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ARTICLES

REFORMING THE CIVIL RIGHTS ACT OF 1871: THE PROBLEM OF POLICE PERJURY

Michael Goldsmith*

Question: Now you just said there was a supervisor or a lieutenant who joked about [police falsifications] in your presence?

[Officer]: That's correct, sir. Scenarios were, were you going to say (a) that you observed what appeared to be a drug transaction; (b) you observed a bulge in defendant's waistband; or (c) you were informed by a male black, unidentified at this time that at that location there were drug sales.

Question: So, in other words, what the lieutenant was telling you is: here's your choice of false predicates for these arrests?

[Officer]: That's correct. Pick which one you're going to use.¹

Testimony Before the City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, 1994

¹ See Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002). Professor Goldsmith also serves on the Board of Directors of the Rocky Mountain Innocence Center. The author wishes to express his appreciation to Kimberlee Hiatt, BYU 2004, for her fine research assistance, Scott Borrowman, BYU 2005, for his assistance reviewing this manuscript, and to the BYU reference staff, especially Galen Fletcher and Ron Fuller.

Police perjury is no joking matter, nor is it confined to New York City. In 1999-2000, Texas authorities convicted thirty-eight mostly African American defendants on fabricated narcotics charges. The Texas experience bore a close resemblance to wrongful prosecutions that occurred in Vermont approximately thirty years ago, where a single high-profile officer’s perjured testimony produced at least seventy-one false narcotics convictions.

Fortunately, the Vermont victims found some measure of relief by suing for damages under 42 U.S.C. § 1983, the present day codification of section 1 of the Civil Rights Act of 1871 (the CRA). This provision, which Congress enacted after the Civil War to enforce the Fourteenth Amendment, imposes civil liability upon “[e]very person who, under color of [law] . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” However, victims today can no longer rely upon the CRA to provide adequate relief. An intervening 1983 Supreme Court decision, Briscoe v. LaHue, held that all witnesses who

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2 Simon Romero & Adam Liptak, Texas Court Acts to Clear 38 in Town-Splitting Drug Case, N.Y. TIMES, Apr. 2, 2003, at A1 (reporting the dismissal of all cases, including those in which defendants had pleaded guilty). Initially, law enforcement authorities conducted a mass arrest of forty-six defendants, which comprised “more than [ten] percent of Tulia’s tiny African-American population.” Bob Herbert, Editorial, Kafka in Tulia, N.Y. TIMES, July 29, 2002, at A19. When a few defendants convicted at trial received prison terms ranging from sixty to 300 years, others rushed to plead guilty in the hope of receiving leniency. Id.; see also SCOTT CHRISTIANSON, INNOCENT: INSIDE WRONGFUL CONVICTION CASES 2 (2004) (analyzing wrongful convictions in New York, but noting a nationwide problem).

3 HAMILTON E. DAVIS, MOCKING JUSTICE 225–26 (1978); see also Joyce Jensen, Full Unconditional Pardons, N.Y. TIMES, Jan. 9, 1977, § 4, at 22 (reporting that the Vermont Governor pardoned seventy-one persons wrongfully convicted of drug charges).

4 The pleadings are on file with the author.

5 In pertinent part, the Fourteenth Amendment provides: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Congress enacted section 1 of the CRA, now codified at 42 U.S.C. § 1983, as part of the Ku Klux Klan Act of 1871 in response to concerns that state officials of the former Confederacy both permitted and promoted actions to deprive newly freed slaves of their legal rights. See Briscoe v. LaHue, 460 U.S. 325, 336–39 (1983); Monroe v. Pape, 365 U.S. 167, 171 (1961); see also ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.2 (4th ed. 2003) (reviewing the history and purpose of § 1983).

commit perjury at trial, including police officers, enjoy absolute immunity from civil liability under the CRA.⁷

The Supreme Court premised Briscoe on the conclusion that the CRA had not abrogated pre-existing common law immunity for witnesses⁸ and noted that only legislative reform can repair the resulting statutory gap.⁹ Remarkably, although the decision engendered considerable criticism,¹⁰ none of its critics have proposed reforms that respond to the Court's suggested legislative solution. Rather than endure passage of another twenty years without congressional response, this Article reconsiders the Briscoe decision, addresses its impact in light of recent experience, and proposes legislative reform to eliminate absolute immunity for perjured police testimony.

Part I of this Article explains that the Briscoe decision inevitably flowed from a series of prior Supreme Court rulings extending common law immunities to defendants sued under the CRA and notes that these decisions, including Briscoe, all violate the basic principle of

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⁷ 460 U.S. at 345-46. The Court stated:

In short, the rationale of our prior absolute immunity cases governs the disposition of this case. In 1871, common-law immunity for witnesses was well settled. The principles set forth in Pierson v. Ray, 386 U.S. 547 (1967), to protect judges, and in Imbler v. Pachtman, 424 U.S. 409 (1976), to protect prosecutors, also apply to witnesses, who perform a somewhat different function in the trial process but whose participation in bringing the litigation to a just—or possibly unjust—conclusion is equally indispensable.

Id.

⁸ Id. at 336-41. The Court also reasoned that to the extent the Civil Rights Act may have been motivated by concerns about perjured testimony, Congress was concerned about unjust acquittals rather than wrongful convictions.

This evidence does not, however, tend to show that Congress intended to abrogate witness immunity in civil actions under § 1, which applied to wrongs committed "under color of . . . law." The bill's proponents were exclusively concerned with perjury resulting in unjust acquittals—perjury likely to be committed by private parties acting in furtherance of a conspiracy—and not with perjury committed "under color of law" that might lead to unjust convictions. In hundreds of pages of debate there is no reference to . . . perjury by a government official leading to an unjust conviction.

Id. at 339-40.

⁹ Id. at 344 n.30 ("[I]t is not for us to craft a new rule designed to enable trial judges . . . to allow recovery in cases of demonstrated injustice . . . Congress has the power to fashion an appropriate remedy if it perceives the need for one.").

statutory construction that Courts must ordinarily interpret a statute according to its plain meaning. Part II discusses the nature and extent of perjured testimony in criminal prosecutions, explains why the threat of criminal prosecution fails to deter perjury, and notes that congressional reform restricting habeas corpus relief has exacerbated the problem. Part III both examines the limited range of financial remedies presently available for the wrongfully convicted and suggests that, at least when police perjury constitutes a "custom" or "practice," Briscoe should not bar § 1983 liability for governmental entities that promote or tolerate such conduct. Finally, Part IV critiques various suggested reforms and proposes amending the CRA to eliminate absolute immunity for law enforcement officials who commit perjury.

I. THE BASIS FOR BRISCOE: COMMON LAW IMMUNITIES UNDER THE CRA—WHEN "EVERY PERSON" DOES NOT MEAN "EVERY PERSON"

Section 1983 ostensibly applies to "every person" who violates its provisions "under color of [law]." As such, the Briscoe holding initially appears contrary to both the purpose of the CRA and to the principle of statutory construction requiring courts to interpret legislation according to its plain meaning. Nevertheless, the Briscoe decision was hardly surprising. Although the Supreme Court granted certiorari to resolve a circuit split, its CRA decisions since 1951 foreshadowed the outcome in Briscoe. The Court had never read the CRA

11 42 U.S.C. § 1983. By its terms, § 1983 only applies to actions taken "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." Id. It does not generally apply to actions pursuant to federal law, and it "provides no right of action against federal (rather than state) officials." Russell v. U.S. Dep't of the Army, 191 F.3d 1016, 1019 (9th Cir. 1999). In the absence of a statutory remedy against federal officers, the Supreme Court has recognized an implied right of action in various constitutional (but not statutory) provisions. See Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971); see also Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 67 (2001) (noting that the Bivens remedy is at least available for certain violations of the Fourth, Fifth, and Eighth Amendments).

