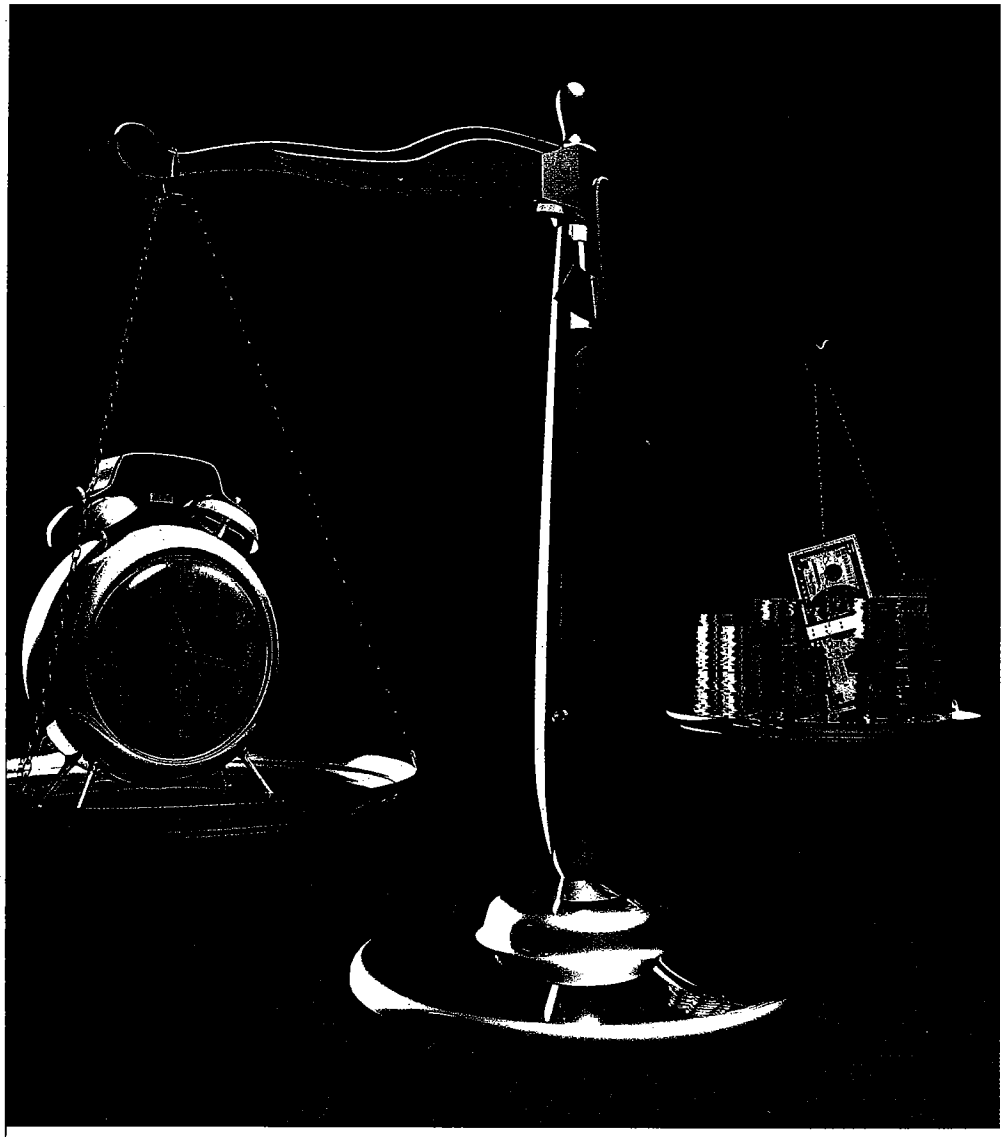

Suing for Prosecutorial Misconduct

BY JOEL B. RUDIN

More than 33 years ago in *Imbler v. Pachtman*,[1] the Supreme Court laid to rest any meaningful possibility that wrongfully convicted criminal defendants might obtain money damages for prosecutorial misconduct — or so it appeared. Relying on policy concerns as well as common law tradition, the Court held that prosecutors, no matter how egregious their misdeeds, have absolute immunity from suit under 42 U.S.C. § 1983, even though such immunity would "leave the genuinely wronged defendant without civil redress. ..."[2]

Since *Imbler*, however, resourceful civil rights attorneys have found it possible to obtain significant money damages for clients who were convicted due to misconduct by prosecutors. In cases brought against municipalities for *Brady* violations perpetrated by line prosecutors, a New Orleans plaintiff won $14 million in damages in 2007 following a federal jury trial, while New York City has paid out five settlements exceeding $2 million each, including four in the last six years.[3] In two recent settlements involving *investigative* misconduct by prosecutors in manufacturing false evidence, an Iowa county this year agreed to pay two men wrongfully convicted for murder and imprisoned 25 years a total of $12 million,[4] while last year, a New York City police detective, who had been acquitted at trial on corruption charges, won a judgment for $750,001, plus attorney's fees, against the City of New York and two high-ranking career prosecutors in their individual capacities.[5]

But prosecutors and municipalities across the country are fighting back. Last year they won a significant immunity decision in the Supreme Court which precludes lawsuits against individual District Attorneys for general, office-wide "administrative" policies that lead to *Brady* violations at trial.[6] In November, the Court heard argument about whether *individual* prosecutors may be sued for their preindictment *investigative* misconduct, although the case then settled before the Court decided the question.[7] A challenge to lawsuits against *municipalities* under § 1983, such as the $14 million Louisiana case, may well be next on the Court's immunity menu.

The purpose of this article is to review the types of claims that may be brought to obtain civil redress for misconduct by prosecutors. When are such lawsuits precluded by absolute or qualified immunity? When are they legally or factually viable? This area of the law, particularly the reach of absolute or prosecutorial immunity, is very much in flux, and there are numerous pitfalls to be avoided by the practitioner.

Common Law and Constitutional Claims Related to Wrongful Prosecutions

The classic common law causes of action for wrongful arrests and prosecutions are false arrest and malicious prosecution.

