

A NEW BALANCE OF EVILS: PROSECUTORIAL MISCONDUCT, *IQBAL*, AND THE END OF ABSOLUTE IMMUNITY

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*Criminal prosecutors wield immense power in the criminal justice system. While the majority of prosecutors exercise this power in a professional manner, there is compelling evidence of a serious and growing problem of prosecutorial misconduct in this country. Although much prosecutorial misconduct results in the violation of the constitutional and other legal rights of criminal defendants, prosecutors are protected from any liability arising from these violations in all but the most exceptional cases by the defense of absolute immunity. The U.S. Supreme Court has justified the application of absolute prosecutorial immunity, in part, by noting that other means of incentivizing appropriate prosecutorial conduct exist, namely criminal prosecution and professional sanction. This Article briefly documents the extent of the problem of prosecutorial misconduct in this country and the complete ineffectiveness of non-civil liability mechanisms for controlling it. It argues that absolute immunity is an excessive protection for prosecutors and that qualified immunity, which limits the liability of prosecutors to instances where they have violated an objectively clear constitutional right, is sufficient to serve the policy objectives that absolute immunity was created to protect. This Article discusses the sufficiency of qualified immunity in the new context of the Supreme Court's recent decision in *Ashcroft v. Iqbal*, and the standard it announced for legal sufficiency for civil rights claims filed against prosecutors. This new standard was expressly designed to make it easier to dismiss factually weak claims against prosecutors thereby removing one of the central justifications for the absolute immunity defense applied by courts for decades in light of the previous, and more lenient, sufficiency standard articulated by the Court in *Conley v. Gibson*. Because qualified immunity is a sufficient liability protection for prosecutors (particularly in the post-*Iqbal* federal court system) the harsh and unjust defense of absolute immunity for prosecutors should be eliminated.*

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“No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.”¹

“It was indeed the purpose of this civil rights legislation to secure federal rights against invasion by officers and agents of the states. I see no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain.”²

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INTRODUCTION

During the early years of World War II, a French immigrant named Armand Gregoire was arrested on the false grounds that he was a German national and, therefore, an “enemy alien.”³ Although Gregoire’s true nationality was soon confirmed at a hearing before the Enemy Alien Hearing Board he was nonetheless incarcerated from January 5, 1942 until after the war was over in 1946.⁴ Gregoire subsequently filed an action in United States District Court against several federal officials, including two past Attorneys General of the United States, alleging that his arrest and imprisonment were “without any authority of law and without any reasonable or colorable cause” and that

1. *United States v. Lee*, 106 U.S. 196, 220 (1882).

2. *Tenney v. Brandhove*, 341 U.S. 369, 383 (1951) (Douglas, J., dissenting).

3. *Gregoire v. Biddle*, 177 F.2d 579, 579 (2d Cir. 1949).

4. *Id.*

defendants “conspired together and maliciously and willfully entered into a scheme to deprive the plaintiff of his liberty contrary to law.”⁵ The trial judge held that the defendants’ unlawful acts “had been induced only by personal ill-will” but concluded that the defendants had an “absolute immunity from liability” and granted their motion to dismiss.⁶

In his opinion in *Gregoire v. Biddle*, Second Circuit Judge Learned Hand was demonstrably outraged by the circumstances of the case but nonetheless affirmed the lower court’s order, explaining:

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.⁷

In the almost 75 years since Hand’s decision, courts have repeatedly reached the same conclusion⁸ when adjudicating civil claims alleging the most egregious intentional misconduct on the part of prosecutors (including intentionally withholding exculpatory evidence,⁹ conspiring to present false testimony,¹⁰

5. *Id.* (“The second count reiterated these allegations and added that the defendants ‘subjected the plaintiff to the deprivation of his liberty and of his rights, privileges and immunities secured by the Constitution and the laws of the United States,’ and deprived him of equal protection of the law in violation of Sections 43 and 47 of Civil Rights Act.”).

6. *Id.*

7. *Id.* at 581. This characterization of the extent of official immunity was not uncontroversial at the time Hand issued his opinion. See Karen Lin, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718, 1724 (2008) (“Other courts, however, rejected such a broad rule in favor of case-by-case analysis and balancing of the competing individual and public interests at stake.”).

8. See Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 269 (2009) (“In 1949, Judge Learned Hand wrote a path-marking opinion on official immunity in *Gregoire* . . . [providing] the basis for the Supreme Court’s twentieth-century resurrection of immunity doctrines based on concern about the possible chilling of official action in all areas, not just national security.”).

9. See *Imbler v. Pachtman*, 424 U.S. 409, 427, 431 (1976) (stating that non-disclosure of exculpatory information is reprehensible, but nonetheless protected by absolute immunity); see also *Koubriti v. Convertino*, 593 F.3d 459, 468-69 (6th Cir. 2010).

10. *Rehberg v. Paulk*, 611 F.3d 828, 839 (11th Cir. 2010) (finding that a prosecutor who used false testimony before a grand jury was absolutely immune for both the testimony itself

knowingly offering perjured testimony,¹¹ to name just a few¹²): that all prosecutors, regardless of the extent of their intentional or reckless misconduct, must be immune from any civil judgment arising out of the performance of their official adversarial duties¹³ because the procedural and substantive burdens associated with such claims would “dampen the ardor” of honest officials “in the unflinching discharge of their duties.”¹⁴

Perhaps it goes without saying, particularly in his distinguished case,¹⁵ that

and the alleged pre-indictment conspiracy to present false testimony).

11. *Id.* at 839; *Brawer v. Horowitz*, 535 F.2d 830, 840-41 (3d Cir. 1976).

12. See Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 61 (2005). Professor Johns referenced a 1999 study by the *Chicago Tribune* that noted that prosecutors “have prosecuted black men, hiding evidence the real killers were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs.” *Id.* (citing Kenneth Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice to Win (Part 1: The Verdict: Dishonor)*, CHI. TRIB. (Jan. 11, 1999), <http://www.chicagotribune.com/news/watchdog/chi-020103trial1-story.html>).

13. See Anthony J. Luppino, *Supplementing the Functional Test of Prosecutorial Immunity*, 34 STAN. L. REV. 487, 487-88 (“Prosecutors sued for damages under section 1983 of the Civil Rights Act of 1871 obtain varying degrees of immunity depending upon the function they are performing when they commit the allegedly violative acts. For ‘quasi-judicial’ acts—those closely related to the adjudicative process of the criminal justice system—prosecutors have absolute immunity from civil liability. For investigative and administrative acts, prosecutors accused of misconduct have generally received only qualified immunity.”); see also Veronica Zhang, *Throwing the Defendant in the Snakepit: Applying a State-Created Danger Analysis to Prosecutorial Fabrication of Evidence*, 91 B.U. L. REV. 2131, 2138-44 (2011) (discussing the functional distinction in prosecutorial immunity and the policy reasons given by courts to justify it).

14. See Laure Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, n.153 (“The single most influential opinion, however, was Judge Learned Hand’s decision in *Gregoire*. . . . Judge Hand ruled that, regardless of any allegations of malice, various federal officials were absolutely immune for their acts . . . [and] penned a justification of the absolute defense in language which has been cited ever since by both federal and state courts. The essence of that justification was the necessity of sparing the officials from the chilling effect of the hazards of litigation.”).

15. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE*, at xv (Oxford Univ. Press 2d ed. 2011) (“Learned Hand is numbered among the small group of truly great American judges of the twentieth century, a group that included Oliver Wendell Holmes, Jr., Lois Brandeis, and Benjamin Cardozo.”).

Judge Learned Hand¹⁶ had a point. Shocking¹⁷ or even tragic¹⁸ as the circumstances of an individual case of intentional prosecutorial abuse might be, there are broader societal interests to be considered beyond the potential for monetary compensation for the injured party.¹⁹ The availability of a civil action against a prosecutor even for her intentional acts would be problematic,

16. See *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923). Earlier in his illustrious career, Judge Hand had expressed his belief that the criminal justice system was balanced inappropriately in favor of the accused, particularly in regard to procedure including discovery rules, and dismissing the legitimate possibility of erroneous conviction: “Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. . . . Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.” *Id.*

17. See Charlie Savage & Michael Schmidt, *Inner Workings of Senator’s Troubled Trial Detailed*, N.Y. TIMES (Mar. 15, 2012), http://www.nytimes.com/2012/03/16/us/politics/report-details-inner-workings-of-troubled-ethics-trial-of-senator-ted-stevens.html?_r=0 (“At least two federal prosecutors involved in the botched ethics trial of the late Senator Ted Stevens ‘intentionally withheld and concealed’ significant evidence from the defense team that could have resulted in his acquittal. . . . [T]he government’s chief witness against Mr. Stevens, William J. Allen, had made statements to prosecutors that conflicted with his testimony at the trial. The prosecution team did not turn over to the defense information about the earlier conversations.” (quoting a court-appointed investigator)).

18. *Michael Morton*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases/michael-morton/> (“After spending nearly 25 years in prison for the murder of his wife, [Michael] Morton was released on October 4, 2011, and officially exonerated in December 2011. . . . During the course of the post-conviction DNA litigation, Morton’s attorneys filed a Public Information Act request, and finally obtained the other documents showing Morton’s innocence in the prosecution’s file that had been withheld at trial. . . . The Court of Inquiry ruled there to be probable cause to believe Mr. Anderson had violated criminal laws by concealing evidence and charged him with criminal contempt. The State Bar of Texas also brought ethics charges against Mr. Anderson. In early November 2013, Mr. Anderson entered a plea to criminal contempt and agreed to serve a 10-day jail sentence. He resigned from his position as a district court judge and permanently surrendered his law license.”) (last visited June 2, 2017).

19. See John P. Taddei, *Beyond Absolute Immunity: Alternative Protections for Prosecutors Against Ultimate Liability for § 1983 Suits*, 106 NW. U.L. REV. 1883, 1902 (2012) (“At its most abstract, the core rationale for absolute prosecutorial immunity is that it best promotes the ‘broader public interest.’ It is based on a concern that the possibility of personal liability will have a chilling effect on a prosecutor’s performance of his duties and hamper his independence: If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution.” (quoting *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976))); see also Megan M. Rose, *The Endurance of Prosecutorial Immunity—How the Federal Courts Vitiating Buckley v. Fitzsimmons*, 37 B.C. L. REV. 1019, 1026-27 (1996) (“The policy justifications underlying these early grants of absolute immunity varied. Some courts have described prosecutorial immunity as quasi-judicial. Judicial immunity for acts within the judge’s jurisdiction can be traced to the early English common law, as can the immunity of grand jurors. These courts reason that judges, grand jurors and prosecutors all perform the discretionary function of evaluating evidence presented to them.”).

according to Hand, first, because while *Gregoire*'s claim was apparently valid, not all allegations of prosecutorial misconduct will be truthful, and second, because prosecutors will be forced to respond to all such claims (valid or not) taking up valuable time managing the "burdens" of litigation,²⁰ and potentially (but presumably only in response to the valid claims) paying extensive out of pocket awards to successful plaintiffs.²¹ Encumbered by these burdens, prosecutors would be unable to participate effectively in the criminal justice system.²² It is this consequence, and its broader social cost, that Hand balances against the uncompensated injuries of the victims of the actions of a malicious prosecutor. He concludes, as courts in the U.S. all but invariably have since *Gregoire*, that the preservation of effective prosecutorial function is more important than compensation for injured parties, and that the only way to assure this effectiveness is to shield prosecutors from liability no matter how egregious or intentional their misconduct.²³

It is important to note that notwithstanding his decision in the case and the balance he reluctantly applies, Hand characterizes the action of the prosecutor there as an "evil," one for which he "should not escape liability" and that it is "monstrous" for a court to deny recovery in such an instance. Hand says that prosecutors *should* be subject to civil liability for their intentional misconduct, and that if offending prosecutors *could* be efficiently identified, our justice system would be obliged to compensate the victims of their actions in the same way it compensates others injured by intentional torts.²⁴ The problem that mandates Hand's balance is that the validity of the allegations against prosecutors cannot be determined without forcing the defendant ("guilty" or not) to suffer the significant burden posed by even the most frivolous of lawsuits. Perhaps Hand's balance, therefore, was not about the appropriate scope of prosecutorial liability so much as it was about the nature and inherent burdens of

20. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

21. Judicial presumptions in *Gregoire* regarding the dramatic impact of potential civil damage awards on actual prosecutors may be exaggerated, or at least overstated with time. The reality of civil liability for claims arising from the official acts of prosecutors is complex. See Taddei, *supra* note 19, at 1887 ("[S]tates and local municipalities have created a number of protections for public officials, including prosecutors—such as indemnification legislation, private insurance, and other alternative liability mechanism—to cover losses from torts they commit in the line of duty. These protections prevent prosecutors from shouldering the burden of personal financial liability even in instances in which they cannot don the cloak of absolute immunity.").

22. See *Imbler*, 424 U.S. at 422-23 ("The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties.").

23. See *Id.* at 422-24.

24. *Gregoire*, 177 F.2d at 582. See generally John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 521 (2003) ("The most influential torts scholars in the Twentieth Century form a diverse group whose thoughts may be placed under the banner of compensation-deterrence theory.").

our civil litigation system.

Eight years after Hand's decision in *Gregoire*, the Supreme Court in *Conley v. Gibson*²⁵ confirmed the sufficiency standard for claims filed in federal court—the rule for what must be included in a complaint in order for it to survive a 12(b)(6) motion to dismiss for failure to state a claim.²⁶ In response the defendant's contention that the plaintiffs' complaint "failed to set forth specific facts to support its general allegations," Justice Black held that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."²⁷ While this is a fair and non-controversial reading²⁸ of the language of Rule 8,²⁹ and one relied upon by courts routinely for half a century,³⁰ it provides for the kind of litigation-related burden that Hand identified as arising from claims filed against prosecutors by allowing all but the most frivolous claims to move to the discovery stage of litigation and its exponential increase in costs and related burdens.³¹ And it is all but universally accepted that the discovery burden has

25. 355 U.S. 41, 42 (1957).

26. FED. R. CIV. P. 12(b)(6) ("Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion . . . (6) failure to state a claim upon which relief can be granted . . .").

27. *Conley*, 355 U.S. at 47.

28. See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 575-76 (2007) (Stevens, J., dissenting) ("Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. . . . But the bare allegation suffices under a system that 'restrict[s] the pleadings to the task of general notice-giving and invest[s] the deposition-discovery process with a vital role in the preparation for trial . . .'" (quoting *Hickman v. Taylor*, 329 U.S. 495, 501 (1947))).

29. FED. R. CIV. P. 8(a) ("A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.").

30. *Twombly*, 550 U.S. at 577-78 (Stevens, J., dissenting) ("If *Conley*'s 'no set of facts' language is to be interred, let it not be without a eulogy. That exact language, which the majority says has 'puzzled the profession for 50 years,' has been cited as authority in a dozen opinions of this Court and four separate writings. In not one of those 16 opinions was the language 'questioned,' 'criticized,' or 'explained away.' Indeed, today's opinion is the first by a Member of this Court to express *any* doubt as to the adequacy of the *Conley* formation.").

31. Edward H. Cooper, *Discovery Cost Allocation: Comment on Cooter and Rubinfeld*, 23 J. LEGAL STUD. 465, 466 (1994) ("The problem of excessive discovery seems reasonably straightforward. Discovery rules are designed to enable a party to force others, parties and nonparties, to disclose information. The inquiring party does not bear all the costs of the process. The costs of responding, which include interpreting the demand, gathering the information, and formulating and delivering a response, are borne by the responding party."); see also *Twombly*, 550 U.S. at 559 ("[I]t is self-evident that the problem of discovery abuse cannot be solved by 'careful scrutiny of evidence at the summary judge stage,' much less

grown even more onerous in the decades since both *Conley* and *Gregoire*.³²

But what if there was another way to address the litigation-related burdens on prosecutors other than a blanket immunity protection? What if baseless claims against prosecutors could be dismissed all but immediately and without measurable procedural burdens? Would Hand's balance of evils require a recalibration? Would the diminished burden on the prosecutor, as compared to the "monstrous evil" of uncompensated injury he or she has caused to an individual, suggest a reconsideration of absolute prosecutorial immunity? Particularly if there was a form of immunity that was better tailored to distinguish prosecutors who act reasonably from those who engage in reckless or intentional misconduct?

