THROWING THE DEFENDANT INTO THE SNAKE PIT: APPLYING A STATE-CREATED DANGER ANALYSIS TO PROSECUTORIAL FABRICATION OF EVIDENCE

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INTRODUCTION

In 1978, two teenagers, Curtis McGhee and Terry Harrington, were convicted of a murder they did not commit and sentenced to life in prison.[1] Twenty-six years later, the Iowa Supreme Court vacated Harrington's conviction and granted both petitioners new trials after discovering that prosecutors had induced the primary witness's testimony, with the knowledge that it was false.[2] The two prosecutors had investigated the murder alongside the police from the outset of the case, interviewing witnesses before any arrests were made or charges were filed.[3] The prosecutors later admitted that they disregarded exculpatory evidence throughout the investigation and supplied their primary witness with facts about the murder to help fill the gaps in his story.[4] The witness revealed that he had no personal knowledge of the murder and gave false testimony inculpating Harrington and McGhee in exchange for a monetary reward and the prosecutors' promise that they would not charge him with the murder.[5]

McGhee and Harrington were released in 2003 after each serving twenty-six years in prison. Both subsequently brought § 1983 actions against the prosecutors and officers involved in the investigation and prosecution, alleging, among other things, that the state officials used false and fabricated testimony and withheld exculpatory evidence, depriving McGhee and Harrington of their liberty in violation of the Fourteenth Amendment.[6]

The district court rejected the prosecutors' assertion of absolute immunity.[7] Instead, the court held that the prosecutors were entitled at most to qualified immunity because they acted as investigators, rather than as advocates, in

[1] McGhee v. Pottawattamie Cnty. (*Pottawattamie I*), 475 F. Supp. 2d 862, 874, 887 (S.D. Iowa 2007), *aff'd*, 547 F.3d 922 (8th Cir. 2008), *cert. dismissed*, 130 S. Ct. 1047 (2010).

[2] *Id.* at 886-87 (finding that the witness's story had changed many times during questioning and that both the police and prosecutors admitted to coaching the witness in developing his testimony).

[3] Brief for Respondents at 15, Pottawattamie Cnty. v. Harrington, 130 S. Ct. 1047 (2010) (No. 08-1065) (stating that one of the prosecutors was present at nearly every interview with the state's primary witness).

[4] *Id.* at 8 (admitting further to personally taking the witness to the crime scene multiple times to help him reconstruct the story).

[5] McGhee v. Pottawattamie Cnty. (*Pottawattamie II*), 547 F.3d 922, 928 (8th Cir. 2008).

[6] *Id.*

[7] *Pottawattamie I*, 475 F. Supp. 2d at 894.

eliciting false testimony prior to the filing of criminal charges.[8] The Eighth Circuit affirmed in large part.[9] In doing so, the court dived squarely into the growing controversy over whether a prosecutor's pre-trial fabrication of evidence can stand as a cognizable constitutional violation under § 1983.[10] Judge Easterbrook, writing for the Seventh Circuit, concluded that it could not,[11] and the Third Circuit followed suit.[12] The Second Circuit, however, strenuously disagreed, reasoning that individuals have a substantive due process right not to be deprived of liberty as a result of a prosecutor's fabrication of evidence.[13]

Under the Seventh Circuit's analysis, fabricating witness testimony does not, standing alone, infringe upon the defendant's constitutional rights, and thus there is no prima facie § 1983 case.[14] Further, the prosecutor's use of the fabricated evidence at trial is shielded by absolute immunity because a prosecutor acts as an advocate for the State when presenting evidence during a trial.[15] An individual convicted on the basis of fabricated evidence thus has no remedy under § 1983 – *fabrication* of evidence before trial does not violate his constitutional rights, and *use* of the fabricated evidence at trial is shielded from suit by absolute immunity.

The Supreme Court granted the prosecutor's petition for certiorari in *Pottawattamie County* for the 2009-2010 Term, and many observers expected the Court to resolve the circuit disagreement over the issue. The parties argued before the Court but reached a $12 million settlement before a decision was released,[16] leading the Court to dismiss the case without resolving the conflicting circuit approaches.[17] Meanwhile, studies continue to document the pervasive prosecutorial misconduct present in wrongful convictions.[18] Yet

[8] *Id*. at 893-94.

[9] *Pottawattamie II*, 547 F.3d at 933.

[10] *Id*. at 932-33.

[11] Buckley v. Fitzsimmons (*Buckley II*), 20 F.3d 789, 794 (7th Cir. 1994).

[12] Michaels v. New Jersey, 222 F.3d 118, 122 (3d Cir. 2000) (emphasizing that although this rule would leave § 1983 plaintiffs "without recourse," the policy concerns underlying absolute immunity were more important).

[13] Zahrey v. Coffey, 221 F.3d 342, 349 (2d Cir. 2000) ("[T]he right at issue is a constitutional right, provided that the deprivation of liberty of which [the petitioner] complains can be shown to be the result of [the prosecutor's] fabrication of evidence.").

[14] *Buckley II*, 20 F.3d at 795 (hypothesizing that confessions extracted through torture but kept in a drawer and never used in a criminal prosecution would not allow the individual implicated in the confession to sue under § 1983).

[15] *Id.*

[16] Associated Press, *Deal in Case of Prosecutorial Immunity*, N.Y. TIMES, Jan. 4, 2010, http://www.nytimes.com/2010/01/05/us/05scotus.html.

[17] Pottawattamie Cnty. v. McGhee (*Pottawattamie III*), 130 S. Ct. 1047 (2010).

[18] The Center for Public Integrity conducted a large-scale study of prosecutorial misconduct between 1970 and 2002, reporting that of the 11,452 documented appeals alleging prosecutorial misconduct, 2,012 cases produced reversals or remanded indictments

victims of the misconduct, individuals wrongfully deprived of liberty, have virtually no private remedy, given the broad scope of prosecutorial immunity currently recognized by the Supreme Court.[19]

In this Note, I will apply a "state-created danger" analysis to justify § 1983 liability for a particularly egregious type of misconduct: prosecutors who fabricate evidence while investigating a criminal case and later use the falsified evidence at trial to secure a conviction. Under the current formulation of the "state-created danger" theory, courts permit § 1983 plaintiffs to allege a substantive due process violation when a state actor acts affirmatively and with a culpable state of mind to create an opportunity for harm by a *private* third party, where the harm actually results. I will argue that the doctrine, premised on the State's culpability for exposing individuals to a serious and foreseeable harm, provides a parallel framework for finding an independent substantive due process violation in a prosecutor's act of fabricating evidence prior to the establishment of probable cause.

In Part I, I will discuss the Supreme Court's formulation of prosecutorial immunity and the functional test currently used to distinguish acts entitled to absolute immunity from those that merely receive qualified immunity. In particular, I will examine the Court's rationale for conferring absolute immunity on actions directly linked to the judicial process, as well as how prosecutorial fabrication of evidence in the pre-trial stage illuminates some of the weaknesses of the functional test. In Part II, I will lay out the current circuit split over whether pre-trial fabrication of evidence is covered by the Supreme Court's absolute immunity doctrine. I will argue that the Second and Eighth Circuits' reasoning is doctrinally inconsistent with the Court's functional test. This points to the need for a new framework for analyzing pre-trial fabrication of evidence. In Part III, I will discuss the "state-created danger" theory of recovery in § 1983 litigation and suggest that it serves as a possible way of establishing a substantive due process violation in a prosecutor's pre-trial conduct itself. In Part IV, I propose a state-created

– a harmful error rate of 17.6%. CENTER FOR PUBLIC INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS 2 app. at 108-09. In thousands of other cases, the appellate court found prosecutorial misconduct but held that they amounted to harmless error. *Id.* Of the 2,012 cases in which the misconduct was deemed a harmful error, only forty-four prosecutors were disciplined and none were ever criminally punished. *Id.* The Innocence Project also recently published a report documenting the effect of prosecutorial misconduct in the organization's first 255 DNA exoneration cases. Emily M. West, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 225 DNA Exoneration Cases*, INNOCENCE PROJECT 1 (Aug. 2010), http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf. It found that sixty-five of these cases alleged prosecutorial misconduct, with errors found in thirty-one cases (48%) and harmful errors leading to reversals found in twelve cases (18%). *Id.* at 2-3.

[19] *See infra* Part I.D-E.

danger test that would hold state actors who culpably fabricate evidence in the investigative stage of a case liable under § 1983 for the direct and foreseeable deprivation of the individual's liberty as a result of a wrongful conviction.

I. IMMUNITY UNDER § 1983

A. *The Historical Background to § 1983*

Adopted as part of the 1871 Civil Rights Act,[20] 42 U.S.C. § 1983 was Congress's Reconstruction-era response to racial violence against African Americans in the South.[21] Not only did § 1983 serve as a mechanism to enforce the Fourteenth Amendment's guarantee of due process, it represented a "revolutionary shift" in the legal relationships among individuals, states, and the federal government in the post-Civil War period.[22] By providing a civil remedy for the deprivation of constitutional rights, § 1983 sought to "interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[23] Section 1983 provides in pertinent part,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[24]

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[20] Act of April 20, 1871, ch. 22, 17 Stat. 13, 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2006)).

[21] *See* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 5 (1985) (observing that the 1871 Civil Rights Act "aimed specifically at the activities of the Ku Klux Klan"); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 73.

[22] Mitchum v. Foster, 407 U.S. 225, 242 (1972) (observing that the legislative history of § 1983 "makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights"); Blackmun, *supra* note 21, at 6 (observing that § 1983 gave individuals three new types of protections in the post-war period: "federal rights, federal remedies, and federal forums").

[23] *Mitchum*, 407 U.S. at 242 (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1879)); *see* CONG. GLOBE, 39TH CONG., 1ST SESS. 478-79 (1866) (statement of Sen. William Saulsbury) (warning that § 1983 would interfere with state officials' duties and flood the federal courts with petty cases).

[24] 42 U.S.C. § 1983 (2006).

For nearly one hundred years after the statute's enactment in 1871, § 1983 remained essentially dormant.[25] In particular, courts were divided as to whether they would read the "color of law" requirement of § 1983 to confine federal court review to authorized state conduct, rather than any conduct taken under the premise of state authority.[26] In 1961, however, the Supreme Court ruled in the watershed case, *Monroe v. Pape*,[27] that police officers were liable under § 1983 for an unconstitutional search and seizure, emphatically rejecting the argument that § 1983 only reached official state action.[28] In reaching the decision to construe the "color of state law" requirement broadly, the Court held that the Reconstruction Congresses intended to provide a federal right of action in federal courts, anticipating that state agencies might be unwilling or unable to enforce the guarantees of the Fourteenth Amendment.[29] *Monroe* thus marked an important shift in § 1983 jurisprudence, and the number of § 1983 challenges after the 1961 decision correspondingly increased.[30]

B. *Absolute vs. Qualified Immunity*

At first glance, the notion of immunity for individuals sued under § 1983 seems contrary to the language of the statute, as the text on its face would appear to impute liability without exception.[31] No congressional intent to immunize certain individuals or actions from liability is apparent from the statute's legislative history.[32] Yet the Supreme Court has consistently rejected

[25] Blackmun, *supra* note 21, at 19 (finding that the number of Supreme Court cases involving § 1983 challenges prior to 1961 "can almost be counted on one hand").

