COMMENT

LET THE MASTER ANSWER: WHY THE DOCTRINE OF RESPONDEAT SUPERIOR SHOULD BE USED TO ADDRESS EGREGIOUS PROSECUTORIAL MISCONDUCT RESULTING IN WRONGFUL CONVICTIONS

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Prosecutorial misconduct is a known cause of wrongful convictions, yet prosecutors enjoy absolute immunity when working within their official capacities. Furthermore, municipalities generally cannot be held responsible for the misdeeds of their employees, including prosecutors. This is true even when the misdeeds of employees involve egregious prosecutorial misconduct that results in a wrongful conviction. Ethical guidelines and the possibility of criminal sanctions have long been touted as sufficient control mechanisms for promoting prosecutorial accountability. These methods, however, are not sufficient and do not allow redress for those individuals who are wrongfully convicted due to prosecutorial misconduct.

The doctrine of respondeat superior should be available to hold municipalities liable for the acts of prosecutors engaged in egregious or intentional misconduct. In addition to the current and proposed measures aimed at increasing prosecutorial accountability, the use of respondeat superior is part of a viable solution aimed at reducing prosecutorial misconduct as a contributing factor in wrongful convictions. Furthermore, the use of the doctrine aligns with the underlying justifications of vicarious liability and provides a remedy for those wrongfully convicted as a result of egregious prosecutorial misconduct.

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INTRODUCTION

During his remarks at the 2011 Equal Justice Initiative Dinner, Justice John Paul Stevens asked a simple question: why can't a district attorney's office be held accountable for its employees' actions under the common law doctrine of respondeat superior?[1] The answer, while

1. Justice John Paul Stevens, Address at the Equal Justice Initiative Dinner 8 (May 2, 2011) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/speeches.aspx). "Respondeat superior," generally speaking, refers to holding an employer responsible for the actions of his employee(s) as long as the

relatively simple, has been the focus of countless articles of historical analysis regarding Congress's enactment of 42 U.S.C. § 1983[2] (Section 1983) as well as numerous Supreme Court decisions concerning Section 1983.[3] In sum, the doctrine of respondeat superior does not apply to district attorney's offices and "[f]or reasons based on what scholars agree are historical misunderstandings[4] . . . the Supreme Court has held that municipalities are not liable for the torts of their employees under

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employee is acting within his scope of employment. BLACK'S LAW DICTIONARY 1426 (9th ed. 2009); *see also* RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

2. *See, e.g.*, David Jacks Achtenberg, *Taking History Seriously: Municipal Liability under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183 (2005); Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to § 1983*, 16 TEX J. C.L. & C.R. 29 (2010) (proposing an amendment to § 1983); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482 (1982); Michael J. Gerhardt, *The* Monell *Legacy: Balancing Federalism Concerns and Municipal Accountability under Section 1983*, 62 S. CAL. L. REV. 539 (1989).

3. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 694 (1978) (eliminating the use of respondeat superior and requiring proof of an official municipal policy that creates a deprivation of constitutional rights to proceed under Section 1983); *Canton v. Harris*, 489 U.S. 378, 388–89 (1989) (finding that a failure to train could qualify as an official policy required by *Monell*); *City of Okla. City v. Tuttle*, 471 U.S. 808, 823–24 (1985) (holding that unless proof of a single incident can be linked to an unconstitutional municipal policy, liability under *Monell* cannot be based on a single incident); *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (holding that prosecutors have full immunity from civil claims when working within their official capacity).

4. In rejecting respondeat superior in Section 1983 cases, the Supreme Court relied on the legislative history surrounding the rejection of the Sherman Amendment, the predecessor of Section 1983. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478–79, 479 n.7 (1986). The Sherman Amendment proposed holding municipalities liable for citizen injuries sustained as a result of the Ku Klux Klan or other racially driven violence occurring within the city limits. Achtenberg, *supra* note 2, at 2196. In interpreting Section 1983, the Supreme Court viewed the rejection of the Sherman Amendment as proof that "the enacting Congress was opposed to vicarious liability and thus opposed to respondeat superior." *Id.* However, the Court's interpretation "rest[s] on historically inaccurate assumptions about the nineteenth-century justifications for respondeat superior." *Id.* In fact, nineteenth-century judges and lawyers generally promoted the underlying rationales of respondeat superior. *Id.* These rationales included: (1) that a master and servant were legally considered to be one unit, (2) that liability should follow because the master had legal power to control the actions of his servant, (3) that the master assured that his servant was qualified, and (4) that since a master stood to profit from his servants' actions, he should also be held responsible for any costs resulting from those actions. *Id.* In rejecting the Sherman Amendment, Congress did not reject the concept of vicarious liability per se. *Id.* at 2196–97. Instead, Congress applied accepted rationales for respondeat superior and found that they did not allow municipal liability for mob violence, which the Sherman Amendment proposed. *Id.*

the strict-liability doctrine of respondeat superior, as private employers are."[5]

Despite scholarly attention to the historical misunderstandings underlying the prohibition of respondeat superior in Section 1983 jurisprudence, these discussions have not explored the use of respondeat superior as a control mechanism to curb prosecutorial misconduct that results in a wrongful conviction. Prosecutorial misconduct and the implications of the Supreme Court's interpretation of Section 1983 stand at the forefront of the Court's recent decision in *Connick v. Thompson*.[6] The defendant in that case, John Thompson, spent fourteen years on death row and a total of eighteen years in prison before blood evidence, previously withheld by prosecutors, proved his innocence.[7]

In 1985, Thompson was charged with the murder of Raymond Liuzza, Jr., a prominent New Orleans businessman.[8] Following the murder charge, the victims of an unrelated armed robbery came forward and identified Thompson as their assailant.[9] During the course of the robbery investigation, the crime laboratory analyzed a portion of one of the victims' pants, which had been stained with the robber's blood.[10] Before Thompson's robbery trial, the district attorney's office received the crime laboratory report, which identified the robber's blood as type B.[11] Thompson's blood was never tested and the report was never disclosed to the defense.[12] A jury convicted Thompson of the armed robbery, after which he stood trial for the Liuzza homicide.[13] During the homicide trial, Thompson did not testify due to his prior armed robbery conviction and was ultimately convicted of the homicide and sentenced to death.[14]

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5. Stevens, *supra* note 1, at 10 (quoting *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011)) (citation added); *see also Monell*, 436 U.S. at 691 (under Section 1983, municipalities cannot be held liable through an application of respondeat superior).

6. 131 S. Ct. 1350 (2011).

7. *Id.* at 1355–56.

8. Respondent's Brief on the Merits at 2, *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (No. 09-571), 2010 WL 3167311 at *2; *see also Connick*, 131 S. Ct. at 1356.

9. *Connick*, 131 S. Ct. at 1356.

10. *Id.*

11. *Id.*

12. *Id.* In fact, Assistant District Attorney Gerry Deegan transferred all of the physical evidence in the robbery case from the police property room to the courthouse property room *except* the swatch stained with the robber's blood. *Id.* To this day, the bloody swatch has never been found. *Id.* at 1373 (Ginsburg, J., dissenting).

13. *Id.* at 1356.

14. *Id.*

After his conviction, Thompson had six different execution dates postponed while he exhausted his appeals.[15] Less than one month before his final execution date, a private investigator, hired by Thompson's attorneys, discovered the previously undisclosed crime laboratory report.[16] After immediate testing, officials learned Thompson's blood type (type O) did not match the robber's blood type.[17] Thompson's execution was stayed, his robbery conviction overturned, and a jury found him not guilty during his retrial for the Liuzza homicide.[18]

When the crime laboratory report was discovered, evidence of prosecutorial misconduct came to light.[19] In 1994, Gerry Deegan, who prosecuted the armed robbery case, was diagnosed with a terminal illness.[20] Following his diagnosis, Deegan confessed to Michael Riehlmann, a former prosecutor in the New Orleans District Attorney's Office, that he purposely withheld potentially exculpatory[21] blood evidence during Thompson's robbery trial.[22] Riehlmann held on to this information for five years, while Thompson remained incarcerated on death row.[23]

Following the reversal of his convictions, Thompson filed a civil suit under Section 1983 against Harry Connick, Sr., the District Attorney of New Orleans Parish.[24] Thompson's suit alleged that a lack of training in Connick's office led to the prosecutors' failure to disclose exculpatory blood evidence to Thompson's attorneys.[25] Thompson prevailed and a jury awarded him $14 million dollars—$1 million dollars for each year he spent on death row.[26] The Fifth Circuit

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15. John Thompson, Op-Ed., *The Prosecution Rests, but I Can't*, N.Y. TIMES, Apr. 10, 2011, at WK11.

