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REVISING STANDARDS TO REDUCE PROSECUTORIAL MISCONDUCT

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INTRODUCTION

"At first, it was unbelievable. Then, it was maddening. But as the days, months, and years piled up, I had to accept it. It wasn't fair…but as we all learn, life ain't fair."[1]

These are the words that Michael Morton[2] used to describe his wrongful conviction and incarceration.[3] On February 17, 1987, Morton was convicted of murdering his wife and sentenced to life in prison.[4] The State's case was simple: "Morton and his wife had a past history of conflict regarding her personal appearance and her lack of interest in sex; he had planned a romantic evening on his birthday; she rejected him; he…beat her to death with a billy club."[5] Though Morton admitted their conflict, he denied killing his wife, arguing that an unknown burglar must have committed the crime.[6] However, a jury convicted him.[7] Morton appealed, arguing as one of his main points of error that the State had withheld exculpatory *Brady* material in violation of his right to due process.[8] The court denied that appeal, concluding that there was "nothing more to consider than a mere possibility" that exculpatory evidence had been withheld by the prosecutor on the case.[9]

Nearly 25 years later, with the help of the Innocence Project, Morton was exonerated of the crime of murdering his wife when DNA evidence pointed to another man having committed

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[1] Posting of Michael Morton to Reddit, "My name is Michael Morton. I was wrongly convicted for murder and imprisoned for 25 years. I was released a free man in 2011. Ask me anything." (Jul. 9, 2014 15:37 UTC) https://www.reddit.com/r/IAmA/comments/2a8rje/my_name_is_michael_morton_i_was_wrongly_convicted/cislnrk/.
[2] Morton v. State, 761 S.W.2d 876, 877 (Tex. App.—Austin 1988, writ granted) (writ of habeas corpus granted by Ex parte Morton, No. AP-76,663, 2011 LEXIS 778, at *2 (Tex. Crim. App. Oct. 12, 2011)).
[3] Innocence Project, *Michael Morton*, INNOCENCE PROJECT (2016), http://www.innocenceproject.org/cases/michael-morton/.
[4] Morton, 761 S.W.2d at 876.
[5] *Id.* at 877.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 881 (citing Brady v. Maryland, 373 U.S. 83 (1963)).
[9] *Id.*

it.[10] Morton's exoneration revealed that the prosecutor on his case *had* failed to turn over several vital pieces of potentially exculpatory evidence to the defense, including a statement by Morton's son saying his "Daddy was not home" when the murder occurred.[11] The Texas Supreme Court ordered a Court of Inquiry to determine whether that prosecutor, Ken Anderson[12], had committed prosecutorial misconduct.[13] "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."[14] Along with the criminal contempt, the State Bar of Texas brought criminal charges against Anderson.[15] Anderson ended up serving a 10-day jail sentence, along with resigning from his position as district court judge and surrendering his law license.[16] For his wrongful incarceration, Morton received the standard compensation offered by Texas law, describing it as "generous."[17]

Morton's story is not an anomaly.[18] "Since 1970, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charged at trial, reversing convictions or reducing sentences in at 2,012 cases."[19] In cases where a conviction was overturned based on new DNA evidence, prosecutorial misconduct was a factor from 36%-42% of the

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[10] Innocence Project, *supra* note 3.
[11] *Id.*
[12] Chuck Lindell, *Judge finds that Anderson hid evidence in Morton murder trial*, STATESMAN (Apr. 19, 2013, 8:12 PM), http://www.statesman.com/news/local/judge-finds-that-anderson-hid-evidence-morton-murder-trial/3vcGr1o0mDXo27sSInXrBI/.
[13] Innocence Project, *supra* note 3.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Posting of Michael Morton to Reddit, *supra* note 1, at https://www.reddit.com/r/IAmA/comments/2a8rje/my_name_is_michael_morton_i_was_wrongly_convicted/cismdu u/.
[18] Steve Weinburg, *Breaking the rules: Who suffers when a prosecutor is cited for misconduct?*, CENTER FOR PUBLIC INTEGRITY (June 26, 2003, 12:00 AM, last updated May 19, 2014, 12:19 PM), https://www.publicintegrity.org/2003/06/26/5517/breaking-rules.
[19] *Id.*

convictions.[20] Especially troubling is the rate of prosecutorial misconduct in cases with the highest penalty in the country—from 1973 to 1995, 19% of capital cases reversed by appellate courts were reversed because of prosecutorial misconduct.[21]

These numbers paint prosecutorial misconduct as a problem that needs to be addressed, to avoid more wrongful convictions of innocent people. This paper seeks to address that problem, and posits that by allowing civil lawsuits against prosecutors in certain situations and imposing stronger rules of ethics, misconduct leading to wrongful convictions will be greatly diminished.

The first section of this article will argue that prosecutorial immunity should be limited to only qualified immunity rather than both absolute and qualified, and that malicious prosecution should be a usable exception to qualified immunity allowing civil sanctions to be imposed on prosecutors. Namely, this section will discuss the different types of immunities and provide examples of the ways in which courts have allowed prosecutorial misconduct due to those immunities. In addition, prosecutorial immunity should be reduced to qualified immunity, while allowing wrongfully convicted people to sue prosecutors under 42 U.S.C.S. § 1983.

The second section will further argue that civil sanctions of prosecutors, in particular lawsuits under 42 U.S.C.S. § 1983, should permit only the defense of qualified immunity, as well as allow plaintiffs to use an objective reasonableness standard for malicious prosecutions claims as a deterrent for prosecutorial misconduct. This section will discuss in depth the basis for 42 U.S.C.S. § 1983 malicious prosecution claims; and argue that an objective reasonableness standard

[20] *Prosecutorial Misconduct*, CALIFORNIA INNOCENCE PROJECT (2016), https://californiainnocenceproject.org/issues-we-face/prosecutorial-misconduct/.
[21] James S. Liebman and Simon H. Rifkind, *A Broken System: Error Rates in Capital Cases, 1973-1995*, Columbia Law School, 5 (2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

is the only appropriate standard for such claims in order to correct the systematic prosecutorial misconduct that occurs in the state criminal justice systems.

