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Bennett L. Gershman

*Elisabeth Haub School of Law at Pace University*

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## **Bad Faith Exception to Prosecutorial Immunity for *Brady* Violations**

**By Bennett L. Gershman**

### **Introduction – *Imbler v. Pachtman* 34 Years After**

For those of us who teach and write about the conduct of prosecutors, reading *Imbler v. Pachtman*<sup>1</sup> 34 years after 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,<sup>2</sup> and as recently as last Term.<sup>3</sup> 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.<sup>4</sup> 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

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<sup>1</sup> 424 U.S. 409 (1976).

<sup>2</sup> See *Kalina v. Fletcher*, 522 U.S. 118 (1997)(prosecutor 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)(prosecutor 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)(prosecutor absolutely immune for participation in probable cause hearing but not entitled to absolute immunity for giving legal advice to police).

<sup>3</sup> See *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009)(absolute immunity applies to administrative functions of District Attorney and chief supervisory prosecutor for allegedly failing to institute supervision and training programs for assistants). See also *Pottawattamie County, Iowa v. McGhee*, 547 F.3d 922 (8<sup>th</sup> Cir. 2009), *cert. granted*, 129 S. Ct. 2002 (2009)(Court hears oral arguments on whether prosecutors who allegedly procured false testimony from witnesses during murder investigation and introduced false testimony at trial that resulted in defendants wrongful convictions and incarceration for nearly 20 years are entitled to absolute immunity), *cert. dismissed*, 2010 WL 6917 (Mem.) U.S. 2010. See Warren Richey, *Supreme Court Drops Key Case on Limits of Immunity for Prosecutors*, *Christian Science Monitor*, January 4, 2010 (parties agree to end case in \$12 million settlement).

<sup>4</sup> *Imbler*, 424 U.S. at 423-429.

without the distraction of a flood of civil lawsuits by disgruntled and resentful defendants.<sup>5</sup> The Court acknowledged the hard choice between the evils inherent in either alternative but, quoting Judge Learned Hand, concluded that it is “in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.”<sup>6</sup>

As an open question 34 years ago, *Imbler*’s choice to afford prosecutors absolute immunity for advocacy functions was not entirely unreasonable. Although the Court had to invent a specially-tailored common law history for absolute immunity, and had to concoct a public policy to spare prosecutors from having to defend civil lawsuits, *Imbler*’s accommodation is not without justification contextually. 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.<sup>7</sup> 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.<sup>8</sup> 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, and in any event, as the Court acknowledged, may present close questions requiring line-drawing in future cases.<sup>9</sup> 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

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<sup>5</sup> Id. at 423-426.

<sup>6</sup> Id. at 428, quoting *Yaselli v. Goff*, 12 F.2d 396, 404 (2d Cir. 1926)(L. Hand, J.).

<sup>7</sup> See *infra* notes 185-190, and accompanying text.

<sup>8</sup> See *infra* notes 152-184, and accompanying text.

<sup>9</sup> See 424 U.S. at 431 n. 33.

exculpatory evidence; the subject was not nearly as complex and controversial as it is today.<sup>10</sup>

Thus, as the edifice for the doctrine that has spawned hundreds of decisions immunizing prosecutors from civil liability for acts of willful misconduct – misconduct that occasionally resulted in innocent defendants being convicted and punished<sup>11</sup> – *Imbler* appears in retrospect to have been a gratuitous experiment in judicial administration that not only failed to protect the judicial process but in fact skewed the balance of power in the criminal justice system more heavily toward prosecutors.<sup>12</sup> 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 a defendant exculpatory evidence that in some cases could be used to prove the defendant's innocence. That is the subject of this Article: whether prosecutors should enjoy absolute immunity from civil liability for deliberately suppressing exculpatory evidence, or whether the Supreme Court, or Congress, should create an exception to absolute immunity for the deliberate suppression of exculpatory evidence.

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<sup>10</sup> See *infra* Part III.

<sup>11</sup> See *infra* note 137, and accompanying text.

<sup>12</sup> 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 discusses *Imbler's* adoption of absolute immunity for prosecutors. Part II discusses *Imbler's* extension of absolute immunity to a prosecutor's violation of his disclosure duty under *Brady v. Maryland*.<sup>13</sup> Part III describes the ease with which prosecutors are able to evade the *Brady* rule and the difficulty of enforcing compliance with *Brady*. Part IV discusses the absence of any meaningful sanctions to deter and punish prosecutors for willful violations of *Brady*. Part V proposes a bad faith exception to absolute immunity of prosecutors for *Brady* violations.

### **I. *Imbler's* Adoption of Absolute Prosecutorial Immunity**

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.<sup>14</sup> The prosecution's key witness was Alfred Costello, who positively identified Imbler as the gunman.<sup>15</sup> Imbler raised an alibi defense.<sup>16</sup> 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.<sup>17</sup> Imbler thereupon filed a state habeas corpus petition based on this new

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<sup>13</sup> 373 U.S. 83 (1963).

<sup>14</sup> *Imbler*, 424 U.S. at 411-412. 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 killing and that Imbler killed Hasson.

<sup>15</sup> *Id.* at 412. The prosecution also introduced several other eyewitnesses whose testimony supported Costello.

<sup>16</sup> *Id.* Imbler claimed to have 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.

<sup>17</sup> *Id.* Pachtman's letter described newly discovered corroborating witnesses for Imbler's alibi as well as new revelations about Costello's background which indicated 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.

evidence but after a hearing, the writ was denied,<sup>18</sup> although for unrelated reasons, Imbler's death sentence was overturned.<sup>19</sup> A few years later Imbler filed a federal habeas corpus petition raising the same grounds that were rejected by the state court.<sup>20</sup> 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.<sup>21</sup>

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 Costello about his criminal background, his education, and his current income.<sup>22</sup> Although Pachtman lacked actual knowledge of the falsity, according to the district court, he had "cause to suspect" it.<sup>23</sup> The other two instances of misconduct were suppressions of evidence by a police fingerprint expert who testified at the trial,<sup>24</sup> and by a police investigator who had altered an artist's sketch to resemble Imbler more closely.<sup>25</sup> The Ninth Circuit Court of Appeals affirmed,<sup>26</sup> finding that the district court had merely

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<sup>18</sup> *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." But he also charged that Pachtman had 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 (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.* at 10-14.

<sup>19</sup> *Imbler*, 424 U.S. at 414.

<sup>20</sup> *Id.*

<sup>21</sup> See *Imbler v. Craven*, 298 F. Supp. 795, 812 (C.D. Cal. 1969).

<sup>22</sup> *Imbler*, 424 U.S. at 415 n. 8 (referring to district court's finding that Costello had "lied flatly" about his criminal record, education, and current income).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 415.