12 See, e.g., Mitchum v. Foster, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" (quoting Ex parte Virginia, 100 U.S. 339, 346 (1879))); supra note 5; infra note 27.


14 Briscoe, 460 U.S. at 328.
literally, reasoning instead that § 1983 "cannot be understood in a historical vacuum."\textsuperscript{15}

For example, starting with \textit{Tenney v. Brandhove},\textsuperscript{16} an action alleging that California legislators violated the plaintiff's First Amendment rights through intimidation, the Supreme Court reasoned that Congress could not have intended the general language of § 1983 "to overturn the tradition of legislative freedom achieved in England . . . and carefully preserved in [America]."\textsuperscript{17} Accordingly, \textit{Tenney} held that Congress did not intend § 1983 to abrogate absolute legislative immunity under pre-existing common law.\textsuperscript{18} Prior to \textit{Briscoe}, the Supreme Court employed this reasoning to find that the Forty-Second Congress, which enacted § 1983, intended to continue common law immunities for several categories of defendants, including judges, governors and other executive officials, and legislators, among others.\textsuperscript{19} Thus, when faced with the question of absolute immunity for witnesses under § 1983, the \textit{Briscoe} Court readily credited Congress with awareness of common law witness immunity and concluded that § 1983 incorporated that principle.\textsuperscript{20} Justice Stevens's majority opinion recognized that this outcome bars relief for wrongfully convicted defendants, but concluded that "the alternative of limiting the official's immunity would disserve the broader public interest."\textsuperscript{21} From a policy standpoint, Justice Stevens expressed concern that without absolute immunity "witnesses might be reluctant to come forward to testify. And once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability."\textsuperscript{22} Finally, although the Court acknowledged that these concerns apply with "diminished

\begin{thebibliography}{99}
\bibitem{tenney} 341 U.S. 367 (1951).
\bibitem{tenney} Id. at 376.
\bibitem{tenney} Id. at 378–79.
\bibitem{briscoe} Briscoe v. LaHue, 460 U.S. 325, 330 (1983); cf. \textit{Fact Concerts, Inc.}, 453 U.S. at 258 (noting that an "important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary").
\bibitem{briscoe} \textit{Briscoe}, 460 U.S. at 345.
\bibitem{briscoe} Id. at 333 (citations omitted).
\end{thebibliography}
force” to police officers as compared to private witnesses,\textsuperscript{23} it declined to “carve out an exception to the general rule of immunity in cases of alleged perjury by police officer witnesses.”\textsuperscript{24}

Cumulatively, the Court’s willingness to continue common law immunities for a wide range of governmental officials threatened to undermine the very purpose of § 1983, which, by definition, only applies to persons acting “under color of [law]” who deprive others of their constitutional rights.\textsuperscript{25} Given this objective, the \textit{Briscoe} majority’s interpretation of legislative history has been criticized as unduly narrow and improperly selective.\textsuperscript{26} More fundamentally, however, \textit{Briscoe} and the other CRA immunity decisions contravene perhaps the first principle of statutory construction: that Courts must give a statute its plain meaning, unless doing so would produce absurd results.\textsuperscript{27} A corollary to this principle further dictates that judges ordinarily may not

\textsuperscript{23} Id. at 342. In contrast to private citizens, police officers have a duty to testify and their professional interest in securing convictions “would assertedly counterbalance any tendency to shade testimony in favor of potentially vindictive defendants.” Id. Moreover, they ordinarily enjoy only qualified immunity from § 1983 liability and their government employers handle their defense. Id. Further, because juries usually consider police witnesses to be credible, perjured police testimony is likely to be given more weight than other witnesses. Id. Finally, the close relationship between prosecutors and the police results in the risk of criminal prosecution being “not an effective substitute for civil damages.” Id.

\textsuperscript{24} Id. at 341-42.

\textsuperscript{25} 42 U.S.C. § 1983 (2000); see supra notes 5, 12. Thus, it makes no sense to immunize the same individuals that the statute targets. See Imbler v. Pachtman, 424 U.S. 409, 434 (1976) (White, J., concurring) (“To extend absolute immunity to any group of state officials is to negate . . . the very remedy . . . Congress sought to create.”); Scheuer v. Rhodes, 416 U.S. 232, 243 (1974) (noting that, through the CRA, “Congress intended ‘to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State . . . , whether they act in accordance with their authority or misuse it’” (quoting Monroe v. Pape, 365 U.S. 167, 171-72 (1961))).


consider a statute’s legislative history to interpret its plain meaning.\textsuperscript{28} Indeed, the strict constructionist Supreme Court routinely applies this principle, emphasizing that legislative history properly becomes an interpretative tool only when statutory language is ambiguous.\textsuperscript{29} In contrast, the text of § 1983, which applies to “every person,”\textsuperscript{30} is certainly broad but hardly ambiguous.

Nonetheless, the Supreme Court has declined to give the CRA its plain meaning; therefore, “every person” who violates this statute is not necessarily liable under § 1983. Police officers and other government officials may perjure themselves without risk of statutory civil liability. Unfortunately, such perjury often contributes to wrongful convictions.

II. Perjury, Wrongful Convictions, and Habeas Corpus Restrictions

Although our criminal justice system is premised on the principle “that it is better that ten guilty persons escape, than that one innocent suffer,”\textsuperscript{31} recent experience demonstrates that wrongful convictions are not uncommon. Based upon a current prison population of 2,000,000, recent studies report that an error rate of just 0.5% would translate into 10,000 wrongful convictions.\textsuperscript{32}

\textsuperscript{28} See 2A SINGER, \textit{supra} note 13, § 46:04 (“It has been held that the remarks of a legislator, even the sponsor of the bill, will not override the plain meaning of a statute.”).

\textsuperscript{29} See BedRoc Ltd. v. United States, 124 S. Ct. 1587, 1593 (2004) (declining to look to legislative history in interpreting an unambiguous statute); United States v. Gonzales, 520 U.S. 1, 6 (1997) (refusing to consider legislative history when the statute was straightforward).


\textsuperscript{32} C. Ronald Huff et al., \textit{Convicted But Innocent: Wrongful Conviction and Public Policy} 61–62 (1996) (reporting statistical analysis); see also Daniel Givelber, \textit{Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?}, 49 Rutgers L. Rev. 1317, 1343 (1997) (describing studies reporting an erroneous conviction rate ranging from 0.5% to five percent). This is not a new problem. See generally Edwin M. Borchard, \textit{Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice}, at vii (1932) (detailing a landmark study on twentieth century wrongful conviction cases and noting that the sixty-five cases in the study “have been selected from a much larger number” and that “they come from all sections of the country”). In capital cases, the erroneous conviction rate has often been higher. See, e.g., Barry C. Scheck & Sarah L. Tofte, Gideon’s Promise and the Innocent Defendant,
No definitive data exists documenting the degree to which police perjury accounts for wrongful convictions. However, there is overwhelming anecdotal evidence of widespread police perjury in our criminal justice system.\textsuperscript{33} Most often, it occurs at pretrial suppression hearings litigating defense claims of police constitutional violations.\textsuperscript{34} Since judges finding constitutional error must often suppress incriminating evidence,\textsuperscript{35} police witnesses anxious to avoid this result can readily rationalize perjury in the interest of convicting a guilty defendant.\textsuperscript{36} Indeed, this practice has become so common that police officers themselves refer to it as "testilying."\textsuperscript{37}

Although motions to exclude evidence are designed to vindicate constitutional rights and rarely touch upon claims of actual innocence, policy perjury at suppression hearings can increase the risk of

\textsuperscript{33} For example, Professor Alan Dershowitz has observed:

\begin{quote}
Every objective study of police perjury has come to similar conclusions. The problem of pervasive police perjury is rampant in every major city in the country. Joseph McNamara, the former police chief of San Jose and Kansas City . . . recently said that he had "come to believe that hundreds of thousands of law enforcement officers commit felony perjury every year testifying about drug arrests."
\end{quote}

Alan Dershowitz, Editorial, \textit{Police Testilying Must Not Be Tolerated}, \textit{BOSTON GLOBE}, Dec. 11, 1997, at A27; see also Slobogin, \textit{supra} note 10, at 1041–42 (providing numerous examples); Scott Cooper, \textit{Chemist’s Colleagues Saw Warning Signs}, \textit{DAILY OKLAHOMAN} (Oklahoma City), May 13, 2001, at 1-A (reporting that a state laboratory chemist had provided dubious testimony in hundreds of cases); David Kocieniewski, \textit{New York Pays a High Price for Police Lies}, \textit{N.Y. TIMES}, Jan. 5, 1997, § 1, at 1 (reporting the dismissal of 125 cases: "more dismissals than in any other police perjury case on record in the state"); \textit{infra} notes 40, 90.