The third and final section will argue that along with the aforementioned reforms, some reforms toward the ABA Model Rules of Professional Conduct, by which prosecutors conduct themselves, should be implemented. To reach the stage of a civil lawsuit against a prosecutor for misconduct, plaintiffs require an extensive amount of time and effort. This gap in between misconduct and consequences for that misconduct can be rectified through an update of the ethical rules, and will help deter prosecutors from that misconduct while also not having a chilling effect on the ability of prosecutors to perform their duties.

PROSECUTORIAL IMMUNITY

In one sense, Morton's case *is* an anomaly: prior to his case, discipline for prosecutorial misconduct, particularly a criminal conviction, was—and to some extent, still is—practically unfathomable.[22] Though Texas law provides for compensation to wrongfully imprisoned people[23], there are generally no civil remedies available to innocent people who are wrongfully convicted of crimes due to prosecutorial misconduct.[24] These people are unable to bring civil lawsuits against prosecutors for misconduct due to the two kinds of immunity that apply to prosecutors: absolute immunity and qualified immunity.[25] This section will discuss both of those types of immunities,

[22] James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2121-22 (2000) ("Bar discipline is almost nonexistent; prosecution for malfeasance is all-but-unheard-of and always unsuccessful in the rare instances in which it occurs; and even more rare are investigations by police or prosecuting agencies themselves to find out why the mistakes that led to reversals and even to the release of innocent condemned prisoners were made.")
[23] TEX. CIV. PRAC. & REM. CODE § 103.001 (West Supp. 2016).
[24] Lesley E. Williams, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3452 (1999) ("Absolute and qualified immunity pertain to claims for monetary relief against officials in their personal capacities.")
[25] *Id.* at 3453-3454; *see also* 42 U.S.C.S. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

and argue that prosecutors should retain only qualified immunity, with malicious prosecution as an exception to that immunity, allowing civil lawsuits.

I. Absolute Immunity

Federal law does authorize claims for compensatory and punitive damages against state and local officials in their individual capacity who deprive plaintiffs of rights created by the Constitution and federal law.[26] It is the Supreme Court who created the concept of absolute immunity for public officials in certain cases.[27] Absolute immunity prevents civil lawsuits against public officials such as prosecutors for actions taken in their official capacity, even when those actions are "malicious" or "dishonest."[28] In creating this absolute immunity, the Supreme Court recognized the unfairness to citizens subject to the whim of prosecutors: "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty."[29] Yet the Court determined that this "balance" was necessary to the "vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."[30]

The Court did go on to limit absolute immunity to instances in which a prosecutor is performing an "advocative" function, meaning one which is "intimately associated with the judicial phase of the criminal process."[31] Yet this limitation has been broadly interpreted. In the

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subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.")

[26] 42 U.S.C.S. § 1983, *supra* note 19.
[27] Scheuer v. Rodes, 416 U.S. 232, 242 (1974).
[28] Imbler v. Pachtman, 424 U.S. 409, 427 (1976).
[29] *Id.*
[30] *Id.*
[31] *Id.* at 430-431.

Imbler case, for example, Imbler was wrongfully convicted of murder, but his conviction was vacated based on prosecutorial misconduct and a conspiracy to unlawfully charge and convict him.[32] Imbler then sued the prosecutor in his case under 42 U.S.C.S. § 1983 for civil damages.[33] Even though the prosecutor had knowingly used perjured testimony, deliberately withheld exculpatory information, and failed to make full disclosure of all facts casting doubt upon the state's testimony, the Court determined that absolute immunity still applied, because filing criminal charges against a person is an "advocative" function, and dismissed Imbler's case.[34]

Other types of "advocative" functions include presenting evidence before a grand jury (even when that evidence is fabricated)[35], negotiating a plea agreement (by lying about a grand jury indictment)[36], and retaining evidence pending an appeal (namely, a defendant's prosthetic leg)[37]. In such cases, no matter how malicious the prosecutorial misconduct, absolute immunity applies and no civil lawsuits are permitted.

Absolute immunity does not apply to a prosecutor who "has intertwined his exercise of prosecutorial discretion with other, unauthorized conduct."[38] "For example, where a prosecutor has linked his authorized discretion to initiate or drop criminal charges to an unauthorized demand for a bribe, sexual favors, or the defendant's performance of a religious act, absolute immunity has been denied."[39] However, political motivations do not deprive prosecutors of absolute immunity.[40]

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[32] *Id.* at 415-416.
[33] *Id.*
[34] *Id.* at 432-433.
[35] Hill v. City of New York, 45 F.3d 653, 664 (2nd Cir. 1995).
[36] Taylor v. Kavanagh, 640 F.2d 450, 454 (2nd Cir. 1981).
[37] Parkinson v. Cozzolino, 238 F.3d 145, 153 (2nd Cir. 2001).
[38] Bernard v. County of Suffolk, 356 F.3d 495, 504 (2nd Cir. 2004).
[39] *Id.* (citing Doe v. Phillips, 81 F.3d 1204 (2nd Cir. 1996)).
[40] *Id.* at 507.

Essentially, 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."[41]

II. Qualified Immunity

Unlike absolute immunity, which prevents a lawsuit, qualified or "good faith" immunity is an affirmative defense available to prosecutors who are sued under 42 U.S.C.S. § 1983.[42] The prosecutor must show that he did not violate "clearly established statutory and constitutional rights of which a reasonable official would have known."[43] First, however, it is the plaintiff's burden to show that a prosecutor has violated a constitutional right, and whether that right was "clearly established" at the time of the defendant prosecutor's alleged misconduct.[44]

Cases where prosecutors are entitled to qualified immunity as opposed to absolute immunity are fewer than cases where absolute immunity exists. Qualified immunity tends to apply to actions by prosecutors that are "investigative" or "administrative," rather than "advocative" as with absolute immunity.[45] In the *Buckley* case, Buckley sought damages from prosecutors for fabricating evidence and making false statements.[46] The Supreme Court determined that the prosecutors were not entitled to absolute immunity because the fabrication of evidence happened before any grand jury proceedings and before Buckley was arrested.[47] However, the Court held that the prosecutors were entitled to qualified immunity, noting "the presumption is that qualified