[26] *Compare* United States v. Classic, 313 U.S. 299, 326 (1941) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."), *with* Screws v. United States, 325 U.S. 91, 141-42 (1945) (Roberts, J., dissenting) (arguing that § 1983 only provides a remedy against a state officer who claims state authority for his actions).

[27] 365 U.S. 167 (1961).

[28] *Id.* at 184, 187.

[29] *Monroe*, 365 U.S. at 180.

[30] Blackmun, *supra* note 21, at 19; *see* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 497 (1992); Johns, *supra* note 21, at 74.

[31] Various Supreme Court justices have argued unsuccessfully for a literal reading of the statute that forecloses immunity for any official or function. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting) (arguing against immunity for judges); Tenney v. Brandhove, 341 U.S. 367, 382-83 (1951) (Douglas, J., dissenting) (arguing against immunity for legislative committee members).

[32] *See Pierson*, 386 U.S. at 559-60 (arguing that the legislators who passed § 1983 were aware that the courts were often involved in denying certain individuals their civil rights and thus would not have approved of judicially-created exceptions to liability); Achtenberg, *supra* note 30, at 502-11 (observing that the legislative history of § 1 of the Civil Rights Act of 1871, from which § 1983 was derived, did not contain a single sentence suggesting that certain defendants would be immune from liability).

this literal reading, finding that "immunities 'well grounded in history and reason' ha[ve] not been abrogated 'by covert inclusion in the general language' of § 1983."[33] Rather, though the Court concedes that § 1983 created a new type of tort liability, the Court continues to interpret the statute in light of the common law immunities existing at the time of the statute's adoption, reasoning that Congress would have explicitly stated otherwise if it intended to abolish them.[34]

Two types of immunity have developed in § 1983 jurisprudence: absolute immunity and qualified immunity. They differ in procedural posture as well as the type of conduct and officials covered.[35] A valid assertion of absolute immunity bars a claim entirely.[36] Qualified immunity, on the other hand, is an affirmative defense that only shields conduct that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[37] As later discussed in Parts I.C and I.D, the Supreme Court has limited absolute immunity to activities closely associated with three categories of state actors who had immunity at common law: legislators, judges, and prosecutors. For all other government officials, the Court continues to presume that qualified immunity offers sufficient protection from liability.[38] Qualified immunity, reasoned the Court, achieves the "best attainable accommodation" between vindicating victims of abuse and minimizing the societal costs of excessive litigation.[39] Thus, the presumption is that qualified immunity suffices to protect state officials and that the burden to establish absolute immunity rests with the official seeking it.[40] Over the years, the Court has considered and declined to extend absolute immunity to activities undertaken by police officers,[41] governors, and most state executive officials.[42]

[33] Imbler v. Pachtman, 424 U.S. 409, 418 (1976) (quoting *Tenney*, 341 U.S. at 376).

[34] *Id.* at 417-18; *Pierson*, 386 U.S. at 554.

[35] *Imbler*, 424 U.S. at 419 n.13; *see* Johns, *supra* note 21, at 77 (observing that while judicial, legislative, and prosecutorial functions enjoy absolute immunity, most other executive officers enjoy only qualified immunity).

[36] *Imbler*, 424 U.S. at 419 n.13.

[37] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[38] Burns v. Reed, 500 U.S. 478, 486-87 (1991).

[39] *Harlow*, 457 U.S. at 814 (reasoning that the requirements of qualified immunity would weed out claims that were not meritorious).

[40] *Burns*, 500 U.S. at 486-87.

[41] *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 341 (1986) (holding that police officers have qualified immunity in seeking arrest warrants); Pierson v. Ray, 386 U.S. 547, 557 (1967) (holding that police officers have qualified immunity for false arrests).

[42] Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (holding that executive branch officers generally only have qualified immunity).

C. *Importing Common Law Immunities into § 1983*

The Court has, however, preserved common law immunity for three categories of officials: legislators,[43] judges,[44] and grand jurors.[45] Three general observations can be drawn from the immunities afforded these officials. First, the Court has repeatedly emphasized that the immunity the parties seek must be rooted in the common law.[46] Because the statute on its face admits of no immunities, the Court has always preceded the inquiry into available immunities by searching for identical or analogous immunities in the English and American legal traditions. Second, the immunity must be justified as essential to the exercise of an official's independent decision-making power.[47] In choosing between the policies of providing judicial recourse for injured parties and state officials, the Court stresses that the public benefit will not be served if certain state actors do not feel free to execute their legitimate public duties. Finally, the Court carefully limits the reach of absolute immunity to conduct undertaken within the official scope of the position.[48]

D. *Prosecutorial Immunity and the Functional Test*

The Court had its first opportunity in 1976 to consider whether state prosecutors should enjoy the same immunity afforded legislators, judges, and grand jurors in § 1983 suits in *Imbler v. Pachtman*.[49] In concluding that they should, the Court provided a detailed account of the common law history of prosecutorial immunity and the policies animating its decision in light of present-day realities.[50]

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[43] Tenney v. Brandhove, 341 U.S. 367, 372-76 (1951) (tracing the tradition of protecting a legislator from civil liability and impeachment from the English Bill of Rights to the Articles of Confederation, the U.S. Constitution, and the vast majority of state constitutions).

[44] *Pierson*, 386 U.S. at 553-54 (recognizing the long-standing English and American traditions of granting immunity to judges, reasoning that they had to be able to exercise independent judicial decision-making without fear of civil prosecution by the disgruntled losing party).

[45] Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976) (citing various state supreme courts' adoption from English courts of grand juror immunity, such as that elaborated in *Floyd v. Barker*, [1608] 77 Eng. Rep. 1305, 1308); *see, e.g.*, Turpen v. Booth, 56 Cal. 65, 67 (1880); Hunter v. Mathis, 40 Ind. 356, 357-58 (1872).

[46] Burns v. Reed, 500 U.S. 478, 493 (1991); *see* Malley v. Briggs, 475 U.S. 335, 339-40 (1986).

[47] *See Imbler*, 424 U.S. at 423 n.20.

[48] *See Pierson*, 386 U.S. at 553-54 ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts *committed within their judicial jurisdiction* . . . ." (emphasis added)); *Tenney*, 341 U.S. at 379 (holding that legislators have immunity when "acting in a field *where legislators traditionally have power to act*" (emphasis added)).

[49] 424 U.S. at 420.

[50] *Id.* at 421. *But see* Kalina v. Fletcher, 522 U.S. 118, 132 (1997) (Scalia, J.,

In *Imbler*, an individual whose petition for habeas corpus was granted after the district court found that the prosecutor used false testimony at trial subsequently brought a § 1983 suit against the prosecutor, alleging that he intentionally introduced false witnesses at trial and withheld exculpatory evidence.[51] After noting the immunities already recognized for legislators, judges, and grand jurors, the Court found that prosecutors also enjoyed immunity at common law for initiating criminal proceedings in malicious prosecution suits.[52] The Court reasoned that the "functional comparability" of prosecutors to judges in their exercise of discretionary judgment logically justified extending judicial immunity to prosecutors.[53]

Most importantly, however, the Court identified several policy reasons to give prosecutors the benefit of absolute immunity, rather than the qualified immunity granted police officers and other executive officials.[54] First, the threat of § 1983 suits, protected only by qualified immunity, would undermine a prosecutor's performance and the public's trust in his ability to exercise independent judgment in bringing suits to trial.[55] Second, given that disgruntled defendants might have a greater incentive to bring suit if a prosecutor only had qualified immunity, the Justices worried that a prosecutor's attention would be diverted away from his law enforcement duties and toward defending allegations of misconduct.[56] Defending against these allegations would result in a "virtual retrial of the criminal offense" before a jury unfamiliar with the original trial proceedings.[57] Third, the Court explained that other checks in the system, such as the threat of criminal and professional sanctions, would adequately deter misconduct.[58] While acknowledging that such immunity effectively deprived malicious prosecution victims of their only means of civil redress, the Court concluded that it chose

concurring) (arguing that absolute prosecutorial immunity did not exist at the time § 1983 was adopted and that the modern public prosecutor, who would have been considered "quasi-judicial," would receive the modern equivalent of qualified immunity).

[51] *Imbler*, 424 U.S. at 414-16.

[52] *Id*. at 421.

[53] *Id*. at 423 n.20.

[54] *See* Wood v. Strickland, 420 U.S. 308, 322 (1975) (holding that school officials were entitled only to qualified immunity in implementing school disciplinary policies); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (granting a state governor and other executive officers qualified immunity to varying degrees based on the "discretion and responsibilities of the office"); Pierson v. Ray, 386 U.S. 547, 555-57 (1967) (distinguishing a police officer's § 1983 defenses of "good faith and probable cause" from a judge's or legislator's absolute immunity).

[55] *Imbler*, 424 U.S. at 424-25.

[56] *Id*. at 425.

[57] *Id*.

[58] *Id*. at 429 ("[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.").

the lesser of two evils by allowing prosecutors to defend "vigorously" the public's interest in the criminal justice system.[59]

Absolute immunity for prosecutors is not without limits, however. The Court in *Imbler* adopted a functional test to determine whether the challenged conduct properly fell within the scope of absolute immunity. The test holds that a prosecutor enjoys absolute immunity only when he functions as an advocate for the state.[60] As a general matter, a prosecutor acts as an advocate when his activities exhibit an "intimate" relationship with the judicial aspect of the criminal process.[61] Though *Imbler* only held that "initiating a prosecution and . . . presenting the State's case" constituted advocacy, it also contemplated that a prosecutor's responsibilities could be investigatory or administrative in nature.[62] Prosecutorial actions serving these functions, the Court suggested, might receive less protection than absolute immunity.[63]

The Court did not immediately draw lines between the prosecutor's investigatory, administrative, and prosecution-initiating functions, however.[64] Only fifteen years later, in *Burns v. Reed*,[65] did the Court first attempt to distinguish the types of activities that are advocatory from those that are not.[66] Since then, the Court has considered the issue with increased frequency, perhaps responding to the heightened media scrutiny of prosecutorial conduct in the context of wrongful convictions, as well as to criticism that the other checks in the system envisioned in *Imbler* simply have not worked to deter misconduct.[67]

E. *Investigative vs. Advocatory Prosecutorial Acts: Current Law*

A survey of post-*Imbler* case law discussing the line between investigative and advocatory acts reveals several factors driving the Court's decisions to

[59] *Id*. at 427; *see* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

[60] *Imbler*, 424 U.S. at 430 ("We agree with the Court of Appeals that [the prosecutor's] activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force.").