<sup>25</sup> *Id.*

<sup>26</sup> *Imbler v. California*, 424 F.2d 631, 632 (9<sup>th</sup> Cir. 1970).

reached different conclusions than the state court in applying federal constitutional standards to the facts. The state chose not to retry Imbler and he was released.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> The district court granted Pachtman's motion to dismiss the complaint,<sup>30</sup> holding that public prosecutors repeatedly had been afforded immunity from civil liability for "acts done as part of their traditional official functions." The Court of Appeals for the Ninth Circuit affirmed, finding that Pachtman's acts were committed during prosecutorial activities that were "an integral part of the judicial process."<sup>31</sup>

The Supreme Court granted certiorari to consider the "important and recurring issue" of prosecutorial liability under § 1983 of the Civil Rights Act of 1871.<sup>32</sup> The Court acknowledged at the outset that Section 1983, the statutory remedy for the deprivation of constitutional rights caused by an official's abuse of power,<sup>33</sup> contains no immunities for

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<sup>27</sup> Imbler, 424 U.S. at 415.

<sup>28</sup> Id. at 415-416.

<sup>29</sup> Id. at 416.

<sup>30</sup> Id.

<sup>31</sup> Imbler v. Pachtman, 500 F.2d 1301, 1302 (9<sup>th</sup> Cir. 1974), quoting Marlowe v. Coakley, 404 F.2d 70 (9<sup>th</sup> Cir. 1968).

<sup>32</sup> Imbler, 424 U.S. at 417.

<sup>33</sup> See Monroe v. Pape, 365 U.S. 167, 172 (1961). 42 U.S.C. § 1983, 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, subjects, or causes to be subjected, any citizen of the United States or other

prosecutors.<sup>34</sup> However, the Supreme Court assumed 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.<sup>35</sup> Thus, according to the Court, absolute immunity was available at common law for judges,<sup>36</sup> legislators,<sup>37</sup> grand jurors,<sup>38</sup> and other government officials such as assessors, highway officers, and members of township boards.<sup>39</sup> In addition, absolute immunity, referred to as “defamation immunity,” also was available to any person for statements that were made in the course of judicial proceedings.<sup>40</sup> However, absolute immunity was not afforded to other government officials, only a qualified immunity, referred to at common law as

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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.”

<sup>34</sup> *Imbler*, 424 U.S. at 417. Indeed, in 1871, when Section 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. at 132 (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. at 500 (Scalia, J., concurring and dissenting)(noting that “prosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial”). It was 25 years later 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 true bill after grand jury refused to indict plaintiff and which resulted in plaintiff’s arrest and incarceration).

<sup>35</sup> *Imbler*, 424 U.S. at 417-419. 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 section 1983.

<sup>36</sup> *Id.* 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.”).

<sup>37</sup> *Id.* at 418, noting that “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 act,’” quoting *Tenney v. Brandhove*, 341 U.S. at 379.

<sup>38</sup> *Id.* at 423 n. 20 (noting that the immunity of grand jurors enjoys “an almost equally venerable common law tenet” as judges).

<sup>39</sup> For discussion of these immunities, see *Burns v. Reed*, 500 U.S. at 499 (Scalia, J., concurring and dissenting). 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.* (emphasis in original).

<sup>40</sup> *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.”).



“quasi-judicial immunity.”<sup>41</sup> Qualified immunity was available to government officials such as governors,<sup>42</sup> other executive branch officials,<sup>43</sup> and police officers.<sup>44</sup>

With respect to a prosecutor’s immunity at common law, *Imbler* concluded, as had several lower courts, that it is “well settled” that a prosecutor enjoyed absolute immunity when he acted within the scope of his prosecutorial duties.<sup>45</sup> To be sure, 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.<sup>46</sup> Moreover, *Imbler* referred to a prosecutor as a “quasi-judicial” official, and at common law, absolute immunity was not available to quasi-judicial officials.<sup>47</sup> 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.<sup>48</sup> Thus, despite some analytical gaps and inconsistencies, *Imbler* was able to extrapolate from the common law two broad categories in which absolute immunity for prosecutors would be available;

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<sup>41</sup> Id. at 420, 423 n. 20 (referring to grand jurors and prosecutors as “quasi-judicial” officers); *Burns v. Reed*, 500 U.S. at 500 (noting that quasi-judicial immunity afforded an official only qualified immunity)(Scalia, J., concurring and dissenting); *Kalina v. Fletcher*, 522 U.S. at 132 (noting that at common law, the discretionary decisions of public officials that did not involve actual adjudication were protected by “quasi-judicial” immunity, and is “more akin to what we now call ‘qualified,’ rather than absolute immunity”)(Scalia, J., concurring).

<sup>42</sup> *Imbler*, 424 U.S. at 419. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

<sup>43</sup> *Imbler*, 424 U.S. at 419. See *Scheuer v. Rhodes*, 416 U.S. at 247.

<sup>44</sup> *Imbler*, 424 U.S. at 418. See *Pierson v. Ray*, 386 U.S. 547, 555-557 (1967).

<sup>45</sup> Id. at 424, 424 n. 21 (citing cases)..

<sup>46</sup> Id. at 418-419.

<sup>47</sup> See *supra* note 41, and accompanying text.

<sup>48</sup> *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.”)

first, suits for malicious prosecution,<sup>49</sup> and second, suits alleging courtroom misconduct that involves the examination of witnesses and arguments to the jury.<sup>50</sup>

*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.<sup>51</sup> *Imbler* speculated that lawsuits against prosecutors could be expected "with some frequency,"<sup>52</sup> and that the prosecutor's energy and attention to his work as a consequence would be diverted.<sup>53</sup> *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 officials.<sup>54</sup> Moreover, according to *Imbler*, a prosecutor might be discouraged from presenting evidence whose accuracy might be questionable, or making arguments about that evidence, if the use of and arguments about that evidence exposed him to personal liability.<sup>55</sup> In sum, according to *Imbler*, "the ultimate fairness of the

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<sup>49</sup> Id. at 422-424.

<sup>50</sup> Id. at 426 n. 23.

<sup>51</sup> Id. at 424-425 ("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.").

<sup>52</sup> Id. at 425.

<sup>53</sup> Id. ("if 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").

<sup>54</sup> 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).

<sup>55</sup> Id. at 426 (noting that 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").

operation of the system itself would be weakened by subjecting prosecutors to §1983 liability.”<sup>56</sup>

Although *Imbler* recognized that a genuinely wronged defendant would be without a civil remedy against a malicious and dishonest prosecutor, *Imbler* believed that the alternative would disserve the broader public interest.<sup>57</sup> In fact, *Imbler* surmised that a defendant might actually be prejudiced if he was 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.<sup>58</sup> Moreover, *Imbler* asserted, alternative sanctions to civil lawsuits against prosecutors were available to deter a prosecutor’s malicious and dishonest behavior. Indeed, the availability of bringing criminal charges against a prosecutor,<sup>59</sup> as well as the availability of professional discipline by bar associations,<sup>60</sup> would “not leave the public powerless.”<sup>61</sup> “These checks,” said the Court, “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.”<sup>62</sup>

The scope of the absolute immunity that *Imbler* afforded prosecutors was not demarcated precisely. *Imbler* used various formulations to describe the extent of a prosecutor’s immunity, stating that absolute immunity would be available for prosecutors

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<sup>56</sup> Id. at 427.