16. *Id.* (Thompson's final execution date was set for May 20, 1999); *Connick*, 131 S. Ct. at 1356. The withheld report presents a possible violation of *Brady v. Maryland* because the withholding of exculpatory evidence from the defense is a violation of a defendant's due process rights (commonly known as a "*Brady* violation"). *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The term "exculpatory evidence" refers to "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment." *Id.*

17. *Connick*, 131 S. Ct. at 1356.

18. *Id.* at 1356–57.

19. *Id.* at 1356 n.1.

20. *Id.* at 1374 (Ginsburg, J., dissenting).

21. See *supra* note 16 for the definition of exculpatory evidence.

22. *Connick*, 131 S. Ct. at 1356 n.1; *see also id.* at 1375 (Ginsburg, J., dissenting). For the first time during the 2011 term, Justice Ruth Bader Ginsburg read her dissent from the bench. Adam Liptak, *$14 Million Jury Award to Ex-Inmate Is Dismissed*, N.Y. TIMES, Mar. 30, 2011, at A14.

23. *Connick*, 131 S. Ct. at 1375 (Ginsburg, J., dissenting).

24. *Id.* at 1376 (Ginsburg, J., dissenting).

25. *Id.* at 1355.

26. Thompson, *supra* note 15.

affirmed.[27] The U.S. Supreme Court, however, reversed and held that a district attorney's office could not be held accountable, based on a single *Brady* violation,[28] for failure to train its employees.[29] Underpinning the Court's conclusion was its adherence to precedent, which requires "that a municipality itself actually cause[] a constitutional violation."[30] The Court clearly refused to interpret Section 1983 in a way that might open the door for respondeat superior liability.[31]

Connick v. Thompson highlights the injustice Thompson faced as a result of the Supreme Court's prohibition of the theory of respondeat superior in Section 1983 suits. Commentators, including Justice Stevens, expressed strong disapproval of the Supreme Court's decision and its application of Section 1983 jurisprudence.[32] In reflecting on the injustice he found in the Court's decision, Justice Stevens proposed "a simple potential change in a federal rule of law that would have salutary effects on the administration of justice."[33] The change in law to which Justice Stevens refers is the recognition of respondeat superior liability in Section 1983 suits.

The doctrine of respondeat superior should be available in Section 1983 suits involving egregious prosecutorial misconduct that results in a wrongful conviction. This Comment explores the implications of holding municipalities responsible for the actions of their employees, including prosecutors, under Section 1983 in cases of wrongful convictions involving egregious prosecutorial misconduct. Part I provides an overview of prosecutorial misconduct as a contributing factor to wrongful convictions and the current state of prosecutorial immunity under Section 1983. Part II begins with an overview of measures of prosecutorial accountability, which includes a discussion of special ethical guidelines and office policies aimed at either reducing or remedying wrongful convictions. Part III then considers proposed theories to increase prosecutorial accountability, including the advantages and disadvantages of applying the theory of respondeat superior to instances of egregious prosecutorial misconduct that result in wrongful convictions. This Comment concludes that, in addition to current and proposed accountability measures, the doctrine of respondeat superior is part of a viable solution aimed at reducing

27. *Thompson v. Connick*, 578 F.3d 293, 293 (5th Cir. 2009).
28. See *supra* note 16 for a definition of a "*Brady* violation."
29. *Connick*, 131 S. Ct. at 1356.
30. *Id.* at 1365.
31. *Id.* at 1365 n.12.
32. *E.g.*, Stevens, *supra* note 1, at 3–4.
33. *Id.* at 3.

prosecutorial misconduct as a contributing factor in wrongful convictions. Furthermore, the use of respondeat superior in Section 1983 suits aligns with the underlying justifications for vicarious liability and provides a remedy for those wrongfully convicted as a result of egregious prosecutorial misconduct.

I. WRONGFUL CONVICTIONS, PROSECUTORIAL MISCONDUCT, AND PROSECUTORIAL IMMUNITY UNDER SECTION 1983

In the mid-1990s, the innocence movement began to take shape.[34] This movement, characterized by the realization that innocent people are convicted of crimes, includes a tremendous increase in research devoted to the causes of wrongful convictions.[35] While there is no universal list of the causes that lead to wrongful convictions, "[m]ost lists include eyewitness misidentification (including lineup procedures), false confessions, forensic science and examination issues, jailhouse snitches, prosecutorial misconduct, and inadequate assistance of counsel."[36] Before research focused on the causes of wrongful convictions, and before the realization that prosecutorial misconduct is also a contributing factor to these causes, the Supreme Court granted prosecutors absolute immunity for their actions.[37]

A. Prosecutorial Misconduct as a Cause of Wrongful Convictions

The Supreme Court has long recognized that a prosecutor's improper actions can diminish the likelihood of a reliable outcome in a criminal trial.[38] In a frequently quoted passage from *Berger v. United States*,[39] the Supreme Court defined the role of the prosecutor:

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34. The "innocence movement" is generally thought to be comprised of lawyers, journalists, researchers, and activists who work to exonerate the wrongfully convicted and who promote systemic change by advocating for policies to correct the known causes of wrongful convictions. Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1468 (2011).

35. *See* Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201, 201–02 (2005).

36. Zalman, *supra* note 34, at 1501–02.

37. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) (holding that prosecutors are immune from civil suits under Section 1983).

38. *Berger v. United States*, 295 U.S. 78, 89 (1935) (granting the defendant a new trial due to the prosecutor's improper argumentation, which undoubtedly influenced the jury).

39. 295 U.S. 78 (1935).

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[40]

As the Court in *Berger* recognized, a prosecutor can influence both the fairness and the reliability of a criminal trial. Current scholarship suggests several ways in which a prosecutor can influence a trial's outcome.[41] Prosecutors can prevent the fact-finder from accessing relevant and reliable evidence, present false or misleading evidence, or "significantly distort the fact-finder's evaluation of the evidence."[42] Studies confirm that prosecutorial misconduct is a significant contributor to the causes of wrongful convictions.[43]

There are several factors underlying the types of prosecutorial misconduct that contribute to the wrongful conviction of innocent persons. The idea of overzealousness, such as an extreme desire to

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40. *Id.* at 88.

41. BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT 123 (1997). "It is especially important that prosecutors play by the rules, because they play a dominant role in criminal cases." BRANDON L. GARRETT, CONVICTING THE INNOCENT 208 (2011). For example, a study of the trial transcripts of the first 250 DNA exonerations revealed that prosecutors "presented most of the evidence and called most of the witnesses." *Id.* at 6–7, 148–49, 208.

42. GERSHMAN, *supra* note 41, at 123.

43. JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE 246 (2000). A study of sixty-two wrongful convictions in North America sought to determine which factors contributed most prevalently to wrongful convictions. *Id.* While eyewitness misidentification, found in 84% of the wrongful convictions studied, was the most common factor, 42% of the cases involved prosecutorial misconduct. *Id.* The most prevalent types of prosecutorial misconduct included the suppression of exculpatory evidence (43%) and the knowing use of false testimony (22%). *Id.* at 265. Other less common types of prosecutorial misconduct included coercion of witnesses, false statements made to the jury, use of improper closing arguments, and evidence fabrication. *Id.* A study of the first 250 DNA exonerations found that ten of the twenty-one cases reversed before DNA test results were available were based, at least in part, on claims of prosecutorial misconduct. GARRETT, *supra* note 41, at 208.

convict the accused, is one cause of prosecutorial misconduct.[44] Additionally, Professor Randolph Jonakait argues that the causes of prosecutorial misconduct are endemic and relate to the unique role and attitude of the prosecutor.[45] Furthermore, Professor Daniel Medwed proposes that the longstanding push by courts and scholars to identify prosecutors as "ministers of justice"[46] is not in line with "practice at the trial level in light of the reality of prosecutorial culture and its organizational pressures."[47] Others surmise a lack of professional guidelines and disciplinary measures contributes to the types of prosecutorial misconduct seen in wrongful convictions.[48] Finally, tunnel vision on the part of prosecutors as well as other actors in the criminal justice system may lead to wrongful convictions.[49]

B. The Evolution of Prosecutorial Immunity under Section 1983

Although prosecutorial misconduct contributes to wrongful convictions, prosecutors enjoy absolute immunity from Section 1983

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44. C. RONALD HUFF ET AL., CONVICTED *BUT* INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 71 (1996). For example, overzealousness may stem from an impending reelection, a desire to impress ones colleagues, or a desire to receive personal accolades. *Id.* Furthermore, overzealousness may arise in situations where agencies are financially unable to complete proper investigations. *Id.*

45. Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 554 (1987) ("The prosecutor is thereby placed in a position where he cannot believe that the people he prosecutes are innocent, he is exhorted to prosecute only those he believes guilty, and the information he receives . . . confirms that they are, in fact, guilty.").