Part I of this paper provides a brief survey of the frightening epidemic of prosecutorial misconduct and of the utter ineffectiveness of mechanisms (other than civil liability) designed to prevent or at least control it.³³ Part II provides a summary of the development and application of the defense of absolute immunity for prosecutors for litigation-related actions taken in the course of their official duties.³⁴ It notes the central policy basis for the application of this dramatic blanket preclusion of liability, a set of related concerns that Judge Hand articulated in *Gregoire* and that I have previously referred to as "nuisance" concerns.³⁵ The related concerns are that threatening prosecutors with potential

'lucid instructions to juries'; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.'" (citation omitted)).

32. For a discussion of widespread dissatisfaction with federal discovery practice in the second half of the 20th Century see George Shepherd, *Failed Experiment: Twombly, Iqbal and Why Broad Pretrial Discovery Should Be Further Eliminated*, 49 IND. L. REV. 465, 478 ("[In *Twombly* and *Iqbal*] the Supreme Court recognized that the decades of tinkering with the [discovery] rules had not worked. Despite all the rule changes, discovery abuse was still pervasive. So the Supreme Court effectively eliminated discovery in many cases.")

33. See H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 55 (2013) ("Academics and practitioners considering the problem of punishing prosecutorial misconduct agree that the disciplinary measures in place are grossly inadequate.")

34. John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 207-08 (2013) ("There is no liability rule for constitutional torts. There are, rather, several different liability rules, ranging from absolute immunity at one extreme to absolute liability at the other. The choice among them does not depend, as the proverbial Martian might expect, on the role of money damages in enforcing particular rights. The right being enforced is irrelevant to constitutional tort doctrine. What matters instead is the identity of the defendant or the act she performs.")

35. See Mark C. Niles, "*Nothing but Mischief*": *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1309-10 (2002) ("There are two related, but distinct distracting impacts produced by the threat of tort liability. First, the more critical and potentially debilitating form, which I call 'complex' nuisance, involves the impact that exercising their authority, or exercising it in a certain way, would have on their possible exposure to substantial civil liability. The central concern raised by this potentiality is that the threat of liability will induce government officials to make decisions based on the relevant and applicable policy objectives that should be governing the execution of their authority, but

civil liability in multiple cases will distract them from their duties (“simple” nuisance) and alter the motivations that inform their decision-making process (“complex” nuisance).³⁶ “Simple” nuisance involves the fear that prosecutors will be such obvious targets for frivolous civil lawsuits that they will be inundated and will be severely handicapped in performing their core functions. “Complex” nuisance is the concern that the fear of potential liability will lead prosecutors to alter the performance of their duties and not act with the appropriate force and zeal for the fear that they would be exposed to potentially catastrophic financial consequences.³⁷

Part III argues that in light of the Supreme Court’s replacement of the “sufficiency” requirement for FRCP 8(a)(c) with the “plausibility” requirement for pleading in the *Bell Atlantic Corp. v. Twombly*³⁸ and *Ashcroft v. Iqbal*³⁹ cases, absolute immunity is unnecessary (at least as a remedy for simple nuisance) given the drastically diminishing likelihood that factually weak claims will reach the discovery stage of litigation.⁴⁰ The complex nuisance concern cannot provide a justification for absolute immunity for willful or reckless prosecutorial misconduct. The strong societal interest in discouraging such conduct and the availability of an alternative defense—qualified immunity (which shields a government official from civil liability when s/he has acted reasonably in securing an established Constitutional right)—protects prosecutors from the kind of perverse incentives that would distract them from the vigorous performance of their duties.⁴¹ The obsolescence of absolute immunity for prosecutors is cemented by the development of the qualified immunity defense

based rather on a concern for self-preservation. . . . The related nuisance factor, which I will call ‘simple’ nuisance, deals with the costs, in the form of expenditure of limited time and resources, that society bears when its government is involved in civil litigation. . . . [C]ourts have consistently held that liability for discretionary government acts should be limited because of the practical impact that litigation—and its multifarious procedural necessities—has on the ability of government officials to do their jobs.”)

36. See *id.* at 1307-12; see also Carissa Hessick, *Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution We Have Been Looking For?*, 47 S.D. L. REV. 255, 260 (2002) (“The argument that sanctions will have a chilling effect on prosecutors is more difficult to oppose. Each time a system of incentives is created, an effect on parties’ behavior can be observed. The extent to which those disincentives will extend beyond the behavior that is sought to be discouraged is not easily measured.” (citation omitted)).

37. See Niles, *supra* note 35, at 1309-10.

38. 550 U.S. 544, 557 (2007).

39. 556 U.S. 662, 678 (2009).

40. See Goutam U. Jois, Pearson, Iqbal, and *Procedural Judicial Activism*, 37 FLA. ST. U. L. REV. 901, 903 (2010) (“*Iqbal* makes it easier for courts to dismiss lawsuits at the outset, once again making it harder for plaintiffs to get past a defendant’s motion to dismiss.”).

41. Niles, *supra* note 35, at 1339 (“The only ‘incentive’ that potential liability for negligent acts would place on government officials performing activities analogous to private conduct would be the incentive to act in a reasonable manner, particularly when the contemplated act poses the threat of causing harm.”).

in the latter part of the 20th Century.⁴² This more modern defense has removed the common law's focus on the "subjective" mental state of the government actor in question and instead addresses the objective reasonableness of the action itself.⁴³

In light of the modern version of qualified immunity protection⁴⁴ and the new procedural sufficiency standard set out in *Iqbal*, the social harms that currently result from prosecutorial misconduct can be diminished by replacing absolute immunity protection with qualified immunity without posing a legitimate threat of increased diversion of prosecutorial focus.⁴⁵

I. PROSECUTORIAL MISCONDUCT AND THE FAILURE OF NON-LIABILITY REMEDIES

Criminal prosecutors play a unique and vital role in our criminal justice system and wield an incomparable amount of power over individuals and the broader communities that they serve.⁴⁶ While the majority of prosecutors perform their duties in good faith,⁴⁷ there is a wide array of statistical analyses

42. See David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 35-47 (1989) (discussing the development of the qualified immunity defense in courts throughout the United States).

43. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1981) ("[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens or broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.") (citation omitted).

44. See Jeffries, Jr., *supra* note 34, at 250-51 (discussing the evolution of qualified immunity as a defense with both objective and subjective components to one where the defendant's subjective motivation is irrelevant).

45. For arguments in favor of replacing absolute immunity with qualified immunity as the applicable defense for prosecutors in claims seeking civil damages see generally Johns, *supra* note 12, at 106-45; Jeffries, Jr., *supra* note 34, at 220-31.

46. See Alexandra White Dunahoe, *Revising the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 45 (2005) ("The prosecutor's power to employ the full machinery of the state to scrutinize and force an individual's immersion in a criminal investigation and adjudication occupies a unique position among state actors whose authority suggests the potential for deprivation of precious rights.").

47. Kathleen M. Ridolfi, *Foreword* to KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, at v (2010), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs> ("The majority of California prosecutors successfully discharge the obligations requisite in their two roles: acting both as advocates in seeking convictions and as ministers of justice, charged with using only fair methods to prosecute those they believe are guilty."); see also Caldwell, *supra* note 33, at 54 ("To be clear, instances of prosecutorial misconduct are relatively rare.").

that catalogue the growing problem of prosecutorial misconduct in this country.⁴⁸ But these disturbing numbers likely expose only a small percentage of the actual instances of misconduct in part because the vast majority of criminal cases are resolved by plea bargain.⁴⁹ Legal scholars have discussed this problem across the full spectrum of criminal practice (including charging, plea bargaining and trial),⁵⁰ and the lack of any viable mechanism to discourage or punish any of these forms of misconduct. This Article will focus on instances of intentional prosecutorial misconduct in preparation for and during trial, and the lack of any measurable consequences for those actions.

As detailed below, the Supreme Court's jurisprudence on the scope of civil liability for prosecutors who engage in misconduct has cloaked prosecutors with absolute immunity from any claim based on their official advocacy-related activities.⁵¹ In the course of justifying the application of absolute prosecutorial immunity, courts have frequently referenced mechanisms other than tort liability that arguably serve to incentivize appropriate conduct on the part of prosecutors. In one characteristic example, the Supreme Court observed:

We emphasize that the immunity of prosecutors from liability . . . does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. 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. Moreover,

48. See Dunahoe, *supra* note 46 (“Prosecutorial misconduct documented by the U.S. Department of Justice’s Office of Professional Responsibility has tripled during the last decade, requiring a larger staff of investigative lawyers to police abuses by Justice Department attorneys.”).

49. See David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 209-10 (2011) (detailing several “empirical problems [that] hamper efforts to provide an accurate assessment of prosecutorial misconduct in the United States” including: 1) that “prosecutors who engage in willful misconduct presumably do not want to be discovered and therefore take steps to conceal their misdeeds,” 2) that “prosecutors’ offices enjoy considerable autonomy in shaping their internal policies . . . [and] courts are generally loath to interfere with [their inner workings],” 3) that “the vast majority of known instances of prosecutorial misconduct come to light only during the course of a . . . trial. . . . But most criminal cases in the United States result in plea bargains,” and 4) that “those in the best position to report misconduct—namely judges, other prosecutors and defense attorneys and their clients—are often disincentivized from doing so for both strategic and political reasons.”).

50. Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U.L.Q. 714, 714-16 (1999); George A. Weiss, *Prosecutorial Accountability After Connick v. Thompson*, 60 DRAKE L. REV. 201, 201-02 (2011).

51. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (stating that a prosecutor’s administrative and investigatory functions unrelated to the preparation for prosecution or judicial proceedings are not protected by absolute immunity); see also *Burns v. Reed*, 500 U.S. 478, 496 (1991).

a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks 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.⁵²

Here⁵³ the Court identifies two main alternative means of dissuading and punishing intentional prosecutorial misconduct—criminal prosecution and professional sanction.⁵⁴ Before discussing the justifications for an expansion of the scope of civil liability for prosecutors, it is reasonable to ask whether the Court is correct that these devices provide an effective means for the public to “deter misconduct or punish that which occurs.”⁵⁵

In her recent book, *Arbitrary Justice: The Power of the American Prosecutor*,⁵⁶ Professor Angela J. Davis identifies several categories of prosecutorial misconduct. These demonstrated instances are all the more daunting in light of the reality that there is “no opportunity to challenge any misconduct that may have occurred in the over 95% of all criminal cases which result in a guilty plea.”⁵⁷ Davis notes that for this and other reasons, “much prosecutorial misconduct goes unchallenged, suggesting that the problem is much more widespread than the many reported cases” indicate.⁵⁸

Professor Davis provides some perspective on the question of whether the

52. *Imbler v. Pachtman*, 424 U.S. 409, 428-39 (1976) (citations omitted).

53. *See, e.g., Burns v. Reed*, 500 U.S. 478, 486 (1991) (“The Court also noted that there are other checks on prosecutorial misconduct, including the criminal law and professional discipline.”).

54. One potential mechanism for controlling or deterring prosecutorial misconduct not referenced here by the Court is the political process—the potential for publicly disclosed misdeeds of prosecutors resulting in their removal from office by the electorate. A recent high profile example of the removal of a controversial prosecutor occurred with the Democratic primary loss of Chicago prosecutor Anita Alvarez in March 2016 in the wake of the release of a video of police shooting Laquan McDonald. Mark Guarino, *Chicago Prosecutor Loses Reelection Battle in the Shadow of the Laquan McDonald Video*, WASH. POST (Mar. 15, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/03/15/chicagos-prosecutor-faces-a-reelection-battle-in-the-shadow-of-the-laquan-mcdonald-video/?utm_term=.0d143b53294a.

55. *See* Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 304 (2010) (discussing mechanisms other than civil or criminal liability or professional sanction for prosecutors to discourage specific misconduct including the failure to turn over *Brady* material to the defendant, including “dismissal of the indictment . . . without the possibility of re-indictment, rather than a new trial, where the *Brady* violation is show to be the product of willful misconduct by the prosecutor.”).

56. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (Oxford Univ. Press 2007).

57. *Id.* at 127.

58. *Id.* at 126 (“Most of the prosecutorial practices that occur behind closed doors, such as charging and plea bargaining decisions and grand jury practices, are never revealed to the public.”).

non-civil liability mechanisms of criminal and professional sanction are effective in deterring or punishing prosecutorial misconduct.⁵⁹ She cites a study which showed that from 1963 to 1999 the homicide convictions of at least 381 defendants were dismissed because their prosecutors had “either concealed exculpatory information or presented false evidence.”⁶⁰ Of these defendants, sixty-seven had been sentenced to death.⁶¹ The study noted that given the limited focus on murder convictions, these instances of *Brady*⁶² violations were almost certainly just a fraction of the total committed by prosecutors across the spectrum of criminal prosecution, and that none of “the prosecutors who engaged in the reported misconduct” was convicted of a crime or prevented from practicing law.⁶³ Indeed, the same study provided compelling evidence that some prosecutors found their careers advanced as a result of (or at least in spite of) their violation of the constitutional rights of the accused.⁶⁴

Among the many identifiable categories of prosecutorial misconduct, Professor Davis focuses her attention on what she calls “the most common form of misconduct”: *Brady* violations.⁶⁵ Professor Cynthia Jones also has addressed this specific category, noting that notwithstanding the frequency of these

59. Professor Caldwell provides an overview of studies nationwide regarding prosecutorial conduct. *See* Caldwell, *supra* note 33, at 68-81 (noting surveys of several procedures applied by the bars of the several states and the U.S. Department of Justice to address prosecutorial misconduct).

60. DAVIS, *supra* note 56, at 131.

61. *Id.*

62. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”).

63. DAVIS, *supra* note 56, at 131; *see also id.* at 135-36 (“In the 381 cases [*Chicago Tribune* journalists Ken Armstrong and Maurice Possley] examined in which appellate courts reversed convictions based on either *Brady* violations or prosecutors knowingly allowing lying witnesses to testify, the courts described the behavior in terms such as ‘unforgivable,’ ‘intolerable,’ ‘beyond reprehension,’ and ‘illegal, improper and dishonest.’ Yet of those cases, [o]ne was fired, but appealed and was reinstated with back pay. Another received an in-house suspension of 30 days. And a third prosecutor’s law license was suspended for 59 days, but because of other misconduct in the case . . . not one received any kind of public sanction from a state lawyer disciplinary agency or was convinced of any crime for hiding evidence or presenting false evidence . . .” (footnote omitted) (citing Ken Armstrong & Maurice Possley, *Verdict: Dishonor*, CHIC. TRIB., Jan. 10, 1999, at C1)).

64. *Id.* at 136 (“It is unclear whether any were sanctioned by state bar authorities, because these proceedings are not a matter of public record if the sanction was minor. Several of the offending prosecutors advanced significantly in their careers. . .” (footnote and internal quotation marks omitted) (citing Ken Armstrong & Maurice Possley, *Verdict: Dishonor*, CHIC. TRIB., Jan. 10, 1999, at C1)).