<sup>57</sup> See supra note 6, and accompanying text.

<sup>58</sup> 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”); and 428 n. 27 (“consideration of the habeas petition could well be colored by an awareness of potential prosecutorial liability”).

<sup>59</sup> Id. at 429.

<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> Id.

in “initiating a prosecution,”<sup>63</sup> “presenting the state’s case,”<sup>64</sup> performing activities that are “an integral part of the judicial process,”<sup>65</sup> performing activities that are “intimately associated with the judicial phase of the criminal process,”<sup>66</sup> and performing functions as an “advocate,”<sup>67</sup> 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.<sup>68</sup>

*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.”<sup>69</sup>

## **II. *Imbler’s* Application to *Brady* Violations**

*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*.<sup>70</sup> *Imbler’s* lawsuit against Pachtman was based almost entirely on allegations that Pachtman knowingly allowed a key eyewitness at

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<sup>63</sup> Id. at 431; Id. at 421

<sup>64</sup> Id. at 431.

<sup>65</sup> Id. at 430, quoting *Imbler v. Pachtman*, 500 F.2d at 1302

<sup>66</sup> Id. at 430.

<sup>67</sup> Id. at 431; Id. at 431 n. 33.

<sup>68</sup> Id. at 431 n. 33.

<sup>69</sup> 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 (4<sup>th</sup> 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 (7<sup>th</sup> 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).

<sup>70</sup> 373 U.S. 83 (1963).

Imbler’s capital murder trial to testify falsely without correcting that testimony.<sup>71</sup> Imbler included counts charging suppression of evidence by the police, and claimed that Pachtman was responsible for that suppression vicariously.<sup>72</sup> 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 in which he argued against extending absolute immunity to *Brady* violations.<sup>73</sup>

In his concurring opinion, Justice White, joined by Justices Brennan and Marshall, 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 prosecution,<sup>74</sup> and suits for defamatory remarks made during judicial proceedings.<sup>75</sup> 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 fear of being sued if the defendant was acquitted.<sup>76</sup> 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

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<sup>71</sup> Imbler, 424 U.S. at 416.

<sup>72</sup> Id.

<sup>73</sup> Imbler, 424 U.S. at 431 n. 34.

<sup>74</sup> Id. at 438 (“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.”).

<sup>75</sup> Id. at 440 (noting that function of judicial proceeding is “to determine where the truth lies,” and those parties involved in judicial proceedings should be encouraged to make full disclosure of all relevant information).

<sup>76</sup> Id. at 438 (“If suits for malicious prosecution were permitted, the prosecutor’s incentive would always be not to bring charges.”).

and candid disclosures of all relevant information without fear of being sued for false and defamatory testimony and arguments.<sup>77</sup> Indeed, Justice White observed, 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.<sup>78</sup>

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.<sup>79</sup> Rather than protecting the judicial process, according to Justice White, 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.<sup>80</sup> Accusing the majority of an illogical extension of immunity, Justice White explained that whereas it is sensible to afford defamation immunity to prosecutors to 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.<sup>81</sup> Thus, according to

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<sup>77</sup> Id. at 439.

<sup>78</sup> 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 demonstrating the falsity of the witness’s testimony in constitutionally material respects. Id. at 440 n. 5.

<sup>79</sup> Id. at 441 (“I disagree with any implication that the absolute immunity extends to suits charging unconstitutional suppression of evidence.”).

<sup>80</sup> Id. at 442 (“one 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”).

<sup>81</sup> Id. at 442-443.

Justice White, immunizing a prosecutor for not disclosing exculpatory evidence to the defendant encourages nondisclosure and discourages disclosure.<sup>82</sup> Denying immunity to a prosecutor for withholding evidence encourages disclosure and discourages nondisclosure.<sup>83</sup> 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.<sup>84</sup> But such broader disclosure, Justice White argued, “would hardly injure the judicial process.”<sup>85</sup> “Indeed, it will help it.”<sup>86</sup>

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, clearly are integral parts of the judicial process,<sup>87</sup> and suggested that such violations may be corrected by the judicial process. However, according to Justice White, 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.<sup>88</sup> It is therefore all the more important to deter such violations by permitting § 1983 damage actions in those cases where violations are exposed, Justice White argued.<sup>89</sup> “The stakes are high,” Justice White

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<sup>82</sup> Id.

<sup>83</sup> Id.

<sup>84</sup> Id. at 443 (“A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required.”).

<sup>85</sup> Id.

<sup>86</sup> Id.

<sup>87</sup> Id. at 443.

<sup>88</sup> Id. at 443-444 (“the 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.”).

<sup>89</sup> Id. at 444.

observed,<sup>90</sup> citing *Hilliard v. Williams*,<sup>91</sup> 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.<sup>92</sup> However, he added, it is "virtually impossible" to identify any injury to the judicial process from permitting such suits.<sup>93</sup>

In its *Brady* footnote, 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.<sup>94</sup> 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*.<sup>95</sup> Moreover, according to the majority, denying immunity to the prosecutor would "weaken the adversary system" as well as "interfere with the legitimate exercise of prosecutorial discretion."<sup>96</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> 465 F.2d 1212 (6<sup>th</sup> Cir. 1972)(no absolute immunity for prosecutor in civil complaint charging prosecutor with deliberate suppression of exculpatory evidence), cert. granted and decision vacated, 420 U.S. 945 (1975), vacated on remand, 540 F.2d 220, 221 (6<sup>th</sup> Cir. 1976)(prosecutor absolutely immune from civil liability for suppressing exculpatory police report and instructing witness to testify falsely).

<sup>92</sup> *Id.* at 444-445.

<sup>93</sup> *Id.* at 444-445 ("Where the reason for the rule extending absolute immunity to prosecutors disappears, it would truly be 'monstrous to deny recovery'"), citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

<sup>94</sup> *Id.* at 431 n. 34. ("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.").

<sup>95</sup> *Id.*

<sup>96</sup> *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 and nor abstract. Indeed, the Court would hear oral arguments the following month, and decide later that Term in *United States v. Agurs*, 427 U.S. 97 (1976) that the distinction between a prosecutor's knowing use of false testimony and a prosecutor's suppression of exculpatory evidence were distinct violations. Moreover, in contrast to *Imbler*, the Court in *Agurs*



### III. 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*<sup>97</sup> 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.<sup>98</sup> *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 more balanced and objective search for the truth.<sup>99</sup> As the Court in *Brady* observed: “[S]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system

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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”).

<sup>97</sup> 373 U.S. 83 (1963).

<sup>98</sup> 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”).