46. The "minister of justice" concept simply means that, regardless of the outcome, a prosecutor is victorious "as long as the outcome is fair." Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH L. REV. 35, 39 (2009).

47. *Id.* at 44. In many offices, conviction rates are used to measure the success of prosecutors and can be given weight when determining promotions. *Id.* Furthermore, conviction rates are emphasized during elections for district attorneys and are often cited to validate budgets. *Id.* at 45.

48. *See e.g.*, Peter A. Joy, *The Relationship between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400. "[T]he history of ethics rules directed toward prosecutors demonstrates that the ethics rules generally have been limited to nonspecific pronouncements that the prosecutor has 'special' responsibilities, different from other lawyers, and that the prosecutor should 'seek justice.'" *Id.* at 408.

49. Keith A Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 ("This process leads investigators, prosecutors, judges, and defense lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion.").

suits.[50] Section 1983 provides that "[e]very person" acting under state law who deprives another of his or her constitutional rights shall be held accountable to that person in a suit for damages.[51] Section 1983's purpose is "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."[52] While the purpose of Section 1983 is seemingly straightforward, the Supreme Court has limited the reach of the statue by granting immunity to certain categories of individuals, including prosecutors.[53]

1. *IMBLER V. PACHTMAN*: A SIMPLE TEST OF FUNCTIONALITY

In *Imbler v. Pachtman*,[54] the U.S. Supreme Court granted prosecutors absolute immunity from Section 1983 suits.[55] The Court affirmed the Ninth Circuit's decision, extending immunity to prosecutors so long as they were acting within the scope of their employment as it relates to "the judicial phase of the criminal process."[56] The Court wished to stem unfounded litigation directed at prosecutors that would divert their attention away from their work and could limit their use of independent judgment.[57] Without prosecutorial immunity, the Court hypothesized that a prosecutor could be subject to a civil suit initiated by a defendant in every case that resulted in acquittal.[58] The Court maintained that civil liability was not essential since prosecutors could still be held accountable for constitutional rights

50. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976) ("[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under [Section] 1983.").

51. 42 U.S.C. § 1983 (2006).

52. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

53. *Imbler*, 424 U.S. at 431.

54. 424 U.S. 409 (1976).

55. *Id.* at 431.

56. *Id.* at 430–31. The Court failed to elaborate on the meaning of "integral part of the judicial process," but instead found that the prosecutorial function of initiating and presenting the state's case clearly falls within the meaning of this phrase. *Id.* at 430. Recently, the scope of prosecutorial immunity has been extended to cover administrative conduct when it relates to criminal proceedings. *Van de Kamp v. Goldstein*, 555 U.S. 335, 349 (2009) (holding that a prosecutor's failure to maintain an information management system of informant testimony was an administrative task related to the judicial phase of criminal proceedings, which qualified for prosecutorial immunity).

57. *Imbler*, 424 U.S. at 422–23.

58. *Id.* at 423–24.

violations through either criminal prosecution or professional discipline.[59]

2. *MONELL*: REMOVING RESPONDEAT SUPERIOR AND ADDING A POLICY REQUIREMENT

In 1978, the Supreme Court evaluated a claim brought by individuals alleging constitutional rights violations committed by governmental employees under Section 1983.[60] In *Monell v. Department of Social Services*,[61] the Supreme Court concluded that Congress intended Section 1983 to encompass claims of municipal liability for constitutional rights violations.[62] Based on a reading of the legislative history, however, the Court found that municipalities could not be held accountable unless the plaintiff could show that the violation stemmed from an "official municipal policy."[63] Further complicating the ability of individuals seeking redress for violations of their constitutional rights, *Monell* clearly held that the theory of respondeat superior is not applicable in Section 1983 suits; therefore, municipal employers cannot be held liable for the misdeeds of their employees.[64]

In rejecting the theory of respondeat superior, the Court maintained that the plain language of Section 1983 could not be interpreted to impose liability on the employer when actions of the employee caused the constitutional violation.[65] The Court determined that Congress's rejection of the Sherman Amendment,[66] the precursor to Section 1983, clearly indicated that Congress did not intend for respondeat superior to apply to Section 1983 litigation.[67]

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59. *Id.* at 429.

60. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 660–61 (1978).

61. 436 U.S. 658, 660–61 (1978).

62. *Id.* at 690. The Court's decision overruled *Monroe v. Pape*, which previously held that municipalities could not be sued under Section 1983. 365 U.S. 167 (1961); *Monell*, 436 U.S. at 663.

63. *Monell*, 436 U.S. at 691. The official municipal policy requirement of *Monell* is difficult to apply in practice. Peter H. Schuck, *Municipal Liability under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L. J. 1753, 1758–59 (1989). The primary difficulties include determining which officials can make an official policy and establishing the point at which an agency custom becomes the equivalent of an official policy. *Id.* at 1759.

64. *Monell*, 436 U.S. at 691.

65. *Id.* at 692.

66. *See supra* note 4 and accompanying text.

67. *Monell*, 436 U.S. at 693–94.

3. THE ISSUE OF INADEQUATE TRAINING AND A "SINGLE" INCIDENT

In *City of Oklahoma City v. Tuttle*,[68] the Court further clarified the policy requirement imposed by *Monell*. The Court held that a single incident of inadequate training and supervision of municipal employees did not establish the official policy or custom requirement of municipal liability under *Monell*.[69] The Court found also that proving an official policy based on inadequate training would require a showing that an official policymaker made a deliberate choice to inadequately train employees when other adequate training programs were available.[70]

II. PROSECUTORIAL ACCOUNTABILITY

The broad purpose of Section 1983 is at odds with the Supreme Court's decision to grant prosecutors absolute prosecutorial immunity in Section 1983 suits.[71] Furthermore, there is a growing body of research indicating that prosecutorial misconduct is a known cause of wrongful convictions.[72] While a variety of measures are available to address prosecutorial misconduct, this Part suggests that these current measures alone are not sufficient.

The doctrine of respondeat superior should be available to hold municipalities liable for the acts of prosecutors engaged in egregious or intentional misconduct when their conduct leads to a wrongful conviction.[73] Respondeat superior is necessary because current nationwide measures, including the use of professional disciplinary

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68. 471 U.S. 808 (1985).

69. *Id.* at 823–24.

70. *Id.* at 823. Ultimately, *Tuttle* stands for the proposition that a single violation cannot justify municipal liability under *Monell* unless the single violation can prove that the alleged constitutional violation stems from an official municipal policy. *Id.* at 823–24. While *Tuttle* recognized the difficult nature of showing that inadequate training constituted an official policy under *Monell*, *id.* at 823, the Court in *City of Canton v. Harris* added an additional requirement. 489 U.S. 378, 388 (1989) ("[I]nadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons.").

71. Section 1983 "provide[s] a cause of action for anyone who has been deprived of rights protected by the Federal Constitution and laws, with full relief available." Bodensteiner, *supra* note 2, at 31.

72. *See supra* Part I.A.