65. *Id.* at 126; *see also* Jeffries, Jr., *supra* note 34, at 228 (“At a minimum, *Brady* casts prosecutors in what Justice Marshall called an ‘unharmonious role.’ Of course, they are officers of the court, but they are also hard-charging, competitive lawyers whose reputations and satisfactions depend on obtaining convictions.”).

violations, “in the overwhelming majority of cases, prosecutors face few, if any, adverse consequences for *Brady* violations either within their offices or from an outside entity with the power to address their misconduct.”⁶⁶ This is true even in instances of intentional and blatant prosecutorial misconduct⁶⁷ because “when *Brady* violations are discovered—even when the violations are intentional and blatant—trial judges focus on curing any harm suffered by the defendant but fail to take punitive measures against the offending prosecutor to deter future *Brady* violations.”⁶⁸ There is evidence that these violations have a measurable impact on our criminal justice system. Jones notes that *Brady* violations “played a major role in the wrongful conviction of more than one-third of the prisoners later exonerated by DNA evidence[]”⁶⁹ and those exonerated on other grounds, including several defendants who were sentenced to death.⁷⁰

In addition, there is no evidence that the threat of criminal prosecution for their misdeeds has any practical impact on prosecutors. Professor Davis notes that much of what constitutes “prosecutorial misconduct” involves criminal conduct. She observes, “[w]hen prosecutors knowingly put witnesses on the stand to testify falsely, they suborn perjury. Subornation of perjury is a felony in all fifty states. . . . Yet, despite overwhelming evidence that prosecutors routinely break the law, they are not punished.”⁷¹

There are essentially no criminal indictments of prosecutors in our legal system. Professor Davis notes that only six prosecutors in the United States were subject to criminal prosecution for subornation of perjury in all of the 20th century,⁷² including five prosecutors in one particularly egregious case

66. Cynthia Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 419 (2010).

67. *Id.* at 421 (“Even though the disclosure duty is violated regardless of whether the nondisclosure is negligent or intentional, the most egregious *Brady* violations occur when prosecutors purposely withhold information that they know is clearly and unquestionably favorable to the defense.”).

68. *Id.* at 420; *see also id.* at 428 (“Intentional violations occur when the prosecutor fully understands the *Brady* disclosure duty, is aware of the existence of favorable evidence in the government’s possession, appreciates the exculpatory or impeachment value of the evidence, but intentionally withholds the evidence to gain a tactical advantage in the litigation.”).

69. *Id.* at 429 (citation omitted); *see also* Hessick, *supra* note 36, at 259 (“Even in this age of scientific evidence, prosecutor misconduct poses a real danger of convicting an innocent defendant. A 1992 study by Northwestern University sampled 400 people wrongfully convicted of death penalty offenses in the last 50 years. Of those cases, 15% to 20% involved unethical and illegal conduct by prosecutors, including subornation of perjury and mishandling of evidence. Wrongfully exposing innocent people to a loss of liberty deserves punishment.”).

70. Jones, *supra* note 66, at 429-30 (“In one case, after twelve years on death row, a man came within fifteen hours of execution before being granted habeas relief. More recently, Delma Banks was strapped to a gurney in the Texas death chamber and was within ten minutes of execution when the Supreme Court granted a stay of execution and ruled that he was entitled to habeas relief based on *Brady* violations that infected his trial.”).

71. DAVIS, *supra* note 56, at 136 (citation omitted).

72. *Id.* at 137 (“According to Armstrong and Posley only six prosecutors have been

commonly referred to as the “Du Page Five.”⁷³ Had the five prosecutors indicted in this case been convicted, “it would have been the first time that prosecutors had been found guilty of felonious prosecutorial misconduct. Prior to the Du Page prosecution, it appears that there was only one criminal action against a prosecutor who violated a defendant’s civil rights (the conviction resulted in \$500 fine and a suspension that was reduced by the judge to a censure).”⁷⁴ Perhaps the most obvious explanation for the lack of criminal indictment of prosecutors is the inherent conflict of interest that arises when the “people charged with investigating and indicting a state prosecutor . . . may be current or former coworkers of the accused.”⁷⁵

In its 2003 report on prosecutorial misconduct, the Center for Public Integrity found that “prosecutors faced disciplinary proceedings for misconduct that infringed on the constitutional rights of criminal defendants”⁷⁶ in only forty-four cases since 1970. Professor Davis provides at least one explanation for the paucity of state bar enforcement actions against prosecutors, noting that “[s]ince over 95% of criminal cases result in guilty pleas, every defense attorney knows that her future clients are at the mercy of the prosecutor . . . Challenging the bar

indicted in this century for the type of misconduct alleged in the Cruz prosecutors.” (citation omitted)); *see also* David A. Love, *Finally, A Prosecutor Goes to Jail for Evidence Tampering*, HUFFINGTON POST (Nov. 18, 2013, 3:46 PM), http://www.huffingtonpost.com/david-a-love/finally-a-prosecutor-goes-to-jail_b_4268214.html (reporting that Ken Anderson, the former Williamson County, Texas District Attorney and 1995 prosecutor of the year in Texas, was sentenced to 10 days in jail for criminal contempt. “Anderson violated a court order when the judge asked him whether he had any evidence that was favorable [to the defendant] and Anderson said no. In fact, Anderson was aware of statements made by several key witnesses, but chose not to disclose them.”).

73. Hessick, *supra* note 36, at 269.

74. *Id.* at 269 (“In the case *United States v. Brophy*, a prosecutor was convicted of suborning perjury, fabricating evidence, withholding evidence, and knowingly introducing false, misleading and perjured testimony at a state proceeding. After conviction, the prosecutor was sentenced to pay a \$500 fine. The conviction also resulted in an automatic suspension, but the court reduced the suspension to censure, finding that Brophy already ‘had suffered the stigma of a criminal conviction.’” (citation omitted)).

75. *Id.*; *see also* Alisha L. McKay, *Let the Master Answer: Why the Doctrine of Respondeat Superior Should Be Used to Address Egregious Prosecutorial Misconduct Resulting in Wrongful Convictions*, 2012 WIS. L. REV. 1215, 1230 (“Criminal sanctions, though theoretically available to discourage prosecutorial misconduct, are seldom used to address the problem.”); Weiss, *supra* note 50, at 220-21 (“Perhaps the most drastic deterrent to prosecutorial misconduct is criminal sanctions for those who abuse the rights of the criminal defendant. Federal law, codified at 18 U.S.C. § 242, criminalizes ‘willful’ actions under color of law that violate constitutional rights. . . . Additionally, prosecutors can be held in criminal contempt if they violate rules of the court. Recently, this sanction was used against Michael Nifong, the prosecutor who indicted several Duke University lacrosse players. As one scholar pointed out, while this form of criminal sanction is slightly more common, it is less serious than sanctions under 18 U.S.C. § 242 and perhaps even less serious than professional discipline or civil damages.” (citations and internal quotation marks omitted)).

76. DAVIS, *supra* note 56, at 128-29 (citations omitted).

license of an official who holds all the cards is risky business, especially given the odds of prevailing.”⁷⁷

Scholars and attorneys have provided additional evidence of the lack of meaningful sanctions, either criminal⁷⁸ or professional,⁷⁹ for prosecutorial misconduct.⁸⁰ In a 2010 report for the Veritas Initiative and the Northern California Innocence Project, Kathleen Ridolfi and Maurice Possley analyzed the response by the California state bar to instances of prosecutorial misconduct in the early 21st century.⁸¹ The study, which reviewed more than 4,000 state and federal appellate rulings, noted that the “majority of California prosecutors successfully discharge the obligations required for the two roles” of seeking conviction and promoting justice.⁸² In about 3,000 of the cases reviewed, courts rejected allegations of misconduct and in almost 300 failed to decide the issue one way or the other, finding that the trials were fair whether or not the actions of the prosecutor amounted to misconduct.⁸³ In the remaining 707 cases, prosecutorial misconduct was found by the reviewing court.⁸⁴ While this amounted to approximately one case of misconduct per week, the report noted that the number “undoubtedly understates the total number of such cases [as they are] just the cases identified in review of appellate cases and a handful of others found through media searches and other means.”⁸⁵ This limited window only exposes cases that were litigated at trial—less than 3% of the total felony criminal cases resolved in the state—and those cases where the misconduct became apparent to opposing counsel and where counsel had the means to file

77. *Id.* at 130.

78. See Aditi Sherikar, *Prosecuting Prosecutors: A Need for Uniform Sanctions*, 25 GEO. J. LEGAL ETHICS 1011, 1013-14 (“Outside of civil liability, criminal liability can be imposed on prosecutors under federal law. But, like with municipal liability, criminal liability does not provide much solace. To be liable for criminal sanctions, the prosecutor must willfully engage in misconduct, rendering the government’s burden of pursuing criminal punishment for unethical prosecutors daunting and making criminal sanctions available only for a fraction of instances of misconduct.” (citations and internal quotation marks omitted)).

79. See McKay, *supra* note 75, at 1228 (discussing “several explanations underlying bar associations’ reluctance to sanction prosecutors who engage misconduct.”)

80. See Sherikar, *supra* note 78, at 1011-12 (“The American Bar Association (ABA) lends little guidance to disciplinary boards charged with sanctioning misconduct. The standard used is to look to comparable misconduct and sanction based on how other cases have been decided. There are multiple problems with this approach. First, there are comparatively few prosecutorial misconduct cases in general (compared to cases of other types of attorney misconduct). Second, a comparison of prosecutorial misconduct with other types of attorney misconduct is inappropriate because prosecutors enjoy a remarkably unique position within the justice system, and thus there should be a separate set of sanctions that account for the special role of prosecutors in our system.”).

81. Ridolfi & Possley, *supra* note 47, at 2.

82. *Id.* at v.

83. *Id.* at 2.

84. *Id.*

85. *Id.* at 2-3.

an appeal.⁸⁶

In 548 of the 707 instances of misconduct that were identified, the reviewing court nonetheless upheld the convictions, ruling that notwithstanding the misconduct, the defendants had received fair trials.⁸⁷ In just 20% of the cases, prosecutors' actions resulted in the setting aside of a conviction or the barring of otherwise admissible evidence.⁸⁸

The report found that there was no measurable threat of disciplinary action from the Bar for prosecutorial misconduct in California. Of the 4,741 public disciplinary actions reported in the California State Bar Journal from 1997 to September 2007, only *six (or .001%)* involved allegations of misconduct by a prosecutor in a criminal case.⁸⁹ Comparing this data to the incidents of misconduct that were identified by the appellate courts, the study found that "the State Bar publically disciplined only 1% of the prosecutors in the 600 cases in which the courts found prosecutorial misconduct,⁹⁰ even in instances involving multiple violations by the same prosecutor.⁹¹ The six prosecutors who were sanctioned by the California Bar had all withheld evidence.⁹² All were sanctioned after the establishment of the California Commissions on Fair Administration of Justice in 2004. Prior to that date, no prosecutors were disciplined by the Bar for misconduct and no prosecutor has ever been disbarred as a result of misconduct in the state.⁹³

The data regarding the lack of any measurable consequences for prosecutors who negligently or intentionally violate the rights of the accused led the Veritas report to conclude that the Supreme Court's repeated "assumption that prosecutorial misconduct would be deterred and punished by the disciplinary bodies charged with the responsibility of regulating conduct" is completely

86. *Id.* at 3.

87. *Id.*

88. *Id.* at 23 (noting that the standard for determining "harmless error" focuses on the question of whether the accused received a fair trial notwithstanding the disputed prosecutorial conduct, and as such "the prosecutorial misconduct in the 548 harmless error cases may have involved infractions just as serious as – in some cases, identical to – those in the 159 harmful error cases. Yet in the harmless error cases, the courts have no obligation to report misconduct to the State Bar or notify the prosecutor of the misconduct finding.").

89. *Id.* at 3.

90. *Id.*

91. *Id.* at 16 ("67 of the 600 identified prosecutors in the 707 cases where misconduct was found committed misconduct more than once, three committed misconduct four times and two did so five times.").

92. *Id.* at 55.

93. *Id.* at 57 ("A striking example of repeat prosecutorial misconduct that has not been publicly disciplined is Los Angeles County deputy district attorney Grace Rai. In October 2008, the Court of Appeal reversed the conviction of Mark Broughton and severely criticized Rai's conduct in prosecuting the case. The court found that Rai committed serial misconduct that included asking improper questions, eliciting inadmissible evidence and hearsay, disobeying court orders and making improper arguments.").

refuted by the realities of our criminal process.⁹⁴ Among its many recommendations, the report argues that prosecutors “should be entitled at best to qualified immunity.”⁹⁵

The information detailed above clearly demonstrates that the Supreme Court’s assumed alternatives to civil liability for incentivizing prosecutors to avoid misconduct—criminal culpability and/or professional sanction—have little if any impact on the actual practice of law in this country. Civil liability of prosecutors, particularly for their intentional or reckless misconduct, would appear to be a vital, if not the exclusive, mechanism for discouraging that misconduct and encouraging the proper and just performance of prosecutorial duties.⁹⁶

However, the application of absolute immunity to prosecutors for their advocacy-related activities leaves civil liability just as impotent a mechanism for influencing prosecutorial conduct as professional ethics and criminal law regimes. In the remainder of this paper, I will describe the development, nature and scope of absolute immunity and the justifications that have been offered for its application. I argue that absolute immunity should no longer be available to prosecutors and that it should be replaced with the defense of qualified immunity—particularly in light of recent changes in sufficiency standards for complaints in federal court.

II. ABSOLUTE PROSECUTORIAL IMMUNITY

A. Development: Malicious Prosecution at Common Law

Prosecutors have enjoyed the defense of absolute immunity for civil claims arising out their official functions, which developed from the common law response to malicious prosecution.⁹⁷ But this version of its development has been

94. *Id.* at 75.

95. *Id.* at 81; *see also id.* at 75 (“The stringent requirements to surmount a qualified immunity defense provide ethical prosecutors adequate protection to ensure independent performance of their duties: the victim of misconduct would need to prove that the prosecutor violated clearly-established constitutional law with a culpable state of mind.”).

96. *But see* Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 462-63 (2011) (“[A]s a general matter there is reason to believe that governments are not responsive to financial deterrence in the same way as private entities. . . . Because governments and agencies respond to political interests rather than financial ones, it is unlikely that requiring them to pay tort judgments will cause them to alter their practices or begin new loss prevention initiatives.” (citing Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 48 (2003))).

97. *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (“The decision in *Tenney* established that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.”).

convincingly challenged.⁹⁸ A brief survey of the defense begins with a summary of the malicious prosecution claim and moves through the development of civil liability (or lack thereof) for judges, legislators and prosecuting attorneys in the 19th century. It finally touches on the application of these standards (and associated defenses) to causes of action for claims alleging violations for constitutional and other federal rights by government officials provided for by Congress in the Civil Rights Act of 1871 and now codified at 28 USC 1983 and *Bivens* claims (similar to 1983 claims but against federal officials) alleging violations of statutory and constitutional rights by prosecuting attorneys.⁹⁹

The common law tort of malicious prosecution was established when a plaintiff showed that a prior civil or criminal proceeding, instituted maliciously and without probable cause, was terminated in her favor.¹⁰⁰ The cause of action “had its roots in a concern for the integrity of the court.”¹⁰¹ The tort provided plaintiffs with a remedy against a private party for “unjustified harm arising out of the misuse of government processes.”¹⁰²

While the malicious prosecution action was available against public officials and private citizens,¹⁰³ it was generally disfavored at common law for at least one of the reasons used today to justify the absolute immunity defense—the perceived impact of exposure to liability on the ability and willingness of the prosecutor to properly perform his duties.¹⁰⁴ *Griffith v. Slinkard* is generally considered the first case where a United States court addressed the issue of prosecutorial civil liability.¹⁰⁵ The Supreme Court of Indiana heard the appeal of a malicious prosecution claim alleging that, in the course of his presentation of evidence, the prosecutor “maliciously, wrongfully and willfully intending to

98. See Jeffries, Jr., *supra* note 34, at 220 (“However ready one may be to assume that the Civil Rights Act of 1871 silently incorporated common-law immunities, absolute prosecutorial immunity cannot rest on that basis.”).

99. See generally Esther M. Schonfeld, Note, *Malicious Prosecution as a Constitutional Tort: Continued Confusion and Uncertainty*, 15 *TOURO L. REV.* 1681, 1702-04 (1999) (summarizing the development of the tort of malicious prosecution until *Saville v. Roberts* in 1689). For more on section 1983 claims, see *infra* note 123 and accompanying text. For more on *Bivens* claims, see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics Agents*, 403 U.S. 388 (1971).

100. STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS, § 3:11 (Clark Boardman Callaghan 1987).

101. Schonfeld, *supra* note 99, at 1702.

102. *Id.*

103. Lyle Kossis, Note, *Malicious Prosecution Claims in Section 1983 Lawsuits*, 99 *VA. L. REV.* 1635, 1637-39 (2013).

104. *Watts v. Gerking*, 228 P. 135, 137 (Or. 1924) (“Public policy favors prosecutions for crime, and requires that a person who in good faith and upon reasonable grounds institutes such proceedings upon a criminal charge be protected.” (citing 19 *AMERICAN & ENGLISH ENCYC. OF LAW* (2nd ed. 1901) 650 and 18 *RULING CASE LAW* 11 (William McKinney & Burdett Rich eds., 1917))).

105. See Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 *BYU L. REV.* 53, 114-15 (2005).

injure [the] plaintiff, represented to said grand jury that he was able to present evidence that would . . . justify an indictment against said plaintiff.”¹⁰⁶

The court noted that even if they had acted with malice toward the plaintiff, the members of the grand jury could not be held “liable to the injured person in an action for malicious prosecution.”¹⁰⁷ Previously, in *Hunter v. Mathis*, the Indiana Supreme Court had cited “Hawkins Pleas of the Crown” for the proposition that grand jurors must be immune from civil liability in order to ensure the proper function of the criminal justice system, because “[f]ew persons would be willing to act as grand jurors, if, upon testimony of their fellows . . . they would be liable to be subjected to an action and to the payment of damages” and to concede that “grand jurors are sometimes influenced by improper motives,” but that, nonetheless, “the evils which would result from any other rule would be far more frequent and pernicious than those resulting from this.”¹⁰⁸

After discussing the immunity of the grand jurors against civil claims for malicious prosecution, the *Slinkard* court asked whether “the prosecuting attorney [is] any more liable for his alleged participation in procuring the indictment maliciously and without probable cause?”¹⁰⁹ The court concluded that a prosecutor is an officer “intrusted (sic.) with the administration of justice” and is, therefore, “a judicial officer” and is protected by the kind of immunity against civil liability that traditionally applied to judges, and for the same reasons.¹¹⁰

In the decades after *Slinkard*, several state courts held that prosecutors were cloaked with absolute immunity against civil liability.¹¹¹ But there were exceptions to this treatment during the period, particularly in cases involving intentional or willful misconduct.¹¹² The Supreme Court of the Territory of Hawaii, for example, ruled in 1916 that while a prosecutor acting in good faith would have a defense against a claim of wrongful prosecution, he could be found

106. *Griffith v. Slinkard*, 44 N.E. 1001, 1001 (Ind. 1896).

107. *Id.* at 1002.

108. *Hunter v. Mathis*, 40 Ind. 356, 358 (1872).

109. *Slinkard*, 44 N.E. at 1002.

110. *Id.* (citing JOHN TOWNSHEND, *THE WRONGS CALLED SLANDER AND LIBEL* § 227 (3d ed. 1877)).

111. *See* *Smith v. Parman*, 165 P. 663, 663-64 (Kan. 1917) (extending absolute immunity from judges and grand jurors to public prosecutors); *Semmes v. Collins*, 82 So. 145, 146 (Miss. 1919) (citing *Spalding v. Vilas*, 161 U.S. 483, 499 (1896)); *Kittler v. Kelsch*, 216 N.W. 898, 904 (N.D. 1927) (adopting absolute immunity for prosecutors); *Watts v. Gerking*, 228 P. 135, 144 (Or. 1924) (holding the prosecutor liable in the case at bar but affirming immunity for prosecutors acting in their quasi-judicial functions).

112. *Buckley v. Fitzsimmons*, 509 U.S. 259, 275-78 (1993) (holding that a prosecutor’s fabrication of false evidence during a preliminary investigation of an unsolved crime and a prosecutor’s false assertions to the media are not protected under absolute immunity); *see also* *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985) (concluding that the Attorney General is not absolutely immune from litigation involving damages resulting from unconstitutional conduct in performing his national security functions).

civily liable for injuries resulting from malicious acts.¹¹³ In *Leong Yau v. Carden*, the plaintiff alleged that a deputy Honolulu prosecutor falsely and maliciously brought criminal proceedings against him, influenced the sheriff to issue an exorbitant bail amount, and delayed trial for several weeks until the indictment was dismissed and the plaintiff was released.¹¹⁴ In its response to the defendant's assertion of immunity, the court noted that prosecutors are "like all enrolled attorneys . . . officers of the courts, they are not part of the courts" and are consequently "quasi-judicial" as opposed to purely judicial officers.¹¹⁵

This conclusion, however, did not lead the court to reject the application of liability limitation to the quasi-judicial prosecutor.¹¹⁶ The court held that "[t]here is nothing in that statement inconsistent with the view that public prosecutors may render themselves liable by acting with malice and without probable cause" and that prosecutors "are entitled to protection against claims growing out of the discharge of their duties done in *good faith though with erroneous judgment*, but private individuals are entitled to the protection of the law against any conduct of such officers which is at once *reckless, malicious and damaging*."¹¹⁷

The United States Supreme Court first ruled on the question of the scope of prosecutorial liability for malicious prosecution in a per curiam affirmance¹¹⁸ of the decision of the United States Court of Appeals for the Second Circuit in *Yaselli v. Goff*.¹¹⁹ The plaintiff had alleged that Special Assistant United States Attorney Goff sought indictment against him "falsely, maliciously and without any reasonable or probable cause."¹²⁰ In affirming the rejection of plaintiff's claim by the district court, the court of appeals stated it was a fundamental principle of English and American law that it is "not in the public interests that such a suit should be maintained[.]"¹²¹

B. Constitutional Torts and Absolute Immunity

Beginning in the latter half of the twentieth century, civil claims alleging injury resulting from the wrongful conduct of a prosecutor were readily available

113. See *Leong Yau v. Carden*, 23 Haw. 362, 368 (1916) (holding that prosecutors enjoy qualified immunity in cases where they are alleged to have acted with malice and without color of authority).

114. *Id.* at 363.

115. *Id.* at 367.

116. *Id.* at 368 (noting that the "same reasons of private interest and public policy which operate to render the judicial officer exempt from civil liability for his judicial acts within his jurisdiction apply equally as well to the quasi-judicial officer").

117. *Id.* (emphasis added).

118. See *Bradley v. Fisher*, 80 U.S. 335, 357 (1871).

119. *Yaselli v. Goff*, 12 F.2d 396, 407 (2d Cir. 1926).

120. *Id.* at 397.

121. *Id.* at 399.

under 42 U.S.C. section 1983.¹²² Prosecutorial liability jurisprudence under Section 1983¹²³ expressly adopted the concepts of limited prosecutorial immunity expressed by courts as part of their interpretation of common law principles.¹²⁴ Compelling arguments have been made that the incorporation of common law limitations on liability for claims arising out of Section 1983 is not justified given the nature and intent of the statute.¹²⁵ The discussion here, however, accepts this application (or at least, acknowledges that it is likely to continue), and seeks to determine the appropriate scope of two controversial descendants of the common law approach—absolute and qualified immunity.

In *Bradley v. Fisher*¹²⁶ the Supreme Court provided the foundation for its subsequent application of absolute prosecutorial immunity in the Section 1983 context in a case involving a lawsuit against a judge.¹²⁷ An attorney filed an action against a sitting judge alleging damages arising from “willful, malicious, oppressive, and tyrannical acts and conduct.”¹²⁸ The attorney, who had represented John Suratt, one of the men charged in the conspiracy to kill

122. See *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961) (“There can be no doubt . . . that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. The question with which we now deal is the narrower one of whether Congress, in enacting [section 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position. We conclude that it did so intend.” (citation omitted)).

123. 42 U.S.C. § 1983 (2012) (“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 persons 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 proceed for redress.”).

124. Nicholas R. Battey, *A Chink in the Armor? The Prosecutorial Immunity Split in the Seventh Circuit in Light of Whitlock*, 2014 U. ILL. L. REV. 553, 563 (2014) (“Immunity from civil liability for certain governmental officials traces back to English and colonial common law. While Section 1983 does not mention immunity in the statute, nor does the legislative history of the original act, the Supreme Court applied common law immunity to Section 1983 claims, finding that Congress did not expressly attempt to destroy common law immunities through the creation of a federal civil remedy.”).

125. See Jeffries, Jr., *supra* note 34, at 221 (“[A] hypothetical legislator in 1871 conscientiously researching the common law on the eve of the passage of § 1983 would have found the well-established tort of malicious prosecution, which had been upheld in an action against a public prosecutor for eliciting and using false testimony. Additionally, he would have found no immunity defense to insulate the prosecutor from liability if the elements of the cause of action were proven, for there was *not a single decision* affording prosecutors any kind of immunity defense from liability for malicious prosecution.”) (footnote omitted).

126. See generally *Bradley v. Fisher*, 80 U.S. 335 (1871).

127. *Id.* at 351 (“[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction. . . .”); see also *Stump v. Sparkman*, 435 U.S. 349, 359 (1978) (“We conclude that the Court of Appeals, employing an unduly restrictive view of the scope of Judge Stump’s jurisdiction, erred in holding that he was not entitled to judicial immunity.”).

128. *Fisher*, 80 U.S. at 336.

President Lincoln, and the judge in the trial apparently had some kind of angry altercation immediately after the case was over.¹²⁹ The judge characterized the dispute as a “threat[]” of “personal chastisement” by the attorney, while the attorney claimed “there was no altercation . . . between him and the judge, and that no words passed between them.”¹³⁰ The judge ordered that the attorney be disbarred from practicing in the jurisdiction and the attorney brought an action against the judge.¹³¹ The trial court rejected the attorney’s claim, holding that “the defendant had jurisdiction and discretion to make the order, and he could not be held responsible in this private action for so doing”¹³²

On appeal, the Supreme Court noted that the attorney’s license to practice had been subsequently reinstated in response to a separate mandamus action¹³³ and affirmed the district court, holding that judges “are not liable to civil action for their judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly.”¹³⁴

The Supreme Court applied the defense of absolute immunity in the context of a constitutional tort claim for the first time in 1951. In *Tenney v. Brandhove*,¹³⁵ the plaintiff brought an action against members of the State of California’s version of the House Un-American Activities Committee (commonly known at the time as the Tenney Committee) and other officials, seeking \$10,000 and alleging that a hearing he was obliged to attend “‘was not held for a legislative purpose’ but was designed ‘to intimidate and silence’” him and violated his constitutional rights.¹³⁶ The district court dismissed the complaint without opinion but the Ninth Circuit reversed, holding that the complaint stated a cause of action against the Committee and its members.¹³⁷ The court expressed no opinion about the truth of the plaintiff’s allegations, holding that “the alleged circumstances of this case are too ambiguous and complex to warrant judgment on the complaint alone” and that the motion to dismiss for “insufficiency should have been denied and the defendants required to answer.”¹³⁸

The Supreme Court reversed. Justice Felix Frankfurter, writing for the majority, held that the federal civil rights legislation “on which this action is founded does not impose liability on the facts before us, once they are related to

129. *Id.* at 337.

130. *Id.* at 339-40.

131. *Id.* at 337.

132. *Id.* at 340.

133. *Id.* at 341.

134. *Id.* at 351.

135. 341 U.S. at 367.

136. *Id.* at 369, 371.

137. *Brandhove v. Tenney*, 183 F.2d 121, 124 (9th Cir. 1950) (“[I]t is rationally possible to believe that the Committee purposely undertook, under an appearance of regularity, to intimidate, punish and oppress him for having done what he did.”).

138. *Id.*

the presuppositions of our political history.”¹³⁹ He went on to cite the 1689 Bill of Rights in England, the forerunner of the U.S. Constitution’s Speech or Debate Clause of Article I, Section 6,¹⁴⁰ arguing that “[f]reedom of speech and action in the legislature was taken as a matter of course” by the founding fathers and that the reasons for such protection were “clear” and substantially the same as those that courts have used to justify the application of absolute prosecutorial immunity.¹⁴¹

Justice Frankfurter posed the question of whether Congress had intended to alter or abridge this traditional immunity defense when it passed federal civil rights legislation in 1871. He concluded that the answer was no.¹⁴² Then, in language reminiscent of his friend and mentor¹⁴³ Learned Hand’s opinion in *Gregoire* just three years before, he applied absolute immunity protection for the challenged actions:

The claim of unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of very little value if they could be subjected to the cost and inconvenience and distractions of a trial . . . or to the hazard of a judgment against them based upon a jury’s speculation as to motives.¹⁴⁴

Justice William Douglas dissented, noting that he agreed with the general statements of the majority opinion regarding legislative liability, but did “not agree that all abuses of legislative committees are solely for the legislative body to police.”¹⁴⁵ He wrote that he could “think of no reason why [a legislative committee that deprives citizens of constitutional rights] should be immune [to civil liability]. . . . [W]e are apparently holding today that the actions of those committees have no limits in the eyes of the law. May they depart with impunity

139. *Tenney*, 341 U.S. at 372.

140. *Id.* at 372-73.

141. *Id.* at 372-73 (“In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected for the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offen[d].”) (internal quotation marks omitted) (quoting *THE WORKS OF JAMES WILSON*, VOL. II 38 (James DeWitt Andrews ed. 1896)).

142. *Id.* at 376 (“We cannot believe that Congress—itsself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.”).

143. Gunther, *supra* note 15, at 187 (“Frankfurter was ten years younger than Hand, much younger than the other reformist lawyers in his circle, but this difference in age was no obstacle to a fast-developing friendship that deepened for the rest of Hand’s life . . .”).

144. *Tenney*, 341 U.S. at 377-78 (concluding that “[i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.”).

145. *Id.* at 381-82.

from their legislative functions, sit as kangaroo courts, and try men for their loyalty and their political beliefs?”¹⁴⁶ Justice Douglas concluded by asserting: “It was indeed the purpose of this civil rights legislation to secure federal rights against invasion by officers and agents of the states. I see no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain.”¹⁴⁷

C. Section 1983 and Prosecutorial Immunity

1. Appellate Cases

Beginning in the early 1960s after the Supreme Court’s decision in *Monroe v. Pape*,¹⁴⁸ several Section 1983 cases involving the application of the absolute immunity defense to prosecutors reached federal appellate courts. In several of these cases, the courts considered the defense to be a product of the prosecutor’s “judicial” or “quasi-judicial” role in the justice system and, in all but two, upheld the application of the absolute immunity defense.¹⁴⁹ In the majority of cases, the courts did not so much compare the work of prosecutors to that of judges (demonstrably different kinds of tasks carried out by officials in different branches of government) as they noted the necessity that both kinds of officials be free to fulfill their duties absent distractions caused by exposure to civil liability.¹⁵⁰

In *Hilliard v. Williams*¹⁵¹ and *Guerro v. Mulhearn*,¹⁵² federal appellate courts rejected the application of absolute prosecutorial immunity. In *Hilliard*, a former criminal defendant alleged suppression of exculpatory evidence and knowing presentation of false testimony by the prosecutor in procuring a conviction later overturned on appeal.¹⁵³ The court held that while it was “well settled that a

146. *Id.* at 382.

147. *Id.* at 383.

148. 365 U.S. 167 (1961); *see also* Rudovsky, *supra* note 42, at 27-28 (“In *Monroe v. Pape*, the Court decided a fundamental issue of statutory construction regarding the scope of § 1983. The Court ruled that the phrase ‘under color of state law’ was intended to include actions undertaken by government officials without state approval or authorization which were indeed contrary to established law, custom, and practice. . . . In determining that § 1983 was intended to remedy such violations, the Court freed the Act from a narrow and unjustified construction.”).

