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Second Thoughts on Damages for Wrongful Convictions

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SECOND THOUGHTS ON DAMAGES FOR WRONGFUL CONVICTIONS

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After the DNA-inspired wave of exonerations in recent years, there has been widespread support for expanding the damages remedies available to those who have been wrongfully accused or convicted.[1] Indeed, in the academy, there has hardly been a dissenting voice on the subject. In this article I mean to break with the consensus.

The case for compensating the wrongly convicted is deeply problematic, whether advanced in terms of no-fault or fault-based liability. Part I below considers the case for strict, no-fault liability for damages in cases of wrongful prosecution or conviction. In contexts thought rife with a risk of injury, a regime of strict liability is thought to be justifiable as a means of creating an economic incentive to scale back such liability-producing conduct to optimal levels. This rationale has little application to the criminal justice system. Instead, a regime of strict liability would operate as a kind of perverse wealth transfer—from those most in need of government assistance to the exonerated—without reducing the risk of error in the criminal process. Part II then considers the many doctrinal obstacles to a regime of fault-based liability and questions whether such a regime can be squared with the traditional approach to negligence or fault-based liability taken by

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1. *See, e.g.*, Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 711–13 (2004); Alberto B. Lopez, *$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 704–21 (2002); John Martinez, *Wrongful Convictions as Rightful Takings: Protecting "Liberty Property"*, 59 HASTINGS L. REV. 515, 534-38 (2008); Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227 (2008); Jessica A. Longergan, Note, *Protecting the Innocent: A Model for Comprehensive Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 449-51 (2007–08). For earlier scholarship in a similar vein, see, for example, Edwin Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201 (1941); Keith S. Rosenn, *Compensating the Innocent Accused*, 37 OHIO ST. L.J. 705, 715–17 (1976); J.H. Wigmore, *The Bill to Make Compensation to Persons Erroneously Convicted of Crime*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 665 (1913); Joseph H. King, Jr., Comment, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1098–1111 (1970); Note, *Postrelease Remedies for Wrongful Conviction*, 74 HARV. L. REV. 1615, 1626–29 (1961).

the law of torts. Part III then considers the outcome if the doctrinal objections to liability are dismissed and a regime of pure fault-based liability is created for wrongful prosecutions and convictions. Part III concludes that even such a regime could not be confidently expected to induce police and prosecutors to take all cost-justified precautions to reduce liability. Instead, our current regime of political accountability for wrongful convictions is likely to be the best we can expect for identifying and reducing the risk of wrongful prosecutions and convictions.

I.

No-fault liability for wrongful convictions has not proven terribly popular. At present, the federal government and twenty-two states have statutes that require compensation to be paid to the exonerated, although many of these statutes contain important limitations on who can make claims and the amount of compensation available.[2] Still, at first blush, the case for strict liability to the exonerated seems strong. It is thought to be "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[3] Liability without fault, by forcing the government to internalize the costs of wrongful prosecutions and convictions, would seemingly encourage the government to take every precaution that one might to reduce the rate of wrongful prosecution and conviction.

It is unclear, however, that this rationale for strict liability holds any water. If the object of a liability regime is to encourage the use of cost-justified precautions against wrongful prosecutions or convictions—precautions that yield benefits exceeding their cost—then a regime of fault-based liability is sufficient. Indeed, the classic economic argument for negligence liability is that a fault-based standard provides an adequate incentive to make efficient investments in loss prevention.[4] Strict liability, in contrast, is usually justified not because someone has concluded that it is desirable to promote *inefficient* efforts at loss prevention, but instead as a means of inducing those engaged in unusually hazardous activities to reduce the scale of their activities to an efficient level by requiring them to internalize all resulting losses.[5] It is open to serious question, however, whether such a large risk of error inheres in the criminal justice system that

2. For an inventory of compensation statutes and discussion of their limitations, see Kaplan, *supra* note 1, at 233–35, 250–51.

3. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

4. *E.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.1 (7th ed. 2007).

5. *E.g.*, *id.* at § 6.5.

it should be treated as a kind of ultrahazardous enterprise. Even more important, talk of efficiency is something of a non sequitur in this context.