[41] Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U.L. REV. 53, 55 (2005).
[42] Williams, *supra* note 18, at 3454.
[43] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
[44] Pearson v. Callahan, 555 U.S. 223, 232 (2009).
[45] *See* Williams, *supra* note 18, at 3456.
[46] Buckley v. Fitzsimmons, 509 U.S. 259, 264 (1993).
[47] *Id.* at 278.

rather than absolute immunity is sufficient to protect government officials in the exercise of their duties."[48]

In short, qualified immunity is a catch-all for actions that absolute immunity would not normally cover. Qualified immunity has been awarded in cases where a prosecutor failed to inform arresting officers that he had mistaken the identity of the target of a warrant[49]; where a prosecutor failed to protect witnesses after they received death threats, resulting in their being "gunned down gangland style"[50]; and where a prosecutor destroyed a defendant's reputation in the media[51]. Some courts have even given qualified immunity to prosecutors in cases of illegal wiretapping[52], altering of trial transcripts[53], and withholding exculpatory evidence when not involved in a pending appeal[54].

Certainly, cases such as these where qualified immunity has been granted to prosecutors still indicate a level of injustice in the way prosecutors conduct themselves. However, all of these cases allowed plaintiffs to sue prosecutors in a civil capacity under 42 U.S.C.S. § 1983 rather than barring the suit from the very beginning, as absolute immunity would. And in theory, qualified immunity should not protect prosecutors from their misconduct when malicious prosecution is involved.

III. Malicious Prosecution as "Exception" to Qualified Immunity

[48] *Id.* (quoting Burns v. Reed, 500 U.S. 478, 486-487 (1991)).
[49] Hart v. O'Brien, 127 F.3d 424, 433 (5th Cir. 1997).
[50] Piechowicz v. United States, 685 F. Supp. 486, 493 (D. Md. 1988).
[51] Aversa v. United States, 99 F.3d 1200, 1206 (1st Cir. 1996).
[52] Powers v. Coe, 728 F.2d 97, 103 (2nd Cir. 1984).
[53] Slavin v. Curry, 574 F.2d 1256, 1264-65 (5th Cir. 1978).
[54] Houston v. Partee, 978 F.2d 362, 365-66 (7th Cir. 1992).

Lawsuits under 42 U.S.C.S. § 1983 are generally Fourth Amendment malicious prosecution actions.[55] To prevail in such a lawsuit, a plaintiff must show that: (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the plaintiff's favor; (3) the proceeding was initiated without probable cause; (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered a deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding.[56]

Though there is extensive case law discussing how to prevail in a § 1983 lawsuit against a prosecutor, cases involving malicious prosecution by prosecutors have practically never been successful.[57] The case of Clarence Brandley is one example where, by all accounts, a malicious prosecution claim should have succeeded.[58] In 1980, Brandley was convicted of the rape and murder of a high school student[59], a conviction "born of public panic and overt racism."[60] Though there were a number of suspects, Brandley became the sole focus of the investigation because he was black.[61] Prosecutors ignored, hid, or lost potentially exculpatory evidence, such as hair, semen, and blood samples taken from the crime scene.[62] Prosecutors additionally coached and threatened witnesses to ensure that their stories would line up with the case the prosecutors wanted to present.[63] After an all-white jury sentenced Brandley to death, his attorneys discovered that

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[55] *See, e.g.*, Jackson v. Mizzel, 361 Fed. Appx. 622 (5th Cir. 2010); Gagliardi v. Fisher, 513 F. Supp. 2d 457 (W.D. Pa. 2007); Kerr v. Lyford, 171 F.3d 330 (5th Cir. 1999); Mata v. Anderson, 685 F. Supp. 2d 1223 (D.N.M. 2010).
[56] *See* Gagliardi, *supra* note 55, at 478.
[57] See, e.g., Boyle v. Barnstable Police Dept., 818 F. Supp. 2d 284 (D. Mass 2011); Trafton v. Devlin, 43 F. Supp. 2d 56 (D. Me. 1999); Almeida v. Rose, 55 F. Supp. 3d 200 (D. Mass. 2014).
[58] Exonerees: Clarence Brandley, Witness to Innocence, http://www.witnesstoinnocence.org/exonerees/clarence-brandley.html.
[59] Brandley v. State, 691 S.W.2d 699, 701 (Tex. Crim. App. 1985).
[60] Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty, Chapter Two: Official Misconduct: A Deliberate Attack on the Truth*, 7, http://texasdefender.org/wp-content/uploads/TDS-2001-StateOfDenial-Ch2.pdf.
[61] Ex parte Brandley, 781 S.W.2d 886, 888 (Tex. Crim. App. 1989).
[62] *Id.* at 890.
[63] *Id.* at 889-90.

"166 of the 309 trial exhibits had vanished."[64] Brandley spent nearly a decade in prison, until Centurion Ministries took on his case for exoneration.[65] Six days before his execution, he was granted a stay when two witnesses came forwarded and swore that another witness had said he knew who killed the student, and it was not Brandley.[66] After much investigation into the missing evidence and prosecutorial misconduct, the Court of Criminal Appeals granted Brandley a new trial, but the prosecution dropped all charges against him.[67] Brandley eventually brought a § 1983 claim against James Keeshan, the prosecutor responsible for his case.[68] Brandley urged the court "to create a 'malice' exception to the affirmative defense of absolute immunity."[69] But despite much public outrage, the court determined that Keeshan was acting in an "advocative" manner and he retained his absolute immunity from suit.[70]

It is true that there have been some cases where malicious prosecution has been recognized as an exception to prosecutorial qualified immunity. However, these cases generally do not go past that recognition. In *Diaz-Morales*, for example, the court denied defendants' request for dismissal of the claims against them on grounds of qualified immunity because a factual dispute remained surrounding the investigation of the crime with which they had charged Diaz-Morales.[71] However, the court did not address whether those facts rose to the level of malicious prosecution or whether that would be an exception to qualified immunity.[72]

