a good faith effort to comply with *Brady*; one who uses her best efforts to obtain exculpatory evidence in the hands of the police, or who believes in good faith that the undisclosed evidence either is not favorable to the accused or is not material to guilt. She would still be protected by immunity. A bad faith exception to absolute immunity would focus squarely on the character and mental culpability of the prosecutor. The exception would be available in those cases when a prosecutor actually is aware that the withheld evidence is both favorable and material to the accused, and that by withholding the evidence the defendant’s ability to obtain a fair trial and prove her non-guilt would be seriously impeded. A bad faith exception would be limited to those egregious cases where a prosecutor makes a conscious decision to conceal from the defendant materially favorable evidence with knowledge that this evidence would exculpate the accused or impeach the credibility of a key witness. Unquestionably, such bad faith conduct is unethical and dishonest. It manifests a conscious intention by a prosecutor to commit a fraud on the judicial process—to defraud the defendant of her right to a fair trial, the court of the assurance that its discovery orders have been complied with, and the jury of learning all of the facts that would materially assist its mission to arrive at the truth.²⁰³ Bad faith conduct embraces the quality of “moral turpitude” that subjects the conduct of all attorneys to professional discipline.²⁰⁴

As examples of cases in which a bad faith exception could be invoked, consider the Duke lacrosse case, in which the prosecutor, who was then running for re-election,

²⁰² United States v. Agurs, 427 U.S. 97, 110 (1976).

²⁰³ See MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (1993) (professional misconduct for lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”).

²⁰⁴ See MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(3) (“A lawyer shall not . . . [e]ngage in illegal conduct involving moral turpitude.”).

concealed from the defense the existence of DNA evidence from four unidentified men on the clothes of the rape victim and the absence of DNA evidence from any of the defendants.²⁰⁵ Knowing that this disclosure would severely discredit the credibility of the victim, the prosecutor directed the laboratory official to exclude this exculpatory information from his report and then represented to the court that the report was a complete description of the laboratory's findings.²⁰⁶ Similarly, in the Ted Stevens case, the trial judge identified some eleven instances of "shocking and serious" *Brady* violations, including the suppression of an interview with the government's key witness, with knowledge that disclosure of this interview would destroy or seriously undermine his credibility.²⁰⁷ Finally, in the "Pottawattamie" case²⁰⁸—in which two innocent defendants spent nearly twenty years in prison for a murder—the prosecution knew that its key witness against the defendants was a "liar and a perjurer" who was not telling the truth; the prosecutor was also aware of several items of evidence that identified and powerfully implicated an alternative suspect in the killing, but hid these from the defense.²⁰⁹ In all of these cases there is strong circumstantial evidence to prove the prosecutor's bad faith: actual knowledge by experienced prosecutors of the existence of exculpatory evidence; actual knowledge that the evidence if disclosed would probably—indeed, almost certainly—produce an acquittal; a powerful personal and political motive to hide the evidence; and a pattern of conduct revealing that the nondisclosure was neither inadvertent nor a good faith mistake.

²⁰⁵ See Wilson, *supra* note 65.

²⁰⁶ *Id.* The trial court asked Nifong [the prosecutor]: "So you represent that there are no other statements from Dr. Meehan?" Nifong replied: "No other statements. . . . No other statements made to me." *Id.*

²⁰⁷ See Transcript of Hearing on Motion to Dismiss at 3–6, *United States v. Stevens*, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 08-231 (EGS)).

²⁰⁸ See *Pottawattamie County v. McGhee*, 547 F.3d 922 (8th Cir. 2009), *cert. granted*, 129 S. Ct. 2002 (2009), *cert. dismissed*, 130 S. Ct. 1047 (2010).

²⁰⁹ See *Harrington v. State*, 659 N.W.2d 509, 524 (Iowa 2003).

Creating an exception for bad faith conduct of prosecutors that violates constitutional rules is hardly a novel proposal. The Court has recognized such an exception in several areas involving the constitutional rights of criminal defendants. For example, with respect to a prosecutor's charging function, the Supreme Court has stated that so long as a prosecutor has probable cause to believe that an accused has committed a criminal offense, the decision whether or not to prosecute rests entirely in his discretion.²¹⁰ However, the Court has created several exceptions when a prosecutor institutes charges in bad faith, such as selectively charging persons based on unconstitutional standards relating to race, religion, or other arbitrary classifications;²¹¹ vindictively charging persons in retaliation for their exercising legal rights;²¹² and bringing charges in order to harass a defendant.²¹³ Further, the Court has also recognized a bad faith exception to the rule that allows prosecutors virtually unfettered discretion in deciding when to bring charges.²¹⁴ Thus, when a prosecutor delays bringing charges against a defendant in order to gain a "tactical advantage" over the accused,²¹⁵ due process may be invoked to bar prosecution.²¹⁶ Although double jeopardy does not protect

²¹⁰ *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.") (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

²¹¹ *Id.* ("[T]he decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification'" (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (defendant alleges selective prosecution when he establishes that administration of criminal law was "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection).