The tort of false arrest occurs when a police officer seizes a person and holds him without his consent, absent legal justification or privilege, which usually means without probable cause or a warrant. Once the setting shifts to the courthouse and criminal proceedings are initiated, the tort becomes malicious prosecution. The claimant then must show that the wrongdoer acted with malice to cause

his prosecution to be initiated (or continued) without probable cause, and that the prosecution ended favorably by acquittal or dismissal.[8] The damages for malicious prosecution may include the value of the victim's loss of liberty, any aggravated injuries suffered in jail or prison, attorney's fees, lost wages and other economic harm, damage to reputation, and mental or emotional pain and suffering.[9]

Claims for false arrest and malicious prosecution usually can be formulated as federal constitutional violations, for which money damages may be sought pursuant to § 1983. This statute, enacted following the Civil War during the Reconstruction Era, creates liability for any state or local government official who, under color of state law, "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. . . ."

The Supreme Court has construed § 1983 broadly to effectuate its purpose of providing a remedy for official misconduct by state officials.[10] Federal law encourages such lawsuits by providing attorney's fees and costs to be paid by the losing party, even where the plaintiff's damages were only minimal or nominal.[11] This is in contrast to common law malicious prosecution and false arrest actions, in which the plaintiff usually pays his attorney a contingency fee.

Section 1983 lawsuits became prevalent in the 1960s and 1970s after the Warren Court, utilizing the due process clause of the Fourteenth Amendment, had incorporated to the states various of the Constitution's procedural protections under the Fourth, Fifth, and Sixth Amendments.[12] In 1978, in *Monell v. New York City Dept. of Social Servs.*, the Court extended § 1983 liability, as Justice Scalia recently put it, "to reach the deep pocket of municipalities."[13] Courts have upheld false arrest and malicious prosecution lawsuits alleging Fourth Amendment violations,[14] unlawful interrogations in violation of the Fifth or Sixth Amendment,[15] and denials of due process or a fair trial under the Fifth, Sixth, and Fourteenth Amendments where false evidence was manufactured for use at trial or exculpatory evidence was withheld.[16]

Such lawsuits most often are brought against police officers, but causation and qualified immunity defenses make them difficult. Where the plaintiff's injuries, such as his detention or other restraint on liberty, occurred during a criminal prosecution, the issue may become whether the police defendant, by pressuring or withholding facts from a later decisionmaker, was truly responsible for them, or whether they resulted from the independent judgment of a prosecutor, court, or jury. A police defendant also may defeat a lawsuit if he can show, under qualified immunity principles, that either (1) his conduct did not violate clearly established Supreme Court case law, so that he lacked fair notice what he was doing was wrong, or (2) based upon the circumstances as he knew them, his conduct was not inherently unreasonable.[17] Qualified immunity thus protects all but the most egregious wrongdoing from civil rights lawsuits.

Where a police officer handed his investigative product to a prosecutor who then made the decisions to bring charges and to use the officer's evidence to achieve a conviction, or where the respective responsibilities of the police officer and the prosecutor are unclear, a subsequently vindicated criminal defendant might wish to sue both under § 1983. However, prosecutors are protected against such lawsuits not only by qualified immunity, but also by absolute or prosecutorial immunity.

Imbler v. Pachtman and The 'Functional' Test for Prosecutorial Immunity

Imbler involved a § 1983 lawsuit against a prosecutor who had allegedly suppressed favorable evidence and utilized testimony he knew or should have known was false or misleading to convict the plaintiff of murder and send him to death row. Nevertheless, after the plaintiff's conviction was overturned and the charges were dismissed, the Supreme Court denied his lawsuit, relying on prosecutorial immunity.

The Court began by observing that § 1983 is to be read in "harmony" with common law tort immunities and defenses which Congress, when it enacted the statute in 1871, presumably intended to incorporate.[18] Prosecutors traditionally were afforded absolute immunity for their "judicial" acts, for the same reason that judges and jurors had received it: so that fear of liability or the inconvenience of having to defend against lawsuits would not deflect them from their duties.[19] Applying the same reasoning, the Court extended absolute immunity to prosecutors who face federal constitutional lawsuits under § 1983.

The Court assumed that honest prosecutors would be deterred from the vigorous performance of their legitimate prosecutorial duties if they had to fear personal civil liability. "Frequently acting under serious constraints of time and even information," the Court reasoned, prosecutors must make difficult decisions about the veracity of potential witnesses and what evidence to disclose to the defense. "Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials," the Court reasoned.[20] It is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[21]

An important component of the Court's policy discussion was its assumption (since disproved, *see infra*) that rogue prosecutors would be held accountable for misconduct through criminal prosecution or professional dis-

Editor's Note: When representing former criminal defendants in civil rights lawsuits involving misconduct by police and prosecutors, Joel Rudin tries not only to recover damages, but also to expose systemic misconduct, especially involving the misuse of interrogation techniques and the withholding of *Brady* material.

Several of these cases against New York City are cited in the accompanying article, including the cases of Alberto Ramos, Shih Wei Su, Sami Leka, and Zaher Zahrey. The *Ramos* case resulted in the largest recovery ($5 million) in the state of New York for a wrongful prosecution. It also produced the first significant data in the nation concerning the failure of a major urban prosecutor's office (Bronx, New York) to impose discipline on prosecutors involved in withholding *Brady* material and other misconduct. Based on discovery he obtained in these cases, Rudin testified in 2009 before the New York State Bar Association's Task Force on Wrongful Convictions, which cited his testimony in recommending stricter procedures to ensure *Brady* disclosures and the disciplining of prosecutors who violate their professional obligations.