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[64] Texas Defender Service, *supra* note 60, at 8.
[65] *Clarence Brandley*, The National Registry of Exonerations (2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3044.
[66] *Id.*
[67] *Id.*
[68] Brandley v. Keeshan, 64 F.3d 196, 198 (5th Cir. 1995).
[69] *Id.* at 200.
[70] *Id.* at 201.
[71] Diaz-Morales v. Rubio-Paredes, 170 F. Supp. 3d 276, 289 (D.P.R. 2016).
[72] *Id.*

In *Harrington*, Harrington was convicted of murder after prosecutors failed to turn over exculpatory evidence.[73] He was freed after the Iowa Supreme Court "found prosecutors committed misconduct by concealing reports of another possible suspect."[74] Harrington sued the prosecutors as well as other city officials, and trial proceeded without prosecutors being provided absolute or qualified immunity.[75] However, a mistrial was declared when three jurors stated they did not agree with the verdict—in favor of the defendants.[76]

Even in the *Buckley* case, where the Supreme Court held that absolute immunity should not apply to the prosecutors in the case[77], the Court remanded the case so that the appellate court could determine whether there was malicious prosecution such that there would be an exception to the prosecutors' qualified immunity.[78] On remand, the court determined that not only was there no malicious prosecution to destroy qualified immunity, the plaintiff had not even brought a Constitutional violation claim.[79]

Malicious prosecution is essentially a violation of the Fourth Amendment (as well as the Due Process Clause of the Constitution), if a plaintiff can prove that it occurred.[80] The difficulty for plaintiffs, it appears, is that proving malicious prosecution requires proving that a prosecutor acted with a culpable mental state.[81] "While the Court has yet to establish the state-of-mind requirement for § 1983 actions against prosecutors, a related decision suggests that the Court will

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[73] Terry Harrington; Curtis W. McGhee, Jr. v. City of Council Bluffs, Iowa; Daniel C. Larsen, in his individual and official capacities; Lyle W. Brown, in his individual and official capacities, et al; 2012 Jury Verdicts LEXIS 17668.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Buckley, *supra* note 46, at 264.
[78] *Id.*
[79] Buckley v. Fitzsimmons, 20 F.3d 789, 799 (7th Cir. 1994).
[80] John T. Ryan, Jr., *NOTE: Malicious Prosecution Claims Under Section 1983: Do Citizens have Federal Recourse?*, 64 GEO. WASH. L. REV. 776, 779 (1996).
[81] Johns, *supra* note 41, at 134.

impose a significant subjective state-of-mind requirement."[82] The *Heck* case required that plaintiffs prove prosecutors acted with malice.[83] Yet Fourth Amendment claims require an "objective reasonableness" standard for determining whether a violation has occurred,[84] not the subjective intent standard that courts have attempted to place on malicious prosecution claims.

As it stands, the subjective standard applied to malicious prosecution claims makes it practically impossible for a wrongfully convicted person to bring such a claim against a prosecutor.[85] By imposing such extreme requirements for a plaintiff to bring a successful malicious prosecution claim, this exception to prosecutorial immunity becomes ineffectual law. Though in theory there should be recovery for plaintiffs against prosecutors for malicious prosecution, practically speaking, that exception does not exist. As a result, qualified immunity becomes no different from absolute immunity for prosecutors.

Yet, we have seen the results of absolute immunity for prosecutors, both in case law and statistics. There is rampant misconduct.[86] The solution to this problem is clear: prosecutorial immunity should be limited to qualified immunity, as opposed to having both absolute and qualified immunity available; and courts should use the reasonable objectiveness standard for malicious prosecution claims, allowing civil lawsuits under § 1983 against prosecutors to be more feasible.

1983 LAWSUITS AS A DETERRENT TO PROSECUTORIAL MISCONDUCT

[82] *Id.*
[83] Heck v. Humphrey, 512 U.S. 477, 484-86 (1994).
[84] Graham v. Connor, 490 U.S. 386, 399 (1989).
[85] *See, e.g.*, Brandley, *supra* note 68, at 201.
[86] *See* Liebman, *supra* note 21, at 5.

The Supreme Court itself has said that "as the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[87] The absolute immunity defense is no longer necessary to protect honest prosecutors, because of this ample protection provided by the qualified immunity defense. With that said, the qualified immunity defense cannot be so impenetrable that it in essence becomes an absolute immunity defense. For that reason, it is important that courts choose an "objective reasonableness" as opposed to a subjective intent standard when determining whether to allow malicious prosecution claims under 42 U.S.C.S. § 1983 against prosecutors. This section will discuss how allowing prosecutors to have only qualified immunity will help safeguard them while also deterring prosecutorial misconduct, and argue that malicious prosecution claims using a objective reasonableness standard for mindset under § 1983 will provide an appropriate remedy for wrongfully convicted plaintiffs, while not detracting from the ability of prosecutors to perform their jobs.

I. Qualified Immunity: Safeguard and Deterrent for Prosecutors

"The defense of qualified immunity has evolved to insure that frivolous actions are eliminated at the earliest stages of litigation."[88] When a prosecutor, defending himself against a malicious prosecution claim, raises a qualified immunity defense, the issue must be resolved before any other stages of litigation take place, including discovery on any other issues.[89] A prosecutor is also entitled to an immediate interlocutory appeal if the trial court rejects the immunity defense.[90]

[87] Burns, *supra* note 48, at 494-95 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).
[88] Johns, *supra* note 41, at 136.
[89] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
[90] Mitchell v. Forsyth, 472 U.S. 511, 529-30 (1985).