\textsuperscript{34} See Cloud, \textit{supra} note 10, at 1312; Slobogin, \textit{supra} note 10, at 1042–44.

\textsuperscript{35} \textit{See}, \textit{e.g.}, \textit{Mapp v. Ohio}, 367 U.S. 643, 655 (1961).

\textsuperscript{36} Slobogin, \textit{supra} note 10, at 1044 (“The most obvious explanation for all this lying is a desire to see the guilty brought to ‘justice.’”).

\textsuperscript{37} \textit{Mollen Commission Report}, \textit{supra} note 1, at 36.
wrongful conviction. Moreover, when such perjury occurs at trial, it is even more likely to convict the innocent. The Innocence Project reports that police misconduct, including perjured testimony, contributed to approximately fifty percent of wrongful convictions, and press accounts certainly confirm that the problem is not isolated. Yet those responsible rarely, if ever, face prosecution. This is hardly surprising, as the prospect of prosecuting law enforcement personnel poses an intractable conflict of interest for district attorneys and their

38 For example, when officers falsely rely upon the "plain view" doctrine to explain their failure to obtain a search warrant, they potentially expose innocent people to wrongful conviction. This can easily occur because crimes such as illegal possession of narcotics require prosecutors to establish that the defendant acted knowingly. See, e.g., 21 U.S.C. § 844 (2000) (requiring knowing possession of a controlled substance). Thus, if the police find narcotics hidden in a bureau drawer, a house guest unaware of its contents would have a viable defense based on lack of criminal intent. However, if the officers lacked a warrant (or if their warrant did not authorize them to open bureau drawers) and they rely upon the plain view doctrine to justify the seizure, their trial testimony that they found the evidence in an open area will necessarily conflict with a defendant's legitimate claim of lack of knowledge. See Mollen Commission Report, supra note 1, at 38 (noting practices of claiming to have found evidence in plain view and falsifying the location of the defendant's arrest).


40 BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246, 265 (2000).

41 See supra note 33.

42 Between 1999 and 2004, perjury convictions accounted for only seventy-five to eighty-three of approximately 60,000 offenders sentenced in federal court. Federal sentencing statistics do not specify how many of these involved police officers. However, the data show that fewer than three percent of these involved enhancements for abuse of trust, which is the specific offense characteristic that would apply both to police officers and others in special positions of authority. E-mail from Louis Reedt, Acting Director, Office of Policy Analysis, U.S. Sentencing Commission, to Michael Goldsmith, Professor of Law, Brigham Young University (Apr. 13, 2004, 11:17:43 EDT) (on file with author); see Lisa C. Harris, Note, Perjury Defeats Justice, 42 Wayne L. Rev. 1755, 1768–71 (1996); cf. Mark Curriden, The Lies Have It, A.B.A.J., May 1995, at 68, 69 (noting that, with few exceptions, "perjury is probably the most underprosecuted crime in America"). This trend dates back more than thirty-five years. See David W. Eagle, Note, Civil Remedies for Perjury: A Proposal for a Tort Action, 19 Ariz. L. Rev. 349, 351 (1977) (noting that in 1968, only two of 20,000 federal prisoners were convicted of perjury).
federal counterparts. To function effectively, prosecutors depend on the police to investigate crime. The police, in turn, rely upon prosecutors to obtain convictions through the judicial system. These mutually dependent and supporting roles inevitably require prosecutors and police to work closely together on a regular basis. A prosecutor who files perjury charges against a police officer risks jeopardizing this vital relationship with his law enforcement team. Further, although many officers disdain perjury and those who commit it, the police culture historically has maintained a "blue wall of silence" against outside investigations. Thus, few police perjury prosecutions occur nationwide.

But absent an effective criminal sanction, there is little to deter police perjury. On the contrary, recent legislative reforms, which both restrict and discourage habeas corpus petitions, have heightened the problem. The Antiterrorism and Effective Death Penalty Act of 1996, which, despite its title, applies in both capital and noncapital cases, imposed a one-year limitations period on filing for a writ of habeas corpus, heightened the standard for filing successive peti-

43 See Briscoe v. LaHue, 460 U.S. 325, 342 (1983); Jay Sterling Silver, Truth, Justice, and the American Way: The Case Against the Client Perjury Rules, 47 VAND. L. REV. 339, 358 n.75 (1994) (noting that the need for "smooth working relations" explains the "institutional tendency to tolerate police perjury"). Dissenting in Briscoe, Justice Marshall observed: "[T]he threat of a criminal perjury prosecution . . . is virtually non-existent in the police-witness context . . . [because] prosecutors exhibit extreme reluctance in charging police officials with criminal conduct because of their need to maintain close working relationships with law enforcement agencies." Briscoe, 460 U.S. at 365-66 (Marshall, J., dissenting). Commenting on this relationship, Professor Irving Younger, a former judge and prosecutor, wrote that "a policeman is as likely to be indicted for perjury by his co-worker, the prosecutor, as he is to be struck down by thunderbolts from an avenging heaven." Irving Younger, The Perjury Routine, THE NATION, May 8, 1967, at 596, 596; see also Slobogin, supra note 10, at 1047-48 (noting the conflict of interest stemming from the prosecutor-police relationship).

44 See Davis, supra note 3, at 137-49 (providing an example of a corrupt officer's partner reporting concerns to prosecutors).


46 See supra note 42 and accompanying text.


tions contesting a state conviction, made it more difficult to present new evidence in support of a federal habeas claim, narrowed the authority of federal courts to overturn erroneous state court rulings, and curtailed the right to appeal an adverse ruling denying post-conviction relief. In light of these measures, police officers contemplating perjury know that defendants are not likely even to obtain a post-conviction evidentiary hearing, much less prevail, in federal court. Taken together, these developments leave the wrongfully convicted few options for habeas relief. Even if successful, however, an exonerated convict will not likely receive financial indemnification.

III. Recovery Options for the Wrongfully Convicted

The wrongfully convicted enjoy no right to full compensation for their loss. Instead, in varying degrees, they are left to whatever monetary or other forms of relief Congress and state legislatures have chosen to authorize. Most jurisdictions, however, provide no compensation whatsoever, and those that do sometimes fail to afford relief commensurate with the loss incurred. For example, of the fourteen states that authorize compensation for wrongful convictions, three

49 Id. § 2244(a)–(b).
50 Id. § 2254(c)(2).
52 28 U.S.C. § 2253(c).
limit recovery to between $20,000 and $50,000 regardless of duration of imprisonment;\textsuperscript{55} federal law caps restitution at $5,000.\textsuperscript{56}

The absence of legislative largesse undoubtedly reflects the view that the government is not always responsible for erroneous judgments. Simple trial error, mistaken identification, and good faith mistakes account for as many wrongful convictions as police and prosecutorial misconduct.\textsuperscript{57} Although certainly harsh to individual victims, this situation reflects both the economic constraints of governmental entities and the grim reality that life is unfair. Indeed, legislative remedies generally draw no distinction based on the nature and cause of the wrongful conviction.\textsuperscript{58} Victims of police perjury thus receive no more compensation than those wrongfully convicted due to inadvertent jury confusion or a wholly innocent mistaken identification.