The basic objection to the use of a regime of governmental liability in order to achieve an "efficient" result was put forward by Daryl Levinson. He argued that because government is not a revenue or profit-maximizer, but instead responds to political costs and benefits, we cannot be confident that any regime of governmental liability will achieve an efficient outcome because the government lacks the incentive to minimize costs and maximize profits that exists in the private sector.[6] The likelihood of the government undertaking efforts to reduce its exposure to liability is particularly remote, Levinson argued, when it comes to law enforcement tactics that are likely to pay handsome political dividends.[7] For this reason, Levinson concluded that "any predictions about the incentive effects of . . . cost remedies on government behavior are highly suspect."[8] It should follow that scaling back or otherwise rendering law enforcement less aggressive in order to reduce the government's potential liability for wrongful prosecutions or convictions may have substantial political costs, and for that reason the likelihood that strict liability will induce the government to deviate from what elected officials otherwise regard as politically optimal law enforcement policies is doubtful.[9]

Imposing personal liability on public officials responsible for an erroneous conviction, moreover, is no answer to the problem. A regime of public official liability without fault—in addition to failing to offer full compensation to the exonerated when a public official proves unable to pay a large award—would create an unacceptable risk of over-deterrence of individual public officials who would internalize the costs but not the full benefits of their efforts to bring offenders to justice.[10] On the other hand, perhaps the more realistic objection to personal liability is not the threat of over-deterrence, but the likelihood that such a regime would not impose any realistic threat of liability on public employees who might shift their

6. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 348–57 (2000).

7. *Id.* at 370.

8. *Id.* at 386–87.

9. For an application of Levinson's insights to liability for wrongful convictions, see Evan J. Mandery, Commentary, *Efficiency Considerations in Compensating the Wrongfully Convicted*, 41 CRIM. L. BULL. 219, 287, 295–301 (2005).

10. Levinson, *supra* note 6, at 351–53. Indeed, the Supreme Court has justified the doctrine of public officials' qualified official immunity absent a violation of clearly established law because of the threat of overdeterrence that would result from unlimited liability. *See, e.g.*, Richardson v. McKnight, 521 U.S. 399, 407–08 (1997); Wyatt v. Cole, 504 U.S. 158, 167–68 (1992); Forrester v. White, 484 U.S. 219, 222–23 (1988); Mitchell v. Forsyth, 472 U.S. 511, 525–26 (1985).

own liability back onto the government by means of indemnification, which is commonplace in public employment.[11] This should be no surprise; labor economics teaches that employers must offer sufficient compensation to offset an employee's risk of personal liability, and indemnification is the most efficient way for an employer to offer the level of compensation that will minimize the risk of over-deterrence.[12] Moreover, efforts to obtain compensation will likely be less frequent in the absence of indemnification; when indemnification is unavailable, a damages remedy will likely be less attractive since an individual public official's personal assets will often be insufficient to satisfy the kind of large damages judgment that makes litigation attractive to plaintiffs and their counsel. Nevertheless, by shifting the burden of liability back to the government, indemnification reintroduces the risk that government will not respond to the risk of liability by scaling back its law enforcement activities to an "efficient" level because of the political costs of doing so.

Although Professor Levinson's view has garnered considerable support among legal scholars,[13] I count myself something of a skeptic. I have elsewhere argued that governmental damages liability, by forcing officials either to raise taxes from what they regard as politically optimal levels or

11. *See, e.g.*, Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 587, 590–96 (2000); Neal Miller, *Less-than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force*, 28 CREIGHTON L. REV. 733, 749–52 (1995); Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability under* Bivens, 88 GEO. L.J. 65, 76-77 (1999); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 819-20 (2007); Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?* 86 IOWA L. REV. 1209, 1216-23 (2001); Nicole G. Tell, Note, *Representing Police Officers and Municipalities: A Conflict of Interest for a Municipal Attorney in a § 1983 Police Misconduct Suit*, 65 FORDHAM L. REV. 2825, 2836 (1997). For an inventory of indemnity statutes, which often contain exceptions to the obligation of indemnity for intentional or other extraordinary misconduct, see Rosenthal, *supra* at 812–13 n.51.

12. *See, e.g.*, Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1239–43 (1984).