<sup>99</sup> The prosecutor's *Brady* duty is contained in FED.R.CRIM. P. R. 16(a)(1)(E)(i)(upon a 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 *Treatment of Brady v. Maryland Material in United States District and State Courts' Rules, Orders, and Policies*, REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, (Federal Judicial Center 2004). 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 <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 [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/5mcrm.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm). But see *United States v. Jones*, 620 F. Supp.2d 163, 171 (D. Mass. 2009)(change in U.S. Attorneys Manual “was not an unprompted effort by the Department of Justice to address a problem that it perceived and acknowledged. Rather, it was part of an ardent and, to date, successful effort of the Department to defeat a possible amendment to the Federal Rules of Criminal Procedure.”).

of the administration of justice suffers when any accused is treated unfairly.”<sup>100</sup> 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.<sup>101</sup> Under *Brady*, however, it is the defendant who bears the burden to establish that the prosecution’s suppression of favorable evidence was harmful.<sup>102</sup> Also, in all other areas of constitutional criminal procedure, the commission of a constitutional error – and a prosecutor’s suppression of evidence under *Brady* violates due process – 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 verdict.<sup>103</sup> 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.<sup>104</sup> A reasonable probability, according to the Court, is a probability “sufficient to undermine confidence in the outcome.”<sup>105</sup>

However, rather than producing a fundamental change in the criminal justice system, *Brady* has become an illusory protection that is easily evaded and virtually

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<sup>100</sup> *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.*

<sup>101</sup> 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”).

<sup>102</sup> 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”).

<sup>103</sup> 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 v. California*, 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.”).

<sup>104</sup> *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.”).

<sup>105</sup> *Id.*

unenforceable.<sup>106</sup> *Brady* represents a contradiction to the operation of the U.S. criminal adversary system. The prosecutor, on the one hand, is 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.<sup>107</sup> Although *Brady* does not require a prosecutor to provide the defense with open-ended discovery,<sup>108</sup> *Brady* does require the prosecutor to sift through his files in a conscientious effort to identify any favorable evidence that might assist a defendant in proving his innocence. Given “this obviously unharmonious role” for a prosecutor,<sup>109</sup> *Brady* exemplifies a remarkable faith by 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. For those prosecutors who “play the game to win,” as prosecutors typically do,<sup>110</sup> carefully analyzing the evidence, reexamining the hypothesis of guilt, and identifying

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<sup>106</sup> See Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?* Chapter 4, CRIMINAL PROCEDURE STORIES (Carol S. Streiker ed. 2006), at 154 (“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 is some ways a hollow one.”).

<sup>107</sup> Id. at 696-697 (Marshall, J., dissenting)(“for 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”).

<sup>108</sup> 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.”).

<sup>109</sup> Bagley, 473 U.S. at 697 (Marshall, J., dissenting).

<sup>110</sup> 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, 289-290 (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*, CHICAGO TRIBUNE, Jan. 14, 1999, at N1 (describing prosecutorial culture “where prosecutors recite conviction rates like boxers touting win-loss records”).

defects and inconsistencies are undertaken not as a “minister of justice,”<sup>111</sup> but as a zealous partisan who keeps score of his convictions, is motivated by the rewards of winning, and is unlikely to sacrifice the conviction of a guilty defendant to an abstract principle of justice. The *Brady* rule runs counter to these considerations.

Moreover, *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 as she prepares for adversarial combat. Any prosecutor preparing for trial undoubtedly believes the defendant to be guilty and has assembled a cache of evidence to prove the defendant's guilt. Given the fact that that the prosecutor and the police have virtually total control of the evidence from the start of the investigation,<sup>112</sup> there inevitably may be evidence in the government's files that contradicts guilt and which might be viewed by a rational prosecutor as favorable to the defendant and subject to *Brady* disclosure. By the same token, however, 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*.<sup>113</sup> To be sure, a prosecutor has no discretion under *Brady* to refuse to search for

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<sup>111</sup> See MODEL RULES OF PROFESSIONAL RESPONSIBILITY R. 3.8 comment 1 (1983) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); MODEL RULES OF PROFESSIONAL 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, The Prosecution Function, Standard 3-1.2(c) (3d ed. 1993) (“The duty of the prosecutor is to seek justice, not merely to convict.”); NATIONAL PROSECUTION STANDARDS 1.1 (2d ed. 1991) (“The primary responsibility of prosecution is to see that justice is accomplished.”).

<sup>112</sup> See Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 314 (2001) (prosecutor enjoys “virtual monopoly of the fact-finding process”).

<sup>113</sup> See *infra* notes 121-130, and accompanying text.

materially favorable evidence, but a prosecutor has unfettered discretion to decide whether any of that evidence must be disclosed. And given the mindset of prosecutors preparing for trial, it is very likely that prosecutors are predisposed to view their disclosure obligations quite narrowly.<sup>114</sup>

But leaving aside intuitive judgments about a prosecutor's mental state and so-called "conviction mentality," it is becoming increasingly recognized by specialists in cognitive psychology that a prosecutor's predisposition probably is to ignore *Brady*. Experts who have studied 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.<sup>115</sup> These studies have examined the capacity of prosecutors to maintain their 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 that *Brady*-compliance requires.<sup>116</sup> For instance, a prosecutor who is

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<sup>114</sup> See Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 559 (1977)(prosecutors are convinced 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 *United States v. Stevens*, Cr. No. 08-231 (D.D.C. Apr. 7, 2009)(Hearing)(Docket No. 372) at 4-7 (district judge identifies at least 12 instances where the prosecution team "was caught making false representations and not meeting its discovery obligations," and as the court listed the violations, the court 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.).

<sup>115</sup> See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 296-307 (describing case studies in tunnel vision by prosecutors that subverted justice).

<sup>116</sup> 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"

convinced of a defendant's guilt – and what prosecutor is not convinced -- may exhibit a so-called “tunnel vision” whereby she ignores, overlooks, or dismisses evidence that might be favorable to a defendant as being irrelevant, incredible, or unreliable.<sup>117</sup> 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;<sup>118</sup> “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;<sup>119</sup> “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;<sup>120</sup> and “avoidance of cognitive dissonance,” under which a person tends to adjust his or her beliefs to conform to their behavior.<sup>121</sup> 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, would probably overestimate the strength of his case and underestimate the probative value of evidence that contradicts or undermines his case, and the 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, is the judiciary's permissive interpretation of the prosecutor's duty under *Brady*

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because of cognitive biases). Having served as a prosecutor for several years, as well as being a long-time observer of prosecutorial conduct, I am inclined to agree with much of Professor Burke's commentary).

<sup>117</sup> See Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L. J. 475 (2006); Findley & Scott, *supra* note 115.

<sup>118</sup> See Burke, *supra* note 14, at 1594-96.

<sup>119</sup> *Id.* at 1596-99.

<sup>120</sup> *Id.* at 1599-1602.