The state’s \textit{moral} obligation to pay those wrongfully convicted without fault, however, differs sharply from the \textit{legal} obligation which the state and its police officers should face for intentional civil rights violations. When governmental misconduct, such as police perjury, causes wrongful convictions, public policy calls for compensating the victims adequately both to remediate their loss to the extent possible and to deter future false testimony.\textsuperscript{59} Existing state laws, however, fall

\textsuperscript{55} N.H. REV. STAT. ANN. § 541-B:14 ($20,000); TEX. CIV. PRAC. & REM. CODE ANN. § 103.006 ($50,000); Wis. STAT. § 775.05 ($25,000). Those jurisdictions which base relief on longevity of wrongful confinement do not necessarily provide compensation commensurate with the harm, though. For example, Illinois provides a graduated compensation plan but caps recovery at $35,000 once the wrongful confinement exceeds fourteen years. \textit{See} 705 ILL. COMP. STAT. ANN. 505/8(c).

\textsuperscript{56} \textit{See} 28 U.S.C. §§ 1495, 2513.

\textsuperscript{57} \textit{See} Scheck \textit{et al.}, \textit{supra} note 40, at 246 (listing a variety of other factors); Scheck & Tofte, \textit{supra} note 32, at 38–39; Innocence Project, \textit{Causes and Remedies of Wrongful Convictions}, at http://www.innocenceproject.com/causes (last visited Feb. 21, 2005) (noting that contributing causes include false confessions (15%), unreliable informants (16%), false testimony (17%), inaccurate microscopic hair comparisons (21%), incompetent counsel (21%), defective science (26%), prosecutorial misconduct (34%), police misconduct (38%), serology inclusion (40%), and mistaken identification (61%)); \textit{see also} Tom Spring, \textit{10,000 Innocent People Convicted Each Year, Study Estimates}, at http://researchnews.osu.edu/archive/ronhuff.htm (last visited Jan. 27, 2005) (noting perjury contributed to eleven percent of wrongful convictions, and eyewitness misidentifications were a factor in 52.3%).

\textsuperscript{58} \textit{See} Bernhard, \textit{supra} note 53, at 73 n.1 (listing applicable statutes).

\textsuperscript{59} The testimony of police officers is often decisive in the criminal justice system. As the Mollen Commission observed: “On the word of a police officer alone a grand jury may indict, a trial jury convict, and a judge pass sentence.” \textit{Mollen Commission Report, supra} note 1, at 36; \textit{cf.} Newsome v. McCabe, 256 F.3d 747, 752 (7th Cir. 2001) (“Requiring culpable officers to pay damages to the victims of their actions . . . holds out promise of both deterring and remediating violations of the Constitution.”).
far short of this goal.\footnote{60
Nor have recent high-profile exonerations prompted remedial legislative action. For example, in 2001, Oklahoma authorities released Jeff Pierce after he served almost fifteen years for a crime he did not commit. The state legislature rejected proposed legislation that would have compensated him in some respect. See Tim Talley, \textit{House Defeats Bill for Prison Lawsuits}, \textit{Daily Oklahoman} (Oklahoma City), May 22, 2001, at 4-A. Instead of paying damages, the legislature issued a formal apology. \textit{Id.}

1 Briscoe v. LaHue, 460 U.S. 325, 329 n.5 (1983).

2 475 U.S. 335 (1986).

3 \textit{Id.} at 340. The Court reasoned as follows:

\begin{quote}
Although the statute on its face admits of no immunities, we have read it “in harmony with general principles of tort immunities and defenses rather than in derogation of them.” \textit{Imbler v. Pachtman}, 424 U.S. 409, 418 (1976). Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. \textit{Tower v. Glover}, 467 U.S. 914 (1984).
\end{quote}

\ldots

\ldots [C]omplaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause. Given malice and the lack of probable cause, the complainant enjoyed no immunity.

\textit{Id.} at 339–41; see also Scalia, supra note 10, at 1456 (arguing that \textit{Malley} “furnishes the means by which lower courts can adjust for the error made by the Supreme Court in Briscoe”)

Lacking adequate legislative recourse, victims have turned to the courts. However, because police witnesses who commit perjury at trial enjoy absolute immunity from civil liability under the CRA, victims must consider other theories of liability. Potential claims could be based on (a) pretrial perjury, (b) the tort of malicious prosecution, (c) the failure to disclose exculpatory evidence, and (d) governmental liability. None provide adequate relief.

\section*{A. Pretrial Perjury}

\textit{Briscoe} expressly left open the question whether absolute immunity also applies to perjury committed pretrial.\footnote{61
Accordingly, victims may consider a § 1983 claim alleging pretrial perjury. Indeed, this theory finds support from the Supreme Court's subsequent decision in \textit{Malley v. Briggs},\footnote{62
which sustained a claim against a police officer who allegedly submitted an arrest warrant affidavit lacking probable cause. The Court ruled in \textit{Malley} that, because “complaining witnesses” at common law held qualified, rather than absolute, immunity, complaining police officers enjoy no greater immunity under the CRA.\footnote{63
}\ldots

\ldots [C]omplaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause. Given malice and the lack of probable cause, the complainant enjoyed no immunity.

\textit{Id.} at 339–41; see also Scalia, supra note 10, at 1456 (arguing that \textit{Malley} “furnishes the means by which lower courts can adjust for the error made by the Supreme Court in Briscoe”).} Accordingly, victims may consider a § 1983 claim alleging pretrial perjury. Indeed, this theory finds support from the Supreme Court's subsequent decision in \textit{Malley v. Briggs},\footnote{62
which sustained a claim against a police officer who allegedly submitted an arrest warrant affidavit lacking probable cause. The Court ruled in \textit{Malley} that, because “complaining witnesses” at common law held qualified, rather than absolute, immunity, complaining police officers enjoy no greater immunity under the CRA.\footnote{63
}\ldots

\ldots [C]omplaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause. Given malice and the lack of probable cause, the complainant enjoyed no immunity.

\textit{Id.} at 339–41; see also Scalia, supra note 10, at 1456 (arguing that \textit{Malley} “furnishes the means by which lower courts can adjust for the error made by the Supreme Court in Briscoe”).}
Accordingly, the wrongfully accused may assert a § 1983 claim based upon a complaining officer’s perjury in an affidavit supporting a warrant application. However, this theory provides only uncertain and incomplete relief. As the police may also commit perjury in other pretrial settings, recovery is uncertain because courts are divided over whether absolute immunity extends to grand jury proceedings and pretrial hearings.\(^6\) And in cases of wrongful convictions, any relief would be incomplete because Briscoe’s absolute immunity doctrine for witnesses precludes proof that the defendant police officer committed perjury at the trial which produced the plaintiff’s false conviction.\(^6\) Thus, the plaintiff’s proof at trial and monetary recovery would not encompass the corrupt officer’s most damaging actions. Similar issues arise in connection with an action based on the tort of malicious prosecution.

**B. Malicious Prosecution**

The tort of malicious prosecution offers an important, albeit imperfect, vehicle to overcome the absolute immunity doctrine. Malicious prosecution requires proof that the defendant (e.g., the complaining police officer), acting with malice and without probable cause, effected a wrongful prosecution in which the plaintiff ultimately was exonerated.\(^6\) This action differs from one based exclusively on pretrial perjury in that malicious prosecution can be based on both sworn and unsworn false statements.\(^6\)

However, although the malicious prosecution theory offers some potential relief, its application is quite limited. The action is ideally suited for the rare defendant, wrongfully accused, who wins pretrial dismissal on the merits.\(^6\) Under such circumstances, the victim’s recovery would include damages for mental distress, economic costs

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\(^6\) See Fed. R. Evid. 401 (defining “relevant” evidence). Although such proof would still be admissible against a municipality to establish a pattern of wrongdoing as required for a Monell claim, the testifying officer’s absolute immunity renders such proof a nullity as to him. See infra notes 83–94.