13. *See, e.g.*, Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 89–90 (2003); Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 259 (2006); John G. Culhane, *What Does Justice Require for Victims of Katrina and September 11?*, 10 DEPAUL J. HEALTH CARE L. 177, 202–03 (2007); Reza Dibadj, *Reconceiving the Firm*, 26 CARDOZO L. REV. 1459, 1517 (2005); Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. LEGIS. 111, 159 (2009); Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 58–59 (2005); Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1103 (2007); Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161, 192–95 (2003); Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1187–88 (2005).

divert resources from what they regard as politically optimal uses, imposes a predictable political cost on those who are accountable for the performance of government.[14] Still, the political costs of governmental liability, like the political benefits of liability-creating governmental activity, are not readily monetizable, and for that reason one cannot expect a regime of governmental liability to produce an "efficient" result.[15] While a regime of governmental liability will create a greater incentive to invest in liability prevention than a no-liability regime, we cannot expect the government to devote $9 to liability prevention in order to save $10 in expected liability unless we know what the political costs of that $9 expenditure are. For example, if the government undertook measures that reduced the risk of wrongful prosecutions and convictions but that also increased the difficulty of convicting the guilty, the political costs of such measures might exceed their benefits if they rendered the government a less effective crime fighter in the eyes of the voters. Thus, we cannot expect the government to reduce its efforts to fight crime, even under a regime a strict liability designed to produce an "efficient" level of law enforcement, if the political consequences of scaling back enforcement efforts are thought to be unacceptable by politically accountable officials.

It follows that even if criminal prosecution was thought to create such grave risks to the innocent to justify a regime of strict liability on the same theory that justifies strict liability of private-sector actors for unusually hazardous activities, we cannot have any confidence that strict liability would produce an "efficient" rate of wrongful convictions. We could expect strict liability to cause the government to scale back its prosecution efforts only if the political benefits of reduced liability are greater than the political costs of scaling back law enforcement—a highly questionable scenario. As many have observed, prosecutors face potent institutional incentives to engage in aggressive tactics borne of their role as advocates in the criminal justice system and the political incentives for aggressive prosecution.[16] To be sure, the threat of liability would at least create some po-

14. *See* Rosenthal, *supra* note 11, at 831–41.

15. *Id.* at 842–43.

16. *See, e.g.*, Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 484, 490–92 (2006); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1602–13 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–31 (2006); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 204–15 (1988); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 405–06 (2006); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 65 FORDHAM L. REV. 851, 869 (1995); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132

litical incentive to avoid wrongful convictions that might not otherwise exist, but the justification for strict as opposed to fault-based liability—the desire to increase the cost of unusually hazardous activities in order to reduce the rate at which they are carried on—is poorly suited to criminal prosecution, which has no "cost" in the conventional sense and which, at least when performed non-negligently, is sufficiently likely to produce political benefits that offset the political costs of potential liability.

As it happens, the advocates for strict liability usually justify their position not by claiming that absolute liability would reduce the risk of error, but instead by arguing that the extraordinary hardships imposed on the wrongly convicted creates a moral obligation of compensation.[17] This position echoes Frank Michelman's Rawlsian justification for the constitutional obligation of compensation to those whose property is taken for public use—the argument that those who have suffered special burdens for the benefit of the public should receive compensation from the public at large.[18] Indeed, some of the advocates of strict liability explicitly ground their position in the constitutional obligation to pay just compensation when private property is taken for public use.[19]

The argument for compensation based on the Constitution's Takings Clause is, however, full of problems. In contrast to the Due Process Clause, which addresses deprivations of "life, liberty, or property," and requires not "compensation" but instead "due process of law,"[20] the Takings Clause requires "just compensation" only when "private property" is "taken for public use."[21] Wrongful prosecution and conviction, of course, seems like a classic deprivation of "liberty," addressed by the two Due Process Clauses, rather than a taking of "property," for which compensation must be paid under the Takings Clause. To be sure, some have argued that a deprivation of liberty is also a deprivation of property by eliminating the detainee's

(2004).

17. *See, e.g.*, Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 92–97 (1999); Lopez, *supra* note 1, at 710-12; Rosenn, *supra* note 1, at 715–17.

18. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1218–23 (1967).

19. *See, e.g.*, Borchard, *supra* note 1, at 207–08; Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1983–96 (2005); Martinez, *supra* note 1, at 538–48; Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 117–36 (2004).

20. U.S. CONST. amend. V, cl. 4 ("No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."); U.S. CONST. amend. XIV, cl. 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .").