Rudin is the author of the NACDL's *amicus* brief in the case of *Pottawattamie v. McGhee*. It contains a comprehensive discussion of the failure of prosecutors' offices and disciplinary bodies to take action against prosecutors who engage in unethical behavior in the prosecution of criminal cases. Read the brief at http://www.nacdl.org/public.nsf/newsissues/amicus_attachments/$FILE/Pottawattamie_Amicus.pdf.

cipline.[22] "These checks," it reasoned, "undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime."[23]

Notwithstanding its concerns about over-deterring legitimate prosecutorial activities, the Court, at the end of its opinion, limited its holding to activities that are "an 'integral part of the judicial process.'"[24] It suggested that in the future it would apply a "functional" analysis looking to the inherent nature of the prosecutor's activity giving rise to the lawsuit. Thus, prosecutors engaged in "investigative," as opposed to "judicial" or "prosecutorial," activities, might enjoy only the qualified immunity afforded policemen. The Court reserved for another day what immunities should be enjoyed by prosecutors acting "in the role of an administrator or investigative officer rather than that of advocate ... initiating a prosecution and ... presenting the state's case. ..."[25]

Imbler Is Applied to Investigative and Administrative Functions

Initially, following *Imbler*, the Court applied absolute prosecutorial immunity sparingly: to a prosecutor who appeared in court to obtain a search warrant[26] or prepared an accusatory instrument for filing, even though no formal prosecution had been initiated,[27] but not to a prosecutor who acted like a complaining witness in swearing to the truthfulness of a court complaint,[28] offered legal advice to the police about their conduct of an investigation,[29] participated during the investigative stage in developing false evidence against a suspect, or made defamatory statements at a press conference after a prosecution had been initiated.[30] What these cases had in common was a functional analysis: if the operation was one that traditionally was performed by nonprosecutors, or was nonprosecutorial in nature, only qualified immunity applied; if it was part of or in immediate preparation for the judicial process, the prosecutor was accorded absolute protection from suit.

The Court's ability to differentiate by function between prosecutorial and nonprosecutorial acts was tested last year in *Van de Kamp v. Goldstein*,[31] and the prosecutors won. The plaintiff, Thomas Goldstein, had been falsely imprisoned in California for 24 years based upon the concocted trial testimony of a jailhouse informant, ironically named Edward Fink, that he had heard Goldstein confess to a murder. Fink defeated defense impeachment by falsely denying, uncorrected by the prosecution, that he had any history of trading his "cooperation" with law enforcement for leniency or other benefits. After the truth — that Fink had a long informant history — was exposed, a federal habeas court vacated Goldstein's conviction, and the District Attorney's Office dismissed the charges. Goldstein sued.

Goldstein had to face the typical problem in such cases of finding a civil defendant to hold accountable. The police might be liable if they hid Fink's history and deceived the prosecutors; most courts have held that police may be held civilly liable for suppressing *Brady* material.[32] However, if the prosecutors knew the truth, their failure to disclose it likely would be viewed as a superseding cause of injury and relieve the police of liability,[33] and they could not be sued due to absolute immunity. The County of Los Angeles probably could not be successfully sued for any unlawful policies that caused the violation because, in California (as discussed below), the District Attorney is considered a *state* official. The state could not be sued due to the Eleventh Amendment, which gives the states immunity from suit. Thus, in addition to the individual police investigators and the city of Long Beach that employed them, Goldstein elected to sue former Los Angeles District Attorney John Van de Kamp and his former Deputy District Attorney Curt Livesay, in their personal capacities.[34]

Goldstein's theory was that Van de Kamp and Livesay were liable for their refusal to adopt adequate *administrative* policies, including an informant record-keeping system and training, many years prior to Goldstein's own trial, to ensure that line prosecutors would comply with *Brady* and *Giglio* obligations. In *Giglio*, the Supreme Court had stated that, to ensure compliance with disclosure obligations, prosecutors' offices should establish "procedures and regulations ... to insure communication of all relevant information on each case to every lawyer who deals with it."[35]

Van de Kamp moved to dismiss the lawsuit on absolute prosecutorial immunity grounds, but the district court denied his motion, and the Ninth Circuit affirmed. It held that Van de Kamp's actions were administrative, not prosecutorial, where they did not have a "close association" with the judicial process, involved the overall management of the office, and were not in the context of any particular prosecution.[36]

The Supreme Court reversed. Justice Breyer's opinion for the Court, which was unanimous, reasoned that, even if administrative, the functions in question — training and information management — affect how, when, and what "impeachment information [would be made] available at a trial. They [we]re thereby directly connected with the prosecutor's basic trial advocacy duties."[37] The Court, as in *Imbler*, was concerned that finding liability in an "easy case," where the supervision and disclosure procedures were grossly inadequate, would "bring difficult cases in their wake" involving not just *Brady* violations but other types of unconstitutional behavior at criminal trials. This, in turn, would "undermine the necessary independence and integrity of the prosecutorial decision-making process."[38] The Court did not discuss, in view of the general rule that prosecutors handling possible *Brady* material should "err on the side of disclosure,"[39] why it would be bad policy to provide an incentive for prosecutors to do just that.

In sum, after *Van de Kamp*, line prosecutors have immunity for anything they do in the course of presenting evidence or argument in court. Their supervisors have immunity for implementing office-wide managerial or administrative policies that cause such violations to occur. The only possible *individual* liability that prosecutors may still have for their involvement in criminal matters is for the investigative function. Following *Van de Kamp*, prosecutors moved to narrow or close off that avenue as well.

Investigative Liability And *Pottawattamie County v. McGhee*

On November 4, 2009, the Supreme Court heard argument in *Pottawattamie County v. McGhee*, a case that amounted to a Rorschach test about prosecutorial misconduct and its civil consequences. The two plaintiffs in the lawsuit, Curtis McGhee and Terry Harrington, had spent 25 years in prison because of the alleged misconduct of two Iowa prosecutors in working with police to manufacture false testimony to frame them for a murder they did not commit. The prosecutors used the same evidence to indict them and to convict them at trial. Unquestionably, McGhee's and Harrington's due process rights were violated, but their ability to recover monetary damages from the prosecutors (they also sued the police) appeared to depend on whether the Court viewed the misconduct as investigative (the creation of the evidence) or trial-related (the use of it to injure the plaintiffs).