²¹² *See Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (prosecutor engages in "vindictive" charging in violation of due process when he brings charges in retaliation for a defendant's exercise of legal rights).

²¹³ *See Perez v. Ledesma*, 401 U.S. 82, 85 (1971) (federal injunctive relief warranted "in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction").

²¹⁴ *See United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971).

²¹⁵ *Lovasco*, 431 U.S. at 795; *Marion*, 404 U.S. at 324.

²¹⁶ This exception would be invoked when a prosecutor intentionally waits until exculpatory evidence is lost, or where the delay prevents the defendant from learning about a witness or being able to interview him. *See, e.g., United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) (defendant may establish due

a defendant who seeks a mistrial from being retried, the Court has created an exception to this rule in order to prevent a prosecutor from subverting a defendant's double jeopardy rights.²¹⁷ Thus, when a prosecutor engages in bad faith conduct for the purpose of provoking a defendant into seeking a mistrial, the protection of double jeopardy may be invoked to prevent the prosecutor from retrying the defendant.²¹⁸ Finally, although the government's loss or destruction of potentially exculpatory evidence does not by itself violate due process, the Court has created an exception for exculpatory evidence that was lost or destroyed by the prosecution in bad faith for the purpose of preventing its use by the defendant.²¹⁹

A bad faith exception to absolute immunity for a prosecutor's deliberate suppression of exculpatory evidence is consistent with the Court's adoption of other exceptions for bad faith conduct by prosecutors. As noted above, the bad faith suppression of exculpatory evidence by prosecutors is a matter of increasing concern to courts and commentators, has contributed to the convictions of innocent persons, and is not subject to meaningful sanctions that might deter such misconduct. A bad faith exception would be limited to conduct by prosecutors that is deliberately undertaken to deprive a defendant of materially favorable evidence, thereby depriving a defendant of a fair trial. A "*Brady* exception" to absolute immunity would create only a modest inroad into the doctrine of absolute prosecutorial immunity; but such an exception would make a

process violation by showing that prosecutor removed witness from U.S. deliberately in order to deprive the defense of opportunity to interview him).

²¹⁷ See *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (retrial barred where prosecutor engages in conduct that "is intended to provoke a mistrial or is "motivated by bad faith or undertaken to harass or prejudice" defendant); *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982) (prosecutor's bad faith conduct that bars retrial limited to situations where prosecutor's conduct "is intended to 'goad' the defendant into moving for a mistrial").

²¹⁸ *Id.*

²¹⁹ See *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (due process violated if defendant shows that failure to preserve potentially useful evidence motivated by bad faith).

significant contribution to the integrity of the judicial process—which was the rationale for the *Imbler* rule in the first place—and would make prosecutors accountable for their deliberate constitutional violations. Finally, a bad faith exception might cause some prosecutors—even those prosecutors with a “win-at-all-costs” mentality—to rethink their decision to hide exculpatory evidence if they are aware that they might be prosecuting the wrong person, and that the real perpetrator is still at large. Indeed, the public backlash from the Duke lacrosse case is harmful not only to prosecutors but to future crime victims who may be discouraged from coming forward and being further victimized by an unscrupulous prosecutor.

Conclusion

Despite relying on questionable history and speculative policy, *Imbler v. Pachtman* is the foundation for the well-established rule that affords prosecutors absolute immunity from civil liability for conduct that is integrally related to the judicial process. *Imbler* held, and subsequent decisions reaffirmed, that absolute immunity extends to a prosecutor’s deliberate concealment from the defense of exculpatory evidence in violation of *Brady v. Maryland*. This is so even though *Imbler*’s concern that absolute immunity is necessary to protect the integrity and fairness of the judicial process is inconsistent with affording absolute immunity for *Brady* violations.

The judicial evolution of the *Brady* rule has made it easier for prosecutors to violate *Brady*, and the lack of an effective mechanism to sanction or deter violations invites a re-thinking of the wisdom in continuing to afford prosecutors the shield of absolute immunity for willful and serious *Brady* violations. *Brady* violations appear to be more common than ever and, as Justice White noted in his concurrence in *Imbler*, “the

stakes are high.” *Brady* violations deny the defendant his right to a fair trial, undermine the integrity of the judicial process, and tarnish the public’s perception of the judicial process.

Consistent with other instances in which the Court has made exceptions to constitutional rules for bad faith conduct by prosecutors, this Article proposes an exception to a prosecutor’s absolute immunity for bad faith conduct that involves the deliberate suppression of exculpatory evidence. Such an exception would not interfere with the policy reasons of *Imbler*. The exception would not apply to the honest and conscientious prosecutor who seeks to comply with *Brady*. It would not apply to the prosecutor who has negligently overlooked or failed to appreciate the significance of potential *Brady* evidence. The exception would apply only to those prosecutors who could be demonstrated to have suppressed evidence in bad faith intentionally to deprive the defendant of exculpatory evidence. The exception is limited. However, given the limited availability of other sanctions, such an exception would provide at the very least a meaningful remedy to individuals whose constitutional rights were violated and who were wrongfully deprived of their liberty by a prosecutor’s unlawful conduct.