21. U.S. CONST. amend. V, cl. 5.

ability to devote his labor to economically productive activities,[22] but this view would render largely redundant the terms "liberty" and "property" in the Due Process Clauses. More important, compensation is required under the Takings Clause only when private property is "taken for public use." It is more than a little difficult to understand how the freedom of wrongfully prosecuted or convicted individuals is taken for some "public use." Although the Supreme Court has construed the public use requirement broadly to include takings that provide a benefit to the public at large,[23] it is difficult to understand how the public benefits from a wrongful prosecution. One could perhaps argue that the public benefits from the operation of criminal justice system as a whole, which protects it from wrongdoers, but if this amounted to a taking of private property for "public use," then compensation would be required to all who are deprived of their freedom by the operation of the criminal justice system, not only those who are erroneously convicted.

As a doctrinal matter, it is well settled that the public use concept refers to the concept of eminent domain rather than takings for other purposes, such as takings by tort, taxation, or police-power regulation.[24] In the course of upholding a forfeiture law against government attack, for example, the Supreme Court was quite clear that the government is not "required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."[25] Thus, Takings Clause jurisprudence provides no support for the use of the Clause to support compensation to the exonerated.

Perhaps, however, the best use of the Takings Clause is not as doctrinal support for an obligation of compensation, but instead as a useful analogy that illustrates the ethical obligation to compensate those who have been subjected to extraordinary hardships as a consequence of governmental action.[26] Still, the argument is a difficult one.

Even putting aside questions about whether there is an ethical obligation to compensate those who are exonerated for reasons other than factual innocence,[27] the loss-spreading argument for strict liability, whether justi-

22. *See, e.g.*, Martinez, *supra* note 1, at 538–48; Master, *supra* note 19, at 120–38.

23. *See* Kelo v. City of New London, 545 U.S. 469, 469 (2005).

24. *See, e.g.*, Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1278–301 (2002); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1119–24 (1993).

25. Bennis v. Michigan, 516 U.S. 442, 452 (1996).

26. *See, e.g.*, Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 790–94 (2004); Manns, *supra* note 19, at 1983–95; Rosenn, *supra* note 1, at 715–17; Kaplan, *supra* note 1, at 243–47.

27. For example, some exonerations result from the suppression of probative evidence of guilt as a

fied in deontological or instrumental terms, is problematic. A regime of strict liability, justified in terms of loss-spreading, would operate as mandatory, publicly-funded wrongful conviction insurance. Of course, we normally leave questions about whether to purchase insurance to private choice. Perhaps a publicly funded insurance program is justifiable rather than leaving such compensation to the private market in light of the risk that those who are wrongfully convicted will be indigent, but questions about the desirability of such an insurance program still remain.

For one thing, it is far from clear that wrongful conviction insurance represents the form of social insurance in most urgent need of public funding. We lack publicly funded social insurance to spread the losses associated with many other severe hardships caused by no fault of the victim, such as natural disasters and health crises, and the indigent are in no better position to obtain private insurance against these costs than for the risk of wrongful conviction. To be sure, these hardships are not the government's fault, but if the argument for insurance is based on loss spreading and not fault, it is far from clear that the losses associated with wrongful prosecutions and convictions are those in most urgent need of spreading. In any event, wrongful convictions are far from the only losses occasioned by the operations of government that go uncompensated. There is a vast array of governmental tort immunity doctrines that leaves a host of losses attributable to even wrongful governmental conduct—including wrongful death caused by tortuous government conduct—entirely uncompensated.[28] Unless we are to rethink the entire edifice of tort immunity, the fact that the activities of the government cause a loss is no reason to select wrongful prosecution and conviction for special treatment.

At a minimum, some inquiry into costs and benefits seems warranted before it is decided to adopt this form of public insurance. On the cost side, a recent study of exonerations between 1989 and 2003 identified 340 individuals who had served an average of more than ten years in prison.[29] A

result of an unlawful search and seizure. For a taxonomy of exonerations, see Martinez, *supra* note 1, at 521–25. The question whether damages representing compensation for an ensuing prosecution or conviction is explored below, but for present purposes it is worth noting that the question of whether there is an ethical obligation of compensation apart from the need to remedy constitutional violations is a complex one. Individuals who were factually guilty have themselves breached a moral obligation to others, and accordingly the case for compensating those who have not compensated their own victims is problematic.

28. For an inventory of state and federal immunity statutes, as well as common-law immunity doctrines, see Rosenthal, *supra* note 11, at 801–21.