\(^6\) W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 119, at 871 (5th ed. 1984); see, e.g., Penn v. Harris, 296 F.3d 573, 577 (7th Cir. 2002) (“A criminal case terminates in an accused’s favor when the circumstances surrounding dismissal reflect innocence.”).

\(^6\) Keeton et al., supra note 66, § 119, at 872.

\(^6\) This could occur, for example, if the magistrate dismisses the case for lack of probable cause. See id. § 119, at 874, 881. Acquittal alone would not necessarily
stemming from wrongful detention, and expenses for having to defend a wrongful prosecution.⁶⁹

In other situations, however, a malicious prosecution action could be problematic. For example, an arrest warrant might be based upon an officer's affidavit containing false allegations. Regardless of the defendant's ultimate exoneration, a subsequent malicious prosecution action would fail if the court finds the affidavit's remaining allegations sufficient to establish probable cause.⁷⁰ Ordinarily, malicious prosecution would also fail when a successful suppression motion (based on unconstitutional conduct) prompts the government to dismiss charges. Because suppression motions are based on constitutional violations rather than claims of innocence, resulting dismissals almost never directly exonerate the accused.⁷¹ The defendant may very well be innocent, but the record underlying the court's suppression ruling almost never addresses this issue.⁷² Absent actual exoneration, however, the malicious prosecution action fails.

Finally, even when post-conviction proceedings exonerate a wrongfully convicted defendant, Briscoe's absolute immunity doctrine still precludes complete relief as the plaintiff's trial-related damages would not encompass injury stemming from the officer's trial per-*produce a judgment, as the defendant could still have been guilty or the charges otherwise supported by probable cause. See id. § 119, at 880, 885.

⁶⁹ Id. § 119, at 887–89.

⁷⁰ See, e.g., Moore v. Hayes, No. 97-1188, 1998 U.S. App. LEXIS. 16383, at *9 (6th Cir. July 14, 1998) (noting that a malicious prosecution claim "must specifically allege either the absence of probable cause or specific instances of prosecutorial misconduct which, if proven, would negate probable cause"); cf. Franks v. Delaware, 438 U.S. 154, 171–72 (1978) (noting that when material in an affidavit accompanying a search warrant is shown to be false, if there remains enough content to show probable cause, an evidentiary hearing is not required).

⁷¹ See Keeton ET AL., supra note 66, § 119, at 874 (noting that "termination must also reflect the merits and not merely a procedural victory"); 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.7(b), at 434 (4th ed. 2004) ("[A]n at-trial granting of a motion to suppress on Fourth Amendment grounds, followed by a dismissal of the case, is a 'termination of the proceedings . . . on a basis unrelated to factual guilt or innocence' . . . ." (quoting People v. Greer, 282 N.W.2d 819, 823 (Mich. Ct. App. 1979))).

⁷² Suppression motions involve allegations of police misconduct during the evidence gathering process. The defendant's guilt or innocence is usually irrelevant to the court's ruling. Indeed, this is one of the features that makes the exclusionary rule so controversial. As the Supreme Court has observed, "[t]he costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding." Stone v. Powell, 428 U.S. 465, 489–90 (1976).
jury. Full relief requires the plaintiff to prove all the events that produced his wrongful conviction—especially those that occurred at trial. A claim based on the prosecution’s failure to disclose exculpatory evidence achieves this goal to a somewhat greater degree.

C. Failure to Disclose Exculpatory Evidence

In Brady v. Maryland, the Supreme Court ruled that the Due Process Clause requires prosecutors to disclose exculpatory evidence to the defense. As this principle bears directly upon a defendant’s possible innocence, a Brady violation can readily produce a wrongful conviction. Brady violations are certainly subject to § 1983 claims. Relying on Brady also overcomes Briscoe’s absolute immunity because, rather than asserting a claim based on immunized perjured testimony, the plaintiff’s complaint charges that the defendant(s) withheld exculpatory evidence pretrial. As this omission places into question the integrity of the entire ensuing prosecution, the plaintiff’s proof could certainly include relevant portions of the criminal trial proceedings, as well as all damages stemming from wrongful conviction.

These advantages make a Brady-based § 1983 claim more attractive than the options outlined above, but this theory of liability still has some flaws. Foremost among them, not all police perjury necessarily constitutes a Brady violation. Thus, a plaintiff may not overcome the Briscoe absolute immunity doctrine simply by recasting his action as a Brady claim. For example, it is not necessarily enough to allege that

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73 See generally 2 Dan B. Dobbs, The Law of Remedies § 7.4 (2d ed. 1993) (describing damages in constitutional civil cases). Plaintiff, however, could recover other economic and emotional damages associated with having to mount a trial defense.


75 See, e.g., Newsome v. McCabe, 256 F.3d 747, 752–53 (7th Cir. 2001) (holding that withholding of exculpatory fingerprint evidence from the prosecutor by police supported a valid claim under § 1983); Jean v. Collins, 221 F.3d 656, 662–63 (4th Cir. 2000) (en banc) (arguing that intentional, “bad faith” withholding of evidence to deprive a criminal defendant of use of that evidence at trial supports a § 1983 claim); Geter v. Fortenberry, 849 F.2d 1550, 1558–59 (5th Cir. 1988) (distinguishing between absolute immunity for trial testimony and potential liability for deliberate concealment of exculpatory evidence).

76 See supra notes 74–75 and accompanying text; see also McCullah v. Gadert, 344 F.3d 655, 661 (7th Cir. 2003) (distinguishing between Brady and Briscoe claims); Ienca v. City of Chicago, 286 F.3d 994, 1000 (7th Cir. 2002) (“Neither the withholding of exculpatory information nor the initiation of constitutionally infirm criminal proceedings is protected by absolute immunity . . . . [N]o absolute immunity attaches to the actions of the officers outside of trial . . . .”).

77 See Gauger v. Hendle, 349 F.3d 354, 360 (7th Cir. 2003). The court rejected a Brady claim because the plaintiff knew what he said at his interrogation. Id. (“The
the police officer perjured himself at trial and withheld his knowledge of the defendant’s innocence. To succeed, the civil rights plaintiff must demonstrate some active concealment or withholding of exculpatory evidence. As such information is usually within control of police authorities, this evidentiary burden poses serious obstacles for civil rights plaintiffs.

Moreover, *Brady* only requires that prosecutors disclose exculpatory evidence to the defense. This obligation does not run to the police, as they are not expected to have contact with defense counsel. The police face liability under *Brady* only if they conceal or withhold exculpatory evidence from the prosecuting agency. Shockingly, if a police officer makes full disclosure to prosecutors who, in turn, violate *Brady* and conspire to have the officer commit perjury at trial, neither the individual prosecutors nor the police officers would necessarily face individual liability under the CRA. Under such circumstances, *Briscoe* confers absolute immunity for the officer’s perjured testimony at trial, and prosecutors would escape liability because they enjoy absolute civil immunity for trial functions, including the failure to satisfy *Brady*. Moreover, most circuits have extended absolute immunity under *Briscoe* to prosecutors alleged to have conspired with a witness problem was not that evidence useful to him was being concealed; the problem was that the detectives were giving false evidence.

78 See id.; Manning v. Dye, No. 02-C372, 2003 U.S. Dist. LEXIS 12649, at *3–4 (N.D. Ill. July 18, 2003) (distinguishing between *Briscoe* and *Brady* and emphasizing officers’ active concealment of evidence); see also Strickler v. Greene, 527 U.S. 263, 281–82 (1999) (“The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.”).