[61] *Id*.

[62] *Id*. at 431 n.33.

[63] *See id.* at 430-31.

[64] *Id*. at 431 n.33.

[65] 500 U.S. 478 (1991).

[66] *Id.* at 492-93 (holding that appearing at a probable cause hearing is closely connected to the judicial process, "since the issuance of a search warrant is unquestionably a judicial act," but that giving legal advice to the police during the investigation of the case is too attenuated from the judicial process to count as advocatory).

[67] *See* John Terzano, *Failing to Punish Prosecutorial Misconduct Only Invites More*, HUFFINGTON POST (Feb. 24, 2010, 11:53 AM), http://www.huffingtonpost.com/john-terzano/failing-to-punish-prosecu_b_474875.html; CENTER FOR PUBLIC INTEGRITY, *supra* note 18, at i (reporting that of the more than two thousand cases of prosecutorial misconduct since 1970 in which a reviewing court found harmful error, disciplinary action commenced only forty four times, resulting in merely two disbarments).

confer either absolute or qualified immunity in § 1983 suits against prosecutors.

First, the Court tends to examine whether the specific prosecutorial act challenged parallels an act performed by another individual in the criminal process and, if so, whether that individual receives absolute or qualified immunity for his act. In *Buckley v. Fitzsimmons* (*Buckley I*),[68] the Court highlighted the traditional distinction between a police officer's role in gathering the evidence necessary to make a showing of probable cause to arrest and an advocate's role in evaluating the evidence after it has been gathered to prepare for trial.[69] Since police officers are entitled to qualified immunity only for their evidence-gathering activities, the Court reasoned that a prosecutor whose conduct was functionally equivalent to that of a police officer logically should receive the same immunity protection.[70] In *Kalina v. Fletcher*,[71] the Court found that prosecutors are entitled to qualified immunity only when they submit false factual information in a certification used to obtain a warrant for the defendant's arrest, as complaining witnesses traditionally performed the act of certification.[72] Thus, although prosecutors in this jurisdiction routinely made the certifications necessary for a warrant, because the prosecutor acted as the functional equivalent of a complaining witness, who was only entitled to qualified immunity at common law, the prosecutor was acting in an investigative, rather than advocatory, role. [73]

Second, borrowing the general, pre-*Imbler* reasoning that absolute immunity protects the judicial process, the Court has indicated that the further removed the challenged conduct is from judicial proceedings, the less likely that absolute immunity applies.[74] For example, in *Burns v. Reed*,[75] the Court held

[68] 509 U.S. 259 (1993).

[69] *Id.* at 273 (emphasizing that a prosecutor is entitled to absolute immunity only for certain functions, and that for other actions, qualified immunity "'represents the norm'" (quoting Malley v. Briggs, 475 U.S. 335, 340 (1986))).

[70] *Id.* ("When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973))); *see id.* at 276 ("When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.").

[71] 522 U.S. 118 (1997).

[72] *Id.* at 130-31.

[73] *Id*. at 129 (finding that though state law required the certification to be made under penalty of perjury, neither state nor federal law required the *prosecutor* to do so); *Malley*, 475 U.S. at 340-41 (observing that complaining witnesses were not afforded absolute immunity at common law).

[74] *See Malley*, 475 U.S. at 342-43 (affirming the inquiry into the challenged act's association with the judicial process "because any lesser degree of immunity could impair the judicial process itself"); Briscoe v. LaHue, 460 U.S. 325, 334-35 (1983) ("The central focus of our analysis [of absolute immunity in § 1983 suits] has been the nature of the

that prosecutors were absolutely immune for making false statements at judicial hearings and before any tribunal that served a judicial function.[76] Since the issuance of a search warrant is a judicial act, appearing before a magistrate at a probable cause hearing or other pretrial court appearance to obtain the warrant is sufficiently connected to the judicial process to justify absolute immunity.[77] The act of giving legal advice to the police, on the other hand, is attenuated from judicial proceedings and thus triggers only qualified immunity.[78] Similarly, in *Van de Kamp v. Goldstein*,[79] the Court found that absolute immunity covered the district attorney's failure to train and supervise adequately the prosecutor who did not turn over impeachment evidence concerning the State's primary witness, as these administrative obligations were directly connected to the prosecutor's conduct at trial.[80]

Third, in *Buckley I*,[81] the Court drew a temporal line, holding that prosecutorial acts undertaken before the establishment of probable cause to arrest will not be considered advocatory.[82] Acts taken after establishing probable cause, however, are not *per se* absolutely immune, as the functional, not the temporal, test still controls.[83] Thus, because the district attorney's alleged fabrication of evidence in *Buckley I* took place well before he had probable cause to arrest or to initiate criminal proceedings, he was only entitled to qualified immunity.[84] *Buckley I* suggests that while the probable cause line is not dispositive of the immunity issue, the Court will closely scrutinize absolute immunity claims when the challenged prosecutorial act occurs prior to a judicial finding of probable cause.

The Court has not ruled, however, on whether a prosecutor's subjective purposes for acting play a role in determining whether his actions are advocatory or investigative. In *Al-Kidd v. Ashcroft*,[85] the Ninth Circuit reasoned that the functional test should not merely be "a formalistic taxonomy

judicial proceeding itself.").

[75] 500 U.S. 478 (1991).

[76] *Id.* at 489-90.

[77] *Id.* at 492 (observing, however, that petitioner only challenged the prosecutor's *participation* in the probable cause hearing). Justice Scalia disagreed with the majority's framing of the issue, as he thought the petitioner challenged both the prosecutor's participation and his in-court statements at the hearing and thus would not have found absolute immunity. *Id.* at 504 (Scalia, J., concurring in part).

[78] *Id.* at 494 (majority opinion).

[79] 129 S. Ct. 855 (2009).

[80] *Id.* at 862.

[81] 509 U.S. 259 (1993).

[82] *Id.* at 274 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.").

[83] *Id.* at 274 n.5.

[84] *Id.* at 275 (observing further that there was no evidence that a common law immunity existed for fabricating evidence during a preliminary investigation).

[85] 580 F.3d 949 (9th Cir. 2009), *rev'd*, 131 S. Ct. 2074 (2011).

of acts that are inherently either prosecutorial or investigative, regardless of what each act is really serving to accomplish."[86] Instead, the court held that courts drawing the line between the two functions should inquire into the contested act's immediate purpose, citing the Supreme Court's characterization of the prosecutor's motive in *Buckley I*.[87] The Supreme Court, however, did not address the absolute immunity issue in *Al-Kidd*, merely holding that then-Attorney General John Ashcroft was entitled to qualified immunity because he did not violate clearly established law in authorizing federal prosecutors to seek material witness warrants as a pretext for detaining terrorist suspects.[88] Thus, the Ninth Circuit's "immediate purpose" inquiry, as well as its origins in the language of *Buckley I*, arguably could remain a factor in drawing the line between advocacy and investigation.

In the October 2011 Term, the Supreme Court heard oral arguments in *Rehberg v. Paulk*[89] and will again address whether a distinguishing factor used by a lower court to determine immunity is consistent with the functional test. The Eleventh Circuit held that a prosecutor and investigator are protected by absolute immunity for maliciously conspiring to fabricate a story about the defendant and subsequently telling that story to the grand jury under oath.[90] While stressing that "investigating and gathering evidence falls outside the prosecutor's role as an advocate," the Eleventh Circuit held that this case was different because the only evidence of the conspiracy to fabricate evidence was the investigator's later false grand jury testimony itself, and both the investigator and prosecutor were absolutely immune for that testimony.[91] Significantly, the court stated that no "particular discrete item of physical or expert evidence . . . was falsely created during the investigative stage to link the accused to a crime."[92] This suggests that a critical factor in drawing the

[86] *Id.* at 960.

[87] *Id.* at 962-63 (rejecting then-Attorney General John Ashcroft's argument that his authorization of federal prosecutors to obtain federal material witness warrants was an inherently prosecutorial act, and instead finding that these warrants were obtained as a pretext to investigate and preemptively detain terrorist suspects whom the prosecutors otherwise lacked probable cause to arrest, thus affording the prosecutors merely qualified immunity for the investigative activity).

[88] Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2085 (2011). The plaintiff failed to show that (1) Ashcroft violated a statutory or constitutional right, as the objectively reasonable arrests of the material witnesses pursuant to a validly obtained warrant were constitutional, or that (2) the right was "clearly established" at the time. *Id.* Because such valid arrests, even if pretextual, did not violate clearly established law, the Court did "not address the more difficult question whether [Ashcroft] enjoys absolute immunity." *Id.*

[89] 611 F.3d 828 (11th Cir. 2010), *cert. granted*, 131 S. Ct. 1678 (Mar. 21, 2011) (No. 10-788).

[90] *Id.* at 840-41.

[91] *Id.* at 841-42.

[92] *Id.* at 841 (distinguishing this case from *Buckley v. Fitzsimmons (Buckley I)*, 509 U.S. 259, 262-64 (1993), in which a prosecutor fabricated expert testimony, and other cases

line between investigation and advocacy is whether the plaintiff can point to discrete items of evidence fabricated during the investigative stage, which might be satisfied by evidence that the prosecutor induced witnesses to testify falsely at a judicial proceeding.[93]

The Eleventh Circuit's reasoning in *Rehberg*, if upheld by the Supreme Court, would appear to settle the issue raised in this Note, as evidence that a prosecutor coerced witnesses to testify falsely at a judicial proceeding would suggest he acted in an investigative function, thus only entitling him to qualified immunity. However, the petitioner focused on a separate issue in the case, arguing only that the investigator who presented false testimony before a grand jury was not entitled to absolute immunity.[94] Specifically, the Court will decide whether an investigating official who made false statements in his grand jury testimony that resulted in three indictments functioned as a "complaining witness," who, as discussed in *Kalina v. Fletcher*,[95] was "not absolutely immune at common law."[96] Thus, it appears that the Court's ruling in *Rehberg* is unlikely to disturb the current functional test analysis for prosecutors or reach the Eleventh Circuit's discrete evidence rationale.

II. THE CURRENT CIRCUIT SPLIT OVER WHETHER A PROSECUTOR IS LIABLE FOR PRE-TRIAL FABRICATION OF EVIDENCE

The Supreme Court has consistently held that the use of fabricated evidence against a criminal defendant violates his constitutional rights.[97] However, a prosecutor's liability for his role in securing a conviction based upon the fabricated evidence is generally very limited, as absolute immunity works to shield his decision to prosecute and presentment of evidence at trial from suit under § 1983.