149. *See* Tyler v. Witkowski, 511 F.2d 449, 450-51 (7th Cir. 1975); Weathers v. Ebert, 505 F.2d 514, 515 (4th Cir. 1974); Barnes v. Dorsey, 480 F.2d 1057, 1060 (8th Cir. 1973); Fanale v. Sheehy, 385 F.2d 867, 867 (2d Cir. 1967); Carmack v. Gibson, 363 F.2d 862, 864 (5th Cir. 1966); Bauers v. Heisel, 361 F.2d 583, 589, 591 (3d Cir. 1966); Hurlburt v. Graham, 323 F.2d 723, 725 (6th Cir. 1963); Kostal v. Stoner, 292 F.2d 492, 493 (10th Cir. 1961).

150. *See e.g.*, *Ebert*, 505 F.2d at 515.

151. 465 F.2d 1212 (6th Cir. 1972).

152. 498 F.2d 1249 (1st Cir. 1974).

153. *Hilliard*, 465 F.2d at 1216.

prosecuting attorney, when acting in his official capacity, is immune from suit for damages” that immunity is “not absolute”¹⁵⁴ and concluded that because the prosecutor is a “quasi-judicial” officer, his “acts outside the scope of his jurisdiction” were not sheltered from liability.¹⁵⁵ The court reasoned that prosecutorial immunity was not a product of the officer’s “formal association with the judicial process,” but was applied in light of the discretion exercised by prosecutors and the need for insulation from liability to promote “courageous exercise” of those discretionary functions.¹⁵⁶ But when “an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity.”¹⁵⁷ The court cited the American Bar Association ethics code and held that the alleged misconduct of the prosecutor was “beyond the scope of duties constituting an integral part of the judicial process.”¹⁵⁸

In *Mulhearn*, the plaintiff brought an action against Massachusetts police officers and prosecutors, alleging that perjured testimony was used to secure a search warrant and that the presence of an illegal wiretap in the plaintiff’s home was intentionally concealed during the criminal trial.¹⁵⁹ The court rejected the prosecutors’ argument that they were cloaked with absolute immunity from suit “when acting within their quasi-judicial capacity,” observing the conventional distinction between prosecutors’ advocacy-related and investigatory acts.¹⁶⁰ But the court noted that both the police and the prosecutors shared responsibility for the flawed search warrant, concluding that “it would be wrong to hold the officers liable but the State’s Attorney exempt.”¹⁶¹

While the weight of the appellate case law demonstrated an acceptance of absolute immunity protection for prosecutors analogous to that which protected judges, these two cases demonstrated an alternative interpretation and approach based on two important distinctions. First, prosecutors are dramatically different from judges and the justifications for immunity that apply to one do not

154. *Id.* at 1217.

155. *Id.* (quoting *Lewis v. Brautigam*, 227 F.2d 124, 129 (5th Cir. 1955)).

156. *Id.* (quoting *McCray v. Maryland*, 456 F.2d 1, 3 (4th Cir. 1972)).

157. *Id.*

158. *Id.* at 1217-18 (internal quotation marks omitted).

159. *Guerro v. Mulhearn*, 498 F.2d 1249, 1251 (1st Cir. 1974).

160. *Id.* at 1256; see also Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 *TOURO L. REV.* 473, 475 (2008) (“A second general principle is that absolute immunity goes to the task, not to the office. This means a couple of things. Even office holders who are protected by absolute immunity only receive absolute immunity for certain tasks, not all of them. For instance, prosecutors have absolute immunity, but only for prosecutorial actions; judges have absolute immunity for their judicial acts, but not for administrative acts; legislators have absolute immunity for their legislative functions, but not for administrative tasks.”).

161. *Mulhearn*, 498 F.2d at 1256.

necessarily apply to the other.¹⁶² And second, a more apt comparison for the functions performed by prosecutors might be police officers¹⁶³ and that the qualified immunity protection enjoyed by police might be appropriately applied to prosecutors as well.¹⁶⁴

2. Supreme Court Cases

The Supreme Court finally reached the question of the scope of prosecutorial immunity after this flurry of appellate treatment of the issue.¹⁶⁵ Along the lines of the majority of these lower court cases, the Court extended the analysis it had already applied to the assessment of the scope of immunity for legislators¹⁶⁶ and judges¹⁶⁷ in response to constitutional tort claims, to prosecutors.

In *Imbler v. Pachtman*,¹⁶⁸ the Los Angeles District Attorney prosecuted Paul Imbler for first-degree felony murder on the strength of the testimony of three witnesses.¹⁶⁹ Imbler testified that he was not at the scene of the crime, but the jury found him guilty and he was sentenced to death.¹⁷⁰ Soon after the trial, evidence was discovered that supported Imbler's alibi and cast doubt on the testimony of one of the eyewitnesses.¹⁷¹ In a subsequent habeas action, the United States District Court found that the prosecution had intentionally used false or misleading testimony and had suppressed favorable evidence during Imbler's trial.¹⁷² The state of California released Imbler after its appeal to the Ninth Circuit was denied.¹⁷³

162. For a discussion of appropriate immunity defenses based on comparisons of prosecutorial action to that of police and prosecutors see Jeffries, Jr., *supra* note 34, at 221-24.

163. See Chemerinsky, *supra* note 160, at 494 (noting that while police officers are generally protected by qualified immunity in suits seeking damages, they are covered by absolute immunity for damages arising out of their in-court testimony).

164. See Jeffries, Jr., *supra* note 34, at 222 ("The pressure to deny absolute immunity for investigative acts is especially great when police and prosecutors perform the same functions. In that circumstance, extending absolute immunity only to prosecutors would look too much like class-based adjudication, or, in Justice Rehnquist's gentler phrasing, an especially keen judicial sensitivity to the difficulties faced by lawyers and judges." (citing *Butz v. Economou*, 438 U.S. 478, 528 n.* (1978) (Rehnquist, J., concurring in the judgment in part and dissenting in part))).

165. See Chemerinsky, *supra* note 160, at 477-82 (surveying the Supreme Court's treatment of absolute immunity defenses for prosecutors).

166. *Tenney v. Brandhove*, 341 U.S. 369, 379 (1951).

167. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

168. 424 U.S. 409, 410 (1976).

169. *Id.* at 411.

170. *Id.* at 412.

171. *Id.*

172. *Id.* at 414.

173. *Id.*

Imbler then filed a Section 1983 action and the district court granted the prosecutor's motion to dismiss, observing that "public prosecutors repeatedly had been held immune from civil liability for 'acts done as part of their traditional official functions.'"¹⁷⁴ The Court of Appeals, in a two-to-one decision, affirmed the district court, holding that violations alleged by Imbler were committed "during prosecutorial activities which can only be characterized as an integral part of the judicial process." The majority elaborated, closely mirroring Judge Hand's opinion in *Gregoire*, holding that the "protection given a prosecutor acting in his quasi-judicial role protects not simply the prosecutor, but, more importantly, the effective operation of the judicial process, and hence the 'common good.' Because both the honest and dishonest are insulated, on occasion an injury without redress inevitably results."¹⁷⁵

Circuit Judge John Kilkenny dissented from the panel opinion,¹⁷⁶ citing a Supreme Court opinion from earlier that same year¹⁷⁷ which held that high level executive officials do not have absolute immunity from civil liability pursuant to Section 1983 because to allow such a blanket limitation would leave the statute "drained of meaning."¹⁷⁸ Judge Kilkenny argued: "it must necessarily follow that a prosecuting attorney, shielded only by a form of judicial immunity, should not be elevated to a status which would place him above the chief executive officer of his state. Otherwise, the office of the district attorney, rather than the Constitution of the United States, becomes the Supreme Law of the Land. . . . State officials in these circumstances should not escape the paramount authority of the Federal Constitution."¹⁷⁹ Judge Kilkenny said that he would have held that the prosecutor "acted entirely outside the scope of his jurisdiction and should not be permitted to shelter himself from liability by a plea that he was acting under the immunity of his office . . . It is time to recognize that prosecutors are not entirely above the law which holds other individuals financially accountable for their intentional misdeeds."¹⁸⁰

In affirming the panel majority, the Supreme Court, in a majority opinion by

174. *Id.* at 416.

175. *Imbler v. Pachtman*, 500 F.2d 1301, 1303 (9th Cir. 1974).

176. *Id.* at 1304 (Kilkenny, J., dissenting) ("Although appellant's 22 page complaint, with 23 pages of exhibits, is admittedly repetitious and in places ambiguous, there is no question that it charges appellee, Pachtman, with knowingly, willfully and maliciously using eight different items of false material testimony in securing appellant's initial conviction. If this is true, I believe that appellee violated appellant's procedural due process rights, and that he should be stripped of his official or representative character and subjected in his person to the consequences of his individual conduct.").

177. *Id.* (citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974)).

178. *Id.* at 1305 ("To now hold . . . that the knowing, willful and malicious use of perjured testimony to gain a conviction, even though accomplished during the course of a trial, constitutes an integral part of the judicial process, flies in the very face of the integrity sought to be protected by judicial and quasi-judicial immunity.").

179. *Id.*

180. *Id.* at 1306 (emphasis omitted).

Justice Lewis Powell, acknowledged that Section 1983 “creates a species of tort liability that on its face admits of no immunities”¹⁸¹ but cited the prevailing judicial treatment that Congress had not intended to abrogate “those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials,” and that the statute must “be read in harmony with general principles of tort immunities and defenses than in derogation of them.”¹⁸² Justice Powell referenced the several appellate courts that had reached the question noting that they were “virtually unanimous that a prosecutor enjoys absolute immunity from Section 1983 suits for damages when he acts within the scope of his prosecutorial duties”¹⁸³ based on the “quasi-judicial” character of prosecutorial activities, holding that the immunity was “derivative of the immunity of judges recognized in *Pierson v. Ray*.”¹⁸⁴

Imbler challenged this conclusion, arguing that given the nature of a prosecutor’s function and duties, prosecutors should be extended the same “qualified” immunity traditionally applied to police officers and other officials with executive duties.¹⁸⁵ The majority rejected this argument based on its “considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.”¹⁸⁶ The “interests behind it” referred to what I have called the “simple” and “complex nuisance” concerns:

The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.¹⁸⁷

181. *Imbler v. Pachtman*, 424 U.S. 409, 417-18 (1976) (citing *Pierson v. Ray*, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting) and *Tenney v. Brandhove*, 341 U.S. 369, 382-83 (1951) (Douglas, J., dissenting)).

182. *Id.* at 418.

183. *Id.* at 420 (citing *Tyler v. Witkowski*, 511 F.2d 449, 450-51 (7th Cir. 1975); *Weathers v. Ebert*, 505 F.2d 514, 515 (4th Cir. 1974); *Guerro v. Mulhearn*, 498 F.2d 1249, 1255-56 (1st Cir. 1974); *Barnes v. Dorsey*, 480 F.2d 1057, 1060 (8th Cir. 1973); *Fanale v. Sheehy*, 385 F.2d 867, 867 (2d Cir. 1967); *Carmack v. Gibson*, 363 F.2d 862, 863-64 (5th Cir. 1966); *Bauers v. Heisel*, 361 F.2d 583, 583 (3d Cir. 1966); *Kostal v. Stoner*, 292 F.2d 492, 493 (10th Cir. 1961).

184. *Id.* (citation omitted).

185. *Id.* at 420-21.

186. *Id.* at 421.

187. *Id.* at 422-24 (citing *Pearson v. Reed*, 44 P.2d 593, 597 (Cal. App. 1935) (“The office of the public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law

Later in the opinion, Justice Powell focused specifically on the simple nuisance concern, noting that prosecutors “inevitably make[] many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions . . . could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.”¹⁸⁸ As to the complex nuisance issues (and their broader social impact) Justice Powell discussed another, the impact that the fear of subsequent litigation challenging prosecutors’ actions would have on the performance of their duties:

[V]eracity of witnesses in criminal cases frequently is subject to doubt before and after they testify. . . . If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about the resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.¹⁸⁹

But in response to the argument that qualified immunity would be sufficient to avoid the “complex” nuisance problem, Justice Powell addresses the “simple” nuisance issue instead, holding that qualified immunity would be insufficient to protect against this problem: “Such suits could be expected with some frequency[and] 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.”¹⁹⁰ It is critical that the Supreme Court in *Imbler*, the foundation of our current prosecutorial immunity jurisprudence, rejected the application of qualified (instead of absolute) immunity to prosecutors purely on simple, and not complex, nuisance grounds.¹⁹¹

Noting the obvious injustice inherent in allowing the injuries suffered as a result of intentional prosecutorial misconduct to be uncompensated, Justice Powell recited the alternatives to civil liability that courts had been referencing for generations: first, that the prosecutors are still subject to the criminal law,¹⁹²

enforcement.”)).

188. *Id.* at 425-26.

189. *Id.* at 426-27. Justice Powell also argued that the potential for civil liability for prosecutors would undermine the “ultimate fairness of the operation of the system itself” because the “subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor being called upon to respond in damages” could influence and warp post-trial procedures designed to determine if a defendant received a fair trial. *Id.*

190. *Id.* at 425.

191. Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1212-13 (“[T]he Supreme Court emphasized its concern with frivolous claims and meritless cases, noting that constitutional tort claims “frequently run against the innocent as well as the guilty,” that “ingenious plaintiff’s counsel” are able to create material issues of fact based on scant evidence, and that immunity is necessary to terminate “insubstantial” suits.” (citing *Imbler*, 424 U.S. at 425)).

192. *Imbler*, 424 U.S. at 429 (“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

and second, there is the potential for discipline by their professional peers,¹⁹³ concluding that these “checks 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.”¹⁹⁴

The majority took no position on whether a similar blanket absolute immunity applies to “those aspects of the prosecutor’s responsibility that cast him in the role of an administrator or investigative officer rather than an advocate” and reinforced their holding that a prosecutor is absolutely immune from any civil damages arising from his “initiating a prosecution and in presenting the State’s case.”¹⁹⁵ The Court did not explain, however, why the concern that prosecutorial activity will be undermined and altered by the fear of liability, even for intentional violations of constitutional rights in the course of the presentation of case at trial, does not apply to conduct at the equally vital stage of pre-trial investigation.¹⁹⁶

Justice White concurred but wrote separately to express his concern that the majority opinion could be read to extend a broader immunity for prosecutors than existed at common law and to reinforce the point that preventing or limiting what constitutes “simple nuisance” was not a sufficient justification for absolute immunity.¹⁹⁷ In fleshing out the “policy reasons” justifying absolute immunity protection, White focused on the “complex nuisance” problem and the concern that “such immunity is necessary to protect the decision-making process in which the official is engaged.”¹⁹⁸ He expressly rejected reliance on any other proffered policy justifications for absolute immunity, observing that “these adverse consequences are present with respect to suits against policemen, school teachers, and other executives, and have never before been thought sufficient to immunize an official absolutely no matter how outrageous his conduct.”¹⁹⁹

centuries, could be punished criminally.”).

193. *Id.* (“Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of peers.”).

194. *Id.*

195. *Id.* at 430-31.

196. *See* Johns, *supra* note 12, at 87-88 (“The Court’s functional approach to prosecutorial immunity has created conflicts and confusion as the lower courts attempt to grapple with the difficult of characterizing prosecutorial misconduct and determining which immunity applies.”).

197. *Imbler*, 424 U.S. at 433 (White, J., concurring).

198. *Id.* at 434-35 (“In justifying absolute immunity for certain officials, both at common law and under 42 U.S.C. § 1983, courts have invariably rested their decisions on the proposition that such immunity is necessary to protect the decision-making process in which the official is engaged.”).