<sup>121</sup> *Id.* at 1601-02.

that 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 his possession that might be materially favorable to the accused and to immediately disclose that evidence.<sup>122</sup> 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.<sup>123</sup> 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 made it increasingly easy for prosecutors to evade their *Brady* duty simply by claiming that given the strength of their case, and the confidence they had in the quality of their evidence, they believed that it would be inconceivable that any evidence they possessed might reasonably be viewed as so favorable to the accused that it would be reasonably probable that with this evidence the defendant would be found not guilty. What rational prosecutor would ever reach such a

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<sup>122</sup> 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”).

<sup>123</sup> *Bagley*, 473 U.S. 699-700 (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 likely effect the evidence will have on the outcome of the trial”). See *United States v. 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)..

conclusion?<sup>124</sup> Under this perverse standard of constitutional due process, a prosecutor is encouraged to play games,<sup>125</sup> i.e., to “gamble” and “play the odds,”<sup>126</sup> to “bury his head in the sand,”<sup>127</sup> play “hide and seek” with the accused,<sup>128</sup> and require the accused to undertake a “scavenger hunt” for hidden *Brady* clues.<sup>129</sup> And further emboldening a prosecutor to evade *Brady* with impunity is the knowledge that the undisclosed evidence

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<sup>124</sup> 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).

<sup>125</sup> See Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007).

<sup>126</sup> 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”).

<sup>127</sup> *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7<sup>th</sup> Cir. 1990). See Gershman, *supra* note 125, 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)(“in legal ethics, unlike criminal law, there is no willful blindness doctrine”).

<sup>128</sup> *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.”).

<sup>129</sup> *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.”).



probably will remain hidden forever,<sup>130</sup> and that even if the evidence ever does surface, the obstacles to a defendant successfully using it are daunting.<sup>131</sup>

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. Indeed, given the ease with which *Brady* evidence may be concealed and remain hidden,<sup>132</sup> one may surmise that the documented violations probably 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 misconduct is difficult to measure accurately. Nevertheless, there exists a large and growing body of empirical and anecdotal evidence suggesting that *Brady* violations are the most common type of prosecutorial misconduct,<sup>133</sup> often occurring in the same prosecutor's office,<sup>134</sup>

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<sup>130</sup> Imbler, 424 U.S. at 443-444 (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 (9<sup>th</sup> Cir. 1996)(“the 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. Plfaumer, 473 U.S. 922 (1985)(mem.). 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 FORDHAM L. REV. 1537, 1579 (2000)(arguing that in most cases “withheld evidence will never see the light of day”); Bibas, supra note 106, at 142 (“Because *Brady* material is hidden in prosecutors’ and police files, defense lawyers probably will never learn of its existence. Most defendants lack the investigative resources to dig up *Brady* material.”).

<sup>131</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)(imposing stringent pleading requirements imposing on plaintiff need 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).

<sup>132</sup> See supra notes 122-131, and accompanying text.

<sup>133</sup> See John F. Terzano & Alanna D. Holt, *Improving Prosecutorial Accountability – A Policy Review*, The Justice project (2009), at 9 (“Suppression of exculpatory evidence is the most widespread and common form of prosecutorial misconduct.”).

<sup>134</sup> See Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?* THE CENTER FOR PUBLIC INTEGRITY, 2003, at 3-4 (analyzing 11,451 cases since 1970 in which charges of prosecutorial misconduct were reviewed by appellate courts and found 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

often committed by the same prosecutor,<sup>135</sup> and that appear to occur disproportionately in capital cases.<sup>136</sup> And, tragically, *Brady* violations have been a principal cause of convictions of innocent persons.<sup>137</sup>

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 381 of these convictions were reversed for *Brady* violations.<sup>138</sup> Sixty-seven of these defendants had been sentenced to death,<sup>139</sup> many of whom were subsequently exonerated.<sup>140</sup> A 2003 report by the Center for Public Integrity analyzed 11,452 post-1970 convictions that appellate courts reviewed for prosecutorial misconduct, and which found reversible misconduct in 2,012 cases, the majority of them for *Brady* violations.<sup>141</sup> A 2000 study by Columbia Law School of error rates in capital cases found that apart from errors relating to incompetent counsel, the most frequent basis for reversible error in

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Office between 1975-1996, eighteen of which involved reversals of convictions based on prosecutorial suppression of exculpatory evidence).

<sup>135</sup> See Weinberg, *supra* note , at 3 (study finds many “recidivist prosecutors” around the country had “bent or broken the rules multiple times”).

<sup>136</sup> See JAMES LIEBMAN, JEFFREY FAGAN & VALERIE WEST, *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995*, at 5 (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.

<sup>137</sup> See Weinberg, *supra* note 134 at 2 (noting that in 28 cases involving 32 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).

<sup>138</sup> Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, *CHICAGO TRIBUNE*, Jan. 10, 1999, at 3.

<sup>139</sup> *Id.*

<sup>140</sup> *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*, *CHICAGO TRIBUNE*, June 6, 1999, at 1.

<sup>141</sup> See *supra* note 134, at 2.

capital cases was attributable to *Brady* violations.<sup>142</sup> A report by the California Commission on the Fair Administration of Justice examined 2,130 state cases over a ten-year period ending in 2006 in which claims of prosecutorial misconduct were raised.<sup>143</sup> Misconduct was found in 443 of these cases, or 21%. 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.<sup>144</sup>

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.<sup>145</sup> In an extraordinary

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<sup>142</sup> See supra note 136 at 5.

<sup>143</sup> See CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, *Report and Recommendations on Reporting Misconduct*, Oct. 18, 2007, at 3 (“The most common forms of misconduct found were failing to disclose exculpatory evidence and improper argument.”).

<sup>144</sup> See Bill Moushey, *Win at All Costs*, PITTSBURGH POST-GAZETTE, Nov. 24, 1998 (study of over 1,500 cases nationwide during past decade found hundreds of cases in which prosecutors intentionally concealed exculpatory evidence).