The current circuit split over whether a prosecutor is liable for pre-trial fabrication of evidence reflects disagreement on two separate but interrelated issues: (1) whether the act of fabricating evidence is itself a constitutional

where prosecutors fabricated physical evidence such as bootprints or crime tools).

[93] *Id.* at 842 n.10 (noting that there were no allegations in this case that the prosecutor "convinced another witness to testify falsely about [the defendant's] involvement").

[94] Brief for Petitioner at i, Rehberg v. Paulk, No. 10-788 (U.S. filed June 9, 2011) ("Whether a government official who acts as a 'complaining witness' by providing false grand jury testimony leading to the initiation of a prosecution against an innocent citizen is entitled to absolute immunity – rather than qualified immunity – in a damages action under Section 1983 arising from the unjustified prosecution."); *id.* at 2 (arguing that under *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997), the investigator's actions as a complaining witness are entitled to qualified immunity, not absolute immunity).

[95] 522 U.S. 118 (1997).

[96] *Id.* at 127-28 n.14 (quoting Malley v. Briggs, 475 U.S. 335, 340 (1986)) (affirming that complaining witnesses "were subject to suit at common law").

[97] *See* Briscoe v. LaHue, 460 U.S. 325, 326 n.1 (1983); Pyle v. Kansas, 317 U.S. 213, 216 (1942).

violation and (2) whether absolute or qualified immunity should apply to the prosecutor who fabricates evidence.[98]

A. Buckley I *on Remand: A Catch-22 in the Seventh and Third Circuits*

Because *Buckley I* only held that the prosecutor's various acts prior to the establishment of probable cause were to be evaluated under qualified immunity, the question of whether the prosecutor could be sued at all was left for the Seventh Circuit to consider on remand. In *Buckley v. Fitzsimmons* (*Buckley II*),[99] Judge Easterbrook found that while coerced confessions violate the Constitution, the *witness* is the party whose rights are infringed, not the defendant against whom the confession was used.[100] Since rights are personal to the holder, a criminal defendant could not allege that the coercion, standing alone, violated his own constitutional rights.[101] The only injury the plaintiff suffered, therefore, was the prosecutor's decision to present the fabricated evidence at trial.[102] But because prosecutors clearly functioned in an advocate's role at trial, they were absolutely immune from liability. Thus, the plaintiffs had alleged no cognizable constitutional injury.[103]

Justice Fairchild's dissent in *Buckley II* argued for finding liability on a but-for theory of causation: Prosecutors would not be immune for their non-advocatory wrongful conduct if the § 1983 litigant could show that the indictment and trial would not have occurred but for the prosecutorial fabrication of evidence.[104] The majority, however, squarely rejected this

[98] The opinions in *Buckley I* addressed both issues, albeit in dicta. As to the first, while the majority did not decide whether prosecutorial fabrication of evidence itself established a constitutional violation, Justice Scalia's concurrence argued that the constitutional violation occurred only when the evidence is used at trial. Buckley v. Fitzsimmons (*Buckley I*), 509 U.S. 259, 281 (1993) (Scalia, J., concurring) ("I am aware of [] no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution."). On the second issue, Justice Kennedy stated that it would be anomalous that a prosecutor who falsified information in the pre-probable cause investigation could regain absolute immunity simply because a third party relied on the fabricated evidence to determine that probable cause existed. *Id.* at 287-88 (Kennedy, J., concurring in part and dissenting in part).

[99] 20 F.3d 789 (7th Cir. 1994).

[100] *Id.* at 794.

[101] *Id.* at 795 (hypothesizing that confessions extracted through torture and then kept in a drawer and never used in a criminal prosecution would not allow the individual implicated in the confession to sue under § 1983).

[102] *Id.* at 796 (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), which held that the "*use* of fabricated evidence at trial violates the Constitution without implying that the fabrication is an independent problem").

[103] *Id.* ("Just as there is no common law tort without injury, . . . there is no constitutional tort without injury." (citation omitted)).

[104] *Id.* at 800 (Fairchild, J., dissenting) (reasoning that prosecutors should not be immune

argument, finding that an unconstitutional act completed out of court can still be immunized by subsequent in-court activity.[105] The Third Circuit in *Michaels v. New Jersey*[106] subsequently adopted the Seventh Circuit's approach, holding that there was no constitutional violation in coercing witness testimony against the § 1983 plaintiff and that the presentation of the fabricated evidence before a grand jury was shielded by absolute immunity.[107]

B. *Reasonable Foreseeability in the Second and Eighth Circuits*

The Second Circuit disagreed in *Zahrey v. Coffey*,[108] reasoning that if the initial and subsequent wrongdoers were the same person, the misconduct should be treated as a single act.[109] While acknowledging that fabrication alone does not amount to a constitutional violation, the court held that an individual has a substantive due process right "not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity."[110] Even though absolute immunity covered the actual use of fabricated evidence, if a direct causal link could be established between the investigative-stage fabrication and the ultimate deprivation of liberty, the prosecutor was entitled to only qualified immunity.[111] The court explained that § 1983 was a species of tort liability that should be interpreted according to ordinary principles of causation.[112] Because it was "reasonably foreseeable" that a prosecutor acting in an investigatory capacity would later use the evidence in his advocatory role, the deprivation of liberty "was the legally cognizable result of [the prosecutor's] alleged misconduct in fabricating evidence."[113] That is, a prosecutor's wrongful use of the evidence at trial does not break the chain of causation linking the fabrication to the ultimate conviction secured by the evidence.[114]

from liability even though their pre-trial non-advocatory conduct "d[oes] not ripen into a § 1983 cause of action" prior to its use at trial).

[105] *Id.* at 796 (majority opinion).

[106] 222 F.3d 118 (3d Cir. 2000).

[107] *Id.* at 122-23.

[108] 221 F.3d 342 (2d Cir. 2000).

[109] *Id.* at 352 n.8 (observing, however, that the initial wrongdoer could avoid liability by showing that the intervening party would have undertaken the acts that caused the suspect's deprivation of liberty even without the wrongful conduct).

[110] *Id.* at 349.

[111] *Id.* at 353-54 ("It would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty.").

[112] *Id.* at 349-50; *see also* Monroe v. Pape, 365 U.S. 167, 187 (1961).

[113] *Zahrey*, 221 F.3d at 354.

[114] *Id.* at 351-52 (responding to the prosecutor's argument that the decision to use fabricated evidence at trial is an independent act that breaks the chain of causation, and emphasizing that there is no superseding cause if the initial wrongdoer deceives or unduly

The Eighth Circuit in *McGhee v. Pottawattamie County* (*Pottawattamie II*)[115] applied the Second Circuit's causation theory but simultaneously acknowledged that it was in tension with *Buckley II*.[116] The court denied the prosecutors absolute immunity because it found that manufacturing evidence prior to the filing of formal charges was not a distinctly prosecutorial function.[117] Further, the Eighth Circuit agreed with the district court's finding that it would make no sense to hold police officers liable for producing false evidence used to secure a conviction while exonerating a prosecutor who similarly fabricated evidence.[118]

C. *The Second Circuit's Problem: When Reasonable Foreseeability Collides with Immunity and the Functional Test*

In holding that a prosecutor is liable for pre-trial fabrication of evidence, the Second Circuit applied a proximate cause analysis to make a prosecutor responsible for all of the reasonably foreseeable consequences of his actions.[119] This reasoning, however, is doctrinally problematic, given the Court's continued adherence to the functional test for prosecutorial immunity. This points to the need for a new framework for holding prosecutors responsible for investigative-period fabrication that does not depend on the decisions they make in the course of their prosecutorial duties.

The functional test contemplates a distinction between investigative and advocatory acts and assigns immunities based on that distinction. Under a straightforward application of the functional test, presenting trial evidence is an undeniably advocatory role.[120] A prosecutor's decision to use fabricated evidence at trial is thus shielded by absolute immunity as one of the discretionary judgments he makes as an advocate for the State. As discussed in Part I.D, one of the purposes of the functional test is to protect the judicial process.[121] In applying the test, the Court has drawn the line between

pressures the intervening actor to act).

[115] 547 F.3d 922 (8th Cir. 2008).

[116] *Id.* at 932-33 (recognizing the tension between *Buckley II* and *Zahrey*).

[117] *Id.* at 933 (finding that prosecutors were entitled to absolute immunity only for distinctively prosecutorial acts).

[118] *Id.* at 932-33 (holding that the district court's conclusion was consistent with the Second Circuit's reasoning in *Zahrey*, 221 F.3d at 344, 349, that a constitutional violation exists when the prosecutor both fabricates the evidence and then uses it at trial).

[119] *Id*. at 349-51.

[120] *See* Buckley v. Fitzsimmons (*Buckley I*), 509 U.S. 259, 273 (1993) ("[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity."); Forrester v. White, 484 U.S. 219, 229 (1988).

[121] The premise of the functional test is that only actions "intimately associated with the judicial phase of the criminal process" are entitled to the protections of absolute immunity. Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

investigative and advocatory. In hindsight it may be possible to find a causal connection between many actions taken prior to and during a trial, where the prosecutor clearly acts as an advocate. Allowing a court to decide, *ex post*, that certain advocatory acts are actually extensions of investigative acts would eviscerate the functional difference between the two phases.

Further, the relationship between the State and the defendant shifts significantly after the initiation of criminal proceedings – from investigative to formally adversarial. This shift parallels the move from qualified to absolute immunity, in recognition of the importance of giving prosecutors discretion in initiating and presenting a case after formal proceedings commence without the fear of later liability.[122] The Court worried that without absolute immunity, time and information constraints inherent in the system would subject even honest prosecutors to colorable constitutional claims.[123] A reasonable foreseeability test undercuts the policy considerations justifying the different immunity levels granted to investigative and advocatory acts. The test makes prosecutorial acts traditionally protected by absolute immunity because of their uniquely adversarial nature subject to later judicial scrutiny, precisely what the functional analysis sought to prevent.

Supreme Court cases considering absolute immunity have consistently focused on whether the specific, challenged act in question was part of the prosecutor's advocatory or non-advocatory role. In *Kalina v. Fletcher*,[124] the Court found that a prosecutor who personally attested to false statements of fact in an affidavit supporting an arrest warrant application functioned as a complaining witness, distinguishing her actions from the "traditional functions of an advocate."[125] More recently, the Court, in upholding absolute immunity for supervising prosecutors in *Van de Kamp v. Goldstein*,[126] reasoned that their duties, though administrative, were directly linked to a prosecutor's trial conduct and concerned evidence presented at trial.[127] Thus, while it is tempting to apply a reasonable foreseeability test to hold a prosecutor responsible for fabricating evidence, it is doctrinally inconsistent with the Court's continued adherence to the functional test.