199. *Id.* at 436 (“The majority articulates other adverse consequences which may result from permitting suits to be maintained against public officials. Such suits may expose the official to an unjust damage award . . . such suits will be expensive to defend even if the official prevails and will take the official’s time away from his job . . . and the liability of a

Therefore, according to Justice White, “unless the threat of suit is also thought to injure the governmental decision-making process, the other unfortunate consequences flowing from damage suits against state officials are sufficient only to extend qualified immunity to the official in question.”²⁰⁰

More recently, in *Van de Kamp v. Goldstein*,²⁰¹ a case in which the Court applied absolute immunity to shield a prosecutor from a Section 1983 claim,²⁰² Justice Breyer, writing for a unanimous court, referenced Judge Hand’s “balance” of “evils” discussion in *Gregoire* and noted that the Supreme Court has applied absolute immunity for prosecutors particularly when prosecutors’ actions “are intimately associated with the judicial phase of the criminal process.”²⁰³ He clearly distinguished between the simple and complex nuisance: the “general common-law concern that harassment by unfounded litigation could both cause a deflection of the prosecutor’s energies from his public duties [simple] and also lead the prosecutor to shade his decisions instead of exercising the independence of judgment required by his public trust [complex].”²⁰⁴ Justice Breyer concluded that the “very reasons” that supported Judge Hand’s opinion in *Gregoire* support application of absolute immunity in the case, noting that “sometimes such immunity deprives a plaintiff of compensation that he undoubtedly merits but the impediments to the fair, efficient functioning of a prosecutorial office that liability could create lead us to find that *Imbler* must apply here.”²⁰⁵

prosecutor for unconstitutional behavior might induce a federal court in a habeas corpus proceeding to deny a valid constitutional claim in order to protect the prosecutor . . .”).

200. *Id.* at 437, 442 (“[I]t is by no means true that such blanket absolute immunity is necessary or even helpful in protecting the judicial process. It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which § 1983 was enacted . . . [O]ne would expect that the judicial process would be protected – and indeed its integrity enhanced—by denial of immunity to prosecutors who engage in unconstitutional conduct.”).

201. 555 U.S. 335, 338 (2009).

202. *Id.* at 349.

203. *Id.* at 340-41 (quoting *Imbler*, 424 U.S. at 430).

204. *Id.* at 341-42 (“The ‘public trust of the prosecutor’s office would suffer’ were the prosecutor to have in mind his ‘own potential’ damages ‘liability’ when making prosecutorial decisions—as he might well were he subject to § 1983 liability. . . . This is no small concern, given the frequency with which criminal defendants bring such suits . . . and the ‘substantial danger of liability even to the honest prosecutor’ that such suits pose when they survive pretrial dismissal . . .”) (quoting *Imbler*, 424 U.S. at 423)).

205. *Id.* at 348.

III. THE END OF ABSOLUTE PROSECUTORIAL IMMUNITY

A. Absolute Immunity and the “Nuisance Factors”

From its first discussion of limits on the liability of some government officers, starting with judges in *Bradley* and moving on to legislators in *Tenney* and finally prosecutors in *Imbler*, the Supreme Court has consistently relied on what is commonly referred to as the “policy” basis for these limits—the notion that allowing for such liability will alter and harm the criminal justice process. But this policy basis is actually two distinct concepts with different potential consequences and different solutions. Perhaps the central flaw in the Court’s prosecutorial immunity jurisprudence, particularly in Justice Powell’s decision in *Imbler*, in addition to its fanciful reliance on means other than civil liability (criminal prosecution and professional sanction) to discourage prosecutorial misconduct, has been the conflation of these related but distinct concerns.

Both components of this policy concern the potential negative impact of civil suits filed against prosecutors by the very people they have previously prosecuted. Courts have referenced “policy” justifications to support application of absolute immunity to prosecutors for decades²⁰⁶ but have never effectively differentiated between the two distinct kinds of nuisance concerns which I call “simple” and “complex” nuisance.

The problem with the treatment of these distinct concerns as if they were the same is that courts have traditionally applied one remedy—the absolute preclusion of exposure to liability for prosecutors regardless of the nature of the misconduct—to prevent either or both. But absolute prosecutorial immunity is an excessive and unnecessary tool to limit simple nuisance and it overcorrects for the complex nuisance problem, which can be readily addressed by the qualified immunity defense.²⁰⁷

206. See, e.g., *id.* at 341-42 (“Where § 1983 actions are at issue . . . both sets of concerns are present and serious. The ‘public trust of the prosecutor’s office would suffer’ were the prosecutor to have in mind his ‘own potential’ damages ‘liability’ when making prosecutorial decisions ‘Defending these decisions . . . could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.’” (quoting *Imbler*, 424 U.S. at 424-26)).

207. See Johns, *supra* note 12, at 55-56 (“But contrary to this policy argument, absolute immunity is not needed to prevent frivolous litigation or to protect the judicial process. Absolute immunity protects the dishonest prosecutor but is unnecessary to protect the honest prosecutor since the requirements for establishing a cause of action and the defense of qualified immunity will protect all but the most incompetent and willful wrongdoers.”); see also Jeffries, Jr., *supra* note 34, at 251 (“As thus interpreted, *Harlow* announced a change in substantive law, but it aimed at a change in procedure. It sought to accelerate the dismissal of insubstantial suits and thus to protect government officers not only from liability but also from the burdens of discovery and trial. Implicitly, *Harlow* changed civil practice for constitutional tort actions. It encouraged judges to decide cases before discovery and to be far more forward in resolving the factual predicate for legal conclusions than is customary in American civil litigation.”).

The simple nuisance problem is essentially unrelated to the ultimate resolution of the lawsuit. The premise of the concern is that prosecutors will be subjected to *baseless* lawsuits that they will ultimately win but will have to waste their (and their community's) time resolving. Essential to this concern is the expected prevalence of frivolous claims, as no one—certainly not Judge Hand—would accept as a policy basis for blanket immunity for damages in civil claims, the argument that prosecutors will be distracted from their duties by an overwhelming number of *valid* allegations of their intentional misconduct.²⁰⁸ As Judge Hand observed in *Gregoire*, “if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery.”²⁰⁹

The avoidance of simple nuisance requires either that frivolous lawsuits against prosecutors be effectively discouraged or that such claims be dismissed quickly with limited expenditure of time and resources. While Federal Rule of Civil Procedure 11 was designed (particularly after its amendment in 1983) to perform the former function,²¹⁰ the debate rages on as to its relative effectiveness,²¹¹ particularly in light of further amendment in 1993 creating “safe harbor” provisions.²¹² But, expressly in response to the perceived inability of the

208. See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 567, 580 (2002) (“Federal courts began to impose a heightened pleading requirement in § 1983 cases . . . fueled by concerns over burgeoning dockets and a perception of recurring frivolousness. Heightened pleading then proliferated in the context of qualified immunity for government actors and their protection from vexatious litigation . . . [and a] reformulated qualified immunity doctrine and the Court’s admonition to prevent disruptive discovery provided a new basis for heightened pleading.”).

209. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d. Cir. 1949).

210. See Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 593 (1998) (“[I]n 1983, a series of amendments were adopted. As with the 1980 amendments, the new provisions were intended to improve the conduct of civil litigation in the federal courts. . . . From an academic perspective, the sanctions amendments represented more than a subtle shift in procedural thinking. After years of trying to cope with the expense and delays purportedly caused by notice pleading and liberal discovery, the courts and many litigants sought a return to pre-1938 fact pleading.”). See generally BARBARA ALLEN BABCOCK ET AL., CIVIL PROCEDURE: CASES AND PROBLEMS 362 (3d ed. 2006) (“The original design of the [Federal] Rules to increase access and simplify procedure also made it easier for people to file unmerited, even frivolous, cases. Rule 11, framed in terms of the lawyer’s duty to the court, was intended, from the first, to deal with this problem. It provided for striking pleadings filed for ‘delay’ or without good ground to support them.”).

211. See, e.g., Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1983 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677, 678-79 (1996) (“Rule 11, like so many other judicial reforms, has been a lightning rod for ‘arguments about the meaning of courts as institutions.’”); Charles Yablon, *Hindsight, Regret, and Safe Harbors in Rule 11 Litigation*, 37 LOY. L.A. L. REV. 599, 600-04 (2004) (“There is a general consensus that the 1993 amendments to Rule 11 reduced both the likelihood that monetary actions will be imposed on lawyers and parties for making frivolous filings as well as the severity of those sanctions.”).

212. Compare Yablon, *supra* note 211, at 600 (“[T]he 1993 revisions to Rule 11 of the Federal Rules of Civil Procedure, which the Advisory Committee believed ‘should reduce the number of motions for sanctions presented to the court,’ appear to have done precisely that.”), with Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of*

federal court system to avoid exorbitant discovery costs in all but the most baseless claims, the Supreme Court, following a strong tradition of concern on the part of earlier justices about the impact of the discovery process on the legal profession,²¹³ substantially enhanced the likelihood that baseless claims could be dismissed at an early stage before the onset of discovery.²¹⁴ Absolute immunity certainly discourages frivolous lawsuits and makes them easy to dismiss, but it does so in much the same way that amputating a leg would cure a sprained ankle—the solution is effective but wildly excessive and incongruous given the actual problem.

And while complex nuisance does justify some limits on liability exposure for government officials, it does not justify the application of absolute immunity. Indeed, the public policy arguments used by courts to support the liability *limitation* more readily justify an *expanded scope* of potential liability for prosecutors who willfully violate the rights of the targets of their prosecution. The central justification for absolute immunity is that we do not want consideration of potential civil liability to influence prosecutorial decision-making because we don't want prosecutors to be reluctant to pursue otherwise appropriate courses of action based on a fear of subsequent personal consequences. But this concern does not apply to willful and intentional acts of misconduct. Presumably we *do want* a prosecutor to think twice about pursuing a course of action the he *knows* to be unlawful.²¹⁵ Providing an incentive to

Civil Procedure and its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments, 37 VAL. U. L. REV. 1, 3, 110 (2002) (noting that whatever the frequency and impact of Rule 11 sanctions in general civil litigation, “[c]ivil rights plaintiffs are still targeted for Rule 11 sanctions more frequently than other litigants in the federal courts, and they are actually sanctioned at a much higher rate than any other category of litigant.”).

213. See Vairo, *supra* note 210, at 592-93 (“For decades, criticisms of the civil litigation process became increasingly loud and frequent. For example, in 1976, then Chief Justice Warren Burger complained that professionalism had declined and that the costs and delays in civil litigation had become intolerable. For a time, the focus was on curbing discovery abuse. . . . In 1980, the Supreme Court adopted discovery rules changes, but they were characterized by Justice Powell as mere ‘tinkering changes.’ Moreover, for litigators working at the time, few noticed much practical difference and business continued as usual. Thus, the perceived problems did not go away, and the Advisory Committee began to work again at dealing with the problems the organized bar continued to complain about. The 1983 amendments that resulted, in contrast to the 1980 and earlier amendments, did generate change.”).

214. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management,’ . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. . . . And it is self-evident that the problem of discovery abuse cannot be solved by ‘careful scrutiny of evidence at the summary judgment stage,’ much less ‘lucid instructions to juries . . .’”).

215. See *Butz v. Economou*, 438 U.S. 478, 507 (1978) (holding that in a suit for damages arising from unconstitutional behavior, executive officials who exercise their discretion are only entitled to qualified immunity, subject to exceptional situations where absolute immunity

prosecutors to act contrary to their understandable instinct in regard to *Brady* evidence²¹⁶ would promote adherence to this constitutional requirement.²¹⁷ Even the judicial opinions that apply absolute immunity to prosecutors acknowledge this point when they note the alternatives to civil liability—the possibilities of criminal or professional sanction—which they suggest will be sufficient disincentives for misconduct even absent potential civil liability.²¹⁸

B. Simple Nuisance and *Iqbal*

Prior to 2009, “simple” nuisance was a legitimate, if overstated, concern. Prosecutors were obvious targets for frivolous lawsuits arising from their official acts, and it was difficult to imagine a mechanism that would allow for the early dismissal of even the weakest of claims.²¹⁹

The existing rules for civil practice in the federal courts had not provided an effective solution. Rule 11 provided for the quick dismissal of, and sanction for, frivolous claims, but the effectiveness of the rule was the subject of all but continuous debate from its promulgation through its major amendments in 1983 and 1993.²²⁰ Regardless, the proponents of absolute prosecutorial immunity have

is essential); *see also* *Davis v. Scherer*, 468 U.S. 183, 197 (1984) (“A plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official’s qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue.”).

216. *See* *Johns*, *supra* note 12, at 141-43 (“If courts decide that absolute immunity must persist in the § 1983 framework, they should deny the doctrine’s application in . . . cases in which the prosecutor has suppressed exculpatory evidence . . . [T]he application of absolute immunity for *Brady* violations should be reconsidered for three reasons. First, it extends the doctrine beyond its proper scope since it is not necessary to protect the judicial system or the prosecutorial function. Second, it leaves unchecked prosecutorial misconduct that is unlikely to be addressed by the existing procedural safeguards. And, third, it is inconsistent with the Court’s functional approach to immunity defenses. . . . The prosecutor who fears liability on this ground can simply err on the side of caution and disclose more evidence than is actually required. Marginal evidence—viewed through the eyes of defense counsel—might be the key to unraveling the case and exonerating the accused.”).

217. *See* *Jeffries, Jr.*, *supra* note 34, at 230-31 (“Absolute immunity for such actions is profoundly unwise. In discharging their obligations under *Brady*, prosecutors act *ex parte* and without judicial supervision, usually without correction from opposing counsel, and under professional and psychological circumstances that vitiate the incentives to comply. Other remedies are inadequate.”).

218. *See, supra* notes 192-94 and accompanying text.

219. *See e.g.*, *Weathers v. Ebert*, 505 F.2d 514, 515-17 (4th Cir. 1974) (noting that absolute immunity “allows suits to be dismissed on the basis of the complaint without exploring the underlying facts” and warning that “bare charges of malice are no substitutes for specific averments, for ‘the immunity doctrine would be of little value if such characterization . . . could force the prosecutor to stand trial’” (quoting *Hampton v. City of Chicago*, 484 F.2d 602, 608 (7th Cir. 1973))).

220. Edward D. Cavanagh, *Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 504-05 (1986) (stating that sanctions under the old Rule 11 were rarely imposed, and that courts were reluctant to issue

never taken solace in the ability of Rule 11 to reduce, let alone eliminate, simple nuisance. Attempts at court-created heightened pleading standards for Section 1983 claims against government officials were thwarted by courts pointing to the language of Rule 9 and its exclusive statement of the circumstances under which heightened pleading could be required.²²¹

But in 2009, the United States Supreme Court expressly addressed, and essentially solved, the “simple” nuisance concern in civil rights claims against prosecutors with its dramatic re-writing of Federal Rule of Civil Procedure 8(a) and its standard for the sufficiency of a civil complaint in federal court in *Ashcroft v. Iqbal*.²²² The new standard, which relied on the Court’s prior decision in *Bell Atlantic Corp. v. Twombly*,²²³ was expressly designed to make it easier to dismiss claims against prosecutors and high level law enforcement officials with a low probability of ultimate success prior to discovery.²²⁴ It provides a sufficient remedy for the simple nuisance concern and makes absolute immunity for prosecutors in such cases unnecessary, at least as a means of controlling or preventing simple nuisance. It, coupled with the modern version of the qualified immunity defense, effectively resets the balance that Judge Hand sought in *Gregoire* by precluding factually baseless claims against prosecutors and the harmful distraction they produce while allowing the liability for the “guilty” actor who Hand cautioned “should not escape liability for the injuries he may so cause.”²²⁵

The Court’s rewriting of Rules 8 and 12 began in 2007 with *Twombly* and that opinion’s assault on the sufficiency standard set out more than a half-century before in *Conley v. Gibson*²²⁶ and, more broadly, on the defining feature of the

sanctions).

221. See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 594-95 (1998) (“Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provide any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself. The same might be said of the qualified immunity defense The unprecedented change made by the Court of Appeals in this case, however, lacks any common-law pedigree and alters the cause of actions itself in a way that undermines the very purpose of § 1983—to provide a remedy for the violation of federal rights.”).

222. 556 U.S. 662, 686-87 (2009).

223. 550 U.S. 554, 570 (2007).

224. See *Iqbal*, 556 U.S. at 685 (“Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery.’ . . . There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed.”).

225. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

226. 355 U.S. 41, 45-46 (1957); see also A. Benjamin Spencer, *Pondering Iqbal: Iqbal and the Slide Toward Procedure*, 14 LEWIS & CLARK L. REV. 185, 186 (2010) (“*Twombly* did away with the ‘no set of facts’ standard of *Conley v. Gibson* and introduced the notion that

Federal Rules of Civil Procedure themselves—its replacement of stylized and restrictive code pleading with simple procedures allowing for “notice pleading.”²²⁷ Writing for the majority, Justice David Souter addressed concerns about the nature of modern civil litigation and the costs and demands it places on parties (particularly from discovery²²⁸), in terms essentially identical to the “simple” and “complex” nuisance concerns.²²⁹ Justice Souter noted that “it is self-evident that the problem of discovery abuse cannot be solved by ‘careful scrutiny of evidence at the summary judgment stage’” and that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”²³⁰

Justice Souter sought to avoid these concerns by altering the standard for dismissal under 12(b)(6),²³¹ stating that in order to avoid dismissal the plaintiff

Rule 8 requires a claimant to plead facts showing plausible entitlement to relief in order to survive a motion to dismiss.”); Michael Eaton, Comment, *The Key to the Courthouse Door: The Effect of Ashcroft v. Iqbal and the Heightened Pleading Standard*, 51 SANTA CLARA L. REV. 299, 305-06 (2011) (“With its decision in [*Twombly*], the Supreme Court seemingly upended fifty years of case law precedent, which had consistently held that a complaint should not be dismissed unless it is ‘beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’”); Robert G. Bone, *Pleading Rules and the Regulation of Court Access*, 94 IOWA L. REV. 873, 875 (2009) (“Many judges and academic commentators read the decision as overturning fifty years of generous notice pleading practice, and critics attack it as a sharp departure from the ‘liberal ethos’ of the Federal Rules, favoring decisions ‘on the merits, by jury trial, after full disclosure through discovery.’”).

227. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 3 (2010) (“When adopted in 1938, the Federal Rules of Civil Procedure represented a major break from the common law and code systems. Although the drafters retained many of the prior procedural conventions, the Federal Rules reshaped civil litigation to reflect core values of citizen access to the justice system and adjudication on the merits based on a full disclosure of relevant information.”).

228. See *id.* at 61-62 (“If litigation costs are to be considered in applying the pleading and motion-to-dismiss rules, all costs should be taken into account, including those borne by plaintiffs, the expenditure of system resources, and the loss to society from any impairment of important public policies as a result of non-enforcement. The costs to defendants—in particular, large corporate and government entities—have been decried frequently. *Twombly* justified establishing plausibility pleading on the basis of assumptions about excessive discovery costs for these organizations and the threat of extortionate settlements.”).

229. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed internet service in the continental United States, in an action against America’s largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.”).

230. *Id.* (“Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of [discovery] in cases with no ‘reasonably founded hope that the discovery process will reveal relevant evidence’ . . .”).

231. Miller, *supra* note 227, at 14 (“With the advent of ‘plausibility’ pleading, the Rule 12(b)(6) motion seems to have stolen center stage. It has become the vehicle of choice for both disposing of allegedly insufficient claims and protecting defendants from supposedly

must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action” but allegations sufficient “to raise a right to relief above the speculative level.”²³² In defense of his rejection of the notice pleading requirement of Rule 8, Justice Souter insisted, incoherently, that “[a]sking for plausible grounds to infer an agreement does not impose a *probability requirement* at the pleading stage,” contradicting this assertion later in the *same sentence* by saying that the new Rule 8 sufficiency standard “simply calls for enough facts to raise a *reasonable expectation* that discovery will reveal evidence of illegal agreement.”²³³ Given Merriam-Webster’s definition of “probability” as “the chance that a given event will occur” and “expectation” as “the state of being expected” and “expect” as “to consider probable or certain,” it is nonsense to suggest that a new *plausibility* analysis does not impose a new *probability* requirement for complaints at the pleading stage.²³⁴

Commentators initially disagreed about the full impact of the *Twombly* decision,²³⁵ however, with some arguing that its holding was limited to civil claims arising under the federal antitrust laws,²³⁶ or that its impact on actual

excessive discovery costs and resource expenditures—objectives previously thought to be achievable through the utilization of other rules and judicial practices.”).

232. *Twombly*, 550 U.S. at 555.

233. *Id.* at 556 (emphasis added).

234. See Miller, *supra* note 227, at 19 (“After *Twombly* and *Iqbal*, mere notice of a claim for relief likely does not satisfy the Court’s newly minted demand for a factual showing.”); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2128 (2015) (“Despite these changes, the *Iqbal* and *Twombly* Courts disclaimed any intent to adopt a heightened fact pleading standard. Unsurprisingly, however, lower courts are confused as to the precise ramifications of the cases. . . . *Iqbal* and *Twombly* adopt ‘plausibility’ pleading instead of *Conley*’s notice pleading, taking the relatively distinct roles accorded Rules 8, 12(b)(6) and 12(e), and conflating them to introduce a heightened fact pleading regime in direct conflict with the original purposes of the Federal Rules.”); Bone, *supra* note 226, at 881 (“The term ‘plausible’ obviously refers to the strength of the inference from allegation to necessary factual conclusion. It is useful to think about an inference as a conditional probability ‘Plausible’ corresponds to a probability greater than ‘possible.’ Exactly how much greater is uncertain.”).

235. See Eaton, *supra* note 226, at 307 (“In the immediate wake of *Twombly*, there were questions about the efficacy of the Court’s newly adopted “plausibility” standard outside the antitrust context. Confusion within the legal community was compounded by the Court’s decision in *Erickson v. Pardus*, in which the Court, just three weeks after *Twombly*, upheld the sufficiency of a complaint without mentioning the plausibility standard.” (citation omitted)); Spencer, *supra* note 226, at 186 (“However, after *Twombly* there was some uncertainty regarding whether the case signaled a new era in pleading similar to the seismic shift in how courts approached pleading before and after the advent of the Federal Rules of Civil Procedure in 1938. Many observers argued that *Twombly* did not represent a major change in pleading doctrine and in any event merely reflected the approach to pleading that was prevalent among the lower federal courts.”).

236. Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 906 (2010) (“In responding to the opinion, some judges agreed with Justice Stevens’s view . . . that *Twombly* ‘rewr[o]te the Nation’s civil procedure textbooks and called into doubt the pleading rules of most of its States,’ whereas

pleading practice would be minimal.²³⁷ But *Iqbal* ended serious debate about whether a new era in civil pleading had begun,²³⁸ and one arguably more restrictive than even *Twombly* had announced.²³⁹

Javaid Iqbal, a Muslim from Pakistan, was arrested after the terrorist attacks of September 11, 2001 on immigration related fraud charges along with approximately 750 other people perceived to be Muslims.²⁴⁰ Pending trial on the charges, Iqbal, along with a 180 or more of the original group considered by the Federal Bureau of Investigation as of “high interest” to their investigation of the attacks, was detained at the Administrative Maximum Special Housing Unit section of the Metropolitan Detention Center in Brooklyn, New York.²⁴¹

After pleading guilty to criminal immigration violations and serving a prison sentence, Iqbal was deported to Pakistan. He later filed a *Bivens* action against more than fifty federal investigatory and corrections officials, including FBI Director Robert Mueller and United States Attorney General John Ashcroft.²⁴² Iqbal’s complaint alleged that the FBI, under the direction of Mueller, “arrested and detained thousands of Arab Muslim men” and that Ashcroft and Mueller were the “principal architect” and “instrumental” to “adoption, promulgation and implementation,” respectively, of a “policy of holding post-September-11th detainees in highly restrictive conditions of confinement,” and that both “knew of, condoned, and willfully and maliciously agreed to subject’ respondent to harsh conditions of confinement ‘as a matter of policy solely on account of his religion, race, and/or national origin and for no legitimate penological interest.’”²⁴³

The District Court denied the defendants’ motion to dismiss, relying on the traditional standard for review under FRCP 12(b)(6), as interpreted in *Conley*, which held that a complaint should be dismissed only when “‘there [is] no set of facts on which [respondent] would be entitled to relief as against’ petitioners.”²⁴⁴

others viewed *Twombly* fundamentally as an antitrust case and assumed that the case’s effects would begin and end there.” (footnote omitted).

237. Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1098 (2009).

238. Eaton, *supra* note 226 at 299-300 (“With its recent decision in *Ashcroft v. Iqbal*, the Supreme Court appears to have placed the proverbial final nail in the notice pleading coffin, accepting the ‘plausibility standard’ with open arms. The decision has created serious doubts about the efficacy of the notice pleading system and has raised concerns about plaintiffs’ constitutional rights to access courts.”).

239. Spencer, *supra* note 226 at 192 (“Although *Iqbal* involves the application of pleading standards developed previously in *Twombly*, the *Iqbal* Court’s rejection of Iqbal’s core allegations as too conclusory to be entitled to the assumption of truth reflects a disturbing extension of the *Twombly* doctrine in the direction of increased fact skepticism.”).

240. *Ashcroft v. Iqbal*, 556 U.S. at 666.

241. *Id.* at 667.

242. *Id.* at 667-69 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics Agents*, 403 U.S. 388 (1971)).

243. *Id.* at 669.

244. *Id.* (alteration in original) (citation omitted).

Defendants filed an interlocutory appeal of the denial of the motion to dismiss; while that appeal was pending the United States Supreme Court decided *Twombly*, in which the Court expressly rejected the *Conley* language and the traditional standard for 12(b)(6) motions.²⁴⁵

In response to Ashcroft and Mueller’s interlocutory appeal, the United States Circuit Court of Appeals for the Second Circuit reviewed the *Twombly* decision and held that its new standard for dismissal did not apply in all cases and that it specifically did not apply to Iqbal’s claim, thus affirming the District Court’s denial of the motion to dismiss.²⁴⁶ In his concurring opinion, Judge José Cabranes used the terminology of simple nuisance to support a more demanding pleading requirement for claims against law enforcement officials, particularly in light of the 9/11 attacks. He noted that defendants in this and similar suits would “have to submit to discovery, and possibly to a jury trial If so, these officials . . . may be required to comply with inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates . . . at a time when Ashcroft and Mueller were trying to cope with a national and international security emergency unprecedented in the history of the American Republic.”²⁴⁷

The Supreme Court reversed the lower court decisions, concluding that the new *Twombly* standard for Rule 8(a) and 12(b)(6) did apply to Iqbal’s claim and that pursuant to that standard his claim should have been dismissed.²⁴⁸ The Court summarized the *Twombly* standard—“[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face’”²⁴⁹—and experienced the same difficulty in trying to explain how the new “plausibility standard is not akin to a ‘probability’ requirement” when the new rule “asks for *more than a sheer possibility* that a defendant has acted unlawfully.”²⁵⁰ In the majority’s view, “[w]here a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’”²⁵¹ The majority applied this standard and concluded that

245. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

246. *Iqbal v. Hasty*, 490 F.3d 143, 155-56 (2d Cir. 2007).

247. *Id.* at 179 (“Even with the discovery safeguards carefully laid out in Judge Newman’s opinion, it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery process.”).

248. See Robert G. Bone, *Plausibility Pleading Revisited: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 851 (2010) (noting that the plausibility standard arising out of *Iqbal* is “significantly stricter than *Twombly*’s”); Kilaru, *supra* note 236, at 911-12; Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505, 516-17 (2009).

249. *Iqbal*, 556 U.S. at 678 (emphasis added) (citation omitted).

250. *Id.* (citation omitted).

251. *Id.* (emphasis added). Merriam-Webster defines “possibility” as “a chance that

the complaint “has not ‘nudged [Iqbal’s] claims’ of invidious discrimination ‘across the line from conceivable to plausible,’”²⁵² or, in other words, from possible to more likely than not.²⁵³

The Court stated that while FRCP 8 marked “a notable and generous departure from the hyper-technical, code-pleading regime,” the rule did not “unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”²⁵⁴ In rejecting Iqbal’s argument that stricter sufficiency requirements under Rule 8 are unnecessary given that the “basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery,’” the Court focused on simple nuisance concerns:

If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to . . . “a national and international security emergency unprecedented in the history of the American Republic.”²⁵⁵

Evidence demonstrates that *Iqbal*’s plausibility standard is having its intended effect²⁵⁶ on litigation in federal court.²⁵⁷ In the immediate wake of the

something might exist, happen, or be true: the state of a fact being possible.” *Possibility*, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/expectation (last visited June 3, 2017).

252. *Iqbal*, 556 U.S. at 680.

253. See Tymoczko, *supra* note 248, at 534 (describing Iqbal’s “plausibility standard” as meaning “more likely than any other (plausible) explanation”).

254. *Iqbal*, 556 U.S. at 678-79 (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”).

255. *Id.* at 685 (citation omitted). The court continued:

It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

Id. at 685-86.

256. See Miller, *supra* note 227, at 20 (“The Court’s signal was loud and clear. Motions to dismiss based on *Twombly* and *Iqbal* have become routine, and the perception among many practicing attorneys and commentators is that the grant rate has increased, particularly in civil rights cases, employment discrimination, private enforcement matters, class actions, and proceedings brought pro se.”).

257. See Kilaru, *supra* note 236, at 918 (“*Twombly* and *Iqbal* do—and if their language is to be respected, must—impose a heightened pleading standard. While neither case raises the

decision,

[C]ivil proceduralists and litigators alike watched as the Supreme Court fully embraced the heightened pleading standard articulated in *Twombly* as the proper pleading standard under [Rule 8]. In the first two months following the decision, litigators cited to *Iqbal* as grounds for dismissing law suits more than five hundred times in what are now known as “*Iqbal* motions.”²⁵⁸

The majority’s language in *Iqbal* justified the plausibility standard for Rule 8 sufficiency as a solution to the “simple nuisance” problem in the context of the *qualified*, not *absolute*, immunity defense.²⁵⁹ If the new plausibility standard, coupled with the qualified immunity defense, is sufficient to resolve the simple nuisance problem for prosecutors even at the highest levels of government, then absolute immunity is no longer necessary, at least to address that aspect of the nuisance concern. Its continued application should not be allowed to restrict access to justice for the victims of prosecutorial misconduct even more than it already is.²⁶⁰

C. “Nuisance” and Qualified Immunity

Professor Margaret Johns and others have proposed the alternative use of the qualified immunity defense, which already applies to police officers, as one possible solution to “the problem of absolute prosecutorial immunity.”²⁶¹ This

pleading requirement for one group of cases relative to others, both raise the pleading requirement across the board, at least relative to the *Conley* standard.”).

258. Eaton, *supra* note 226, at 300-01 (citation omitted). “*Iqbal* has unquestionably erected substantial barriers to the judicial system for certain plaintiffs that were nonexistent under the notice pleading regime.” *Id.* See also Reinert, *supra* note 234, at 2121 (“The data presented here strongly support the conclusion that dismissal rates have increased significantly post-*Iqbal*, and in addition suggest many other troubling consequences of the transition to the plausibility standard. Based as it is on an analysis of more decisions than any prior research has canvassed in detail—opinions and orders from more than 4,000 counseled and 1,200 pro se cases—the results herein have considerable consequences for the ongoing debate about the impact of the plausibility pleading standard.”).

259. See *Iqbal*, 556 U.S. at 686 (“We decline respondent’s invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of *qualified immunity* for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties.” (emphasis added)).

260. See Miller, *supra* note 227, at 71 (“The Court’s establishment of plausibility pleading, with its emphasis on the need for factual allegations, has a direct impact on the accessibility of the federal courts to the citizenry in all categories of cases. To a degree not yet determined, it will chill a potential plaintiff’s or lawyer’s willingness to institute an action. And even if one is started, it will result in some possibly meritorious cases being terminated under Rule 12(b)(6), thereby reducing citizens’ ability to employ the nation’s courts in a meaningful fashion.”).