73. For the purpose of this discussion, a wrongful conviction requires "an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted." Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005). See Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157 (2011), for a thoughtful discussion of the meaning of "innocence" and "exoneration" in the context of the innocence movement.

measures and criminal sanctions, do not adequately address the injustice of egregious prosecutorial misconduct. In addition, while states and local jurisdictions are making positive efforts to increase prosecutorial responsibility in both preventing and addressing wrongful convictions, the use of respondeat superior provides additional incentives for the ethical behavior of prosecutors. Although there are other proposed theories of accountability and liability for prosecutors and potential drawbacks to holding municipalities responsible through the doctrine of respondeat superior, the doctrine provides a remedy for those wrongfully convicted, which is absent in the majority of current proposals. Moreover, the use of respondeat superior in Section 1983 suits to address prosecutorial misconduct aligns with the justifications for respondeat superior in other contexts.

A. A Lack of Disciplinary Sanctions and Criminal Actions

In *Imbler v. Pachtman*,[74] the Supreme Court was careful to highlight other means by which prosecutors could be held accountable for instances of misconduct when it granted prosecutorial immunity.[75] In doing so, the Court cited the availability of professional discipline and criminal sanctions.[76] The Court stated, "[t]hese checks undermine the argument that the imposition of civil liability is the only way to insure [sic] that prosecutors are mindful of the constitutional rights of persons accused of crime."[77] The Court's reliance on professional discipline and criminal actions, however, is undermined by the infrequent use of these disciplinary measures.

1. THE USE OF PROFESSIONAL DISCIPLINE TO DETER PROSECUTORIAL MISCONDUCT

Despite the Supreme Court's reliance on professional discipline as a justification for prosecutorial immunity, numerous studies found only a few disciplinary actions against prosecutors engaging in egregious conduct even when their conduct resulted in a wrongful conviction.[78]

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74. 424 U.S. 409 (1976).

75. *Id.* at 428–29.

76. *Id.* at 429.

77. *Id.*

78. In one study, *Chicago Tribune* reporters analyzed thousands of court documents from across the nation dating back to 1963. Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at C1. The reporters found at least 381 homicide convictions in which the defendant had been granted a new trial because prosecutors either "concealed evidence suggesting innocence or presented evidence they knew to be false." *Id.* Not a single prosecutor involved in any of the 381

This lack of disciplinary action is especially telling considering that while discipline for violations committed by both prosecutors and defense attorneys in criminal cases is rare, this is not the case in the private civil bar.[79]

There are several explanations underlying bar associations' reluctance to sanction prosecutors who engage in misconduct. First, there is a failure of judges and others to bring cases of prosecutorial misconduct to the attention of professional association authorities.[80] Second, the lack of professional discipline might result from unclear and conflicting ethical guidelines for prosecutors, which some have found send "mixed signals by commanding prosecutors to be both adversarial and neutral, [which] result[s] in unclear norms."[81]

The late Professor Fred C. Zacharias, a leading scholar on legal ethics, pointed to several additional reasons why state bar associations fail to discipline prosecutors engaged in misconduct.[82] First, authorities have few resources with which to prosecute instances of misconduct.[83] Second, prosecutors do not have clients in the traditional sense, which in turn requires bar associations to both find and prosecute misconduct.[84] Third, agencies may be reluctant to initiate proceedings against prosecutors when those proceedings would require investigation into the inner workings of the prosecutor's office, another

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cases involving misconduct faced criminal sanctions, disbarment, or even public sanction. *Id.* A study of prosecutorial misconduct in California found similar results. *See* KATHLEEN RIDOLFI, CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, PROSECUTORIAL MISCONDUCT: A SYSTEMIC REVIEW (July 11, 2007). This study surveyed 2130 published and unpublished cases involving claims of prosecutorial misconduct during a ten-year period starting in 1997. *Id.* at 4–5. Of these 2130 cases, courts found prosecutorial misconduct in 443 cases (twenty-one percent). *Id.* at 5 chart 2. The cited misconduct occurred during all stages of the judicial process except for the charging phase. *Id.* at 7–8. The study also determined that appellate courts rarely name the prosecutors engaged in the misconduct. *Id.* at 12.

79. *See* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 753 (2001). For example, one study compiled the number of reported ethical violations that resulted in discipline for a select number of ethical rules that apply to prosecutors and lawyers at large. *Id.* at 750–51. The study found just twenty-seven cases of disciplinary action taken against prosecutors out of the 520 total cases considered by the study. *Id.* at 753 tbl.7. Only 5.2% of the cases of disciplinary action studied involved the discipline of prosecutors. *Id.* Discipline of criminal defense lawyers accounted for 5.8%. *Id.* In contrast, 89% of the cases studied involved discipline of civil attorneys. *Id.*

80. Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2095–96 (2010).

81. Joy, *supra* note 48, at 416.

82. Zacharias, *supra* note 79, at 756–62.

83. *Id.* at 756.

84. *Id.* at 758–59.

governmental agency.[85] Finally, political considerations may play a role in deciding whether or not to pursue disciplinary action against elected state prosecutors.[86]

Connick v. Thompson presents a striking example of the lack of professional discipline of prosecutors. The majority opinion in *Connick* cited ethics rules that apply to prosecutors, including the duty to seek justice and the duty to disclose exculpatory material to the defense.[87] The majority then cited, as the proper control over the prosecutors' behavior, the consequences for failure to abide by ethics rules, such as disbarment.[88] The majority opinion does not highlight, however, that New Orleans Parish District Attorney Harry Connick, Sr. avoided holding prosecutors in his office accountable.[89] Under Connick's direction, no prosecutor in that office was ever fired or disciplined for failing to turn over exculpatory evidence.[90]

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85. *Id.* at 761.

86. *Id.*

87. *Connick v. Thompson*, 131 S. Ct. 1350, 1362–63 (2011). The Court paid special attention to the Louisiana State Bar Association's (LSBA) Articles of Incorporation, which encompass "character and fitness standards" and comprise an "ethical regime designed to reinforce the profession's standards." *Id.* at 1362 (citing LSBA, Articles of Incorporation, art. 14 § 7 (1985)). Furthermore, the Court relied on *Strickland v. Washington*, which states that "[t]rial lawyers have a 'duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.'" *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Finally, the Court found that prosecutors have "unique ethical obligations" such as "the duty to produce *Brady* evidence to the defense." *Id.* (citing LSBA, Articles of Incorporation, art. 16, EC 7-13 (1971); MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (1984)).

88. *Id.* at 1362–63. Bar associations retain the authority to disbar attorneys, including prosecutors, for conduct such as withholding exculpatory evidence. Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 446 (2009). Generally speaking, disbarment is not used with regularity to address prosecutorial misconduct. *See supra* notes 78–79. The recent disbarment of District Attorney Michael Nifong for withholding exculpatory evidence and improper pretrial publicity in the Duke University lacrosse case, however, received considerable publicity. *See generally* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 285–306 (2008) (detailing the misconduct that ultimately led to Mr. Nifong's disbarment).

89. *Connick*, 131 S. Ct. at 1375, 1382 (Ginsburg, J., dissenting).

90. *Id.* at 1382. Connick served as district attorney for New Orleans Parish from 1973 until his retirement in 2002. DAVID W. NEUBAUER, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM 135–36 (9th ed. 2008). During his long tenure as district attorney, Connick's office was involved in several high-profile cases, including John Thompson's case, which involved the failure to disclose exculpatory evidence. *Id.* at 136 (discussing the Shareef Cousin case); *Kyles v. Whitley*, 514 U.S. 419, 453–44 (1995) (finding that the New Orleans District Attorney's Office withheld numerous potentially exculpatory pieces of evidence from the defense). Earlier this year, the Supreme Court handed down another opinion, which addressed the withholding of exculpatory evidence by the New Orleans Parish District Attorney's Office under

Moreover, even when prosecutors are disciplined professionally, and even if discipline were more regularly imposed, such sanctions provide no remedy for those wrongfully convicted due to prosecutorial misconduct.[91] In *Connick*, for example, even if prosecutors were disciplined for their misconduct, John Thompson would still be left with no compensation for the years he spent in prison for crimes he did not commit. The disciplinary process is not designed to redress wrongs, but to deter and punish misconduct. The correct use of professional discipline, thus, still remains a potential deterrent against intentional misconduct that results in a wrongful conviction. In light of the lack of professional discipline of prosecutors and the minimal remedies available to exonerees, the role of criminal sanctions and the importance of civil liability to deter prosecutorial misconduct must be revisited.