The Second Circuit's approach tries to get around the immunity issue by treating the prosecutor's pre-trial and trial conduct as a single act, but this proximate cause analysis squarely conflicts with the Court's established functional test for determining immunity. It cannot avoid adverting to a prosecutor's decisions at trial, where there is a strong argument for upholding

[122] *Id.* at 424-25.

[123] *Id.* at 425 (conceding that many of these mistakes would be made "inevitably").

[124] 522 U.S. 118 (1997).

[125] *Id*. at 131 (emphasizing that the court will "not depart from [its] prior cases that have recognized that the prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate").

[126] 129 S. Ct. 855 (2009).

[127] *Id.* at 862.

absolute immunity in order to guard the sanctity of judicial proceedings.[128] Thus, holding prosecutors responsible for fabricating evidence in the investigative period requires a new doctrine that fits into the current constitutional tort jurisprudence. I will argue that the state-created danger doctrine provides courts with a way of treating the act of fabrication as an independent ground for § 1983 liability.

III. THE STATE-CREATED DANGER APPROACH TO LIABILITY

A. *Overview of the Doctrine*

The state-created danger doctrine has developed over the past twenty years to hold state officials sued under § 1983 liable for their affirmative, culpable acts that expose individuals to a specific danger that results in harm caused by another person.[129] Typically, it has been invoked when a state official's actions put an individual at risk of injury by a private third party, for instance, when a police officer arrests a motorist but leaves his children behind in the car, or when a state social service worker knows about ongoing child abuse but takes no active steps to remove the child from the home. The doctrine hinges on the State's complicity in using its authority to create opportunities for a subsequent, direct, and foreseeable harm to occur.[130] State-created danger thus serves as a basis for alleging a substantive due process violation for the purposes of a § 1983 action.[131]

Traditionally, the Supreme Court has refused to read constitutional due process as imposing upon the State a general duty to aid citizens, even if such aid is necessary to securing life, liberty, or property.[132] In *DeShaney v. Winnebago County Department of Social Services*,[133] however, Chief Justice Rehnquist hinted at two possible exceptions, one of which subsequently became the basis for the state-created danger doctrine.[134] In *DeShaney*, the Court ruled that state officials could not be held liable under § 1983 for the death of a child after the State's child protection services returned him to his father's custody, despite knowing that the father had a history of abusing the

[128] *See* Briscoe v. LaHue, 460 U.S. 325, 334 (1983).

[129] *See* David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 REV. LITIG. 357, 357-58 (2001).

[130] Karen M. Blum, *Local Government Liability Under Section 1983*, *in* 2 SECTION 1983 CIVIL RIGHTS LITIGATION 7, 578-79 (PLI Litig. & Admin. Practice Course, Handbook Series No. H-749, 2006).

[131] *See, e.g.*, Pena v. DePrisco, 432 F.3d 98, 108 (2d Cir. 2005).

[132] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 317-18 (1980) (holding that the State does not have a duty to fund certain medical procedures that may be necessary to preserve life); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (finding that the government has no obligation to provide adequate housing).

[133] 489 U.S. 189 (1989).

[134] *Id.* at 198-99.

child.[135] Nevertheless, the Court discussed two possible exceptions to the general rule that the government has no obligation to protect individuals from private harm. Under the first, the so-called "special relationship" exception, the State has an affirmative duty to protect if it assumes custody over the individual against his will.[136] The Court observed that, here, the State had "played no part in [the danger's] creation, nor did it do anything to render [the child] any more vulnerable to them," and therefore the State "placed him in no worse position than that in which he would have been had it not acted at all."[137] Circuit courts have seized upon this language to justify a second, "state-created danger" exception as a basis for liability under § 1983.[138]

There are three components to the state-created danger theory of liability, though the circuits that recognize the doctrine assign varying weights to the three factors. Every state-created danger claim involves an individual who has (1) suffered a loss of liberty that was directly brought about by (2) a state-created danger that inflicted the foreseeable loss and (3) a state official who acted with a requisite degree of culpability.[139] Because the Supreme Court has never specified the contours of this doctrine, the various circuit courts that recognize it have fashioned different requirements necessary to make out the substantive due process violation.[140] As discussed below in Part III.C, the key factor underlying successful state-created danger claims is the State's culpability in the ultimate injury by exposing the individual to harm he otherwise may not have suffered. Judge Richard Posner honed in on this factor in a pre-*DeShaney* case discussing the State's complicity in placing a citizen in danger: "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."[141]

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[135] *Id*. at 191.

[136] *Id.* at 199-200.

[137] *Id.* at 201.

[138] *See, e.g.*, Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907 (3d Cir. 1997) (observing that "the state-created danger theory had its origins" in *DeShaney*); Wood v. Ostrander, 879 F.2d 583, 597 (9th Cir. 1989) (Carroll, J., dissenting) (arguing, four months after *DeShaney* was decided, that *DeShaney* now determined the criteria for alleging a § 1983 substantive due process violation claim under the Fourteenth Amendment).

[139] Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1174 (2005).

[140] *See* Matthew D. Barrett, Note, *Failing To Provide Police Protection: Breeding a Viable and Consistent "State-Created Danger" Analysis for Establishing Constitutional Violations Under Section 1983*, 37 VAL. U. L. REV. 177, 188-210 (2002) (surveying the different tests adopted in the circuits that recognize the state-created danger theory of liability and finding that the doctrine has developed haphazardly).

[141] Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982); *see also Wood*, 879 F.2d at 595-96 (finding that a police officer who left the female passenger of an impounded vehicle by the side of the road at night in a high-crime area was not entitled to the defense of

B. *Textual and Historical Support for the State-Created Danger Doctrine*

Some have argued that the state-created danger doctrine draws direct support from the text of § 1983. The wording of the statute imputes liability to any individual acting under the color of state law who "subjects, *or causes to be subjected*, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[142] This language suggests that state actions need not directly cause the constitutional harm in order to amount to an actionable § 1983 claim. Rather, as the state-created danger theory goes, official action that places an individual in a position where the actual cause of injury is likely to occur also falls within the scope of the statute.[143]

The Fifth Circuit cited the text of § 1983 to support this type of indirect causation. In *Morris v. Dearborne*,[144] a teacher fabricated a report alleging that a child was sexually molested, and the report was later used as the basis for removing the child from his parents' custody.[145] While the court found that the teacher was not the actual cause of the removal, it held that she could be liable for causing the child to suffer deprivation from a separate source:

> The district court . . . stated that direct participation is not necessary for liability under § 1983. Any official who "causes" a citizen to be deprived of her constitutional rights can also be held liable. The district court held that the requisite causal connection is satisfied if the defendant *set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights*. . . . We agree with the district court that in order to establish Dearborne's liability, the Plaintiffs must prove that she set in motion events that would foreseeably cause the deprivation of Plaintiff's constitutional rights.[146]

While the court does not explicitly mention the state-created danger doctrine, the elements it enumerates correspond to most circuits' requirements for liability under the doctrine: the official took some affirmative step that caused a direct and foreseeable deprivation of the individual's constitutional liberty.

The historical backdrop of § 1983 also reflects Congress's intent to impose liability for actions that indirectly cause a constitutional violation. As discussed in Part I.A, § 1983 was conceived as a civil rights statute aimed at

qualified immunity in a § 1983 suit she brought after being raped, because he affirmatively placed her in danger and then abandoned her).

[142] 42 U.S.C. § 1983 (2006) (emphasis added).

[143] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978) (acknowledging that Congress provided in the statute that "A's tort became B's liability if B 'caused' A to subject another to a tort").

[144] 181 F.3d 657 (5th Cir. 1999).

[145] *Id.* at 663.

[146] *Id.* at 672 (emphasis added).

targeting racially discriminatory conduct in the post-Civil War South. Section 1983 codified portions of the Ku Klux Klan Act of 1871, a statute originally aimed at private, rather than state, conduct.[147] In passing the Act, Congress examined significant portions of a 600-page report detailing the Klan's anti-African American activities and the local government's complicity in tolerating and even supporting the Klan's conduct.[148] Thus, the "causes to be subjected to" language in § 1983 can be interpreted as expressing Congress's concern with state conduct that allowed a third party to inflict constitutional harm and its corresponding desire to hold liable governmental actors for such actions.

C. *Elements of the State-Created Danger Doctrine*

Currently, all of the circuits except the First and Fourth recognize the state-created danger theory of liability in some form.[149] The courts, however, frame the doctrine in a number of ways.[150] At its core, the doctrine states that government actors can be held liable for affirmatively placing an individual in a position of danger he would not otherwise have been in.[151] In particular,

[147] Pruessner, *supra* note 129, at 375.

[148] *Id.*

[149] The First Circuit has, to date, rejected the state-created danger claim, though with some reluctance. It held in *Monahan v. Dorchester Counseling Center, Inc.* that even if a state official acted with willful indifference or recklessness, the official has not violated the Constitution, and as currently stated, the state-created danger doctrine "would convert most torts by state actors into constitutional violations." 961 F.2d 987, 991, 993 (1st Cir. 1992). The court also appeared to struggle with the doctrine in *Soto v. Flores*, however, observing that the "state-created danger theory is a difficult question" and proceeding to resolve the case on a different ground. 103 F.3d 1056, 1064 (1st Cir. 1997). The Fourth Circuit, on the other hand, firmly rejected the state-created danger doctrine in *Pinder v. Johnson*, arguing that "[i]t cannot be that the state 'commits an affirmative act' or 'creates a danger' every time it does anything that makes injury at the hands of a third party more likely." 54 F.3d 1169, 1175 (4th Cir. 1995). Otherwise, the court maintained, this right "would be implicated in nearly every instance where a private actor inflicts injuries that the state could have prevented." *Id.* at 1178.

[150] *See, e.g.*, Kennedy v. City of Ridgefield, 439 F.3d 1055, 1066 (9th Cir. 2006) (observing that it was well-settled that "state officials could be held liable where they affirmatively and with deliberate indifference placed an individual in danger she would not otherwise have faced"); *Soto*, 103 F.3d at 1064 (framing the theory as the "constitutional duty not to affirmatively abuse governmental power so as to create danger to individuals and render them more vulnerable to harm"); Kneipp v. Tedder, 95 F.3d 1199, 1209 n.22 (3d Cir. 1996) (describing the state-created danger theory as "contemplat[ing] some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense"); White v. Rochford, 592 F.2d 381, 383 (7th Cir. 1979) (finding a due process violation based on a state-created danger theory where "unjustified and arbitrary refusal of police officers to lend aid to children endangered by the performance of official duty . . . ultimately result[ed] in physical and emotional injury to the children").