The prosecutor-civil defendants argued that the only possible constitutional violation was their *use* of fraudulent evidence at trial, not their manufacture of it, which in and of itself caused plaintiffs no actual harm. While they conceded that a prosecutor who fabricates evidence during a criminal investigation, and hands it to another, unsuspecting prosecutor to use at trial, has liability, they argued that a prosecutor who fabricates evidence and then uses it himself does not because his decision to use it at trial is protected by absolute immunity.[40] The plaintiffs, on the other hand, argued that the constitutional violation was the fabrication itself with the intent of using the same evidence to cause them harm at trial, which then did in fact occur. They relied on *Buckley v. Fitzsimmons*, which rejected absolute immunity for prosecutors who fabricate evidence during an investigation, and then-Chief Judge Jon Newman's opinion for the Second Circuit in *Zahrey v. Coffey*, which reasoned: "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."[41]

After the Supreme Court granted *certiorari*, numerous national organizations representing local, state, and federal prosecutors and governmental entities, as well as the Obama administration's Justice Department, filed *amicus* briefs supporting the two prosecutor-civil defendants. Among other reasons for defending the two prosecutors despite their apparently heinous acts, they contended that prosecutors already are adequately deterred from committing misconduct by the risk of professional discipline and that civil lawsuits are unnecessary — even though neither of these two prosecutors were disciplined in any respect.[42]

On the other side, NACDL submitted an *amicus* brief, joined by the ACLU and the libertarian Cato Institute, supporting the plaintiffs and refuting the prosecutors' position that there is adequate deterrence for prosecutorial misconduct. NACDL's brief contained a comprehensive discussion of the empirical evidence — investigations by bar groups, law review articles and studies, and the results of lawsuits — showing that professional sanctions for prosecutorial misconduct are exceptionally rare.[43]

During oral argument, several justices were openly troubled that a prosecutor might gain complete immunity from suit by *compounding* his initial wrongdoing in fabricating evidence by then utilizing it himself in a prosecution.[44] On the other hand, several justices also seemed troubled that prosecutors who use coercive tactics to gain the "cooperation" of witnesses during criminal investigations could be sued for causing testimony to be "fabricated." They did not seem mollified by plaintiff's counsel's rejoinder that the Court itself in *Buckley* had selected "probable cause" as the point that an "investigation" generally becomes sufficiently prosecutorial for absolute immunity to attach.[45] Prior to that point, counsel argued, prosecutors who engage in such extreme misconduct that qualified immunity does not protect them *should* have liability.[46]

In January 2010, the Supreme Court dismissed the appeal because of a $12 million total settlement between the plaintiffs and Pottawattamie County for the investigative misconduct of the prosecutors (who did not admit wrongdoing).[47] The settlement is remarkable both because there was a reasonable chance the Court would have dismissed the case against the prosecutors and because the police detectives and their employer, the city of Council Bluffs, are still in the case and may wind up paying additional damages.[48] That the county paid such a large settlement notwithstanding the prosecutors' possibility of success in the Supreme Court speaks volumes about how awful their actual conduct must have been.

Municipal Liability Under *Monell* for Prosecutorial Misconduct

In 1978, the Supreme Court held in *Monell*[49] that a municipality is a "person" that may be sued for damages under § 1983. However, it is not enough to show only that a city employee inflicted constitutional injury — under § 1983, principal-agent or *respondeat superior* liability does not apply.[50] Rather, a plaintiff must show that the municipality, through the acts of its policymaking officials, either intentionally, or with deliberate indifference to the result of their policies, directly inflicted a constitutional injury, or was the proximate cause of an employee doing so.[51] Since a municipal defendant, as opposed to individuals, does not enjoy qualified or absolute immunity,[52] a *Monell* lawsuit offers a way to avoid what might otherwise be an insurmountable immunity defense. But can a municipality be held liable for the acts of a prosecutor during a criminal case? In most jurisdictions, prosecutors bring cases on behalf of the *state*. And states, as we have seen, cannot be sued under *Monell* because of the Eleventh Amendment.

The leading case holding municipalities potentially liable for prosecutorial misconduct at trial is *Walker v. City of New York*.[53] The Second Circuit reinstated a civil rights complaint, which had been dismissed by the district court, seeking to hold the city of New York liable for a murder conviction and 18 years of imprisonment suffered by a Brooklyn criminal defendant who had been victimized by a prosecutor's *Brady* violation. The city argued that it could not be held liable for any unlawful policy of the Brooklyn District Attorney that allegedly caused the violation, because the District Attorney, when he prosecutes criminal cases, acts on behalf of the *state* of New York, not the city or any of its five constituent counties. However, the Second Circuit, citing New York's structure of government and state case law, reasoned that a county District Attorney, in formulating office-wide *administrative and managerial* policies, is a municipal official, even though, when he makes decisions in the course of an individual prosecution, he acts on behalf of the state.[54] Following the Second Circuit's decision, and before any discovery occurred, the city settled the case for $3.5 million.[55]

While *Walker* resolved that a local government in *New York* state could be sued for the unlawful *Brady* policy of a District Attorney, it did not necessarily follow that such suits could be brought against localities outside New York operating under different state constitutional structures. Nor did *Walker* deal with the question of how such claims might be proven.