29. *See* Samuel R. Gross et al., *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005). Another study of the first 200 persons exonerated by DNA evidence found that these individuals served an average of 12 years in prison. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 119 (2008). These figures are likely a bit misleading as a

regime of full, no-fault compensation of a scale necessary to provide full compensation to this group could be enormously expensive. For example, James Newsome, who was exonerated after fifteen years in prison for a murder he did not commit, was awarded $1 million per year in compensatory damages by a jury.[30] While it is easy to understand the appeal of this round number to a jury, an award of this magnitude could devastate a small municipality and imposes a not inconsiderable cost even on a major city. The overall budgetary impact of a regime of no-fault compensation—a total cost of more than $3.4 billion if all of the exonerations between 1989 and 2003 are considered under the standard of compensation set in *Newsome*—should give one pause.

The budgetary impact of a compensation requirement will have important allocative consequences. If we realistically assume that at any given time, government revenues are essentially fixed by the limits of the public's willingness to tolerate taxation (or debt financing in lieu of taxation in jurisdictions that do not require balanced budgets), and that a host of governmental services—such as police and fire protection, education, the maintenance of streets and other public infrastructure—are political necessities that must be funded because of their broad-based appeal, then the decision to fund wrongful conviction insurance requires a concomitant reduction in the funding of other, more politically vulnerable programs. Given political realities, the programs most likely to be cut are those that provide services to the poor—who have relatively little power but relatively great dependence on the provision of governmental services. Thus, allocating funds to the compensation of the wrongly convicted likely means there will be a reduction in the resources available to the poor, such as subsidized early childhood education, the remediation of inner-city environmental hazards, the provision of social services to troubled families, or the provision of health care. For this reason, compensating the wrongly convicted involves a peculiar kind of wealth transfer—from impoverished persons dependent on government resources to the wrongly convicted. Programs that benefit thousands in disadvantaged communities would be replaced by jackpot-type awards to a relative handful. The ethical argument in favor of such a wealth transfer is contestable, to say the least.[31] Even if, however, this supposition is incorrect and the funds necessary to pay the

guide for future liabilities, since they reflect to some extent the time lag between conviction and the development of reliable DNA-testing methodologies.

30. *See* Newsome v. McCabe, 319 F.3d 301, 302–03 (7th Cir. 2003).

31. I have elsewhere made this argument with respect to governmental liability in tort generally. *See* Rosenthal, *supra* note 11, at 844–47.

exonerated are diverted from other programs offering broad-based benefits, it is still far from clear that the provision of wrongful conviction insurance and a concomitant reduction in the scale of other government programs offers any net gain in social welfare. An insurance-based justification, moreover, is a particularly weak justification for awarding compensation through traditional tort litigation, rather than through a statutory system allocating defined compensation to the wrongfully convicted. The weakness of tort litigation as a means of providing social insurance at taxpayer expense, after all, is that judges and juries are in no position to weigh the importance of such insurance against other competing budgetary priorities.

On the benefit side, compensation would improve the lot of the exonerated, but if we cannot expect it to reduce the incidence of error in the criminal justice system, it lacks any additional systemic benefits. As we have seen, however, there is no reason to believe that a regime of strict liability will induce the government to reduce its law enforcement efforts, and therefore reduce the magnitude of wrongful prosecution and conviction in that manner.

Of course, civil liability might induce reforms that might reduce the rate of error in the criminal justice system, but as we have seen, this benefit can be achieved at lower cost without need of strict liability. A fault-based regime of liability offers the possibility of reduced rates of wrongful conviction by encouraging government to adopt cost-justified precautions against prosecuting the innocent. Accordingly, a regime of liability based on fault merits separate consideration.

II.

The doctrinal obstacles to compensation under the prevailing fault-based regime of tort law are formidable. These doctrinal obstacles, moreover, provide some insight into the difficulties that inhere in such a regime of liability for wrongful convictions.

The most promising theory of tort liability for an erroneous conviction involves the tort of malicious prosecution, since "unlike the related cause of action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process."[32] Yet, it is far from clear that this theory can be used against public officials or the units of government that employ them.