[151] Joseph M. Pellicciotti, Annotation, *"State-Created Danger," or Similar Theory, as*

courts have focused on (1) whether the State took an affirmative step rather than simply failed to act at all; (2) whether the State caused the harm or increased the risk of harm; (3) whether the State acted with deliberate indifference to the known danger, sometimes characterized as whether the state actor acted with a degree of culpability that "shocks the conscience"; and (4) whether the harm was relatively direct and foreseeable.

1. Action vs. Inaction

Nine out of ten circuits as well as *DeShaney* itself require the § 1983 plaintiff to allege affirmative state conduct, as opposed to failure to act, in its prima facie case.[152] The Court in *DeShaney* reasoned that it traditionally interprets the Fourteenth Amendment's Due Process Clause as preventing the government from affirmatively abusing its power.[153] The requirement of due process is thus a limitation on state power and not an affirmative obligation to take action.[154] Because the government is not required to provide any services, it cannot be held liable for failing to protect an individual against privately inflicted violence.[155]

The line between action and inaction is exceedingly difficult to draw, however, and often turns on how far back one is willing to look to find an affirmative state act. Judge Posner's famous "snake pit" analogy illustrates how the difference may be one of perspective: while the State "failed to protect" the individual at the instance of harm, if, upon shifting the lens a few frames back, the State "puts [the person] in a position of danger," it has acted affirmatively.[156] Even the *DeShaney* court disagreed as to whether the Department of Social Services' action was affirmative: the dissent argued that the State's affirmative act was returning the child to his father despite knowing

Basis for Civil Rights Action Under 42 U.S.C.A. § 1983, 159 A.L.R. FED. 37, 37 (2000).

[152] *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 203 (1989); *Kennedy*, 439 F.3d at 1068; McClendon v. City of Columbia, 305 F.3d 314, 336-37 (5th Cir. 2002); Butera v. District of Columbia, 235 F.3d 637, 650 (D.C. Cir. 2001); Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1263 (10th Cir. 1998); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998); Wyke v. Polk Cnty. Sch. Bd., 129 F.3d 560, 569 (11th Cir. 1997); Dwares v. City of New York, 985 F.2d 94, 99 (2d. Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990).

[153] *See, e.g.*, Davidson v. Cannon, 474 U.S. 344, 348 (1986) (finding that the Due Process Clause of the Fourteenth Amendment was intended to prohibit the government from "employing [its power] as an instrument of oppression"); Parratt v. Taylor, 451 U.S. 527, 549 (1981) (Powell, J., concurring in result).

[154] Pruessner, *supra* note 129, at 363.

[155] *DeShaney* requires an "affirmative act" for both the "special relationship" and the "state-created danger" theories of liability. 489 U.S. at 194, 201. Under the first theory, the state performs an affirmative act simply by taking an individual into custody. *Id.* at 200. The *DeShaney* court disagreed, however, on what constituted an affirmative act. *Id.* at 203; *see infra* notes 157-158 and accompanying text.

[156] Bowers v. DeVito, 686 F.2d 616, 618-19 (7th Cir. 1982).

the risks of doing so,[157] while the majority held that the State's act was failing to protect the child as the father caused the ultimate harm.[158] Lower courts devising a state-created danger test have struggled to apply *DeShaney*'s affirmative act requirement,[159] with at least one court rejecting the notion that liability should be based on the "tenuous metaphysical construct which differentiates sins of omission and commission."[160]

2. Caused or Increased the Risk of Harm

A plaintiff alleging a state-created danger theory of liability must show that the State was the but-for cause in exposing him to the danger that ultimately led to the injury.[161] *DeShaney* used this factor to draw a distinction between cases that would and would not lead to state liability.[162] The Court in *DeShaney* did not specify the extent to which the State must be involved in creating the danger or vulnerability; it merely required that the State act in a way that puts the individual in a worse position than the one he would have been in had the state official failed to act at all.[163] Some lower courts have extended this reasoning to require that the government's action cut off potential sources of private aid and effectively remove a plaintiff's ability to

[157] *DeShaney*, 489 U.S. at 210 (Brennan, J., dissenting) (rejecting the argument that the State simply "'stood by and did nothing'" and instead arguing that the State "actively intervened in [the child's] life and, by virtue of the intervention, acquired ever more certain knowledge that [the child] was in grave danger").

[158] *Id*. at 203 (majority opinion).

[159] *Compare* Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (finding that the § 1983 plaintiff-decedent, who was murdered by her estranged husband after he was released from jail, would have stated a claim if she alleged that the police chief affirmatively increased her risk of being attacked), *with* Pinder v. Johnson, 54 F.3d 1169, 1175 (4th Cir. 1995) (holding that police officers did not act affirmatively by promising the § 1983 plaintiff that her boyfriend would be detained overnight and then releasing him immediately, after which he returned to the plaintiff's trailer and burned it down with her and her children inside).

[160] White v. Rochford, 592 F.2d 381, 384-85 (7th Cir. 1979) (holding a police officer who arrested the driver of a motor vehicle but left the children who were passengers in the car stranded on a highway liable for the children's physical and emotional injuries, as the court found little difference between "an intent to injure the children" and "a neglect of their safety").

[161] *See, e.g.*, Hart v. City of Little Rock, 432 F.3d 801, 805 (8th Cir. 2005) (requiring that the government's actions put the individuals "at significant risk of serious, immediate, and proximate harm"); Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996) (requiring that "the state actors use[] their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur"); Jeremy Daniel Kernodle, Note, *Policing the Police: Clarifying the Test for Holding the Government Liable Under 42 U.S.C. § 1983 and the State-Created Danger Theory*, 54 VAND. L. REV. 165, 182-83 (2001) (observing the disagreement amongst circuit courts over what is required to show causation).

[162] *DeShaney*, 489 U.S. at 200-01.

[163] *Id.* at 200.

defend himself.[164] Other courts interpret the requirement more broadly, focusing on the victim's increased vulnerability to danger as a result of the state's action.[165]

3. Culpability

The state-created danger theory requires the plaintiff to show that state officials acted with the requisite state of mind to work a constitutional deprivation. A mere three years before *DeShaney* and the birth of the state-created danger doctrine, the Supreme Court held that negligent acts could never violate the Due Process Clause.[166] However, the Court did not explicitly rule which states of mind beyond negligence might suffice to allege a procedural or substantive due process violation.[167]

In the immediate aftermath of *DeShaney*, state-created danger claims appeared to require, at a minimum, a showing that state officials acted with "deliberate indifference."[168] A state official acts with "deliberate indifference" when he knows the risk of harm and yet purposely ignores the risk.[169] "Deliberate indifference" may also be shown if the likelihood of a constitutional violation is so high that the risk of harm is obvious.[170] Some circuits have seized upon the Supreme Court's language in a subsequent non-state-created danger holding that in some situations "deliberate indifference" would not be sufficiently egregious to make out a due process violation, and a more stringent "shocks the conscience" standard would be required.[171] Nevertheless, the majority of courts merely require the plaintiff to show that

[164] Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1263 (10th Cir. 1998). *But see* Monfils v. Taylor, 165 F.3d 511, 517 (7th Cir. 1998) ("[T]here is no absolute requirement that all avenues of self-help be restricted.").

[165] *See, e.g.*, Reed v. Gardner, 986 F.2d 1122, 1126 (7th Cir. 1993); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990).

[166] Daniels v. Williams, 474 U.S. 327, 328 (1986) (adopting Justice Powell's concurring opinion in *Parratt v. Taylor*, 451 U.S. 527, 547 (1981), that deprivation in the due process sense requires more than a "negligent act"); Davidson v. Cannon, 474 U.S. 344, 348 (1986) (finding that the holding in *Daniels* is controlling and affirming that the Due Process Clause cannot be violated by the mere lack of due care).

[167] *Daniels*, 474 U.S. at 334 n.3.

[168] Oren, *supra* note 139, at 1194 (arguing that *DeShaney*'s analysis of the "special relationship" cases appeared to implicitly adopt the "deliberate indifference" standard required in other due process cases involving custody).

[169] Gish v. Thomas, 516 F.3d 952, 954 (11th Cir. 2008).

[170] Lewis v. City of West Palm Beach, Florida, 561 F.3d 1288, 1293 (11th Cir. 2009).

[171] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (holding that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'" and that the test for such conduct is that which shocks the conscience and violates the decencies of civilized conduct (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992))).

the state official acted with at least "deliberate indifference" to a known or obvious danger.[172]

4. Direct and Foreseeable Harm

Finally, courts considering a state-created danger claim conduct a proximate causation analysis to determine whether the injury that caused the deprivation was direct and foreseeable.[173] While this element often implies that the state official must have actual knowledge that a specific individual or class of individuals is faced with harm, at least one circuit has made it clear that foreseeability of harm is the ultimate test.[174] Courts analyzing this element look to see whether it was the state actor's "purpose" to bring about a specific result and whether a "reasonably trained" state actor would have concluded that the ultimate injury was a foreseeable consequence of his actions.[175]

IV. APPLYING A STATE-CREATED DANGER ANALYSIS TO PROSECUTORIAL FABRICATION OF EVIDENCE

Though the state-created danger doctrine addresses liability for state actors who expose individuals to harm by a *private* actor, its underlying rationale can also apply when a *state* actor causes the ultimate injury. For courts dealing with pre-trial prosecutorial fabrication of evidence, the doctrine provides a useful conceptual framework for viewing fabrication as an act that causes or significantly increases the risk of harm to the wrongfully convicted criminal defendant. Further, it provides a basis for finding a substantive due process violation that does not depend on the prosecutor's conduct at trial, where the prosecutor has traditionally enjoyed absolute immunity from suit.

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[172] *See, e.g.*, Huffman v. Cnty. of L.A., 147 F.3d 1054, 1059 (9th Cir. 1998) (finding that gross negligence is insufficient to allege a state-created danger claim and that the plaintiff must show that the State "'acted with deliberate indifference to a known or obvious danger'" (quoting L.W. v. Grubbs, 92 F.3d 894, 899-900 (9th Cir. 1996)); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 910 (3d Cir. 1997) (explaining that the state official must create a dangerous environment, must know that the environment is dangerous, and must have, at a minimum, acted with deliberate indifference). *But see, e.g.*, Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995) (requiring the plaintiff to show that the state official's action is so outrageous as to meet the "shock the conscience" standard); Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 531 (5th Cir. 1994) (finding that a § 1983 plaintiff must show that the State acted with the requisite degree of culpability or in a "conscience shocking" manner in failing to protect the plaintiff from the danger).

[173] *See* Lawrence v. United States, 340 F.3d 952, 957 (9th Cir. 2003); Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996).

[174] *Morse*, 132 F.3d at 914.