An analytical framework to deal with the first question was provided by the Supreme Court in *McMillian v. Monroe County*.[56] In a case involving whether, for purposes of § 1983 liability, a county sheriff in Alabama is a state or a local officer, the Court held that the specific function at issue, and how that function is defined under state law, must be analyzed, with the result potentially varying from state to state.[57] The Court listed a number of factors, including the scope of the officeholder's power or jurisdiction, who elects or appoints her, and whether she has local or state fiscal, administrative, and political accountability, and emphasized that it would "defer considerably" to a state judiciary's own construction of its Constitution and statutes.[58] Following *McMillian*, the Second Circuit reaffirmed *Walker*, extending it to a case involving a trial-related equal protection claim, and a New York state appellate court agreed.[59] On the other hand, the California Supreme Court held that California's District Attorneys are policymakers for the state, not their localities, and its analysis of state law was then followed by the Ninth Circuit.[60] The Fifth Circuit held that District Attorneys in Louisiana and Texas were local officials, but that such officials in Mississippi functioned on behalf of the state.[61]

Even in those states where *Monell* lawsuits may be brought against municipalities for prosecutorial misconduct, proving that a District Attorney (1) had an unlawful policy and (2) that such policy was a substantial cause of the constitutional violation, is difficult. A District Attorney is unlikely to have an unlawful official or overt *Brady*-disclosure or other prosecutorial policy. However, the Supreme Court has held that an unlawful policy may be established through evidence of inadequate training or supervision, where the policymaker's inaction amounts to deliberate indifference to the constitutional violations that are highly likely to result.[62] But the Court has adopted exacting standards for such a theory of recovery in order to avoid creating virtual *respondeat superior* liability. The need for further training or supervision must be obvious, based upon the inherent difficulty of the judgments that employees must make, the likelihood that such issues will arise with frequency, or a history of employees mishandling such decisions.[63] Except in the rarest case, the Court has stated, a pattern of violations must be shown to demonstrate that there was a need for better training or supervision; the single violation of the plaintiff's rights ordinarily will not suffice.[64]

Moreover, establishing a pattern of constitutional violations, such as the suppression of *Brady* material, is difficult. *Brady* is violated when evidence is both favorable to the defense and so potentially material to the outcome of the trial that its timely disclosure would have created a reasonable probability of a more favorable outcome.[65] This requires consideration of the entire trial, and so proving a series of *Brady* violations may require essentially retrying a series of criminal trials within the context of the civil trial — an extraordinarily complex and expensive undertaking. A plaintiff could try to introduce prior court decisions finding *Brady* violations, but they might be held inadmissible as hearsay.[66] Admission of such findings also might be denied under collateral estoppel principles due to the absence of an identity of parties: the state is the litigant in the criminal case, but the municipality is the party in the civil case.[67]

The decision in *Ramos v. City of New York*,[68] by the New York State Appellate Division, established the solution to the

problem. The plaintiff's theory in *Ramos* was that prior court decisions finding *Brady* and related constitutional violations (presenting and failing to correct false or misleading evidence or argument) were admissible to establish the District Attorney's *notice* either that his employees needed further training or that they needed to be controlled through closer supervision or discipline. After upholding this theory of potential recovery, the appellate court ordered the city to disclose the personnel and "disciplinary" records of the prosecutors who had handled 72 reported cases of misconduct.[69]

The resulting disclosure revealed just a single instance of discipline and uninterrupted promotions for the prosecutors involved in the 72 cases, which occurred from the late 1970s through the mid-1990s. The city then settled the lawsuit in 2003, for $5 million, or approximately $700,000 per year of imprisonment.[70] In 2008-09, New York settled similar lawsuits brought in federal court, involving the Queens, Brooklyn, and Manhattan, D.A.'s Offices, for $3.5, $3.1, and $2 million, respectively.[71] In the Queens case, discovery revealed *no* instance of discipline for prosecutors involved in 84 reported cases of misconduct, many involving *Brady* violations.[72]

Possibly the largest award for a prosecutor's trial misconduct occurred in 2007 at a federal civil jury trial in New Orleans in *Thompson v. Connick*.[73] The jury awarded a plaintiff, who had spent 18 years in prison, including 14 years on death row, $14 million, plus $1 million in counsel fees.[74] Thompson had been within one month of execution when a defense investigator discovered a previously undisclosed laboratory report which showed that a robbery perpetrator's blood type did not match Thompson's. The prosecution had convicted Thompson first of this robbery, then threatened to use the conviction during cross-examination to successfully keep him off the stand, and did use it during the capital sentencing phase to obtain the death penalty against him.

A panel of three Fifth Circuit judges affirmed,[75] relying for proof of the District Attorney's deliberate indifference to *Brady* compliance on his complete failure to provide his staff with any formal *Brady* training prior to the trial in 1985, *Brady* violations in four other cases, and additional *Brady* violations in the same case by several prosecutors.[76] Following *en banc* review, the full 16-member court evenly divided, which resulted in an affirmance of the panel's decision. The principal dissenting opinion contended that general *Brady* training did not have to be provided to prosecutors in 1985 because their *Brady* obligations were well-known, and there was no evidence of any obvious need, prior to Thompson's trial, to provide more specific training about turning over potentially exculpatory laboratory reports since there had been no other such incidents.[77]

The Orleans Parish District Attorney's *certiorari* petition was filed November 6, 2009, and is pending. The District Attorney pointed out that the judgment exceeds his annual budget and that the office is considering bankruptcy.[78] The D.A. also cited the strong dissent by Fifth Circuit Chief Judge Edith Jones, who explicitly urged the Supreme Court to grant review in order to "address whether holding governmental entities liable for Section 1983 violations is consistent with absolute prosecutorial immunity for such violations."[79] She contended that many of the practical and policy concerns that the Court relied on in *Van de Kamp* in extending absolute immunity to District Attorneys for their administrative policies leading to *Brady* violations are also presented in lawsuits that are based upon the same theory of recovery but directed against the municipality.

Claims Against Federal Prosecutors

A former federal criminal defendant whose constitutional rights were violated by *federal* law enforcement agents may not sue under § 1983.[80] However, under limited circumstances, he may sue individual federal employees, including a prosecutor, or the federal government itself.