79 See, e.g., Mowbray v. Cameron County, Texas, 274 F.3d 269, 278 (5th Cir. 2001) (“*Brady* imposes a duty on prosecutors to share exculpatory evidence with the defense. . . . [O]ur research reveals no case extending *Brady* to police officers . . . .”).

80 See, e.g., id. at 278 n.5 (noting that the plaintiff failed to allege that the police concealed exculpatory evidence from the prosecution); Jean, 221 F.3d at 660 (holding that the *Brady* duty of disclosure to a criminal defendant rests with the prosecution).

81 See Imbler v. Pachtman, 424 U.S. 409, 427–29 (1976) (holding that prosecutors enjoy absolute immunity for allegedly using perjured testimony and suppressing exculpatory evidence); see also Cousin v. Small, 325 F.3d 627, 635 (5th Cir. 2003) (“Willful or malicious prosecutorial misconduct is egregious by definition, yet prosecutors are absolutely immune from liability for such conduct if it occurs in the exercise of their advocatory function.”); Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1373 n.4 (10th Cir. 1991) (“Whether the claim involves withholding evidence, failing to correct a misconception or instructing a witness to testify evasively, absolute immunity from civil damages is the rule for prosecutors.”).
to commit perjury.\textsuperscript{82} Given these obstacles, a claim alleging governmental liability may provide the most viable option under § 1983.

\textbf{D. Governmental Liability}

In \textit{Monell v. Department of Social Services},\textsuperscript{83} the Supreme Court overruled an earlier decision that had found municipalities "wholly immune from suit under section 1983."\textsuperscript{84} \textit{Monell} declined to hold municipalities vicariously liable under the doctrine of respondeat superior, reasoning that Congress did not intend the existence of an employment relationship alone to be sufficient to warrant statutory damages.\textsuperscript{85} However, Justice Brennan's majority opinion concluded that both the text and legislative history of § 1983 demonstrated Congress’s intent to impose municipal liability where "the action that is alleged to be unconstitutional implements or executes a [municipal] policy statement, ordinance, regulation, or decision officially adopted."\textsuperscript{86} In addition, because constitutional violations often occur outside formal parameters, the Court recognized that § 1983 also imposes municipal liability "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels."\textsuperscript{87}

As a \textit{Monell} claim addresses a municipality's pattern of civil rights violations, it should prevail notwithstanding an individual officer's successful assertion of \textit{Briscoe}'s absolute immunity defense. \textit{Monell}'s focus on municipal liability renders irrelevant both evidentiary proof of individual liability\textsuperscript{88} and \textit{Briscoe}'s concerns about the need to protect individual witnesses from financial harassment or intimidation. In

\textsuperscript{82} See, e.g., Jones v. Cannon, 174 F.3d 1271, 1288 (11th Cir. 1999) ("The majority of circuits that have addressed the issue have extended the absolute immunity for a witness's trial testimony under \textit{Briscoe} to those persons who allegedly conspire with the witness to present allegedly false testimony."); \textit{see also Robinson}, 940 F.2d at 1373 n.4 ("Whether the claim involves withholding evidence, failing to correct a misconception or instructing a witness to testify evasively, absolute immunity from civil damages is the rule for prosecutors.").

\textsuperscript{83} 436 U.S. 658 (1978).

\textsuperscript{84} \textit{Id.} at 662–63 (overruling \textit{Monroe v. Pape}, 365 U.S. 167 (1961)).


\textsuperscript{86} \textit{Monell}, 436 U.S. at 690.

\textsuperscript{87} \textit{Id.} at 690–91.

\textsuperscript{88} \textit{See Fed. R. Evid.} 401 (defining relevance in terms of elements of a cause of action). Rather than establishing individual liability, plaintiff would introduce evidence of the officer's perjury as part of an overall pattern of misconduct triggering municipal liability.
short, because a Monell claim does not hinge on establishing an individual officer’s liability, a witness’s absolute immunity defense under Briscoe should not defeat a Monell claim of municipal liability.

Monell, therefore, offers the wrongfully convicted a potentially viable option. Indeed, it holds special promise in view of subsequent decisions extending municipal liability to local governments that act with “deliberate indifference” to constitutional rights. This line of authority could dramatically impact civil rights claims involving police perjury given widespread evidence that supervisors routinely tolerate “testilying.”

Despite its potential, however, Monell remains remarkably underutilized in police perjury cases. The decision certainly is not without serious obstacles and limitations. First, as Monell applies only to local governmental bodies, it does not reach states or state law enforcement agencies. Second, Monell only concerns alleged constitutional deprivations that reflect a policy, practice, or custom; municipal liability under the CRA ordinarily does not exist for isolated violations resulting in wrongful conviction. Therefore, a Monell claim imposes more demanding elements of proof than do § 1983 actions based on individual liability. Finally, even when a plaintiff can prove these elements, the Supreme Court has ruled that punitive dam-


90 See, e.g., Mollen Commission Report, supra note 1, at 40 (“What is particularly troublesome about this practice [of police falsifications] is that it is widely tolerated by corrupt and honest officers alike, as well as their supervisors.”); Alan Dershowitz, Police Head Confirms “Testilying,” Times Union (Albany), Nov. 25, 1995, at A7 (quoting a police commissioner who said that “cops are almost taught how to commit perjury when they are in the police academy”); Dershowitz, supra note 33 (noting that prosecutors, in effect, train officers to “tailor their testimony to the requirements of the law”); Anthony Flint, Bratton Calls ‘Testilying’ by Police a Real Concern, Boston Globe, Nov. 15, 1995, at A1 (noting “young officers generally learn how to testify . . . through on-the-job training” and reporting a police commissioner’s call for improved training).

91 For example, on April 15, 2004, a Lexis search produced only seventy-seven cases (between 1978 and 2004) discussing possibly pertinent terms.


93 See supra notes 86–87 and accompanying text.

94 1 Nahmod, supra note 85, § 6:40; see, e.g., City of Oklahoma City v. Tuttle, 471 U.S. 808, 823–24 (1985) (reversing because a jury instruction permitted an isolated incident to serve as the basis for § 1983 liability). Tuttle allowed for the possibility of a single incident triggering Monell liability if “proof of the incident includes proof that it was caused by an existing unconstitutional municipal policy, which policy can be attributed to a municipal policy maker.” Id. at 824. “Failure to train” cases may fall within this realm of proof. See 1 Nahmod, supra note 85, § 6:39.
ages may not be imposed against a municipality for policies and practices established by its officials. Thus, despite evidence of systematic and egregious official misconduct, a plaintiff may only recover compensatory damages. Punitive damages are generally available in § 1983 actions alleging individual liability, but in wrongful conviction cases, Briscoe renders this sanction wholly illusory, as the police officer who committed perjury at trial—often the most blameworthy individual—enjoys absolute immunity under the CRA.

Thus, current law affords no reliable monetary recourse for the wrongfully convicted. Nor does it adequately deter police perjury. Achieving these twin goals requires legislative reform.