[175] *See, e.g.*, Estate of Smith v. Marasco, 318 F.3d 497, 507 (3d Cir. 2003) (holding that the fatal heart attack suffered by the plaintiff, who had a known post-traumatic stress disorder, was a foreseeable consequence of the police officers' actions of landing in a helicopter, turning on bright lights, breaking windows, and using tear gas).

A. *A Proposed State-Created Danger Test of Liability for Prosecutorial Fabrication of Evidence*

In this Part, I argue for recognizing an independent substantive due process violation in prosecutorial fabrication of evidence on the basis of the prosecutor's culpable use of state authority to increase significantly the risk of, and ultimately cause, deprivation of the convicted defendant's liberty. Modeled after a state-created danger claim, this proposed test would impute liability to any state actor who, in the investigative stage of a case, fabricates evidence that directly and foreseeably causes the defendant's subsequent deprivation of liberty as a result of a conviction at trial. At the same time, the test recognizes and attempts to accommodate the policy concerns contained in the Court's prosecutorial immunity jurisprudence.

Under the proposed test, in order to allege a state-created danger substantive due process claim based on a prosecutor's actions as an investigator, for which he is entitled to qualified immunity, a § 1983 plaintiff must show the following:

> (1) The prosecutor acted affirmatively;
>
> (2) The prosecutor used his authority to create a direct and foreseeable risk of harm to a specific individual that otherwise would not have existed and of which the prosecutor knew prior to the establishment of probable cause;
>
> (3) The prosecutor's pre-trial actions were the but-for cause of the plaintiff's deprivation of liberty; and
>
> (4) The prosecutor acted with deliberate indifference to the risk that the plaintiff would be wrongfully convicted.

1. Fabrication Is an Affirmative Act that Creates a Direct and Foreseeable Risk of Wrongful Conviction

When a prosecutor fabricates evidence, the use of that evidence at trial to secure a conviction that deprives a criminal defendant of liberty is both a direct and foreseeable consequence of his initial act. The Second Circuit acknowledged the likelihood that a prosecutor will use the false information before a grand jury to secure an indictment against the defendant, leading to the defendant's arrest and likely prosecution.[176] Presumably, a prosecutor fabricates evidence in the investigative stage of the case to obtain sufficient evidence to establish probable cause and initiate criminal proceedings against an individual.

Admittedly, many pre-probable cause actions taken by the prosecutor might increase the risk of harm to the potential § 1983 plaintiff, as the prosecutor's function in the case is to determine whether an indictment can be obtained or a criminal case be made against a suspected individual. Allowing prosecutors to

[176] Zahrey v. Coffey, 221 F.3d 342, 354 (2d Cir. 2000).

be sued each time their actions lead to an increased risk of harm to the criminal defendant may be crippling. What happens, for example, when a prosecutor uses contrary facts in the course of an investigation to test the witness's credibility or the consistency of a witness's story? Or, if a prosecutor makes a deal with a previously uncooperative witness to testify against another party in exchange for leniency? In both of these cases, the witnesses' prior inconsistent statements might be used as evidence of fabrication, and the prosecutor's actions in developing the testimony could be seen as an affirmative act that increases the risk of harm to the potential defendant.

Setting a more stringent requirement for the direct and foreseeable harm factor can limit the types of pre-probable cause acts that would subject the state actor to liability under the proposed test. As with state-created danger claims, certain risks would not be sufficiently egregious to trigger a constitutional violation.[177] The types of harms currently recognized in state-created danger claims are serious,[178] though death or severe injury is not necessarily required.[179] In the context of criminal trials, the Supreme Court has indicated that wrongful convictions constitute a serious harm and that a prosecutor has certain obligations to ensure that the final verdict is just.[180] Withholding evidence that is material to determining guilt or innocence, for example, violates the criminal defendant's right to due process.[181] Therefore, simply

[177] Oren, *supra* note 139, at 1189-92.

[178] *E.g.*, *Estate of Smith*, 318 F.3d at 509 (finding a triable issue of constitutional harm where the plaintiff, whom police officers knew had post-traumatic stress disorder, suffered a fatal heart attack after police officers confronted him at his home with an overwhelming show of force); Armijo v. Wagon Mound Pub. Sch., 159 F.3d 1253, 1264 (10th Cir. 1998) (finding a triable issue of constitutional harm where the plaintiff committed suicide after school officials, who knew of the plaintiff's suicidal tendencies, suspended him from school and drove him home, where the officials knew he had access to firearms, without notifying his parents); *Kneipp*, 95 F.3d at 1208-09 (finding a triable issue of constitutional harm where the plaintiff, whom police officers knew was intoxicated, suffered hypothermia and permanent brain damage after the police separated her from her husband and left her to walk home alone in the cold); Reed v. Gardner, 986 F.2d 1122, 1127 (7th Cir. 1993) (finding a triable issue of constitutional harm where motorists suffered injuries after colliding with a drunk driver, to whom police officers had earlier entrusted the vehicle after removing the sober driver); Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (permitting plaintiff to amend complaint after *DeShaney* to allege a state-created danger claim resulting from police officers refusing to enforce a restraining order against a husband who subsequently murdered his wife and daughter); Wood v. Ostrander, 879 F.2d 583, 589-90 (9th Cir. 1989) (finding a triable issue of constitutional harm where the plaintiff was raped after a police officer impounded the car in which she was a passenger and left her stranded beside the road).

[179] *See* Oren, *supra* note 139, at 1189-92 (arguing that the seriousness of the injury should be evaluated in the context of the degree of state control).

[180] Berger v. United States, 295 U.S. 78, 88 (1935).

[181] Cone v. Bell, 129 S. Ct. 1769, 1782-83 (2009) (holding that the Constitution mandates the disclosure of favorable evidence to the defense when the evidence changes the

because a state act increases the risk that an individual will be charged and prosecuted would be insufficient to show "harm" under the proposed test. In cases alleging prosecutorial misconduct on the basis of a state-created danger theory, the "harm" should be confined to convictions obtained on the basis of fabricated evidence knowingly used by the prosecutor.

Further, the plaintiff must show that the prosecutor's actions created a risk of wrongful conviction that would not have otherwise existed. As in *DeShaney*, if the plaintiff is not put in a worse position as a result of the state official's actions, the government cannot be held liable for its participation in the chain of events leading to the deprivation of liberty, because the plaintiff would have been subjected to the same harm regardless of the state conduct. Thus, the fabricated evidence must have affected the outcome of the case, and the plaintiff must show that, absent the fabrication, the prosecutor could not have secured the conviction.

Finally, the prosecutor must have known about the risk of wrongful conviction as a result of fabricated evidence while he was still acting as an investigator, prior to the establishment of probable cause. By requiring actual knowledge of the fabrication, a prosecutor who unknowingly receives false evidence is shielded from liability in situations where, for example, he unwittingly accepts fabricated evidence and subsequently relies on it to secure a warrant for the plaintiff's arrest.

2. Fabrication Manifests Deliberate Indifference to the Plaintiff's Safety

The culpability element of the proposed state-created danger test aims to protect honest prosecutors from liability by requiring the § 1983 plaintiff to show that a prosecutor acted with deliberate indifference to the risk of wrongful conviction. The plaintiff must show that the prosecutor's conduct was not merely negligent but rather that the prosecutor knew of the risk of wrongful conviction and purposely ignored it. Further, the plaintiff must show that at the time the prosecutor acted, it was possible to inflict the harm.

Courts have said little about whether fabrication of evidence is sufficiently egregious to "shock the conscience," and it is unclear whether the act would meet such a standard. The prosecutors' conduct in fabricating evidence in the *Pottawattamie County* cases involved both coaching a witness to testify falsely and withholding exculpatory evidence pointing strongly to a different suspect.[182] While this specific case might present unusually sympathetic facts, in general prosecutors who fabricate evidence are in a unique position to obtain information that is highly useful to an eventual trial. Working alongside the police in the investigation, the prosecutor has access to the factual investigative record and can, as the prosecutors in the *Pottawattmie County* cases did,

case such that confidence in the final verdict is undermined); Brady v. Maryland, 373 U.S. 83, 87 (1963).

[182] McGhee v. Pottawattamie Cnty. (*Pottawattamie II*), 547 F.3d 922, 925 (8th Cir. 2008).

provide witnesses with material knowledge of the crime. As the State's advocate who will later develop a theory of how the defendant committed the crime, the prosecutor can coach the witness to testify to relevant and damaging facts. Thus, even if fabrication of evidence does not meet the stringent "shocks the conscience" standard that some circuits demand for state-created danger claims, it at minimum demonstrates a deliberate disregard for the possibility that a defendant will be wrongfully convicted.

B. *The State-Created Danger Test Preserves Absolute Immunity Doctrine*

The advantage to using a state-created danger test to address prosecutorial fabrication of evidence is that it allows courts to avoid the issue of absolute immunity, since these actions clearly take place before the establishment of probable cause. Rather than relying, as the Second and Eighth Circuits do, at least in part on a prosecutor's conduct at trial, the state-created danger doctrine would justify finding an independent substantive due process violation in the act of fabrication itself. The proposed test does not require looking to the future act of using the fabricated evidence at trial, where absolute immunity shields most prosecutorial actions. Rather, it argues that state officials are liable for exposing an individual to direct and foreseeable risks of harm through the exercise of state authority, without which the individual would have unlikely suffered injury. While § 1983 plaintiffs still must demonstrate that they were ultimately harmed by a subsequent act, finding state official liability would not depend upon the use of the evidence. Since the constitutional inquiry focuses on State conduct at the fabrication stage, this theory avoids having to draw further lines between investigative and advocatory acts to determine where qualified immunity ends and absolute immunity begins.

C. *Fabrication and the Cost of the Chilling Effect*

During oral arguments before the Supreme Court in *Pottawattamie v. McGhee* (*Pottawattamie III*), acting-Solicitor General Neal Katyal argued that permitting plaintiffs to allege a substantive due process violation for fabricating evidence would lead to a flood of § 1983 lawsuits, since criminal defendants would be naturally inclined to blame the prosecutor who initiated the case. [183] He further argued that criminal evidence is "messy" and accompanied by cooperation agreements that may lead to changes in a witness's testimony, which could serve as the basis of a fabrication charge.[184] Justices Alito and Breyer also expressed concern that finding a substantive due process violation in the act of fabrication would expose prosecutors to liability

[183] Transcript of Oral Argument at 23-24, Pottawattamie Cnty. v. McGhee (*Pottawattamie III*), 130 S. Ct. 1047 (2010) (No. 08-1065).