First, under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[81] and its progeny,[82] a plaintiff may sue a federal law enforcement official personally for violating his constitutional rights. However, the federal official may raise the same immunity defenses (including absolute immunity under *Imbler*) that are available to a state law enforcement defendant.[83] Moreover, *Bivens* only applies to areas where Congress has failed to afford an alternative "substitute" remedy for the constitutional violations of federal officials. Thus, the federal government may legislate alternative remedies for litigants' potential constitutional claims,[84] which may be more limited than those available pursuant to § 1983.[85]

Second, the U.S. government itself has waived sovereign immunity for cer-

tain acts or omissions committed by government employees where such acts, if committed by a private person, would give rise to liability under state law.[86] Under the Federal Torts Claims Act (FTCA),[87] the federal government thus may be sued for false arrest and malicious prosecution committed by federal investigative or law enforcement officers.[88] It also may be sued based on the unconstitutional or illegal policy of a federal agency that caused the commission of such torts.[89] However, the United States has limited its liability and only may be sued if such acts were committed by "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of federal law";[90] thus, the U.S. Attorney's Office is not amenable to such suit under the FTCA.[91]

Claims Against States For Unjust Conviction

The federal government[92] and 25 states[93] have compensation statutes providing for lawsuits against the government for unjust convictions, but most such statutes make recovery exceedingly difficult. Generally, the individual seeking compensation must demonstrate his factual innocence by clear and convincing evidence and demonstrate that he did not in any manner contribute to bringing about his arrest or conviction. Compensation for wrongful imprisonment permitted by such statutes may be severely limited, while Court of Claims judges who hear such claims may be far more reluctant to award higher damages than lay juries.[94]

Conclusion

Lawsuits for prosecutorial misconduct against individual prosecutors or municipalities are extremely time-consuming and expensive. On the other hand, liberal federal discovery rules provide plaintiffs in such cases with powerful tools for exposing to sunlight the dark secrets of some prosecutors' offices concerning their indifference to *Brady* and fair trial obligations. Besides, plaintiffs in such cases have suffered grievous injuries and their potential damage recoveries are enormous, which puts considerable pressure on the individual or municipal defendants to settle. Such lawsuits offer the hope of stimulating prosecutors' offices to improve their training and procedures for complying with constitutional obligations in order to minimize the risk of wrongful convictions occurring in the future.

Because of the uncertainty of the law in this area, plaintiff's counsel would be well-advised whenever possible to pursue additional theories of recovery, such as against the police for malicious prosecution or for withholding of exculpatory evidence. Counsel may also bring simultaneous actions in those jurisdictions that allow direct claims against the state for unjust convictions.

Notes

1. 424 U.S. 409 (1976).

2. *Id.* at 427.

3. *See Ramos v. City of New York*, Index No. 21770/93 (Bronx Co.) ($5 million); *Su v. City of New York*, 06-civ-687 (E.D.N.Y. 2006) ($3.5 million); *Walker v. City of New York*, 91-civ-2327 (S.D.N.Y. 1991) ($3.5 million); *Leka v. City of New York, et al.*, 04-civ-8784 (S.D.N.Y. 2004) ($3.1 million); *Hidalgo v. City of New York*, 06-civ-13118 (S.D.N.Y. 2006) ($2 million).

4. *See* Associated Press, *Immunity Case Deal*, N.Y. TIMES, January 5, 2010, at A12.

5. The case is *Zahrey v. City of New York, et al.*, 98 Civ. 4546 (DCP)(JCF) (S.D.N.Y.). It was settled in 2009, after 11 years of litigation that included an interlocutory appeal, *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000), discussed *infra*. The detective was accused of participation in a robbery-murder and other drug-related robberies, based upon a false story manufactured by New York City Internal Affairs detectives and prosecutors in the Office of the Brooklyn District Attorney, Charles Hynes, through pressure tactics applied to a crack-addicted career criminal.

6. *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009).

7. *Pottawattamie Co. v. McGhee*, No. 08-1065 (argued Nov. 4, 2009); *see* note 4, *supra*.

8. *See, e.g., Russell v. Smith*, 68 F.3d 33, 36 (2d Cir. 1995); *Broughton v. State*, 37 N.Y.2d 451 (1975).

9. *See* LEE S. KREINDLER, ET AL., NEW YORK LAW OF TORTS, § 1.84 (West 1997).

10. *Hensley v. Eckerhart*, 461 U.S. 424, 445 (1983).

11. *See Hudson v. Michigan*, 547 U.S. 586, 598 (2006), citing 42 U.S.C. § 1988(b) (1976). In enacting § 1988, Congress intended to encourage the enforcement of the Civil Rights Act through "private attorneys general," by requiring defendants to pay plaintiff's reasonable counsel fees. *Quaratino v. Tiffany & Co.*, 166 F.3d 422, 426 (2d Cir. 1999). The Civil Rights Act "depend(s) heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important congressional policies which these laws contain." *Hensley v. Eckerhart*, 461 U.S. 424, 445 (1983).

12. *See generally* Michelle Adams, *Causation, Constitutional Principles, and the Jurisdictional Legacy of the Warren Court*, 59 WASH. & LEE L. REV. 1173 (2002).

13. *Hudson v. Michigan*, 547 U.S. 586, 597 (2006), citing *Monell*, 436 U.S. 658 (1978).

14. *Fox v. DeSoto*, 489 F.3d 227 (6th Cir. 2007) (recognizing cause of action under § 1983 for malicious prosecution based on Fourth Amendment violation); *Ricciuti v. N.Y.C. Transit Authority*, 124 F.3d 123, 129 (2d Cir. 1997) (arrest without probable cause proper grounds for civil rights lawsuit). *See also Taylor v. Meacham*, 82 F.3d 1556, 1560 (10th Cir. 1996) ("most of the lower courts recognize that a malicious prosecution claim is cognizable under § 1983").

15. *Clanton v. Cooper*, 129 F.3d 1147, 1157 (10th Cir. 1997) (coerced confession actionable under § 1983). *See also Higazy v. Templeton*, 505 F.3d 161, 173-744 (2007) (action appropriate under § 1983 for violation of Fifth Amendment right against self-incrimination).

16. *Zahrey v.* Coffey, 221 F.2d 352, 355 (2d Cir. 2000) (action appropriate against prosecutor who during the investigation of a case fabricated evidence for use at trial). *See also Pierce v. Gilchrist*, 359 F.3d 1279, 1292 (10th Cir. 2004) (plaintiff properly stated claim under § 1983 against forensic chemist for maliciously withholding exculpatory evidence and fabricating inculpatory evidence); *Douglas v. City of New York*, 595 F. Supp. 2d 333, 345 (S.D.N.Y. 2009) (action appropriate for violation of fair trial right where police "forwarded false information" to the prosecutor's office).