2. THE USE OF CRIMINAL ACTIONS TO DETER PROSECUTORIAL MISCONDUCT

In addition to the use of professional discipline, the Court in *Imbler v. Pachtman* cited the availability of criminal sanctions as reassurance that prosecutorial immunity would "not leave the public powerless to deter misconduct or to punish that which occurs."[92] Criminal sanctions, though theoretically available to discourage prosecutorial misconduct, are seldom used to address the problem.[93]

Connick's direction. *See Smith v. Cain*, 132 S. Ct. 627, 629–31 (2012) (holding that Connick's office violated *Brady* when it withheld police reports detailing statements made by the State's primary witness, which were inconsistent with that witness's trial testimony).

91. The purpose of ethics rules is to "create legally enforceable obligations that can shape norms of behavior." David Keenan et al., *The Myth of Prosecutorial Accountability after* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 221 (2011), http://yalelawjournal.org/2011/10/25/keenan.html. While enforcement of these ethics rules differ from state to state, most states follow the American Bar Association's Model Rules for Lawyer Disciplinary Enforcement. *Id.* at 234. Generally speaking, enforcement of ethics rules results in "one of several possible dispositions: dismissal, reprimand, censure, probation, suspension, or disbarment." *Id.* at 235.

92. *Imbler v. Pachtman*, 424 U.S. 409, 428–29 (1976).

93. In fact, the use of criminal prosecution under 18 U.S.C. § 242, which "allows the U.S. Department of Justice to criminally prosecute those individuals operating under color of law who are suspected of violating the civil rights of another" against any type of government official, is quite rare. Brian R. Johnson & Phillip B. Bridgmon, *Depriving Civil Rights: An Exploration of 18 U.S.C. 242 Criminal Prosecutions 2001–2006*, 34 CRIM. JUST. REV. 196, 197, 204 (2009). Over the span of six years the U.S. Department of Justice indicted a total of just 186 individuals under § 242. *Id.* at 200.

Therefore, the availability of criminal sanctions alone cannot be cited as a reason to limit civil liability for individuals wrongfully convicted of crimes. Criminal prosecution governed by 18 U.S.C. § 242 (Section 242)[94] has long been thought of as the "criminal analog of [Section] 1983."[95] Section 242 "provides a means by which agents of the government can be held criminally responsible for their misdeeds under color of their official position."[96]

Section 242, however, is difficult to apply to instances of prosecutorial misconduct.[97] For example, to prove a *Brady* violation under Section 242, the prosecution would have to show beyond a reasonable doubt that the prosecutor withheld exculpatory evidence *for the purpose of* violating the constitutional rights of the defendant.[98] The difficulty of proving that a prosecutor intended to violate the civil rights of another may explain why there has only been one prosecutor convicted under Section 242 since its enactment in 1866.[99]

B. State and Local Measures to Establish Prosecutorial Responsibility in Addressing and Preventing Wrongful Convictions

While nationwide studies highlight the lack of criminal and professional sanctions imposed on prosecutors engaged in intentional misconduct, some states and jurisdictions are taking steps to address prosecutorial misconduct. For example, some states and jurisdictions have implemented open-file discovery practices and special ethical guidelines aimed at both preventing and addressing prosecutorial misconduct that can lead to wrongful convictions. These local measures, however, have not increased disciplinary action and do not provide civil redress to the wrongfully convicted.

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94. Section 242 provides in part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 242 (1996).

95. *Imbler*, 424 U.S. at 429 (citing *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *Gravel v. United States*, 408 U.S. 606, 627 (1972)).

96. Andrew Smith, Note, Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1966 (2008).

97. Section 242 only applies to intentional misconduct. *See* § 242.

98. Smith, *supra* note 96, at 1967.

99. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 71.

1. THE USE OF OPEN-FILE DISCOVERY

Open-file discovery provides a possible solution to reduce the frequency of wrongful convictions. This remedy is particularly beneficial considering that *Brady* requires prosecutors to make subjective and difficult decisions about what should be considered exculpatory evidence.[100] Under an open-file discovery policy, prosecutors are not required to determine whether evidence is exculpatory; instead, the prosecutor's file is made available to the defense.[101] The defense, of course, is in a better position to evaluate the value of the evidence contained in the prosecutor's file.[102]

North Carolina, for example, enacted an open-file discovery law in response to three high-profile cases of prosecutorial misconduct involving withheld exculpatory evidence.[103] In North Carolina, the open-file discovery law requires the prosecution, upon request of the defense, to (1) make all law enforcement and prosecution files available to the defense, (2) disclose the names of all potential expert witnesses and their qualifications along with any test results or reports prepared by the expert, and (3) disclose the names of all witnesses the state plans to call during trial.[104] The purpose of the law is to minimize reoccurring problems involving the failure of prosecutors to disclose exculpatory evidence to the defense.[105]

Even when state law does not mandate open-file discovery, some local jurisdictions have adopted policies of open-file discovery. For example, in Wisconsin, the district attorneys' offices in La Crosse and Green Lake Counties have open-file discovery policies under which prosecutors turn over all police reports and other nonprivileged evidence to the defense.[106] While these policies largely eliminate the

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100. Mosteller, *supra* note 88, at 310; *see Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that withholding exculpatory evidence from the defense is a due process violation when that evidence is material to the defendant's guilt or innocence).

101. Smith, *supra* note 96, at 1960.

102. *See id.* at 1960, 1966.

103. Mosteller, *supra* note 88, at 273; *see* N.C. GEN. STAT. § 15A-903 (2011). The open-file discovery statute in North Carolina was predicated on prosecutorial misconduct involving the withholding of exculpatory evidence in three different cases prosecuted between 2004 and 2007. Mosteller, *supra* note 88, at 257. These three cases included the highly publicized prosecution of three Duke lacrosse players for sexual assault and two cases in which defendants were convicted of homicide and sentenced to death. *Id.* at 257–58.

104. § 15A-903.

105. *See* Mosteller, *supra* note 88, at 308.

106. Telephone Interview with Tim Gruenke, Dist. Att'y, La Crosse Cnty. (Nov. 23, 2011); Interview with Winn Collins, former Dist. Att'y, Green Lake Cnty. (Dec. 13, 2011).

need for prosecutors to decide if evidence is exculpatory, difficulties can still arise.

Difficulties that occasionally arise with the open-file policy in the La Crosse County District Attorney's Office generally involve either communication between prosecutors and victims or communication between prosecutors and law enforcement agencies. For example, a potential problem occurs when a victim in a case discloses potentially exculpatory information to the prosecutor that the victim does not want the prosecutor to share with the defense.[107] Furthermore, there are cases in which information obtained by law enforcement agencies is not communicated to the prosecutor due to lapses in communication or the failure to update files.[108] Despite these limitations, prosecutors in La Crosse County err on the side of disclosure, which reduces the possibility of wrongful convictions and protects prosecutors from accusations of misconduct.[109]

2. SPECIAL ETHICAL RESPONSIBILITIES OF PROSECUTORS

A limited number of states have also amended their rules of professional conduct to add special responsibilities for prosecutors in addressing wrongful convictions.[110] In 2008, the American Bar Association amended Rule 3.8 of the Model Rules of Professional Conduct, Special Responsibilities of the Prosecutor, to include sections

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107. Telephone Interview with Gruenke, *supra* note 106. For example, a domestic abuse victim may wish to confide in the prosecutor and ask that the prosecutor not disclose the otherwise unknown fact that the victim was intoxicated at the time of the alleged abuse.

108. *Id.* The Supreme Court addressed this issue saying "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Despite *Kyles*, open-file discovery policies cannot control the contents of the prosecutor's file and cannot require the prosecutor to include or search out specific information to add to their files. Jennifer Blasser et al., *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1968 (2010).