[184] *Id.* (arguing that the Court's immunity doctrine acknowledges the possibility that prosecutorial misconduct will go unpunished but that this reflects a policy decision to protect other important prosecutorial functions).

whenever a witness who eventually testifies at trial has made any prior inconsistent statements.[185]

The culpability element in the proposed state-created danger test would address some of these concerns. Prosecutors would not be liable for negligent acts that risk wrongful convictions.[186] Plea deals granting witnesses immunity or reduced charges in exchange for testimony for which a prosecutor has a reasonable basis to believe to be true would not implicate state-created danger concerns. Of course, a prosecutor who knowingly negotiates a deal that would present false evidence at trial could be found to have acted with deliberate indifference at the time he fabricated the evidence, but this is precisely the type of conduct the state-created danger test seeks to deter.

A further concern is that honest prosecutors, who know or reasonably believe that the evidence procured during the investigation was not fabricated, will nonetheless be deterred from seeking plea deals because they fear being accused of wrongdoing. The *Imbler* Court considered and rejected the argument that a prosecutor's willful use of perjured testimony at trial should only be entitled to qualified immunity, worrying that this would interfere with the prosecutor's legitimate exercise of discretion.[187] If § 1983 claims could stand on pre-trial fabrication of evidence, plaintiffs could potentially eviscerate absolute immunity for a prosecutor's advocatory acts simply by pointing back to certain investigatory acts.[188]

The proposed state-created danger test no doubt opens the door to liability where none previously existed.[189] At the same time, prosecutorial immunity is a matter of line-drawing and determining which functions are of such central importance to the functioning of the criminal justice system that they must be shielded from liability.[190] The central concern of absolute immunity is preserving important prosecutorial *functions*, not simply protecting prosecutors.[191] Further, the Supreme Court has already determined that the

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[185] *Id.* at 28-33, 44-47.

[186] *See supra* Part III.C.3.

[187] Imbler v. Pachtman, 424 U.S. 409, 426-27 (1976).

[188] Brief for Petitioner at 32-33, Pottawattamie Cnty. v. McGhee (*Pottawattamie III*), 130 S. Ct. 1047 (2010) (No. 08-1065) (arguing that plaintiffs would simply revise the claim to allege misconduct in the preparatory acts, rather than the immune acts, thus "demot[ing] absolute immunity to nothing more than a pleading rule"); Brief for United States as Amicus Curiae Supporting Petitioners at 11, Pottawattamie Cnty. v. McGhee (*Pottawattamie III*), 130 S. Ct. 1047 (2010) (No. 08-1065).

[189] Though certain state actors currently can be sued for malicious prosecution, prosecutors are generally immune from malicious prosecution suits under § 1983 because their acts in initiating a prosecution are afforded absolute immunity. *See supra* Part I.D.

[190] *See* Kalina v. Fletcher, 522 U.S. 118, 125 (1997) (emphasizing that the "primary importance" of absolute immunity is "in protecting the proper functioning of the office, rather than the interest in protecting its occupant").

[191] *Id.* at 127 ("[T]he absolute immunity that protects the prosecutor's role as an advocate is not grounded in any special 'esteem for those who perform these functions, and certainly

line between advocatory and investigative acts lies at the point where probable cause suffices to make an arrest.[192] The Court's reasoning reflects a fundamental difference between the protections that ought to be afforded one who interviews witnesses *in preparation for trial* (an "advocate") and one who interviews witnesses *in search of probable cause to justify an arrest* (an "investigator").[193]

Thus, under the Court's reasoning, acts performed in the investigative stage of a case are, as a matter of policy, sufficiently attenuated from the judicial phase that the heightened protections afforded to preparing and prosecuting a case are not required. This is underscored by the fact that police officers who perform the initial investigation of a case and supply the prosecutor with information needed to obtain a warrant and initiate criminal proceedings are entitled only to qualified immunity.[194] Further, there is no inconsistency in denying absolute immunity for fabrication of evidence prior to the establishment of probable cause, even if a prosecutor would be absolutely immune for maliciously prosecuting one whom he lacks probable cause to indict.[195] Supreme Court precedent thus implicitly recognizes that a prosecutor ought to have greater incentive to exercise caution prior to the establishment of probable cause, as the constitutional threshold for arrest has yet to be established.

While the state-created danger test's heightened state of mind requirement would insulate most honest prosecutorial conduct from liability, there is likely to be at least some chilling effect on legitimate prosecutorial actions because of the fear of suit. The question is thus whether permitting an independent substantive due process allegation for pre-trial fabrication of evidence is worth losing some prosecutorial discretion. I believe that it is.

First, the chilling effect on legitimate prosecutorial conduct would impact only actions taken prior to the finding that probable cause exists to arrest. The Supreme Court already has, simply by according qualified, rather than absolute, immunity for acts during this time, made clear that a prosecutor's investigative functions do not deserve the same level of protection from liability as do his advocatory functions. In practice, this also means that prosecutors are already more likely to exercise a greater degree of caution in their pre-probable cause conduct because of their greater vulnerability to suit. Recognizing a substantive due process violation in pre-probable cause

not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself.'" (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986))).

[192] *See supra* Part I.E.

[193] Buckley v. Fitzsimmons (*Buckley I*), 509 U.S. 259, 273 (1993) (emphasizing that qualified immunity, which applies to prosecutors functioning as investigators, "'represents the norm' for executive officers" (quoting *Malley*, 475 U.S. at 340)).

[194] *See* cases cited *supra* note 41 (considering and rejecting absolute immunity for certain police functions); *see also Buckley I*, 509 U.S. at 273.

[195] *Buckley I*, 509 U.S. at 274 n.5.

fabrication of evidence is thus consistent with the principle underlying the Court's immunity jurisprudence that insulates only functions closely connected to the judicial process.[196]

Second, the chilling effect may disincentivize prosecutors from participating in pre-probable cause investigative conduct, which arguably generates positive results. Prior to a finding of probable cause, developing a witness's story as comprehensively and accurately as possible is important in order to test the witness's credibility and establish a legitimate reason for arrest. The purpose of a witness interview at the investigative stage is necessarily different from an interview conducted in preparation for trial.[197] Prosecutors often face intense pressure to secure convictions[198] and, therefore, may have fewer incentives to pursue fully the accuracy of a witness's testimony during the investigative period. As they are advocates for the State in the judicial process, it is not hard to imagine that it would be difficult to turn off the adversarial character of this position simply because a criminal proceeding has not yet commenced. A stronger mechanism for prosecutorial accountability in the pre-probable cause period thus acts as a check on prosecutorial overzealousness.

Finally, without an independent substantive due process violation in pre-trial fabrication of evidence, wrongfully convicted § 1983 plaintiffs are left without a remedy. The petitioners in *Pottawattamie County* argued that prosecutors are absolutely immune for the use of fabricated evidence at trial.[199] Under current law, prosecutorial fabrication of evidence during an investigation does not violate a criminal defendant's rights.[200] Thus, the victims of prosecutorial misconduct have no way of holding the prosecutor accountable, even though the original purpose of § 1983 was to provide victims of state misconduct a

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[196] *See supra* Part I.D.

[197] The Supreme Court explicitly acknowledged that the purpose of interviewing a witness as an investigator is different from that of an advocate preparing for a trial. *Buckley I*, 509 U.S. at 273.

[198] *See, e.g.*, Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968) (arguing that a prosecutor has every incentive to offer plea bargains on the basis of "non-penological grounds for tactical as well as administrative reasons," as "prosecutors believe that their interest lies in securing as many convictions as possible"); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471-72 (2004) (observing that "prosecutors want to ensure convictions" and that the "statistic of conviction . . . matters much more than the sentence"); George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 110-19 (1975) (documenting empirical evidence showing that many prosecutors manifest "conviction psychology" and presume guilt).

[199] Brief for Petitioner at 5, Pottawattamie Cnty. v. McGhee (*Pottawattamie III*), 130 S. Ct. 1047 (2010) (No. 08-1065).

[200] *Id.* at 25-26 (arguing that there is no substantive due process claim for wrongful investigative acts and that procuring false testimony is not a recognized, standalone constitutional tort).

remedy.[201] Depriving wrongfully convicted plaintiffs a means of civil redress for prosecutorial fabrication of evidence not only makes the civil rights statute appear to be an empty promise, but it also undermines public trust in the integrity of the prosecutor's office.

D. *Application to Other State Actors Who Fabricate Evidence*

The proposed state-created danger test of liability for fabricated evidence is equally applicable to all state officials. Other state actors who initiate or participate in fabrication could also be held accountable on the ground that their act of fabrication created a direct and foreseeable risk of harm to the § 1983 plaintiff of which the actor knew prior to the establishment of probable cause.

For example, the test could also be applied to police officers who manufacture evidence while investigating a case and then pass off the evidence to an unsuspecting prosecutor, who later uses it to secure the § 1983 plaintiff's conviction. While the element of foreseeability might be more difficult to prove than it would in the case of the prosecutor who fabricated evidence and subsequently prosecuted the case, a police officer who manufactured evidence and handed it over to a prosecutor arguably knew that it was likely to be used at trial.

Using a hypothetical based on one of the state-created danger cases discussed earlier, state officials such as teachers or agency officials could be liable under this theory if they sought wrongfully to convict an individual by manufacturing evidence. In a factual situation like that presented in *Morris v. Dearborne*, where a teacher fabricated a report of sexual assault and then used it to remove a student from her parent's custody,[202] the test I have proposed would apply if the teacher initiated criminal charges against the parents by using the false evidence. Thus, the proposed state-created danger test for pre-trial fabrication of evidence applies not only to prosecutors but also to other state officials who act with deliberate disregard for the risk of a wrongful conviction and affirmatively increase the risk of such conviction.

CONCLUSION

Courts have struggled to fit the issue of prosecutorial fabrication of evidence later used wrongfully to convict a criminal defendant into its current immunity jurisprudence, particularly where the only evidence of fabrication is the introduction of the evidence at trial, when a prosecutor is shielded by absolute immunity. Rather than follow the approaches of either the Seventh and Third Circuits or the Second and Eighth Circuits, both of which rely on the prosecutor's use of the fabricated evidence at the trial, I argue that a state-created danger approach would allow wrongfully convicted defendants to hold

[201] Monroe v. Pape, 365 U.S. 167, 172 (1961); *see supra* Part I.A.

[202] Morris v. Dearborne, 181 F.3d 657, 663-64 (5th Cir. 1999).

prosecutors liable for taking official actions that deliberately disregard the known and foreseeable risks of harm that ultimately injure the plaintiffs. While this may inevitably produce a chilling effect on at least some legitimate prosecutorial acts, I argue that it would only impact prosecutorial conduct during the investigative stage of the case, where prosecutors should be given greater incentives to exercise caution in the first instance. Importantly, it also provides victims wrongfully convicted on the basis of fabricated evidence a means of redress, fulfilling the purposes of § 1983 and ensuring public confidence in the integrity of the prosecutor and functioning of the criminal justice system.