IV. LEGISLATIVE REFORM

The Supreme Court's decision in Briscoe, which held that police officers who commit perjury enjoy absolute immunity for their trial testimony, undermined a major objective of the CRA: holding state officials accountable for violating constitutional rights. In reaching this decision, the Court strayed from conventional principles of statutory construction and relied upon a questionable analysis of legislative history to read the words "every person" out of the statute. However, even if the Court concluded accurately that the Forty-Second Congress intended to incorporate common law immunities into the CRA, this ruling need not control modern civil rights litigation indeterminately. Congress remains free to revisit this issue in light of current civil rights abuses and to repeal a common law immunity no longer suited to modern needs. Remarkably, although the National Institute of Justice at the Department of Justice documented twenty-eight

96 See 1 NAHMOD, supra note 85, § 4:42 (identifying relevant factors for punitive damages awards).
97 See supra notes 5, 12, 25 and accompanying text.
98 See supra notes 27-30 and accompanying text.
99 The Supreme Court "look[s] to the common law and other history for guidance because . . . [its] role is 'not to make a freewheeling policy choice,' but rather to discern Congress' likely intent in enacting § 1983." Burns v. Reed, 500 U.S. 478, 493 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)). Even the Court, however, has declined to allow "arcane rules of the common law" to control the "precise contours of official immunity." Anderson v. Creighton, 483 U.S. 635, 645 (1987) (noting that the Court has "reformulated qualified immunity along principles not at all embodied in the common law"). Congress enjoys even more latitude in this regard, since the scope of any statutory immunity is more properly a legislative function.
wrongful felony convictions in 1996.\textsuperscript{100} Congress has neither fully investigated this issue nor carefully considered to what extent police perjury contributed to these miscarriages of justice.\textsuperscript{101} Extensive congressional hearings would bear out the concerns this Article has identified and provide the foundation for carefully tailored legislative reform eliminating absolute CRA immunity for police witnesses.

Such reform would provide needed relief for victims of police perjury. It would also promote effective law enforcement. As police perjury has become a more pervasive problem, the public’s view of law enforcement witnesses has become more skeptical and made juries less inclined to return guilty verdicts.\textsuperscript{102} Legislative reform would begin the process necessary to restore public confidence in the criminal justice system.

Such reform need not defeat any legitimate policy considerations underlying the \textit{Briscoe} decision. In addition to its analysis of legislative history, the Supreme Court identified three interrelated concerns: (1) that fear of subsequent litigation might make some witnesses “reluctant to come forward to testify,”\textsuperscript{103} (2) that those who do testify might distort or soften their testimony to reduce the risk of future liability,\textsuperscript{104}

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\textsuperscript{100} Edward Connors et al., \textit{U.S. Dep’t of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial} 12 (1996).

\textsuperscript{101} For example, since 1996 Congress has only conducted a few hearings concerning wrongful convictions and enacted no ameliorative legislation. For the most part, Congress has focused on DNA issues to the exclusion of others. Some witnesses, however, have addressed a broader range of problems. See Margery Malkin Koosed, \textit{The Proposed Innocence Protection Act Won’t—Unless It Also Curbs Mistaken Identifications}, 63 \textit{Ohio St. L.J.} 263, 268–71 (2002); Barry C. Scheck, \textit{Preventing Execution of the Innocent: Testimony Before the Senate Judiciary Committee}, 29 \textit{Hofstra L. Rev.} 1165, 1170–71 (2001).

\textsuperscript{102} For example, police perjury played a significant role in the O.J. Simpson trial. See Slobogin, \textit{supra} note 10, at 1037–40; James Sterngold, \textit{Detective in Simpson Case Pleads No Contest to Perjury Count}, \textit{N.Y. Times}, Oct. 3, 1996, at A16. Its role in Simpson’s acquittal, of course, is unknown. However, at least one expert has observed that when “police routinely and casually lie under oath . . . members of the public, including those who serve on juries, [are] less willing to believe all police, truthful or not.” Slobogin, \textit{supra} note 10, at 1039; see also Ed Godfrey, \textit{Poll Shows Oklahomans Distrust System}, \textit{Daily Oklahoman} (Oklahoma City), May 27, 2001, at 1-A (reporting results of a poll taken after the discovery of wrongful conviction based on perjured testimony); Joe Sexton, \textit{Jurors Question Honesty of Police}, \textit{N.Y. Times}, Sept. 25, 1995, at B3 (reporting distrust of New York City police officers because of perjury scandals).

\textsuperscript{103} Id. The Court observed that “[a] witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence.” \textit{Id.}
and (3) "that those involved in judicial proceedings should 'be given every encouragement to make full disclosure of all pertinent information within their knowledge.'"105

Although the Briscoe Court declined to distinguish between private citizens and police witnesses,106 these concerns do not apply with equal force to law enforcement personnel. In contrast to private citizens, police officers are duty bound to testify about criminal activity—for them, testifying is not a matter of choice. Nor would any officer have incentive to soften his testimony in favor of the defense. If anything, securing a defendant's conviction reduces the risk of future litigation accusing the officer of perjury. This is especially true after the Supreme Court's 1994 decision in Heck v. Humphrey107 held that, to avoid "'creat[ing] . . . two [potentially] conflicting resolutions arising out of the same or identical transaction,'"108 a § 1983 claimant may not recover without first establishing that his original conviction was invalidated either on direct appeal or through the issuance of a federal writ of habeas corpus.109 Heck thereby eliminates one of the principal concerns underlying the Briscoe decision: that since "'[t]he loser in one forum will frequently seek relief in another . . . [a]bsolute immunity is . . . necessary to assure that . . . witnesses can perform . . . without harassment or intimidation.'"110

The Heck decision avoids the possibility of conflicting decisions being issued by those courts reviewing an individual's conviction and others reviewing his § 1983 claim for damages stemming from that conviction.111 As a result, however, Heck undermines Briscoe's concern "'that those involved in judicial proceedings should be given every encouragement to make a full disclosure of all pertinent information within their knowledge.'"112 Instead, Briscoe and Heck, taken together, discourage full disclosure; they permit officers to lie with impunity at trial, knowing that a § 1983 claimant may not challenge perjured testimony without first invalidating his underlying conviction and, even then, absolute immunity protects them from civil liability.

105 Id. at 335 (quoting Imbler v. Pachtman, 424 U.S. 409, 439 (1976) (White, J., concurring)).
106 See supra notes 23–24 and accompanying text.
108 Id. at 484 (quoting 8 STUART M. SPEISER ET AL., AMERICAN LAW OF TORTS § 28:5 (1991)).
109 Id. at 486–87.
110 Briscoe, 460 U.S. at 335 (quoting Butz v. Economou, 438 U.S. 478, 512 (1978)).
111 Heck, 512 U.S. at 484.
This result goes beyond any legitimate purpose of witness immunity and makes a mockery of the criminal justice system.

The Supreme Court originally relied on both common law doctrine and historical analysis to read absolute immunity into § 1983. Such immunity is premised on the need to ensure that government officials can function effectively without fear of litigation for exercising important discretionary functions. Accordingly, “[t]he policy underlying absolute immunity is a concern with the chilling effect of potential section 1983 damages litigation upon the exercise of decision-making authority.” Because absolute immunity confers complete immunity from suit and not just protection against liability, officials seeking this unique status must demonstrate that “such an exemption is justified by overriding considerations of public policy.”

Prior to Briscoe, the Court declined to extend absolute immunity beyond a very limited class of officials, including the President of the United States, legislators carrying out their legislative functions, and judges carrying out their judicial functions, “whose special functions or constitutional status requires complete protection from suit.” Police witnesses, by comparison, fall far short of this threshold. Unlike other beneficiaries of absolute immunity, their function at trial does not—or at least should not—involve any discretionary function. Police officers do not have discretion to commit perjury, nor does their trial testimony involve any other constitutional decisionmaking function.

Moreover, to the degree that officers merit protection from potentially abusive litigation, less drastic means than complete immunity from suit under the CRA are available. Recognizing that relatively few categories of potential defendants warrant such broad immunity, the Supreme Court has conferred qualified immunity upon others deserving of some lesser measure of protection. Although not complete protection from suit, qualified immunity provides an affirmative defense for conduct that “does not violate clearly established statutory or
constitutional rights of which a reasonable person would have known."

According to the Supreme Court, qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law" and adequately shields police officers sued in connection with their "investigative" functions. By conferring absolute immunity upon officers performing their "judicial" function as trial witnesses, Briscoe produced the anomaly of allowing an officer to face § 1983 liability for knowingly filing a false police report—which neither absolute nor qualified immunity protects—yet precluding liability for committing the more serious offense of perjury at a criminal trial. In other words, because qualified immunity would suffice, Briscoe simply goes too far, and it creates perverse incentives.