109. Telephone Interview with Gruenke, *supra* note 106.

110. *See* COLO. RULES PROF'L CONDUCT R. 3.8(g)-(h) (adopted in 2010); DEL. RULES PROF'L CONDUCT R. 3.8(d)(2); IDAHO RULES PROF'L CONDUCT R. 3.8(g)-(h) (adopted in 2010); N.D. RULES PROF'L CONDUCT R. 3.8(g)-(h) (adopted in 2012); TENN. RULES PROF'L CONDUCT R. 3.8(g)-(h) (adopted in 2011); WASH. RULES PROF'L CONDUCT R. 3.8(g) (adopted in 2011); WIS. SUP. CT. R. 20:3.8(g)-(h) (adopted in 2009). Effective July 1, 2012, New York became the eighth state to adopt a version of the special responsibilities of the prosecutor rule. N.Y. RULES OF PROF'L CONDUCT R. 3.8(c); *see* AM. BAR ASS'N CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8(G) AND (H) (July 24, 2012), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/3_8_g_h.authcheckdam.pdf.

that specifically address the role of the prosecutor in remedying wrongful convictions.[111] Sections 3.8(g) and (h) require prosecutors to take specific action when they learn of "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."[112]

Since 2008, only eight states have adopted a version of Rule 3.8(g) and (h).[113] While Idaho fully adopted the Model Rule, Colorado, Delaware, New York, North Dakota, Tennessee, Washington, and Wisconsin have adopted a modified version of the rule.[114] In Wisconsin, which was the first state to adopt a version of Model Rule 3.8(g) and (h),[115] the push for adoption came from the Wisconsin District Attorneys Association (WDAA).[116]

Although the adoption of Rule 3.8(g) and (h) is promising, especially in Wisconsin with full support of the WDAA, the fact that the vast majority of states have failed to adopt a version of 3.8(g) and (h) is troubling. In addition, the rules do not provide redress for the exonerated. Furthermore, in light of the lack of professional discipline of prosecutors, violation of Rule 3.8(g) or (h) is unlikely to have consequences. The rule is, however, a positive step toward promoting the role of the prosecutor as one to seek justice, rather than solely to obtain convictions.

III. INCREASING PROSECUTORIAL ACCOUNTABILITY: APPLYING THE THEORY OF RESPONDEAT SUPERIOR TO EGREGIOUS PROSECUTORIAL MISCONDUCT THAT RESULTS IN WRONGFUL CONVICTIONS

Along with positive advancements in the areas of open-file discovery and increased ethical responsibilities for prosecutors, countless proposals have been made seeking to increase prosecutorial accountability. A sample of these proposals includes: abandonment of

111. MODEL RULES OF PROF'L CONDUCT R. 3.8(g)-(h) (2008).

112. *Id.*

113. AM. BAR ASS'N CPR POLICY IMPLEMENTATION COMM., *supra* note 110.

114. *Id.*

115. *In re Amendment of Sup. Ct. Rules Ch. 20, Rules of Prof'l Conduct for Att'ys*, Wis. Sup. Ct. Order No. 08-24, 2009 WI 55 at 2–3, *available at* http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=36849; *see* AM. BAR ASS'N CPR POLICY IMPLEMENTATION COMM., *supra* note 110 (listing Wisconsin as the first state to adopt this version of the Model Rule).

116. *In re Amendment of Sup. Ct. Rules Ch. 20, Rules of Prof'l Conduct for Att'ys*, *supra* note 115.

the official policy requirement established by *Monell*,[117] specialized disciplinary committees,[118] intra-office regulation of prosecutors,[119] training specific to the causes of wrongful convictions,[120] disbarment of

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117. Schuck, *supra* note 63, at 1753; *see supra* text accompanying notes 60–64. For example, Professor Peter Schuck argues that *Monell* established "a doctrine whose principal consequence is to deny citizens recoveries against local governments for damage caused by officials' constitutional violations." Schuck, *supra* note 63, at 1755. Instead of focusing on whether an official policy caused an injury, Professor Schuck argues the official policy requirement should be discarded and courts should simply look to whether or not the municipality is responsible for the injury. *Id.* at 1779. Professor Schuck argues that one way to correct the problems with the official policy requirement under *Monell* is to ask if the municipality is responsible for the constitutional violation in a "legal, moral, [or] functional" way. *Id.* Professor Schuck's proposal to abandon the official municipal policy requirement under *Monell* does not necessarily reject an application of respondeat superior. Professor Schuck explains:

> Whether the Court should import private law notions of enterprise responsibility into the realm of municipal responsibility under § 1983—and if it does, whether it should take the further step of adopting a rule of respondeat superior liability—are important questions. For present purposes, however, the more important point is this: it need not retain its "official policy" requirement in order to serve its jurisprudential and policy goals.

Id. at 1785.

118. DWYER, NEUFELD & SCHECK, *supra* note 43, at 259.

119. *E.g.*, Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215 (2010); Barkow, *supra* note 80. One such proposal models the type of successful quality assurance programs adopted throughout the medical profession. Scheck, *supra*, at 2226. The proposal focuses on the creation of formal and uniform intra-office guidelines that are missing from many prosecutors' offices. *Id.* The underlying premise is that the use of checklists, with specific attention to the disclosure of *Brady* materials to the defense, would reduce disclosure errors and would allow for more effective supervision. *Id.* at 2238–40. Furthermore, this type of quality assurance program could be used to keep data on errors in prosecutors' offices and would promote the need to establish clear office policies on what constitutes *Brady* material. *Id.* at 2242–46. This proposal would also increase the use of formal training programs in prosecutors' offices. *Id.* at 2247–48. Finally, it would include a procedure to audit any case reversed due to prosecutorial misconduct as well as cases involving prosecutorial misconduct that are upheld due to harmless error. *Id.* at 2246–47. A proposal similar to the formation of professional integrity panels also seeks to identify "wrongdoing through monitoring, auditing, and reporting." Barkow, *supra* note 80, at 2106. This proposal applies the corporate compliance model used by federal prosecutors to combat white-collar crime to the inner workings of a prosecutor's office. *Id.* at 2098–101, 2105–06. The corporate compliance model is built on the idea that "companies [are] not merely . . . targets for prosecution, but . . . valuable partners in achieving real reform." *Id.* at 2100. The model focuses on encouraging an office culture that promotes law abidance and recognizes that individuals working within an office are in the best position to identify and combat wrongdoing within the office. *Id.* at 2100–01.

120. HUFF ET AL., *supra* note 44, at 151.

prosecutors involved in egregious misconduct,[121] and amending Section 1983 to broaden plaintiffs' abilities to remedy civil rights violations.[122]

Underlying these proposals is the possibility that the policy considerations relied upon by the Court in *Imbler v. Pachtman*[123] to establish prosecutorial immunity do not account for modern pressures on prosecutors.[124] Since *Imbler* was decided in 1976, media coverage of crime has exploded and placed added pressure on prosecutors to make swift charging decisions and quickly obtain convictions.[125] Additionally, elected prosecutors face political pressure to obtain convictions, which are essential in addressing the public's concern for safety and crime reduction.[126]

The vast majority of both the current and proposed measures aimed at reducing prosecutorial misconduct and wrongful convictions focus on identifying and preventing wrongful convictions. While this focus is justified, it does not properly address the injustice suffered by those who have been wrongfully convicted and incarcerated.[127] There are several reasons why the doctrine of respondeat superior should be available in Section 1983 suits to hold municipalities liable for wrongful convictions resulting from egregious prosecutorial misconduct. The origins and principles of respondeat superior, which are used to justify the use of the doctrine in other contexts, also validate the use of the doctrine in Section 1983 suits. The three underlying principles used to justify respondeat superior (harm reduction, victim compensation, and cost spreading)[128] align with extending respondeat superior liability to Section 1983 suits for egregious prosecutorial misconduct. In addition, the use of respondeat superior in Section 1983 suits would not compromise prosecutors' daily decision making.

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121. *Id.* at 152.

122. Bodensteiner, *supra* note 2.

123. *See supra* text accompanying notes 54–59.

124. Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 8–9 (2009).

125. *Id.* at 12–13.

126. *Id.* at 13.

127. This is not to say that there are no proposals that address the need to broaden the application of Section 1983 to achieve a fair administration of justice. *See, e.g.*, Bodensteiner, *supra* note 2, at 70–71; Schuck, *supra* note 63, at 1755–56.

128. 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS 21 (2d ed. 1986).

A. The Origins and Purposes of Respondeat Superior Align with the Doctrine's Use in Section 1983 Suits

Historians disagree over the exact origins of the doctrine of respondeat superior.[129] The doctrine, however, "is to be understood now principally in terms of its effectiveness in achieving contemporary social objectives."[130] The modern doctrine of respondeat superior is premised upon enterprise liability theory.[131] The concept of enterprise liability is that "liability for torts of employees are business expenses and can be absorbed by the employer."[132] The objectives underlying vicarious liability, upon which respondeat superior is premised, are generally cited as harm reduction, victim compensation, and cost spreading "among the beneficiaries of the enterprises that entail them."[133]

The availability of the doctrine of respondeat superior in Section 1983 suits to address egregious prosecutorial misconduct that results in a wrongful conviction also promotes the general justifications for vicarious liability. While the basic justifications for respondeat superior stem from the context of for-profit businesses, these underlying principles can be applied to nonprofit organizations and governmental entities as well.[134] Namely, the use of respondeat superior to address egregious prosecutorial misconduct can serve to reduce instances of

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129. *Id.* at 8–10.