<sup>145</sup> 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 Appeal granted relief, or criticized prosecutors for nondisclosures, see *United States v. Robinson*, 583 F.3d 1265 (10<sup>th</sup> 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 (6<sup>th</sup> 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 (10<sup>th</sup> 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 (10<sup>th</sup> Cir. 2009)(nondisclosure that confidential informant had been retained by government on two previous occasions required vacating conviction); *United States v. Price*, 566 F.3d 900 (9<sup>th</sup> Cir. 2009)(nondisclosure of extensive criminal history of key government witness requires vacating conviction); *Douglas v. Workman*, 560 F.3d 1156 (10<sup>th</sup> Cir. 2009)(suppression of deal with key witness violates due process); *United States v. Mauskar*, 557 F.3d 219, 232 (5<sup>th</sup> 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 Fed. Appx. 860 (4<sup>th</sup> Cir. 2009)(new trial ordered on some counts based on prosecutor’s discovery violation); *Harris v. Lafler*, 553 F.3d 1028 (6<sup>th</sup> Cir. 2009)(suppression of evidence that key witness promised substantial benefits for his testimony); *United States v. Triumph Capital Group, Inc.*, 544

decision last May in *United States v. Jones*,<sup>146</sup> 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.”<sup>147</sup> Judge Wolf appended Appeals and Federal District Courts in which the courts vacated convictions for serious

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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 (1<sup>st</sup> Cir. 2008)(nondisclosure of DEA reports materially prejudicial and new trial ordered); *United States v. Lopez*, 534 F.3d 1027 (9<sup>th</sup> Cir. 2008)(prosecutor’s *Brady* violation “troubling” but motion for new trial denied); *D’Ambrosio v. Bagley*, 527 F.3d 489 (6<sup>th</sup> 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)(Sotomayor, J.)(court “troubled” and “disappointed” by prosecutor’s belated disclosure of exculpatory evidence and prosecutor’s argument that evidence not material disingenuous but defendant failed to show prejudice); *United States v. Chapman*, 524 F.3d 1073 (9<sup>th</sup> 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 Fed. Appx. 130 (3d Cir. 2008)(prosecutor’s discovery violation requires reversal of conviction and new trial); *United States v. Garcia*, 271 Fed. Appx. 347 (4<sup>th</sup> 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 Fed. Appx. 816 (11<sup>th</sup> Cir. 2008)(suppression of impeachment evidence but no new trial); *United States v. White*, 492 F.3d 380 (6<sup>th</sup> 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 (9<sup>th</sup> Cir. 2008)(suppression of evidence of cooperation agreement with key witness); *United States v. Jernigan*, 492 F.3d 1050 (9<sup>th</sup> 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 (6<sup>th</sup> Cir. 2007)(belated disclosure of evidence used to impeach government’s key witness violates due process); *United States v. Velarde*, 485 F.3d 553 (10<sup>th</sup> 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 (10<sup>th</sup> Cir. 2007)(in theft prosecution, suppression of receipts linking third party to theft violated due process); *United States v. Chases*, 230 Fed. Appx. 761 (9<sup>th</sup> 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 (1<sup>st</sup> 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*, 2009 WL 989289 (S.D. Fla. 2009); *United States v. Stevens*, Cr. No., 08-231 (D.D.C. April 7, 2009)Docket No. 372); *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*, 2009 WL 2096272 (W.D. Tex.); *United States v. Quinn*, 537 F. Supp.2d 99 (D.D.C. 2008); *United States v. Freeman*, 2009 WL 2748483 (N.D.Ill.)(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. App. 2006).

<sup>146</sup> 620 F. Supp.2d 163 (D. Mass. 2009).

<sup>147</sup> *Id.* at 165.

*Brady* violations.<sup>148</sup> And 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 conviction of criminal contempt and disbarment of the Duke prosecutor, Michael Nifong,<sup>149</sup> and the federal district court’s vacating of Stevens’ conviction, dismissing the charges, the commencing criminal contempt proceedings against six prosecutors for obstruction of justice.<sup>150</sup> 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, how much more likely is it that a prosecutor will violate *Brady* with impunity in the thousands of cases involving anonymous and invisible defendants?

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*Imbler* failed to appreciate the uniqueness of the *Brady* rule, the mindset of prosecutors that invites them to hide exculpatory evidence, and the ease with which prosecutors are able to violate *Brady*. *Imbler* worried that a civil action against a prosecutor would dampen the prosecutor’s “courage,” “independence,” and “energy,”<sup>151</sup> and that an “honest” prosecutor would have greater difficulty in defending himself from “error” and “mistaken judgment” than other officials cloaked with qualified immunity.<sup>152</sup>

To be sure, although Pachtman was accused of *Brady* violations, the Court appeared to

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<sup>148</sup> *Id.* at 185-193.

<sup>149</sup> See Duff Wilson, *Hearing Ends in Disbarment For Prosecutor in Duke Case*, N.Y. TIMES, June 17, 2007, at 21; Shaila Dewan, *Duke Prosecutor Jailed; Students Seek Settlement*, N.Y. TIMES, Sept. 8, 2007. See North Carolina State Bar v. Michael B. Nifong, No. 06 DHC 35 (June 16, 2007).

<sup>150</sup> See United States v. Stevens, Cr. No. 08-231 (D.D.C. April 7, 2009)(Motion Hearing)(Docket No. 372). (district court appoints special prosecutor to investigate and prosecute the matter). *Id.* at p. 46-47.

<sup>151</sup> *Imbler*, 424 U.S. at 424-425.

<sup>152</sup> *Id.* at 425.

view his conduct at most as an error, a mistake of judgment, or negligent rather than as willful misconduct. And given the record in that case, it is neither surprising nor counter-intuitive 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, apparently including all actions undertaken before trial, in secret, shielded from public scrutiny, and not subject to 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*. And, by removing the sanction of civil liability from such misconduct, *Imbler* gave prosecutors a further incentive to disregard their constitutional responsibilities.

#### **IV. Lack of Accountability for *Brady* Violations**

*Imbler* acknowledged that the immunity it created left a wronged defendant without a civil remedy.<sup>153</sup> However, the Court added, this absence "does not leave the public powerless to deter misconduct or to punish that which occurs."<sup>154</sup> 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

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<sup>153</sup> *Imbler*, 424 U.S. 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.").

<sup>154</sup> *Id.* at 429.

would be subject to criminal prosecution for willful acts that violate the criminal law.<sup>155</sup>

*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.<sup>156</sup> “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.”<sup>157</sup>

*Imbler*’s confidence that prosecutors would face both criminal and professional sanctions for their misconduct has proved to be dramatically mistaken. Indeed, one of the central themes in criminal procedure and professional ethics since *Imbler* has been the lack of accountability of prosecutors for their misconduct, and especially for their misconduct that involves the deliberate suppression of exculpatory evidence.<sup>158</sup> As noted

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<sup>155</sup> *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.”).

<sup>156</sup> *Id.* (suggesting that a prosecutor is “perhaps unique...in his amenability to professional discipline by an association of his peers”).

<sup>157</sup> *Id.*

<sup>158</sup> See John F. Terzano & Alanna Holt, *Improving Prosecutorial Accountability – A Policy Review*, The Justice Project (2009)(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 disciplinary process as “woefully inadequate in holding prosecutors accountable for misconduct”). See also Armstrong & Possely, *supra* note 110 (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

above,<sup>159</sup> 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.

*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*,<sup>160</sup> and stated: "California also appears to provide for criminal punishment of a prosecutor who commits some of the acts ascribed to respondent by petitioner."<sup>161</sup> The Court's extrapolation of a general principle from a case

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false evidence); Center for Public Integrity, *supra* note 134, at 79 (finding only forty-four 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 3 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. Hasting*, 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 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 *United States v. Stevens*, Cr. 08-231 (hearing, Apr. 7, 2009) Docket No. 372, at 45-46 (expressing obvious lack of confidence in OPR's claim, made six months earlier, to conduct an investigation, and that to date, "the silence is deafening;" court also expresses "shock but not surprise" at lack of response by then-U.S. Attorney General Michael Mukasey to numerous letters from defense counsel urging commencement of formal investigation of prosecutors).