Qualified immunity therefore provides honest prosecutors who are sued under § 1983 with a quick and effective means of avoiding unnecessary litigation.[91]

Additionally, qualified immunity has become stronger because the Court removed the subjective standard of "good faith" associated with the immunity, leaving only the objective standard.[92] Not to be confused with the as-yet undefined mental state standard for malicious prosecution, the Supreme Court previously established that the qualified immunity defense had both an objective and a subjective aspect.[93] "The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights.'"[94] On the other hand, the subjective component referred to "permissible intentions."[95] The Court held that the subjective standard presented more problems than it solved, and that "reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."[96] Essentially, qualified immunity is now sufficient to protect the actions of an honest, even mistaken, prosecutor, because of this requirement that a prosecutor must knowingly violate a defendant's rights.[97]

At the same time, having only qualified immunity may help deter some prosecutorial misconduct that other procedural safeguards fail to deter.[98] "Although numerous procedural protections (including jury trials, appellate review, and habeas corpus proceedings) are designed

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[91] Douglas J. McNamara, *Buckley, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 ALB. L. REV. 1135, 1184-89 (1996).
[92] Harlow, 457 U.S. at 815-16.
[93] *Id.*
[94] *Id.* (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).
[95] *Id.*
[96] *Id.* at 818.
[97] Burns, *supra* note 48, at 494-95.
[98] Johns, *supra* note 41, at 65.

to protect the criminal defendant's rights, they neither prevent nor correct prosecutorial misconduct."[99] For example, in a majority of cases where appellate courts find that prosecutorial misconduct occurred, the courts also find that such misconduct amounted to harmless error and the conviction is not overturned[100], because there is no "reasonable probability that the outcome of the trial would have been different had the evidence been disclosed."[101]

To a wrongfully convicted defendant, like Michael Morton, the general unwillingness of the appellate courts to correct prosecutorial misconduct for the unfortunate recipient of that misconduct is frustrating to say the least. But aside from the consequences to a wrongfully convicted defendant when procedural safeguards such as appellate review fail, there is an equivalent paucity of consequences for a prosecutor who engages in misconduct. Prosecutors are rarely identified publicly in instances of misconduct.[102] Even when a conviction is overturned by an appellate court due to prosecutorial misconduct, the "loss" on the case is not applied to the prosecutor's record, but rather to the appellate lawyer in the state attorney general's office who was then assigned it.[103] When prosecutors do not face even these more minor consequences, much less criminal charges or civil lawsuits, it is not unexpected that they may be "tempted to bend the ethical and constitutional rules to obtain convictions."[104]

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[99] *Id.*
[100] Center for Public Integrity, Harmful Error: Investigating America's Local Prosecutors 45-47, app. at 108-109. (11,452 cases alleging prosecutorial misconduct were studied. Appellate courts granted relief in 2,012 of those cases but found that the prosecutorial misconduct amounted to harmless error in 8,709 cases.)
[101] Gantt v. Roe, 389 F.3d 908, 913 (9th Cir. 2004) (citing Strickler v. Greene, 527 U.S. 263, 281-82 (1999)).
[102] *See* United States v. Horn, 811 F. Supp. 739, 741 n.1 (D.N.H. 1992) (finding serious prosecutorial misconduct but declining to name the offender because the court had been advised to eliminate the name); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L. Q. 713, 831 & n.448 (1999); *contra* Craig Malisow, *Unreasonable Doubt: Did Kelly Siegler Really Railroad an Innocent Man Eight Years Ago?*, Houston Press (Tues. Oct. 20, 2015, 6:00 AM), http://www.houstonpress.com/news/unreasonable-doubt-did-kelly-siegler-really-railroad-an-innocent-man-eight-years-ago-7860329 (where a prosecutor's withholding of evidence was widely publicized in the media, and the defendant in the case received a new trial).
[103] Liebman, *supra* note 22, at 2121.
[104] Johns, *supra* note 41, at 68.

But allowing prosecutors only qualified immunity when claims for prosecutorial misconduct are brought against them may deter some misconduct. When prosecutors are sued under 42 U.S.C.S. § 1983, as the defendants, they have both the burden of pleading the affirmative defense of qualified immunity as well as the burden of proving it.[105] In context, to prove absolute immunity, the prosecutors must simply prove entitlement to that defense.[106] On the other hand, proving qualified immunity does require some justification of prosecutor actions, such as a "reference to clearly established law."[107] "While both parties may be able to research relevant case law equally, the question of whether an executive officer should have made a certain mistake of law is obviously a topic that an executive officer should be in a better position to discuss, at least initially."[108] Prosecutors who know that they will be forced to have that initial discussion about their actions if sued under § 1983 will likely think twice before committing potential ethical and constitutional violations.

It is true that in order to be able to sue a prosecutor under 42 U.S.C.S. § 1983, a plaintiff must first go through the arduous process of being a wrongfully convicted criminal defendant, otherwise he would not have suffered an injury.[109] That process can last a very long time (in Michael Morton's case, 25 years) and require expenditures on the part of the defendant—criminal appeals and writs of habeas corpus are, of course, not usually free without the help of an attorney

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[105] Gary S. Gildin, *The Standard of Culpability in Section 1983 Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557, 594 n.206 (1983).
[106] See, e.g., Poe v. Haydon, 853 F.2d 418, 425 (6th Cir. 1988) ("The official [invoking qualified immunity] must plead facts which, if true, would establish that he was acting within the scope of his discretionary authority when the challenged conduct occurred.")
[107] Harlow, 457 U.S. at 818.
[108] Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L. J. 135, 163 (Fall 2012).
[109] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, (citations omitted), and (b) 'actual or imminent, not "conjectural" or "hypothetical."' (citations omitted) Second, there must be a causal connection between the injury and the conduct complained of… Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." (citation omitted).)

working pro bono. Requiring a wrongfully convicted person to go through that process can perhaps be looked at as an additional safeguard to prosecutors, because only meritorious claims will succeed.[110] There is no question, then, that if a person manages to succeed in that grueling process of clearing his name and chooses to file a § 1983 claim, at the very least, justice requires the prosecutor on the case to explain any potential misconduct that occurred and allow a court to determine whether that explanation is sufficient for the prosecutor to prevail on a qualified immunity defense.