130. *Id.* at 10.

131. *South Carolina Ins. Co. v. James C. Greene & Co.*, 348 S.E.2d 617, 623 (S.C. Ct. App. 1986). Enterprise liability "allocates the risk of the servant's negligence to the master, not because he is at fault, but because he is normally in a better position than the servant to respond in damages." *Id.*; *see also* Mark E. Roszkowski & Christie L. Roszkowski, *Making Sense of Respondeat Superior: An Integrated Approach for Both Negligent and Intentional Conduct*, 14 S. CAL. REV. L. & WOMEN'S STUD. 235, 240 (2005) (explaining that respondeat superior is supported by both enterprise liability theory and the goal of injury prevention). "[R]espondeat superior liability prevents many injuries caused by employees by providing employers with a strong incentive to exercise reasonable care in the selection, training and supervision of employees." *Id.*

132. Roszkowski & Roszkowski, *supra* note 131, at 240.

133. HARPER ET AL., *supra* note 128, at 21. Additionally, the current use of vicarious liability principals, including respondeat superior, has not stifled business development. *Id.* at 21–22.

134. The argument that vicarious liability should not apply to nonprofit organizations, such as charities, ignores three important considerations. First, regardless of profitability, a business or organization "still run[s] risks for the benefit of the organisation." DOUGLAS BRODIE, ENTERPRISE LIABILITY AND THE COMMON LAW 11 (2010). Second, profit does not have to be "viewed in a purely financial sense." *Id.* Finally, vicarious liability rests on the pursuit of profit, whether financial or otherwise, and not on the actualization of a profit. *Id.*

misconduct, provide just compensation, and spread losses to the beneficiaries of the prosecutorial function.

1. THE USE OF RESPONDEAT SUPERIOR AS AN ADDED MEASURE TO REDUCE PROSECUTORIAL MISCONDUCT

The use of respondeat superior may serve as a deterrent against prosecutorial misconduct. Justice Stevens has long argued that the doctrine of respondeat superior would positively affect the inner workings of prosecutors' offices.[135] The use of respondeat superior provides an incentive for municipalities to better supervise their employees, including prosecutors.[136] It may also encourage training opportunities to help ensure that offices are functioning properly, which in turn would minimize civil suits and could ultimately effect systemic change.[137] Conceivably, respondeat superior may incentivize the adoption of intra-office policies and procedures such as an internal integrity panel[138] or another variation of that model that better aligns with the needs and size of the prosecutor's office.[139]

2. INCREASING COMPENSATION AND REDRESSING HARM FOR EXONEREES THROUGH THE USE OF RESPONDEAT SUPERIOR

The doctrine of respondeat superior offers the possibility of greater compensation, which is not found in other proposals that also seek to increase access to civil liability under Section 1983. For example, while eliminating the official policy requirement under *Monell* would allow greater access to civil redress, the doctrine of respondeat superior allows those wrongfully convicted because of egregious prosecutorial

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135. Stevens, *supra* note 1, at 11–12; *City of Okla. City v. Tuttle*, 471 U.S. 808, 843–44 (1985) (Stevens, J., dissenting) (discussing the policy justifications for applying respondeat superior against municipalities).

136. Joel B. Rudin, *Suing for Prosecutorial Misconduct*, CHAMPION, Mar. 2010, at 24, 28.

137. *See id.* at 30.

138. *See supra* note 119 and accompanying text.

139. While respondeat superior may encourage more formalized training and office policies, some would argue that it may not deter the types of individuals engaged in egregious misconduct. *See* Larry Kramer & Alan O. Sykes, *Municipal Liability under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 287. The argument that respondeat superior would somehow lessen an individual prosecutor's job performance ignores that fact that most employees, including prosecutors, are internally motivated to perform their jobs at a high level. *See* Moshe Zvi Marvit, Comment, *Who's Afraid of Municipal Liability? The Supreme Court's Strange Exclusion of § 1983 Respondeat Superior Municipal Liability*, 37 OHIO N.U. L. REV. 461, 488 (2011).

misconduct to access the financial pockets of the municipality.[140] Municipalities, in theory, are likely to have more financial resources than individual government employees, including prosecutors.[141]

Aside from financial compensation, fairness requires that exonerees have access to civil redress in cases involving egregious prosecutorial misconduct that contributed to their wrongful convictions. The very purpose of Section 1983 is to offer a remedy to individuals when those acting under "color of state law" violate an individual's constitutional rights.[142] It seems fitting, considering the purpose of Section 1983, to allow those wrongfully convicted to have a less-restricted avenue to pursue civil redress than what currently exists under Section 1983.[143]

3. SPREADING COSTS TO SOCIETY IS JUSTIFIED TO ADDRESS EGREGIOUS PROSECUTORIAL MISCONDUCT THAT RESULTS IN A WRONGFUL CONVICTION

Finally, cost spreading, an underlying justification for vicarious liability, can be achieved through the use of respondeat superior in Section 1983 suits. This justification is the most difficult concept to translate to the realm of nonprofit institutions and governmental entities like municipalities.[144] While municipalities certainly function differently than for-profit businesses, these differences should not be cited to foreclose the use of respondeat superior in municipal liability suits under Section 1983.[145]

For example, in the context of the medical industry, traditional ideas of charitable immunity for nonprofit hospitals and sovereign immunity for public facilities have fallen to the wayside.[146] The shift

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140. Jack M. Beermann, *Section 1983 Municipal Liability in Civil Rights Litigation*, 48 DEPAUL L. REV. 627, 646 (1999).

141. *Id.*

142. Marvit, *supra* note 139, at 480.

143. *See id.* at 491. Fairness alone justifies the use of respondeat superior in Section 1983 suits addressing egregious and intentional prosecutorial misconduct that results in wrongful convictions. *See* Beermann, *supra* note 140, at 666.

144. The ability of a business enterprise to account for damages caused by its employees is aided by the availability of insurance. HARPER ET AL., *supra* note 128, at 19.

145. *See supra* note 133 and accompanying text.

146. Randall R. Bovbjerg & Robert Berenson, *Enterprise Liability in the Twenty-First Century*, *in* MEDICAL MALPRACTICE AND THE U.S. HEALTH CARE SYSTEM 219, 222 (Rogan Kersh & William M. Sage eds., 2006). "Having lost traditional immunities, hospitals as employers also became responsible for any negligence of their employees, including nurses and others involved in clinical care." *Id.*; *see also* PHILLIP I. BLUMBERG & KURT A. STRASSER, THE LAW OF CORPORATE GROUPS 442–52 (1998)

away from hospital immunity, even in nonprofit hospitals, was in response to changes and increases in hospital services that began in the 1950s.[147] Outside of the United States, the Canadian Supreme Court held that nonprofit organizations are not immune from vicarious liability.[148]

Municipal funds would need to be used to settle damage awards associated with the use of respondeat superior in Section 1983 suits addressing egregious prosecutorial misconduct that results in a wrongful conviction. In other words, the costs associated with the use of respondeat superior in the context of prosecutorial misconduct leading to a wrongful conviction would spread to taxpayers.[149] If one considers that taxpayers benefit from the prosecutor's law enforcement role then it follows that taxpayers should ultimately be held accountable for the risks associated with that benefit.[150]

B. The Use of Respondeat Superior in the Context of Egregious Prosecutorial Misconduct Does Not Compromise Decision Making

In *Imbler v. Pachtman*, the underlying policy consideration for prosecutorial immunity was and still is that prosecutors need to be free from suit in order to make difficult judgments.[151] This important public policy concern would not be affected by applying the doctrine of respondeat superior to extreme cases of prosecutorial misconduct that result in wrongful convictions.[152] First, an application of respondeat

(discussing changes in hospital immunity and the use of respondeat superior in the context of medical liability).

147. *Id.* at 447–48.