<sup>159</sup> See *supra* notes 133-150, and accompanying text.

<sup>160</sup> 449 P.2d 174 (Cal. 1969).

<sup>161</sup> *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



that does not even support that principle,<sup>162</sup> was illogical then, and is even more unsupportable today. In fact, criminal sanctions against a prosecutor have hardly ever been enforced, either in California, or anywhere else in the United States.<sup>163</sup> An extensive search through the internet has located not a single instance in California since *Imbler* in which a prosecutor has been criminally prosecuted for acts related to his prosecutorial duties.<sup>164</sup> A nationwide search for instances of criminal charges against prosecutors in the last twenty-five years has 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, county prosecutor Thomas L. Knight was charged by a special prosecutor 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 10-year-old girl.<sup>165</sup> Knight was acquitted. In 2007 in Detroit,

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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.” *Id.* at 210. 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 have been 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.

<sup>162</sup> *Id.*

<sup>163</sup> See Brink, *supra* note 12 at 27 (“leveling 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. 19351969-1970 (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 Brophy v. Committee on Professional Standards, Third Judicial Department, 442 N.Y.S.2d 818 (N.Y. App. 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).

<sup>164</sup> 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.

<sup>165</sup> 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.

federal prosecutor Richard Convertino was charged by the U.S. Department of Justice with conspiracy, obstruction of justice, and making false statements in connection with his suppression of evidence in a high-profile terrorism trial in 2003.<sup>166</sup> Convertino was acquitted. Indeed, of the hundreds of cases involving *Brady* violations noted above,<sup>167</sup> 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.<sup>168</sup> If *Imbler*'s prediction was even remotely accurate, one might have expected to see criminal charges brought against at least some of those prosecutors. But this has not happened.

*Imbler* also confidently predicted that a prosecutor would be amenable to professional discipline by bar associations.<sup>169</sup> But 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 has issued a stinging rebuke of the

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<sup>166</sup> See *Terror Case Prosecutor Acquitted of Rigging Trial Jury: Convertino and Agent Didn't Hide Evidence*, DETROIT FREE PRESS, Nov. 1, 2007, at A1.

<sup>167</sup> See supra notes 134-150, and accompanying text.

<sup>168</sup> See, e.g., Center for Public Integrity, supra note 134 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 of these individuals were found to be innocent); Gershman, supra note 137, 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).

<sup>169</sup> *Imbler*, 424 U.S. at 429.

prosecutor.<sup>170</sup> The absence of professional discipline is particularly glaring in cases involving intentional *Brady* violations. Indeed, 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.<sup>171</sup> Nonetheless, although one might reasonably expect that such conduct would be viewed by professional disciplinary bodies as unethical, and even dangerous, professional disciplinary bodies for a variety of reasons typically maintain a hands-off approach.<sup>172</sup> Indeed, from an examination of the numerous instances of serious *Brady* violations noted above, very few of the offending prosecutors was 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. Thus, in *United States v. Stevens*, which involved the high-profile prosecution and conviction of then-Senator Ted Stevens of Alaska, Federal District Emmet G. Sullivan dismissed the

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<sup>170</sup> See supra note 158, and accompanying text.

<sup>171</sup> See MODEL RULES OF PROFESSIONAL CONDUCT R. 3.8(d) (2004); MODEL CODE OF PROFESSIONAL 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 AND REGULATIONS 1146 (John S. Dzienkowski ed. 2001). See *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”).

<sup>172</sup> See supra note 158, 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 (discussing a county prosecutor who was disbarred for deliberately presenting a witness's false testimony in two death penalty trials); Duff Wilson, *Hearing Ends in Disbarment For Prosecutor in Duke Case* N.Y. TIMES, June 17, 2007, at 21 (discussing the case of District Attorney Michael Nifong, prosecutor in Duke lacrosse case, who was disbarred, among other misconduct, for suppressing exculpatory evidence); Howard Mint, *State Bar Judge Wants Santa Clara County Prosecutor Suspended*, Feb. 11, 2009, at 1 (discussing Benjamin Field, a county prosecutor who was described in a newspaper series as a “repeat offender” and was brought before the State Bar of California for misconduct in multiple cases spanning a decade).

charges against the defendant with prejudice after finding that the prosecution had suppressed material exculpatory evidence.<sup>173</sup> 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.<sup>174</sup> Similarly, in *United States v. Shaygan*,<sup>175</sup> 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,<sup>176</sup> imposed individual 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."<sup>177</sup> Judge Gold added that the U.S. Attorney General must create a

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<sup>173</sup> See *United States v. Stevens*, Cr. No. 08-231 (D.D.C. April 7, 2009)(Docket No. 372), at 3 ("In nearly 25 years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case.").

<sup>174</sup> *Id.*

<sup>175</sup> 2009 WL 980289 (S.D. Fla.).

<sup>176</sup> 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, 111 Stat. 2440, 2519 (1997)(reprinted in 18 U.S.C. § 3006A. Since its enactment, "prevailing criminal defendants" have applied for Hyde fees in approximately 200 reported cases, and have been successful in less than 10% of the cases. Courts have struggled to define the operative terms. See *United States v. Gilbert*, 198 F.3d 193, 1298-1299 (11<sup>th</sup> 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 annoy the defendant; and "bad faith" is the conscious doing of wrong because of a dishonest purpose, 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, in 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." *Shaygan*, slip. op. at 29..

<sup>177</sup> *Shaygan*, slip op. at 2.

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.”<sup>178</sup>

Finally, in *United States v. Jones*,<sup>179</sup> 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.”<sup>180</sup> In a separate opinion addressing whether sanctions should be imposed,<sup>181</sup> 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.”<sup>182</sup> Judge Wolf warned that he would institute criminal contempt proceedings against offending prosecutors in future cases and would publicly name these prosecutors in published decisions.<sup>183</sup> 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.<sup>184</sup>

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<sup>178</sup> Id. at 3 (“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.”).

<sup>179</sup> 609 F. Supp.2d 113 (D. Mass. 2009).

<sup>180</sup> Id. at 119.

<sup>181</sup> *United States v. Jones*, 620 F. Supp.2d 163 (D. Mass. 2009).

<sup>182</sup> Id. at 167.