II. Malicious Prosecution: In Favor of the Objective Reasonableness Standard

"Malicious prosecution is one of the most difficult causes of action to prove and many cases go down in flames by a directed verdict if not sooner by a summary judgment. The reason for this is the requirement that defendant's institution of either civil or criminal proceedings be dictated by malice."[111] This standard is an extremely difficult one for any plaintiff to prove. For this reason, an objective reasonableness standard should be implemented instead, as a way of allowing 42 U.S.C.S. § 1983 plaintiffs a more appropriate remedy for the injustices committed against them, and a way of reforming the system of criminal prosecution.

In one of the first cases involving 42 U.S.C.S. § 1983, the Supreme Court explained its purpose: "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state

[110] Johns, *supra* note 41, at 123 ("[A]bsolute immunity is not necessary to protect honest prosecutors from vexatious litigation since the requirements for proving a cause of action and the defense of qualified immunity are sufficient to eliminate unmeritorious cases.").
[111] Louis A. Lehr, Jr., *Premises Liability 3d* § 2:18, 1 (2014).

agencies."[112] The federal courts, then, became "guardians of the people's federal rights," protecting them from State violations of the Constitution.[113] Eventually, the courts even became the place to "reform state and local governmental practices."[114]

However, in order for a plaintiff to succeed on a malicious prosecution claim under § 1983, that plaintiff must prove that the prosecutor violated a particular constitutional right.[115] Most courts have required that a malicious prosecution claim be based on the Fourth Amendment, based on the Supreme Court's *Albright v. Oliver* decision.[116] There is some confusion regarding such claims, though, because the Supreme Court has "never explored the contours of a Fourth Amendment malicious prosecution suit under § 1983."[117] Yet in the *Albright* case, Justice Ginsburg opined that "seizure" under the Fourth Amendment describes more than just false arrest, but also other methods by which the state retains controls over a defendant's person, including through criminal charges to which a defendant must answer in court.[118] It is that opinion that guides this section on malicious prosecution.

At common law, a claim of malicious prosecution generally had four elements: (1) the defendant instituted or supported a criminal proceeding against the plaintiff; (2) the proceeding terminated in the plaintiff's favor (for example, by a dismissal of charges or a finding of not guilty); (3) there was no probable cause to support the defendant's charges; and (4) the defendant's actions

[112] Monroe v. Pape, 365 U.S. 167 (1961), rev'd on other grounds, Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).
[113] See Mitchum v. Foster, 407 U.S. 225, 242 (1972).
[114] See Martin A. Schwartz & Kathryn R. Urbonya, *Section 1983 Litigation*, at 2 (2nd ed. 2008), archived at https://perma.cc/WR3E-EHSU.
[115] Id. at § 3.18.
[116] Albright v. Oliver, 510 U.S. 266 (1994) (holding that a claim of criminal prosecution without probable cause may only be based on the Fourth Amendment, not on substantive due process).
[117] Wallace v. Kato, 549 U.S. 348, 390 n.2 (2007).
[118] Albright, 510 U.S. at 277-79.

were malicious or motivated by something other than bringing the guilty to justice.[119] It is this fourth requirement of "malice" that has made it incredibly difficult for plaintiffs to bring malicious prosecution claims under § 1983.[120] Proving malice in some jurisdictions requires proving that a prosecutor acted with a subjective state of mind, an "evil motive."[121] In others, "mere wantonness or carelessness if the actor, when doing the act, knows it to be wrong or unlawful" may be enough to prove malice.[122] Malice may also be inferred from an obvious lack of probable cause.[123] However, it is important not to conflate the two concepts, and when courts fail to "assess the reasonableness of state actors' conduct through a cognitive science lens, they miss a critical opportunity to address the true causes of wrongful convictions."[124] By forcing plaintiffs to prove a malice element to malicious prosecution, courts are ignoring precedent that an inquiry into a Fourth Amendment violation is one of "objective reasonableness" and that "subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry."[125]

This section argues that by implementing an "objective reasonableness" standard to malicious prosecution suits across the Circuit courts, proper plaintiffs in such suits will be appropriately compensated, and prosecutors will be deterred from misconduct, in the context of constitutional violations.

"The Fourth and Sixth Circuits have emphasized that, for a malicious prosecution claim to be actionable under § 1983, it must support a violation of the Fourth Amendment without probing

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[119] *See* Sofia Yakren, *Removing the Malice from Federal "Malicious Prosecution": What Cognitive Science Can Teach Lawyers about Reform*, 50 HARV. C.R.-C.L. L. REV. 359, 369-70 (Summer 2015).
[120] *See* Kingsland v. City of Miami, 382 F.3d 1220, 1234-35 (11th Cir. 2004); Awabdy v. City of Adelanto, 368 F.3d 1062, 1067 (9th Cir. 2004); Grider v. City of Auburn, 618 F.3d 1240, 1256 n.24 (11th Cir. 2010); Manganiello v. City of New York, 612 F.3d 149, 160-61 (2nd Cir. 2010).
[121] *See* Yakren, *supra* note 119, at 370.
[122] Howard Friedman & Charles J. DiMare, 4 *Litigating Tort Cases* § 50:37 (2013).
[123] *Id.*
[124] Yakren, *supra* note 119, at 370 n.71.
[125] Graham, *supra* note 84, at 399.

a defendant's mental state."[126] After all, the goal of § 1983 is to protect citizens who have had their constitutional rights violated by state actors. Whether that violation was as a result of an "evil mind" or rather mere knowledge on the part of the prosecutor that an act was unlawful, but a choice to disregard that knowledge[127], should not matter because the consequences that resulted for a plaintiff bringing such a claim were the same—he was wrongfully convicted and had to go through the process of clearing his name. The extra hurdle of a plaintiff proving the prosecutor's mindset in his misconduct is unnecessary, because under this article's proposed modification of the requirements for § 1983 lawsuits, a court would have initially had to determine whether a prosecutor is entitled to qualified immunity.[128] As discussed previously, honest but mistaken prosecutors are protected from suit through qualified immunity—it is only those prosecutors who knowingly violated a person's constitutional rights that will become defendants in a civil lawsuit.[129] Therefore, if the court has allowed a suit to proceed, and a plaintiff can establish a knowing violation of the Fourth Amendment (or any other), "there is nothing but confusion to be gained" by having to prove a subjective malice mindset on the part of the prosecutor.[130]