The Restatement of Torts describes the tort of malicious prosecution

32. Heck v. Humphrey, 512 U.S. 477, 484 (1994); *accord* RESTATEMENT (SECOND) OF TORTS §§ 670–71 (1977).

this way:

> A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if:
>
> (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and
>
> (b) the proceedings have terminated in favor of the accused.[33]

This formulation, of course, contemplates no public-sector liability. Indeed, the only reference to the public sector in the Restatement's treatment of malicious prosecution is a reference to the absolute immunity that a public prosecutor enjoys from liability for malicious prosecution.[34] The Restatement makes no mention of malicious prosecution actions against police officers or other investigative personnel who lack absolute prosecutorial immunity, or the units of government that employ them. Indeed, the concept of a malicious prosecution action against an investigator is something of an oxymoron. As Justice Ginsburg has observed, a malicious prosecution action against police officers "is anomalous" because "[t]he principal player in carrying out a prosecution . . . is not [the] police officer but [the] prosecutor."[35] Some courts have taken the view that a malicious prosecution action cannot be brought against public officials such as police officers who perform investigative functions,[36] although it seems that the greater weight of authority permits such an action.[37]

Even if these hurdles to liability for malicious prosecution can be overcome, there are others. The tort of malicious prosecution requires proof

33. RESTATEMENT (SECOND) OF TORTS § 653 (1977).

34. *Id.* at § 656. *See, e.g.*, State v. Superior Court, 921 P.2d 697, 701 (Ariz. Ct. App. 1996); Culpepper v. Smith, 792 S.W.2d 293, 300 (Ark. 1990); Falls v. Superior Court, 49 Cal. Rptr. 2d 908, 915 (Cal. Ct. App. 1996); McDonald v. Lakewood Country Club, 461 P.2d 437, 441 (Colo. 1969); DeLaurentis v. New Haven, 597 A.2d 807, 816 (Conn. 1991); Stebbins v. Wash. Metro. Area Transit Auth., 495 A.2d 741, 744 (D.C. 1985); Hansen v. State, 503 So. 2d 1324, 1326 (Fla. Dist. Ct. App. 1987); Robbins v. Lanier, 402 S.E.2d 342, 343–44 (Ga. Ct. App. 1991); Burr v. Cedar Rapids, 286 N.W.2d 393, 395 (Iowa 1979).

35. Albright v. Oliver, 510 U.S. 266, 279 n.5 (1994) (concurring opinion).

36. *See, e.g.*, Phelps v. Dawson, 97 F.2d 339, 340 (8th Cir. 1938); White v. Towers, 235 P.2d 209, 213–14 (Cal. 1951); Butt v. McEvoy, 669 N.E.2d 1015, 1018 (Ind. Ct. App. 1996); Dall v. Caron, 628 A.2d 117, 119 (Me. 1993); Bromund v. Holt, 129 N.W.2d 149, 152 (Wis. 1964).

37. *See, e.g.*, Lee v. Minute Stop, Inc., 874 So. 2d 505, 515 (Ala. 2003); Hartford Fire Ins. Co. v. Kolar, 488 P.2d 1114, 1116–17 (Colo. Ct. App. 1971); Touchton v. Bramble, 643 S.E.2d 541, 545 (Ga. Ct. App. 2007); Hines v. French, 852 A.2d 1047, 1065-66 (Md. Ct. Spec. App. 2004); Belt v. Ritter, 171 N.W.2d 581, 586–87 (Mich. Ct. App. 1969); Motley v. Dugan, 191 S.W.2d 979, 982 (Mo. Ct. App. 1945); Hill v. Burlingame, 797 P.2d 925, 926–27 (Mont. 1990); Orser v. State, 582 P.2d 1227, 1232–33 (Mont. 1978). Similarly, some states permit malicious prosecution actions against prosecutors for acts undertaken in what is thought to be an investigative capacity. *See, e.g.*, Newton v. Etoch, 965 S.W.2d 96, 103 (Ark. 1998); Edgar v. Wagner, 699 P.2d 110, 112 (Nev. 1985).