<sup>183</sup> 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. Mearns, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

<sup>184</sup> 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 memorandums to United States Attorneys, Department Prosecutors, and Heads of Department

In sum, *Imbler* believed that protecting the honest prosecutor from civil liability was the “lesser evil” than affording a civil remedy to a defendant wronged by a dishonest prosecutor.<sup>185</sup> 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 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

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Litigating Components providing guidance in handling criminal discovery. For Memorandum to Department Prosecutors, see <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 United States Attorneys Manual § 9-5.001. 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. For Memorandum on Discovery Policies, see <http://www.justice.gov/dag/dag-memo.html>. For Memorandum for Heads of Department Litigating Components, see <http://www.justice.gov/dag/dag-to-usas-component-heads.html>.

<sup>185</sup> *Imbler*, 424 U.S. at 427-428, 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.”).

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 but also disservices 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 appear to be much 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*,<sup>186</sup> 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 plainly incompetent or those who knowingly violate the law.”<sup>187</sup> The Court since *Imbler* “completely reformulated qualified immunity”<sup>188</sup> 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.”<sup>189</sup> This change was specifically designed to protect the honest and conscientious official from the kinds of frivolous, harassing, and disruptive

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<sup>186</sup> 500 U.S. 478, 494-495 (1991).

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<sup>188</sup> *Anderson v. Creighton*, 483 U.S. 635, 645 (1987).

<sup>189</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

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.<sup>190</sup> 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.<sup>191</sup>

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.<sup>192</sup> Thus, in *Buckley v. Fitzsimmons*,<sup>193</sup> the Court observed that when a prosecutor performs investigative functions normally performed by police officers, 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."<sup>194</sup> Ensuring parity also was addressed in *Burns v. Reed*,<sup>195</sup> where the Court considered whether a prosecutor enjoyed absolute immunity for giving legal advice to the police, and concluded that "it is incongruous to allow prosecutors to be absolutely

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<sup>190</sup> See *Malley v. Briggs*, 475 U.S. 335, 341 (1986)(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 the developments in criminal litigation since *Imbler* "provide adequate protections for prosecutors without the need for absolute immunity").

<sup>191</sup> See *Heck v. Humphrey*, 512 U.S. 477, 486-487 (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").

<sup>192</sup> See *Buckley v. Fitzsimmons*, 509 U.S. 259, 288 (1993)("one of the unquestioned goals of our § 1983 immunity jurisprudence: ensuring parity in treatment among state actors engaged in identical functions")(Kennedy, J., concurring and dissenting).

<sup>193</sup> 509 U.S. 259 (1993).

<sup>194</sup> *Id.* at 273, quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7<sup>th</sup> Cir. 1973).

<sup>195</sup> 500 U.S. 478 (1991).



immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following that advice.”<sup>196</sup> And in *Van de Kamp v. Goldstein*,<sup>197</sup> 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.<sup>198</sup>

The Court’s concern with parity would appear to apply equally to *Brady* violations. Thus, 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 because, according to *Kyles v. Whitley*,<sup>199</sup> 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.”<sup>200</sup> To be sure, for *Brady* purposes the police are considered an “arm of the prosecutor,”<sup>201</sup> and as virtually every circuit has concluded, have a derivative duty under *Brady* to turn over to the prosecutor potentially exculpatory evidence.<sup>202</sup>

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<sup>196</sup> Id. at 495.

<sup>197</sup> 129 S. Ct. 855 (2009).

<sup>198</sup> Id. at 863.

<sup>199</sup> 514 U.S. 419 (1995).

<sup>200</sup> Id. at 437.

<sup>201</sup> See *Walker v. Lockhart*, 763 F.2d 942, 958 (8<sup>th</sup> Cir. 1985)(“Police are treated as an arm of the prosecutor for *Brady* purposes”).

<sup>202</sup> See *Moldowan v. City of Warren*, 578 F.3d 351, 381 (6<sup>th</sup> Cir. 2009)(“virtually 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 (1<sup>st</sup> Cir. 1999)(“a police officer sometimes may be liable [under § 1983] if he fails to apprise the prosecutor of a judicial officer of known exculpatory information”); *Hart v. O’Brien*, 127 F.3d 424, 446-447 (5<sup>th</sup> 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 (11<sup>th</sup> 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 over exculpatory evidence to the prosecutor.”).

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.<sup>203</sup> 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*. To be sure, 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 prosecutor.”<sup>204</sup> However, a bad faith exception to absolute immunity would focus squarely on the character of the prosecutor, as well as the nature of the evidence that was suppressed, and the harm caused by that suppression. Bad faith conduct would consist of a conscious decision by a prosecutor 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

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<sup>203</sup> *Moldowan v. City of Warren*, 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 (5<sup>th</sup> Cir. 1989)(affirming denial of qualified immunity for police officer who failed to disclose exculpatory evidence).

<sup>204</sup> *United States v. Agurs*, 427 U.S. 97, 110 (1976).

prosecutor to commit a fraud on the judicial process – to defraud the defendant of his 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.<sup>205</sup> Bad faith conduct embraces the quality of “moral turpitude” that subjects the conduct of all attorneys to professional discipline<sup>206</sup>

Creating an exception for bad faith conduct of prosecutors that violates constitutional rules is hardly a novel proposal. Such an exception has been recognized by the Court 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.<sup>207</sup> 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,<sup>208</sup> vindictively charging persons in retaliation for their exercising legal rights,<sup>209</sup> and

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<sup>205</sup> See MODEL RULES OF PROFESSIONAL CONDUCT R. 8.4 (c)(professional misconduct for lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”).

<sup>206</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(3)(“A lawyer shall not...[e]ngage in illegal conduct involving moral turpitude”).

<sup>207</sup> *United State v. Armstrong*, 517 U.S. 456, 464 (1996)(“so 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).

<sup>208</sup> *Id.* (“the 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); *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).

<sup>209</sup> 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)..

bringing charges in order to harass a defendant.<sup>210</sup> 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.<sup>211</sup> Thus, when a prosecutor delays bringing charges against a defendant in order to gain a “tactical advantage” over the accused,<sup>212</sup> due process may be invoked to bar prosecution.<sup>213</sup> Moreover, although double jeopardy does not protect 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.<sup>214</sup> 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.<sup>215</sup> 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 which was lost or destroyed by the prosecution in bad faith for the purpose of preventing its use by the defendant.<sup>216</sup>

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<sup>210</sup> 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”).

<sup>211</sup> See *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Marion*, 404 U.S. 307 (1971).

<sup>212</sup> *Lovasco*, 431 U.S. at 795; *Marion*, 404 U.S. at 324.

<sup>213</sup> 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 process violation by showing that prosecutor removed witness from U.S. deliberately in order to deprive the defense of opportunity to interview him).

<sup>214</sup> 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”).

<sup>215</sup> *Id.*

<sup>216</sup> 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).

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 effect only a modest inroad into the doctrine of absolute prosecutorial immunity. But such an exception would make a 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.

## **Conclusion**

Despite being built on questionable history and speculative policy, *Imbler v. Pachtman* has been 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. According to *Imbler*, and reaffirmed in subsequent decisions, the 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*. Indeed, it probably 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 proved 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.