As Briscoe has become firmly embedded judicial doctrine, only legislative reform can restore proper symmetry and accountability under the CRA. Thus far, however, no Briscoe critic has offered a legislative solution directly responsive to the Supreme Court's analysis of the CRA. One commentator, for example, approached the problem indirectly by proposing elimination of the exclusionary rule to remove the incentive for police perjury. That proposal, however, is neither practical nor desirable. Although admittedly controversial, the exclusionary rule is constitutionally based. Short of a constitutional

119 Harlow, 457 U.S. at 818 (emphasis added).
121 See Pierson v. Ray, 386 U.S. 547, 557 (1967); cf. Buckley v. Fitzsimmons, 500 U.S. 259, 273–74 (1993) (distinguishing between a prosecutor's investigative and judicial functions). Note that the evidentiary elements of a perjury-based § 1983 action actually protect an officer more than the qualified immunity defense because perjury requires proof that the officer lied intentionally. See, e.g., United States v. Lee, 359 F.3d 412, 416 (6th Cir. 2004) (stating that perjury requires a knowingly false declaration); United States v. Leonos-Marquez, 323 F.3d 679, 684 (8th Cir. 2003) (holding perjury requires intent to provide false testimony). In contrast, incompetent or knowing conduct renders the officer liable. See supra note 118 and accompanying text.
122 See Scott v. Hern, 216 F.3d 897, 911–12 (10th Cir. 2000) (implying that even if an officer included knowingly false information in a police report which would support an action under § 1983, the officer was entitled to absolute immunity for any claims arising out of perjury at trial); cf. Malley, 475 U.S. at 340–41 (holding that qualified immunity provides sufficient protection to police officers applying for warrants).
123 See 1A SCHWARTZ & KIRKLIN, supra note 64, § 9.10 (setting forth a wide range of illustrative decisions applying Briscoe absolute immunity to witnesses).
amendment, Congress may not repeal it. Further, although the problem of police perjury is certainly an important issue in the debate over the exclusionary rule, there are many others of great complexity. Allowing concern with police perjury to drive this debate would improperly reward officers who choose to oppose the exclusionary rule by corrupting the judicial process.

Rather than tamper with the exclusionary rule, Congress should begin to address the problem of police perjury by amending §1983 to eliminate absolute immunity for law enforcement witnesses. Under this proposal, such witnesses would still retain qualified immunity. Further, private witnesses would retain Briscoe's protections. The common law grounds for absolute immunity still apply with equal force to private witnesses, as their cooperation is often vital to effective law enforcement. Moreover, no evidence exists that private witness perjury is a pervasive problem in the criminal justice system. The following text would implement this reform:

The Civil Rights Perjury Prevention Act

The text of 42 U.S.C. sec. 1983 is amended as follows:

Immunities:

Qualified Immunity: Liability under section 1983 shall not extend to any law enforcement officer whose conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

126 See Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

127 See, e.g., 1 LaFave, supra note 71, § 1.2 (containing extensive discussion of multiple issues concerning the exclusionary rule).

128 This would be especially ironic, as the Supreme Court originally developed the rule due to concern that admitting illegally obtained evidence undermines judicial integrity. Weeks v. United States, 232 U.S. 383, 394 (1914). See generally Gerard V. Bradley, Present at the Creation? A Critical Guide to Weeks v. United States and Its Progeny, 30 St. Louis U. L.J. 1031 (1986) (tracing the history of both the exclusionary rule's development and the criticism of the rule).

129 Indeed, Congress could use this occasion wisely to review all judicially created immunities under the CRA and to repeal those no longer appropriate to modern civil rights enforcement. As former Senator John McClellan observed in another context: "Congress in fulfilling its proper legislative role must examine not only individual instances, but whole problems. . . . [I]t has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, Congress has the duty of enacting a principled solution to the entire problem." 116 Cong. Rec. 18,914 (1970) (statement of Sen. McClellan).

130 This text codifies the Supreme Court's standard for qualified immunity. See supra notes 118–19 and accompanying text.
Absolute Immunity: Except as stated below, United States Supreme Court decisions defining absolute immunity remain in full force and effect.\(^\text{131}\)

Exception: No employee or agent\(^\text{132}\) of any law enforcement agency is entitled to absolute immunity for testifying or providing any statements, under oath or affirmation, in connection with a criminal investigation or any court proceeding.\(^\text{133}\)

**CONCLUSION**

In 1992, despite international protest, a *Time* magazine cover story,\(^\text{134}\) and a papal plea for leniency, the State of Virginia executed Roger Coleman for a rape and murder that he probably did not com-

\(^{131}\) Legislation sometimes cross references prevailing Supreme Court decisions. See, e.g., 28 U.S.C. § 2254(d)(1) (2000). In this instance, the cross reference serves to retain absolute immunity for legislators performing legislative functions and for judges and prosecutors performing judicial functions. See *supra* notes 18, 81 and accompanying text. Of course, after conducting a more comprehensive review of prevailing CRA immunities, Congress may choose to eliminate some of them by adding to the enumerated exceptions.

\(^{132}\) The proposal extends to agents because a heightened risk of perjury exists whenever a witness has a close relationship with a law enforcement agency. Typical examples might include paid informants and defendants working to win "substantial assistance" departures from the U.S. Sentencing Guidelines. See Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835, 866–69 (1993) (discussing the risks and moral implications of permitting substantial assistance sentencing reductions in exchange for cooperation); A. Jack Finklea, *Note, Leniency in Exchange for Testimony: Bribery or Effective Prosecution?*, 33 IND. L. REV. 957, 977–79 (2000) (criticizing substantial assistance departures for promoting inaccurate testimony). See generally Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 23–33 (1992) (discussing risks of perjured testimony stemming from cooperation agreements). Federal courts have expressed similar concerns. See United States v. Jones, 145 F.3d 959, 970 (8th Cir. 1998) (Bright, J., dissenting) ("[T]here are serious inherent incentives to perjury; and prosecutors indulge a wide variety of unstructured practices with respect to substantial assistance motions."); United States v. Mansker, 240 F. Supp. 2d 902, 921 (N.D. Iowa 2003) ("[S]ubstantial reductions in sentences for cooperating against others, have, in my view, brought enormous pressure on cooperators to stretch the truth and to provide previously unknown and all too often false information to federal prosecutors in exchange for... substantial assistance motions.").

\(^{133}\) The proposed text makes clear that absolute immunity does not apply to any statements or testimony under oath. This broad language eliminates an existing circuit conflict concerning pretrial testimony. See *supra* note 61 and accompanying text.

At best, a crucial police witness testified inaccurately at Coleman's trial. At worst, the officer committed perjury. Under the CRA, the distinction between inaccurate testimony and perjury makes no difference, however, as Briscoe v. LaHue conferred all trial witnesses, including police officers, with absolute immunity.

The Supreme Court's conclusion in Briscoe reflected questionable analyses of both statutory text and legislative history. After more than twenty years, however, these points are no longer worth debating. As a matter of sound social policy, Congress should intervene to repeal absolute immunity for law enforcement witnesses. Police officers would still enjoy ample protection under the doctrine of qualified immunity. Of course, legislative reform requires political action. But even in today's highly charged political atmosphere, this issue need not be divisive. Regardless of ideology, all should agree that convicting the innocent offends basic principles of justice—especially since it also permits the true violator to go unpunished.

Much remains to be done to reduce the risk of false convictions. Amending the CRA to provide a civil remedy for victims of police perjury would be a long overdue first step.


136 See Tucker, supra note 134, at 66 (noting the inconsistency and an officer acknowledging inaccurate testimony).

137 Absent such immunity, Coleman's estate could have filed a civil rights action on his behalf. See 1 Nahmod, supra note 85, § 1.12.