not only that the accused be exonerated, but also that the prosecution was unsupported by probable cause—a demanding standard.[38] Moreover, the element of malice requires proof that the criminal case was brought "primarily for a purpose other than that of bringing an offender to justice."[39] Prosecutors or police may sometimes be incompetent or even venal, but no one has yet attempted to mount an empirical case that a significant contributor to the problem of wrongful prosecutions or convictions is law enforcement officials who press charges without at least believing—however mistakenly—in the guilt of the accused. Yet, a belief in the guilt of the accused acts as a defense to a malicious prosecution action.[40] In addition, state tort immunity statutes frequently grant public officials immunity for discretionary decisions, acts undertaken to execute or enforce the laws, or the initiation of judicial proceedings, and also frequently cap the damages recoverable in actions against governmental defendants and public officials.[41] Given all of these obstacles to malicious prosecution claims against governmental defendants, it should be unsurprising that the advocates of compensation reject malicious prosecution as an adequate remedy for the exonerated.[42]

As for the possibility of claims based the United States Constitution rather than state tort law,[43] again, the most promising theory is one of mali-

38. *See* RESTATEMENT (SECOND) OF TORTS § 662 (1977).

39. *See id.* at § 668.

40. *Id.* at § 668 cmt. d. For examples of malicious prosecution actions that foundered on this requirement, see, for example, Reese v. City of Atlanta, 583 S.E.2d 584, 585 (Ga. Ct. App. 2003); Kumner v. City of Fargo, 516 N.W.2d 294, 297–98 (N.D. 1994); Atkinson v. Birmingham, 116 A. 205, 207–08 (R.I. 1922); Smith v. Davis, 999 S.W.2d 409, 414–15 (Tex. Ct. App. 1999). The same problem will generally foreclose an action for abuse of process, which requires the use of civil or criminal process "primarily to accomplish a purpose for which it is not designed. . . ." RESTATEMENT (SECOND) OF TORTS § 682 (1977).

41. For an inventory of state governmental tort immunity statutes, see Rosenthal, *supra* note 11, at 804–13.

42. *See, e.g.*, Bernhard, *supra* note 17, at 86; Michael Goldsmith, *Reforming the Civil Rights Act of 1871: The Problem of Police Perjury*, 80 NOTRE DAME L. REV. 1259, 1272–74 (2005); Lopez, *supra* note 1, at 693–94; Martinez, *supra* note 1, at 530–31; Lauren C. Boucher, Comment, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U. L. REV. 1069, 1083 (2007); Christine L. Zaremski, Comment, *The Compensation of Erroneously Convicted Individuals in Pennsylvania*, 43 DUQ. L. REV. 429, 433–36 (2005).

43. Among other things, federal constitutional claims would avoid state tort immunities in actions against state and local governments and their officials. *See* Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 375–78 (1990); Felder v. Casey, 487 U.S. 131, 141–45 (1988); Martinez v. California, 444 U.S. 277, 284 n.8 (1980). The States, however are not considered amenable to suit under the statute that permits recovery against those who, acting under color of state law, deprive individuals of federally protected rights,42 U.S.C. § 1983 (2006). *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 65–71 (1989). As for federal liability, sovereign immunity bars an action against the United States seeking damages for a violation of a constitutional right. *See* FDIC v. Meyer, 510 U.S. 471, 477 (1994). An action for damages can be brought, however, against an individual federal official allegedly responsible for the violation absent an alternative statutory remedy deemed satisfactory or some other factor that

cious prosecution, which, as we have seen, permits recovery of damages associated with a wrongful prosecution and conviction.[44] Such a theory, however, again encounters the common law rule of prosecutorial immunity, which the Supreme Court has adopted as a matter of federal law.[45] A prosecutor's decision to charge falls squarely within the scope of this immunity.[46] Thus, for example, even assuming a cognizable federal malicious prosecution claim exists, the prosecutor's decision to charge is immunized from liability despite the claim. Suing police and other investigators could circumvent prosecutorial immunity, but as we have also seen, there are considerable conceptual difficulties in holding a police officer responsible for a malicious prosecution—especially when an element of the tort involves the prosecutor's immunized decision to charge—and equally serious difficulties in proving the requisite malice.[47]

Even more problematic, it is far from clear that malicious prosecution is an actionable constitutional tort. The Supreme Court has forcefully rejected the view that every tort committed by a public official should also be considered a constitutional violation.[48] To convert a state-law tort into a constitutional tort, it is necessary to identify a constitutional violation produced by the tort, but that is no easy matter when it comes to wrongful prosecutions. In *Albright v. Oliver*,[49] a majority of the Supreme Court rejected a malicious prosecution action against a police detective premised on the Due Process Clause, while leaving open the possibility of a malicious prosecution theory based on the Fourth Amendment's prohibition on unreasonable search and seizure.[50] A Fourth Amendment theory of malicious

counsels against official liability. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395–97 (1971).