17. *See Anderson v. Creighton*, 483 U.S. 635 (1987).

18. *Imbler*, 424 U.S. at 418.

19. 424 U.S. at 421-24.

20. *Id.* at 425-26.

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

22. *Id.* at 429.

23. *Id.*

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

25. *Id.* at 430-31.

26. *Burns v. Reed*, 500 U.S. 478, 492 (1991).

27. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

28. *Kalina v. Fletcher*, 522 U.S. 118, 129-31 (1997).

29. *Burns v. Reed*, 500 U.S. at 492-96.

30. *Buckley*, 509 U.S. at 273.

31. 129 S. Ct. 855 (2009).

32. *See Brown v. Miller*, 519 F.3d 231, 238 (5th Cir. 2008) (police and laboratory technician liable under § 1983 for withholding *Brady* material from prosecutors and thereby from the defense); *Newsome v. McCabe*, 319 F.3d 301, 304 (7th Cir. 2003) (police liable

for *Brady* violations); *Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000) (en banc); *Spurlock v. Satterfield*, 167 F.3d 995, 1005 (6th Cir. 1999). *See also* note 15, *supra*.

33. *See Wray v. City of New York*, 490 F.3d 189, 193 (2d Cir. 2007) ("In the absence of evidence that [the police officer] misled or pressured the prosecution or trial judge, we cannot conclude that his conduct caused the violation of Wray's constitutional rights; rather, the violation was caused by the ill-considered acts and decisions of the prosecutor and trial judge.").

34. Goldstein also sued the County of Los Angeles.

35. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

36. *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1175-76 (9th Cir. 2007).

37. *Van de Kamp*, 129 S. Ct. at 863-64.

38. *Id.* at 864.

39. *Schledwitz v. United States*, 169 F.3d 1003, 1014 n.4 (6th Cir. 1999), *citing Kyles v Whitley* 514 U.S. 419, 439 (1995).

40. The defendants relied on Judge Easterbrook's reasoning in *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) ("Let us suppose the prosecutors put [the witness] on the rack, tortured him until he named Buckley as his confederate, and then put the transcript in a drawer, or framed it and hung it on the wall but took no other step, or began a prosecution but did not introduce the statement. Could Buckley collect damages under the Constitution? Surely not[].").

41. *Zahrey v. Coffey*, 221 F.3d 342, 353 (2d Cir. 2000).

42. *See* Nat'l Ass'n of AUSAs and ADAs, Br. 8-14.

43. *See* NACDL, ACLU and Cato Institute, Br., 22-33. NACDL cited reports by independent legal task forces in New York and California, which found a troubling lack of professional discipline of prosecutors for *Brady* and other fair trial violations in those states. Nationwide studies conducted by legal scholars such as Fred C. Zacharias and Richard Rosen found the same. *See* NACDL, *et al.*, Br. 27-28, *citing* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. Rev. 721, 755 (2001) (finding in a comprehensive survey only 27 instances of professional discipline of prosecutors for unethical behavior affecting the fairness of criminal trials); Richard Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 718-20, 730 (1987) (finding only six cases where professional discipline was imposed on prosecutors for "*Brady*-type" violations); Bennet T. Gershman, *Reflections on Brady v. Maryland*, 47 S. Tex. L. Rev. 685, 722 (2006) ("most commentators agree that professional discipline of prosecutors is extremely rare"). NACDL also cited two successful civil rights lawsuits in New York state handled by the author, *Ramos v. City of New York*, Index No. 21770/93 (Bronx Co.), and *Su v. City of New York*, 06-civ-687 (E.D.N.Y. 2006), which, as part of the complaints, collectively cited more than 150 reported cases of prosecutorial misconduct in the Bronx and Queens counties, but found through discovery that only two prosecutors ever were formally disciplined for such misconduct.

44. *See* Transcript of Oral Argument in *Pottawattamie County v. McGhee*, No. 08-1065, at 8.

45. *Id.* at 27-30, discussing *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

46. *Id.*

47. *See* note 4, *supra*.

48. *See* Tony Mauro, *Settlement Cuts Short Important Case Over Prosecutorial Immunity*, N.Y. L. J., January 6, 2010, p. 2, col. 1. Mauro, an experienced Supreme Court reporter, wrote that Paul Clement, the former solicitor general who represented the plaintiffs in the Supreme Court *pro bono*, appeared during oral argument to have "gone a long way toward weakening the argument in favor of strict immunity for prosecutors, though the outcome was not entirely clear."

49. 436 U.S. 658 (1978).

50. *Id.* at 691.

51. *Id.* at 694-95.

52. *Owen v. City of Independence*, 445 U.S. 622, 657 (1980).

53. 974 F.2d 293 (2d Cir. 1992).

54. *Id.* at 301.

55. *See* Frances A. McMorris, *Wachtell, Pro Bono, on Big Case*, N.Y. L.J., May 31, 1994, p. 6.

56. 520 U.S. 781 (1997).

57. *Id.* at 785-86, 795.

58. *Id.* at 786-89.

59. *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998) (holding that a county could be sued for the local district attorney's "first-in, first-served" policy of always advocating for the first of cross-complainants, regardless of the merits, in violation of the Equal Protection Clause). New York's Appellate Division agreed. *See Ramos v. City of New York*, 729 N.Y.S.2d 678, 693 (N.Y. App. Div. 1st Dept. 2001) (agreeing with *Walker* and *Myers*). *Carter v. City of Philadelphia*, 181 F.3d 339, 347-55 (3d Cir. 1999), followed *Walker* and *Myers* with respect to the Philadelphia District Attorney.

60. *Pitts v. County of Kern*, 17 Cal.4th 340, 949 P.2d 920 (1998); *Del Camp v. Kennedy*, 517 F.3d 1070, 1073 (9th Cir. 2008).