148. *Bazley v. Curry*, [1999] 2 S.C.R. 534 (Can.) (holding a youth-serving nonprofit organization vicariously liable for an employee's sexual abuse of children in the care of the organization). In refusing to exempt a nonprofit organization from liability based on policy reasons the Court stated, "[t]he employer's enterprise created and fostered the risk that led to the ultimate harm." *Id.* at 537.

149. See *infra* text accompanying notes 156–159 for a discussion of the potential financial burden on municipalities under this proposal.

150. W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 364–65 (2004) ("Law exists in order to provide a framework for coordinated social action in the face of persistent moral disagreement.").

151. *Imbler v. Pachtman*, 424 U.S. 409, 422–25 (1976) ("[I]f the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.").

152. Although holding municipalities liable for egregious misconduct does not necessarily disturb prosecutorial immunity, it is interesting that, before the advent of the innocence movement, Justice Byron White's concurring opinion in *Imbler* expressed concern with extending absolute prosecutorial immunity to prosecutors who withhold exculpatory evidence. *Imbler*, 424 U.S. at 438, 442–44 (White, J., concurring). Justice

superior to egregious prosecutorial misconduct would not affect the majority of prosecutors who make appropriate decisions throughout the course of their employment. Second, holding a municipality liable for the egregious misconduct of its prosecutors does not require that the individual prosecutor also face liability.

C. Overcoming Difficulties and Applying Respondeat Superior to Cases of Egregious Prosecutorial Misconduct

While respondeat superior should be considered as an added proposal to increase the accountability of prosecutors for wrongful convictions and to allow civil redress for exonerees, difficulties with applying the doctrine must be discussed. One difficulty with applying respondeat superior to cases of egregious prosecutorial misconduct that lead to wrongful convictions is defining exactly what level of misconduct is "egregious." For example, while the intentional withholding of a crime laboratory report in *Connick v. Thompson* would seemingly meet the definition of egregious prosecutorial misconduct, not everyone would agree.[153] In *Connick*, Justice Antonin Scalia contended that the withheld crime laboratory report did not reach the level of a *Brady* violation because the state is not required to disclose untested evidence to the defense.[154] But while it may be difficult to define egregious misconduct, judges and juries frequently draw these types of distinctions in other contexts.[155]

There is also a concern that respondeat superior would impose a serious financial burden on municipalities. This could force municipalities to cut essential services to meet the financial burden that civil suits might impose.[156] If a municipality is forced to cut essential services to account for litigation costs and settlement awards then those cutbacks would likely "fall disproportionally on the poor and others who are often left out of the political process."[157]

White's comments were an early indicator that perhaps absolute prosecutorial immunity merits reconsideration.

153. See, for example, Justice Antonin Scalia's concurrence in *Connick v. Thompson*, 131 S. Ct. 1350, 1369 (2011) (Scalia, J., concurring).

154. *Id.* (Scalia, J., concurring). In other words, while the crime laboratory report determined a blood type from a tested swatch of fabric, that evidence was arguably not exculpatory because the State had no reason to know and no obligation to determine John Thompson's blood type.

155. See Lawrence M. Solan, *Jurors As Statutory Interpreters*, 78 CHI.-KENT L. REV. 1281 (2003), for a discussion of the role of the jury in statutory interpretation.

156. Marvit, *supra* note 139, at 488–89.

157. *Id.* at 488.

There is, however, the possibility that respondeat superior would actually reduce the costs incurred by municipalities facing Section 1983 suits under the current structure.[158] The complexity of *Monell* creates unnecessary expenditures of time and money for both plaintiffs and municipalities.[159] The use of respondeat superior instead of the official policy requirement under *Monell* would clarify and arguably simplify Section 1983 litigation, which would lead to less costly and time-intensive suits. It is also possible that respondeat superior would encourage prosecutors' offices to take greater steps to minimize *Brady* violations, which could lead to fewer violations and fewer costs associated with addressing those violations.

While the doctrine of respondeat superior may present a great financial burden to some municipalities, the use of the doctrine should not be abandoned as part of a larger solution aimed at addressing prosecutorial misconduct. Egregious prosecutorial misconduct represents an absolute breakdown of our adversarial system and the doctrine of respondeat superior should be considered a viable option in addressing this type of misconduct.

A change in current Section 1983 jurisprudence from the official policy requirement under *Monell* to the use of respondeat superior is not an impossible feat. Countless scholarly articles have analyzed Congress's enactment of Section 1983 and uniformly concluded that the Supreme Court's exclusion of vicarious liability under Section 1983 is based on historical misunderstandings and merits reconsideration.[160] Furthermore, two retired Supreme Court Justices, Justice Stevens and Justice David Souter, have called for a reexamination of *Monell*.[161] More importantly, two current members of the Court, Justices Stephen

158. Beermann, *supra* note 140, at 666.

159. *Id.* Justice Stephen Breyer has commented that *Monell* "has generated a body of interpretive law that is so complex that the law has become difficult to apply." *Board of County Comm'rs v. Brown*, 520 U.S. 397, 431 (1997) (Breyer, J., dissenting).

160. *See, e.g.*, Achtenberg, *supra* note 2, at 2185 ("*Monell* relies on an historical analysis that is simply wrong. . . ."); Bodensteiner, *supra* note 2, at 70–71 (calling for Congress to amend Section 1983 to undo "some of the damage the Court has inflicted on [Section] 1983"); Eisenberg, *supra* note 2, at 483 ("Past weaknesses in the Court's treatment of [S]ection 1983 cases, however, may pale in comparison to present weaknesses in the Court's understanding."); Gerhardt, *supra* note 2, at 540–41 ("The Supreme Court . . . [has] failed to explain adequately the origin, purpose, or significance of *Monell*'s policy or custom requirement.").

161. Justice Stevens has been a longstanding advocate of reexamining Section 1983. *See, e.g.*, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 489 (1986) (Stevens, J., dissenting); *City of Okla. City v. Tuttle*, 471 U.S. 808, 834–40 (1985) (Stevens, J., dissenting). Justice Souter has also expressed concern with the unsettled precedent set by the Court's Section 1983 jurisprudence. *See Board of County Comm'rs*, 520 U.S. at 430 (Souter, J., dissenting).

Breyer and Ruth Bader Ginsburg, have agreed that a reexamination of *Monell* is necessary.[162]

The growing research on the causes of wrongful convictions, including prosecutorial misconduct, adds to the likelihood that either Congress or the Supreme Court will reexamine municipal liability under Section 1983. Highly publicized decisions, such as *Connick v. Thompson*, also add to the likelihood for change.[163] Furthermore, the proposed use of respondeat superior to enhance prosecutorial accountability in light of wrongful convictions provides another pertinent reason for either the Court or Congress to reexamine Section 1983.

CONCLUSION

There are a limited number of prosecutors who engage in egregious misconduct to obtain convictions; however, professional discipline of prosecutors and criminal sanctions cannot be relied on to curb these instances of prosecutorial misconduct. Moreover, unlike professional discipline, criminal sanctions, and many current proposals aimed at increasing prosecutorial responsibility, the doctrine of respondeat superior allows for the type of civil redress upon which Section 1983 is premised. Under current Section 1983 jurisprudence, the barriers that exonerees face in proving civil liability are almost insurmountable.[164] The doctrine of respondeat superior must be considered along with other efforts, such as internal integrity panels and open discovery practices, as a viable option for both stemming prosecutorial misconduct and allowing civil redress for those whom our justice system has failed.

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162. *Id.* at 430–31 (Breyer, J., dissenting). Justice Ginsburg joined in Justice Breyer's dissent. *Id.* at 430 (Breyer, J., dissenting).

163. See John Schwartz & Brandi Grissom, *Exonerated of Murder, Texan Seeks Inquiry on Prosecutor*, N.Y. TIMES, Dec. 19, 2011, at A16, for a discussion of the prosecutorial misconduct involved in the wrongful conviction and recent exoneration of Michael Morton.

164. For example, suits premised upon a failure to train are difficult to prove "even when it is common knowledge that a particular municipality encourages or ignores wayward behavior on the part of its officials." Beermann, *supra* note 140, at 666. Suits focused on failure to train claims are just one example of the difficult nature of proving the existence of an official policy requirement under *Monell*. *See supra* note 70 and accompanying text.