An "objective reasonableness" standard for determining malicious prosecution is the appropriate solution. Courts should "objectively consider whether government actors made choices reasonably likely to lead to an accurate determination of guilt."[131] This standard goes

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[126] Yakren, *supra* note 119, at 372; *see also* Sykes v. Anderson, 625 F.3d 294, 309 (6th Cir. 2010) ("[T]he Fourth Amendment violation that generates a § 1983 cause of action obviates the need for demonstrating malice … [because] Fourth Amendment jurisprudence makes clear that we should not delve into the defendant's intent.")
[127] See Friedman, *supra* note 122.
[128] Harlow, *supra* note 107.
[129] *See* Burns, *supra* note 48, at 494-95.
[130] *See* Newsome v. McCabe, 256 F.3d 747, 751 (7th Cir. 2001).
[131] Yakren, *supra* note 119, at 374. (Yakren explains that "cognitive psychologists provide a vocabulary and explanations for unintentional, faulty thought processes that, by definition, lead to objectively unreasonable conduct by state actors. In identifying these processes, we can create some parameters for the reasonableness standard." She goes on to discuss confirmation bias, hindsight bias, systemic factors such as institutional pressures and a lack of proper training as some of these faulty processes. Whether the courts take these cognitive issues into consideration when determining "reasonableness" remains to be seen.)

hand-in-hand with the standard for determining whether a prosecutor is entitled to qualified immunity, because it focuses solely on "clearly established law."[132] Plaintiffs in § 1983 claims will only have to prove that a prosecutor had knowledge of the Constitution and violated the rights of the plaintiff. By lightening the burden on plaintiffs once they have reached this stage of the civil remedy process, there will actually be a chance for them to recover under the statute.

Additionally, employing this standard will deter prosecutorial misconduct, but not detract from the ability of prosecutors to do their jobs. First, the cognitive biases associated with criminal prosecution—for example, the tunnel vision that occurs when a prosecutor is sure "he's got his guy"—could be diminished.[133] Even after exoneration, research has shown that prosecutors tend to have a persistent belief in a defendant's guilt.[134] Yet any prosecutor who has reached the stage of being a defendant in a § 1983 claim must have some self-doubt. Knowing that such claims are a possibility, prosecutors may self-impose a way of neutralizing biases, such as by reviewing cases "from the perspective of defense counsel in search of reasonable doubt."[135] Second, district attorneys' offices, in order to avoid such lawsuits that cast doubts on the credibility and ethics of the office as a whole, may implement training to help mitigate bias.[136] Internal and external reviews of prosecutor actions may also provide an "additional debiasing mechanism," even through simple steps such as encouraging "informal debate."[137]

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[132] Harlow, 457 U.S. at 815-16.
[133] *Id.* at 388.
[134] Alafair S. Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 518 (2007) ("In many of the recent exoneration cases, for example, prosecutors have continued to insist that the exonerated defendant is guilty, even when exculpatory DNA evidence undermines the government's initial case.")
[135] Colin Wastell et al., *Identifying Hypothesis Confirmation Behaviors in a Simulated Murder Investigation: Implications for Practice*, 9 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 184, 196 (2012).
[136] *See* Burke, *supra* note 134, at 522-23.
[137] Yakren, *supra* note 119, at 390.

At first glance, these additional steps in the process of prosecuting may seem tedious. However, they will not diminish the ability of a prosecutor to perform his or her job well. On the contrary, the technique of looking at a case from the defense side "has the virtue of advancing good, basic lawyering skills."[138] Informal debate will also help prosecutors prepare for trial, allowing them to anticipate the main arguments by defense counsel. Essentially, the trickle-down effect of applying an "objective reasonableness" standard to malicious prosecution claims under § 1983 will not only be to deter prosecutorial misconduct itself, but also improve the ability of prosecutors to achieve convictions through ethical and intelligent means.

MISCONDUCT DISCIPLINE UNDER THE ABA MODEL RULES

The ABA Model Rules of Professional Conduct provide a number of ethical rules that lawyers are expected to follow in the practice of law.[139] Model Rule 3.8, titled "Special Responsibilities of a Prosecutor," details the additional responsibilities that prosecutors have in their practice of law.[140] "The distinctive rule for prosecutors reflects a well-accepted normative understanding that, in some respects, prosecutors should conduct themselves differently from other lawyers."[141] Yet, "prosecutors have rarely been subjected to disciplinary action by state bar authorities."[142]

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[138] *Id.* at 389.
[139] American Bar Association (hereinafter ABA), *Model Rules of Professional Conduct: Table of Contents*, 2016, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.
[140] *Id.* at Rule 3.8, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor.html.
[141] Bruce A. Green, *Prosecutorial Ethics as Usual*, 5 UNIV. ILL. L. REV. 1573, 1576 (2003).
[142] 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

In one notable case, John Thompson was only weeks away from being executed for murder when an investigator found an exculpatory blood-evidence report in an obscure file.[143] After fourteen years on death row, Thompson was acquitted and sued the five prosecutors involved in his case under § 1983 for failing to disclose *Brady* evidence, but was unsuccessful.[144] What is particularly interesting about Thompson's case is that one of the five prosecutors on his case was actually disciplined by the attorney grievance system in place in Louisiana—"ironically, that prosecutor is Michael Riehlmann, the only one of the five who was not directly involved in prosecuting Thompson's case or implicated in any of the Brady violations that occurred and the only attorney to ever report the violations to Louisiana's Office of Disciplinary Counsel."[145]

The lack of discipline by state bar authorities in the *Thompson* case is not abnormal, but rather a typical reaction to misconduct.[146] This section argues that the main reason for that failure lies in the fact that neither Rule 3.8 of the Model Rules nor the accompanying comments set out clear and extensive examples of prosecutorial misconduct in line with case law. By updating the Rules to reflect cases of prosecutorial misconduct, it can be better avoided through state bar discipline.