61. *Compare Hudson v. City of New Orleans*, 174 F.3d 677, 682-91 (5th Cir. 1999) (Louisiana) and *Crane v. Texas*, 766 F.2d 193, 195 (5th Cir. 1985) (Texas), *with Brooks v. George County*, 84 F.3d 157, 168 (5th Cir. 1999) (Mississippi). *See also Arnold v. McClain*, 926 F.2d 963, 965-66 (10th Cir. 1991) (Oklahoma prosecutors function on behalf of the state).

62. *See Canton v. Harris*, 489 U.S. 378 (1989).

63. *Id.*, at 390. *See also Walker*, 974 F.2d at 297-98; *Doggett v. Perez*, 348 F. Supp. 1179, 1194 (E.D. Wash. 2004). As an example of the difficulty of proving a *Monell* claim premised on a District Attorney's failure to properly train prosecutors to follow *Brady*, compare *Cousin v. Small*, 325 F.3d 627, 638 (5th Cir. 2003), with *Thompson v. Connick*, 553 F.3d 836, 858 (5th Cir. 2008). In *Cousin*, the Fifth

Circuit found that the *Brady* training in the Orleans Parish District Attorney's Office was adequate in 1995, but in *Thompson*, the same court upheld a jury verdict finding that the same office provided *inadequate* training in 1985.

64. *See Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 409 (1997). *See also Canton*, 489 U.S. at 397 (O'Connor, J., concurring in part and dissenting in part).

65. *See generally Brady v. Maryland*, 373 U.S. 83 (1963). *See also United States v. Bagley*, 473 U.S. 667, 684 (1985).

66. *See, e.g., Nipper v. Snipes*, 7 F.3d 415, 417 (4th Cir. 1993) (judicial findings of fact are inadmissible hearsay); *U.S. Steel, LLC v. Teico, Inc.*, 261 F.3d 1275, 1287 (11th Cir. 2001) (same).

67. *See generally Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

68. 729 N.Y.S.2d 678 (App. Div. 1st Dept. 2001).

69. *Id.* at 696.

70. *See* Andrea Elliott, *City Gives $5 Million to Man Wrongly Imprisoned in Child's Rape*, N.Y. TIMES, Dec. 16, 2003, at B3.

71. *See* Jim Dwyer, *Prosecutor Misconduct, at a Cost of $3.5 Million*, N.Y. TIMES, Oct. 22, 2008, at A27; *Leka v. City of New York*, 04-civ-8784 (S.D.N.Y. 2004), Stipulation of Settlement filed March 3, 2008; Benjamin Weiser, *Settlement for Man Wrongly Convicted in Palladium Killing*, N.Y. TIMES, March 30, 2009, at A19 (also noting that the state of New York separately paid plaintiff $600,000 on a parallel action brought under the state's Unjust Conviction Act).

72. *See supra*, note 41.

73. 2005 WL 3541035 (E.D. La. Nov. 15, 2005), *aff'd* 553 F.3d 836 (5th Cir. 2008); *and aff'd by equally divided court en banc* 578 F.3d 293 (5th Cir. 2009).

74. *Id.*

75. *Thompson*, 553 F.3d at 843.

76. *Id.* at 845.

77. 578 F.3d at 302-03.

78. Parish Attorney Cert. Pet., 12 n.11.

79. 578 F.3d at 293.

80. A federal law enforcement official cannot be sued under § 1983 because such an individual is not acting "under the color of state law." However, such a lawsuit is possible if the federal defendant conspires with a state agent. *See Hampton v. Harahan*, 600 F.2d 600 (7th Cir. 1979), *cert. granted in part, judgment rev'd in part on other grounds*, 446 U.S. 754 (1980).

81. 403 U.S. 388 (1971).

82. *Davis v. Passman*, 442 U.S. 228 (1979) (*Bivens* claim may be brought based a Fifth Amendment due process violation); *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment claim). *See also Zahrey v. Coffey*, 221 F.2d 352 (2d Cir. 2000) (a federal prosecutor may be sued for misconduct committed during the investigative stage of a case).

83. *Butz v. Economou*, 438 U.S. 478, 501 (1978).

84. *Schweiker v. Chilicky*, 487 U.S. 412 (1988).

85. *Id.* at 428-29.

86. 28 U.S.C. § 1346(b)(1).

87. 28 U.S.C. §§ 1346(b), 2671, *et seq.*

88. 28 U.S.C. § 2680(h).

89. *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (promulgation of discriminatory policies by U.S. Customs Service that resulted in false arrest and invasion of privacy, if proved unconstitutional, would be actionable under FTCA).

90. *Id.*

91. *Vander Zee v. Reno*, 100 F.3d 952, 2009 WL 625346, at *4 n.2 (5th Cir. 1996).

92. 28 U.S.C. §§ 1496, 2513 (requiring plaintiff "prove" innocence, and limiting damages to $100,000 per year for plaintiffs who were "unjustly sentenced to death" and $50,000 for all other plaintiffs).

93. *See, e.g.*, ME. REV. STAT. ANN. tit. 14 MSRA § 8241; 705 ILL. COMP. STAT. 505/8; MD CODE ANN. STATE & FIN. PROC. § 10-501; N.C. GEN. STAT. § 148-82; TEX. CIV. PRAC. & REM. ANN. § 103.001; N.Y. CT. CL. ACT § 8-b; IOWA CODE ANN. ICA § 663A.I; LA REV. STAT. ANN. §15:572.8; N.J. STAT. ANN. § 52:4C-I.

94. See NACDL, *et al.* Br., *supra* note 41, 37-38 (noting the inadequacies of wrongful conviction statutes in 11 states). *See also* Howard S. Masters, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 108 (2004-2005) ("most existing compensation statutes require wrongfully convicted individuals to surmount onerous obstacles in order to be eligible for compensation").

About the Author

Joel B. Rudin is the principal attorney in the Law Offices of Joel B. Rudin. His state and federal practice consists of defending complex criminal cases at trial, handling appeals of and collateral attacks on criminal convictions, and representing plaintiffs in civil rights litigation.

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