261. See Johns, *supra* note 12, at 76, 104 (“[T]he application of absolute immunity in

proposal comes in light of the development of qualified immunity over the past several decades that removed the “subjective” component of the defense and facilitated the quick dismissal of factually baseless claims against prosecutors.²⁶² The argument for exclusive use of qualified immunity as a defense in claims alleging prosecutorial misconduct is bolstered by the enhanced simple nuisance protection provided by *Iqbal*’s new pleading standard, and by its new focus on Rule 12(b)(6) dismissal of claims against prosecutors instead of resolution on summary judgment, and the associated avoidance of civil discovery and its associated burdens.

In *Pierson v. Ray*,²⁶³ the Supreme Court discussed the level of immunity protection enjoyed by government officials other than legislators, judges, and prosecutors in response to constitutional claims brought under Section 1983 against judges, prosecutors, and police officers. The Supreme Court upheld the dismissal of an action against the judge affirming the application of absolute judicial immunity.²⁶⁴ Writing for the majority, Chief Justice Earl Warren then observed that “[t]he common law has never granted police officers an absolute and unqualified immunity” from liability, but considered the officers’ argument that “they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid.”²⁶⁵ Chief Justice Warren noted that under the prevailing view, probable cause was a valid defense

prosecutorial misconduct cases misreads history and violates public policy. Qualified immunity should be uniformly applied in cases of prosecutorial misconduct. . . . It provides protection for the honest prosecutor from the burden and intimidation of retaliatory litigation, while affording victims a remedy where the prosecutor has intentionally violated clearly established constitutional guarantees.”).

262. See Reinert, *supra* note 191, at 1212-14. Professor Reinert described the standard:

Qualified immunity thus plays two significant roles in mapping the terrain of frivolous and meritless cases. First, . . . qualified immunity is premised largely on the assumption that many constitutional tort claims are frivolous or meritless. At the same time, qualified immunity transforms an otherwise meritorious claim of constitutional violation into a meritless one. . . . [D]efendants can establish the affirmative defense of qualified immunity through one of two routes: (1) by showing that the defendant’s conduct did not violate law that was clearly established at the time she acted; or (2) by showing that the defendant reasonably believed that her conduct did not violate clearly established law. If a defendant can prevail on either prong, then she is entitled to qualified immunity. In other words, a plaintiff may be able to show that the defendant violated the Constitution, but if the law was not clearly established at the time of the violation, the plaintiff’s complaint will be dismissed.

Id. (citing Johns, *supra* note 12, at 143).

263. 386 U.S. 547, 555 (1967).

264. *Id.* at 554 (“This immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.”); *but see id.* at 558-59 (Douglas, J., dissenting) (stating that he did not believe “that all judges, under all circumstances, no matter how outrageous their conduct are immune from suit” under Section 1983).

265. *Id.* at 555.

for a claim for false arrest even when the arrestee is later found not guilty.²⁶⁶ Chief Justice Warren extended the justification for this defense one step further, acknowledging the complex nuisance concerns involved in making police liable for their otherwise “reasonable” performance of their duties.²⁶⁷

The majority rejected the Court of Appeals’ reliance on *Monroe v. Pape*,²⁶⁸ holding that in rejecting the defense of police officers sued in that case, “we in no way intimated that the defense of good faith and probable cause was foreclosed by the statute.”²⁶⁹ The Court ruled that “the defense of good faith and probable cause” was available to the police officers, but ordered a new trial to determine whether the officers “reasonably believed in good faith that the arrest was constitutional.”²⁷⁰

Subsequent cases confirmed that the two-part “qualified immunity” defense applied to preclude liability for government officers who acted 1) in good faith, and 2) with a reasonable belief that their action was lawful.²⁷¹ These cases applied the defense to governors,²⁷² mental health officials,²⁷³ and prison guards and wardens.²⁷⁴ And in *Wood v. Strickland*,²⁷⁵ the Court clearly delineated the dual nature of the test in a claim against school board members, holding that the defense of qualified immunity does not apply if the official in question “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if

266. *Id.*

267. *Id.* (“A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.”).

268. 365 U.S. 167 (1961).

269. *Ray*, 386 U.S. at 555-56 (citing *Pape*, 365 U.S. 167).

270. *Id.* at 557.

271. See generally SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 459-60 (3d ed. 2009).

272. See *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974) (“Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err.”).

273. See *O’Connor v. Donaldson*, 422 U.S. 563, 577 (1975) (“[T]he relevant question for the jury is whether [the official] ‘knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [the defendant], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [the defendant].’” (citing *Wood v. Strickland*, 420 U.S. 308, 322 (1975))).

274. See *Procunier v. Navarette*, 434 U.S. 556, 565-66 (1978) (citing *Strickland*, 420 U.S. at 320).

275. 420 U.S. at 309.

he took the action with malicious intention to cause a deprivation of constitutional rights or other injury to the student.”²⁷⁶

But this two-part qualified immunity standard provided insufficient protection against simple nuisance concerns. Specifically, the subjective “good faith” element of the defense prevented the expeditious dismissal of claims against government officials by requiring factual investigation, and consequently extensive discovery, to determine whether the defense applied. The Supreme Court addressed this problem in *Harlow v. Fitzgerald*.²⁷⁷ Plaintiffs had filed a *Bivens*²⁷⁸ claim against former senior White House aides alleging violation of their statutory and constitutional rights. Defendants argued that discovery had produced no direct evidence of any wrongful activity on their part.²⁷⁹ But plaintiffs offered evidence of what they asserted was a conspiracy to punish them for their whistle-blowing activities.²⁸⁰ In response to defendants’ motion for summary judgment, the district court ruled that there were genuine issues of material fact and that the defendants were not entitled to absolute immunity.²⁸¹ The court of appeals affirmed, and the Supreme Court granted certiorari to determine “the immunity available to senior aides and advisers of the President of the United States.”²⁸²

The Court began with the familiar conflation of the two nuisance concerns, holding that government officials “are entitled to some form of immunity from suits for damages [in order to] shield them from undue interference with their duties and from potentially disabling threats of liability.”²⁸³ The Court distinguished the two kinds of governmental immunity defenses it had recognized—“absolute immunity” “for officials whose special functions or constitutional status requires complete protection from suit”²⁸⁴ and “qualified

276. *Id.* at 322 (“This is not to say that the school board members are charged with predicting the future course of constitutional law. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student’s clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.”).

277. 457 U.S. 800, 802 (1981).

278. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics Agents*, 403 U.S. 388, 389 (1971).

279. *Harlow*, 457 U.S. at 803-04.

280. *Id.* at 804-05 (“Petitioner Butterfield also is alleged to have entered the conspiracy not later than May 1969. Employed as Deputy Assistant to the President and Deputy Chief of Staff to H.R. Haldeman, Butterfield circulated a White House memorandum in that month in which he claimed to have learned that Fitzgerald planned to ‘blow the whistle’ on some ‘shoddy purchasing practices’ by exposing these practices to public view. Fitzgerald characterizes this memorandum as evidence that Butterfield had commenced efforts to secure Fitzgerald’s retaliatory dismissal.”).

281. *Id.* at 805-06.

282. *Id.* at 806.

283. *Id.*

284. *Id.* at 807.

immunity” “[f]or executive officials in general”²⁸⁵—and noted that while the “special functions of some officials might require absolute immunity” those officials who seek application of this blanket liability protection “must bear the burden of showing that public policy requires an exemption of that scope.”²⁸⁶ The Court noted that even in the absence of absolute immunity, “insubstantial suits need not proceed to trial . . . but can be terminated on a properly supported motion for summary judgment based on the defense of [qualified] immunity.”²⁸⁷

After rejecting defendants’ arguments for application of absolute immunity, the Court held that “public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial.”²⁸⁸ The Court referenced to the same “balance between evils” that Judge Hand discussed in *Gregoire*, noting that it is this balance that “has required the *denial* of absolute immunity to most public officers.”²⁸⁹ Continuing its reference to *Gregoire*, the Court observed that “it cannot be disputed seriously [however] that claims frequently run against the innocent as well as the guilty— at a cost not only to the defendant officials, but to society as a whole.”²⁹⁰ The societal costs it references are simple and complex nuisances:

[T]he expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office . . . [and] the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the most irresponsible public officials in the unflinching discharge of their duties.”²⁹¹

But the Court noted that while qualified immunity was considered “the best attainable accommodation of competing values” and that it was designed to “permit insubstantial lawsuits to be quickly terminated,” “the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires adjustment of the ‘good faith’ standard established by our decisions.”²⁹²

The Court observed that the good faith aspect of the qualified immunity defense has “both an ‘objective’ and ‘subjective’ aspect,”²⁹³ and that courts have

285. *Id.*

286. *Id.* at 808.

287. *Id.* (“Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss.”).

288. *Id.* at 813.

289. *Id.* at 813-14. (emphasis added) (“The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.”).

290. *Id.* at 814 (footnote omitted).

291. *Id.* (citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

292. *Id.* at 814-15.

293. *Id.* at 815 (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)) (“The objective

traditionally concluded that the defense did not apply to preclude liability if the official in question “*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the plaintiff, *or* if he took the action with the *malicious intention* to cause a deprivation of constitutional rights or other injury.”²⁹⁴ And it was the “subjective” element of the defense that the Court identified as the element that prevents the kind of expeditious resolution of these claims mandated by public policy:

The subjective element of the good-faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official’s subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.²⁹⁵

The Court concluded that notwithstanding its prior articulation of the qualified immunity defense, “it is now clear that substantial costs attend the litigation of the subjective good faith of government officials [including] distraction of officials from their government duties, inhibition of discretionary action, and deterrence of able people from public service.”²⁹⁶ The majority also observed that there was something special about this kind of element in a civil claim, holding that “[j]udicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official’s professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.”²⁹⁷

Accordingly, the majority held that the qualified immunity defense should be altered, that “bare allegations of malice should not suffice to subject government officials either to the costs of trial or the burdens of broad-reaching discovery,” and that the defense should apply to officials “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁹⁸ The change would serve to prevent the “excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.”²⁹⁹

element involves a presumptive knowledge of and respect for ‘basic, unquestioned constitutional rights.’ The subjective component refers to ‘permissible intentions.’”

294. *Id.* (quoting *Strickland*, 420 U.S. at 308).

295. *Id.* at 815-16.

296. *Id.* at 816.

297. *Id.* at 817.

298. *Id.* at 817-18.

299. *Id.* at 818-19. (“If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was

The majority in *Harlow*, faced with an argument that absolute immunity was necessary to preclude simple and complex nuisance problems, concluded instead that qualified immunity, modified expressly to reduce the distraction caused by full litigation of baseless claims, was sufficient to prevent both nuisance concerns, and constituted the proper balancing of the concerns addressed by Judge Hand in *Gregoire*. As the majority stated, the application of this new objective version of qualified immunity did not provide a

license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected [and when] an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.³⁰⁰

There is, of course, no such access to a cause of action for those injured by the unlawful acts of prosecutors (who, unlike almost all other executive officials, are protected by absolute immunity) and while there may have been a policy justification for this limitation under the traditional version of qualified immunity, that justification does not survive the Court's decision in *Harlow*.

Five years later, in *Anderson v. Creighton*,³⁰¹ the Supreme Court reaffirmed the shift in the qualified immunity defense to a purely objective analysis. The Court started with the familiar reference to the balancing between the interest of the potentially injured plaintiff and nuisance concerns, noting that qualified immunity is the mechanism applied to ensure that balance.³⁰² It held that the clearly-established right, whose violation would allow for rejection of the qualified immunity defense, must be "particularized"³⁰³ to the specifics of the acts in question, it "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right[, and] in light of pre-existing law the unlawfulness must be apparent."³⁰⁴

clearly established, the immunity defense ordinarily should fail since a reasonable competent public official should know the law governing his conduct.").

300. *Id.* at 819.

301. 483 U.S. 635, 636 (1987).

302. *Id.* at 638 ("When government officials abuse their offices, 'actions for damages may offer the only realistic avenue for vindication of constitutional guarantees.' On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." (quoting *Harlow*, 457 U.S. at 814)).

303. *Id.* at 639-40 ("The operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

304. *Id.* at 646 ("The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.' Where that rule is applicable, officials can know that they will

Qualified immunity encourages prosecutors to assess their decisions and actions and to avoid obvious violations of constitutional rights. It also discourages reckless or intentional misconduct. This is the proper “balance” for promoting vigorous prosecutorial conduct while avoiding injury to individual citizens and the society as a whole.

There is no “complex” nuisance justification for absolute immunity. Any prosecutor acting in good faith and with reasonable professionalism with regards to the interests of those accused of crimes will benefit fully from the protection of qualified immunity in a civil lawsuit by a disgruntled plaintiff with no valid claims against her.³⁰⁵ The application of absolute immunity, instead of qualified immunity, serves to relieve the prosecutor of any fear of liability when she acts in bad faith or with a grossly negligent performance of her duties. There is no justification in our legal system for providing such a limitation or in not disincentivizing such activity on the part of government officials cloaked with almost limitless power over individuals.³⁰⁶

CONCLUSION

Qualified immunity coupled with the new plausibility standard for 12(b)(6) set out in *Iqbal* provide more than sufficient defense against the threat of simple nuisance for prosecutors. The combined protection serves all the public policy concerns that could potentially justify the continued application of the defense of absolute immunity. This new procedural approach to assessment of the qualified immunity defense does not prevent all lawsuits against these officials, but neither does the presence of absolute immunity, as demonstrated by

not be held personally liable as long as their actions are reasonable in light of current American law.” (alteration in original) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)).

305. See *Johns*, *supra* note 12, at 104 (“Since first adopting the prosecutorial immunity defense in civil rights actions, the Court has supported absolute prosecutorial immunity on historical and public policy grounds. But . . . the application of absolute immunity in prosecutorial misconduct cases misreads history and violates public policy. . . . Qualified immunity is supported by both history and public policy. It provides protection for the honest prosecutor from the burden and intimidation of retaliatory litigation, while affording the victims a remedy where the prosecutor has intentionally violated clearly established constitutional guarantees.”).

306. See *id.* at 121 (“The justification for absolute immunity is that civil rights litigation will chill the prosecutorial function and unduly burden the government. But the evidence of prosecutorial misconduct resulting in wrongful convictions suggests that we have sacrificed the integrity of our criminal justice system for the sake of efficiency. This corruption of our criminal justice system violates public policy. On the other hand, the elimination of absolute immunity would serve public policy. As Justice White wrote, ‘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.’ Prosecutors must obey their solemn obligation to see that justice is done. To insure the integrity of our system of justice, those who violate their duty by trampling on clearly established constitutional rights must be held accountable.” (citation omitted)).

continued proliferation of civil claims filed against state and federal prosecutors.³⁰⁷ Qualified immunity in the context of the new and restrictive “plausibility” requirement in *Iqbal* does dissuade all but the most compelling of claims, and provides an efficient and inexpensive means for the removal of not only frivolous claims (already policed in our legal system by Rule 11 and similar state provision), but also claims that involve allegations for which there is an equally compelling explanation for the prosecutor’s conduct that does not involve a violation of the plaintiff’s rights. It certainly cannot be reasonably argued that the simple nuisance concern should lead to the suppression of *clearly valid* claims against government officials when a successful mechanism is in place for precluding frivolous and invalid lawsuits.

Judge Hand’s dilemma in *Gregoire* was that there was no way to hold prosecutors responsible for their truly egregious acts without holding the majority of honest and blameless prosecutors hostage to the twin nuisance consequences of exposure to civil liability. But with the *Iqbal* “sufficiency” standard for complaints, and the objective qualified immunity defense, a new balance is possible that will allow what was likely impossible at the time: preventing a prosecutor from “escap[ing] liability for the injuries he may so cause; and . . . confin[ing] such complaints to the guilty.”³⁰⁸

307. See Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 19 (2009) (“[T]he number of uncovered cases of misconduct seems to be growing, and the misconduct itself is increasingly brazen.”).

308. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