Under Rule 3.8, the first responsibility of the prosecutor is to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[147] It goes almost without saying that "it would be unfair for a prosecutor to subject someone who is innocent, or who is expected to be acquitted, to the burdens of an indictment and criminal trial."[148] But Rule 3.8 does

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203 (2011), http://www.yalelawjournal.org/forum/the-myth-of-prosecutorial-accountability-after-connick-v-thompson-why-existing-professional-responsibility-measures-cannot-protect-against-prosecutorial-misconduct.
[143] Connick v. Thompson, 563 U.S. 51, 53 (2011).
[144] *Id.*
[145] Keenan, *supra* note 142, at 205.
[146] *Id.*
[147] ABA, *supra* note 140.
[148] Green, *supra* note 141, at 1588.

not set limits to a prosecutor's discretion on whether to prosecute, nor does it "incorporate other limits recognized in constitutional decisions."[149] To improve the rule, it or the commentary could discuss, for example, instances similar to those where absolute immunity is denied to prosecutors as also being violations of the rule—"where a prosecutor has linked his authorized discretion to initiate or drop criminal charges to an unauthorized demand for a bribe, sexual favors, or the defendant's performance of a religious act."[150] It is true that Model Rule 8.4, "Misconduct," discusses sexual harassment, crimes of moral turpitude, and discrimination as being forms of misconduct, and prosecutors are subject to this rule as well.[151] These are clearly defined forms of misconduct, but other ways in which prosecutors should conduct themselves are less clear. "Over ninety percent of federal criminal prosecutions result in guilty pleas, yet the Model Rule nowhere explains how prosecutors should conduct themselves in plea negotiations."[152] Though it would be unfair to indict someone knowing they are innocent, the rules do not "prohibit a prosecutor who wishes to gain leverage in plea negotiations from filing a charge he has no intention of bringing to trial."[153]

Even with the clearly defined forms of misconduct, there is a distinct silence in both Rule 3.8 and Rule 8.4 about a prosecutor's duty to "confess error when a conviction has been procured through wrongful means or a duty to seek redress when post-trial evidence makes plain that an innocent person was convicted."[154] By including some specific examples of misconduct, along

[149] *Id.* at 1590.
[150] Bernard, *supra* note 39.
[151] ABA, *supra* note 140, at Comment on Rule 8.4, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4.html.
[152] Keenan, *supra* note 142, at 205.
[153] *Id.*
[154] Green, *supra* note 141, at 1591.

with more specific descriptions of proper conduct in Rule 3.8, and by including a duty to "confess error" in Rule 8.4, the Model Rules could be strengthened with respect to prosecutors.

Of course, any improvement to the Model Rules would be overshadowed by a lack of enforcement by state bar authorities in relation to prosecutorial misconduct. State disciplinary authorities have almost "unbridled discretion in deciding whether to pursue individual complaints."[155] Some states' disciplinary systems appear to not even have envisioned "complaints concerning prosecutorial misconduct."[156] Additionally, most states do not publish statistics for prosecutorial misconduct discipline.[157] Only Illinois publishes such data—and in 2010, there were ninety-nine complaints involving charges of prosecutorial misconduct.[158] Yet only *one* of those cases actually reached a formal hearing.[159]

Along with an improvement to the rules, vast improvement to their implementation is needed. Doing so requires effort on the part of everyone involved in the legal profession—it should not be only those who are wrongfully convicted or their family members who file grievances, but rather fellow prosecutors and even judges when they know that prosecutorial misconduct has occurred. One suggestion for improving the discovery of prosecutorial misconduct would be for state grievance committees to "undertake regular and randomized auditing of cases in their jurisdictions."[160] "Such a system of audits would contribute to prosecutors' incentives to

[155] Keenan, supra note 142, at 206.
[156] *Id.* ("In designing its disciplinary system, Georgia's bar officials apparently did not envision complaints concerning prosecutorial misconduct, which ordinarily would not be amenable to mediation.")
[157] *Id.*
[158] *Id.* (citing Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, Annual Report, 2010, http://www.iardc.org/AnnualReport2010.pdf.)
[159] *Id.*
[160] *Id.*

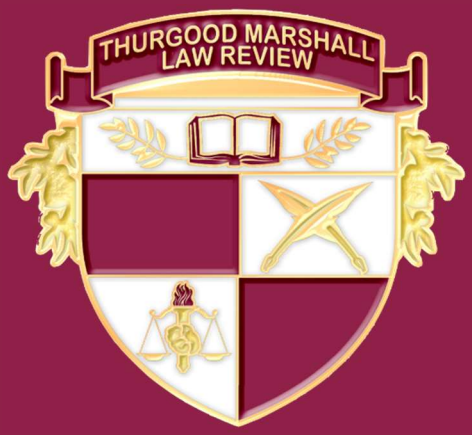
understand and comply with their legal and ethical obligations and serve a pedagogical role in educating prosecutors about the scope of those duties."[161]

Additionally, disciplining misconduct through the state bar authorities has the further incentive of preventing civil litigation. Where misconduct is discovered, if the state bar works to rectify the issue, there is a possibility that it will not result in a wrongful conviction. At the same time, where the possibility of a § 1983 lawsuit exists under the standards discussed in this paper, there is an incentive for the state bar authority to discipline misconduct so as to prevent such lawsuits. The two alterations to the consequences of prosecutorial misconduct will work as checks-and-balances to ensure that less misconduct occurs, especially such misconduct that results in wrongful convictions.

CONCLUSION

Prosecutorial misconduct is a serious problem in the legal profession. Wrongful convictions are often coming to light, revealing the years of damage that even one unjust action by a prosecutor causes. The solution to this problem involves allowing wrongfully convicted people to sue the prosecutors who performed misconduct on their cases under 42 U.S.C.S. § 1983, as malicious prosecution claims. These lawsuits are feasible only if prosecutorial immunity is limited to qualified immunity, and if the standard for determining malicious prosecution is limited to the "objective reasonableness" standard. A complementary part of this solution is improving the ABA Model Rules of Professional Conduct, and ensuring their enforcement. By making these changes, prosecutors will be more likely to refrain from misconduct and there will be fewer wrongful convictions.

[161] *Id.*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