44. The Supreme Court has adopted this rule in interpreting the federal civil rights statute, 42 U.S.C. § 1983. *See* Wallace v. Kato, 549 U.S. 384, 388–90 (2007); Heck v. Humphrey, 512 U.S. 477, 484 (1994).

45. *See* Van de Kamp v. Goldstein, 129 S. Ct. 855, 859–60 (2009); Kalina v. Fletcher, 522 U.S. 118, 124–29 (1997); Imbler v. Pachtman, 424 U.S. 409, 421–28 (1976).

46. *See Kalina*, 522 U.S. at 129.

47. For an example of a federal malicious prosecution claim against an arresting officer rejected because the officer was not involved in the decision to prosecute, see McKinley v. City of Mansfield, 404 F.3d 418, 444 (6th Cir. 2005).

48. *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992); Daniels v. Williams, 474 U.S. 327, 332–33 (1986); Baker v. McCollan, 443 U.S. 137, 146 (1979); Paul v. Davis, 424 U.S. 693, 701 (1976).

49. 510 U.S. 266 (1994).

50. The case produced no majority opinion, and its meaning is less than perfectly clear. Four Justices concluded that deprivations of liberty associated with the initiation of criminal proceedings are governed by the Fourth Amendment's prohibition on unreasonable search and seizure rather than the Due Process Clause. *Id.* at 271–74 (plurality opinion). Justice Souter concluded that the Fourth Amendment rather than the Due Process Clause governed malicious prosecution claims as long as the plaintiff could obtain compensation for all of the liberty interests at issue through a Fourth Amendment

prosecution, however, is not promising.

The Fourth Amendment prohibits "unreasonable search and seizure,"[51] not unwarranted prosecutions. Given the Supreme Court's refusal to equate state-law torts with constitutional violations, the relevant question for purposes of constitutional liability is whether the Fourth Amendment permits recovery for an allegedly unwarranted prosecution, not whether the common law concept of a "malicious prosecution" permits such a recovery.[52] It is far from clear, however, that the Fourth Amendment could support an award of damages for a wrongful criminal prosecution or conviction. Once an arrestee is charged and placed in the custody of a court, it would seem that the arresting officer's seizure of the suspect seems to be at an end, and treating an ensuing prosecution as a compensable wrong under the Fourth Amendment would seem inconsistent with the Fourth Amendment's refusal to require "judicial oversight or review of the decision to prosecute."[53] The courts to consider this question have held that no damages associated with a criminal prosecution are recoverable on a Fourth Amendment claim.[54] This argument is strengthened by the recent

action. *Id.* at 288–91 (Souter, J., concurring in the judgment). As we will see, however, there is some doubt about whether a plaintiff can obtain compensation for an allegedly wrongful prosecution and conviction under the Fourth Amendment. Nevertheless, two additional Justices rejected any due process theory as long as the aggrieved party is able to press a malicious prosecution claim under state tort law. *Id.* at 282–86 (Kennedy, J., concurring in the judgment). As we have seen, the law of torts recognizes malicious prosecution liability, and for that reason state tort law would supply all the process that is constitutionally due. Indeed, the lower courts have generally read *Albright* to foreclose malicious prosecution actions based on the Due Process Clause. *See, e.g.*, Bryant v. City of New York, 404 F.3d 128, 135–36 (2d Cir. 2005); Castellano v. Fragozo, 352 F.3d 939, 953–54 (5th Cir. 2003) (en banc); Nieves v. McSweeney, 241 F.3d 46, 53 (1st Cir. 2001); Newsome v. McCabe, 256 F.3d 747, 751 (7th Cir. 2001), *on reh'g*, 260 F.3d 824 (7th Cir. 2001) (per curiam); Lambert v. Williams, 223 F.3d 257, 261–63 (4th Cir. 2000). To be sure, statutory immunity defenses may sometimes defeat such a claim, but the Court has also held that the Due Process Clause permits the states to enact statutory immunities unless they are wholly irrational or arbitrary. *See* Martinez v. California, 444 U.S. 277, 281–82 (1980). Moreover, the legislative process itself is generally thought to supply all the process that is due when it comes to rules of general applicability. *See* Atkins v. Parker, 472 U.S. 115, 129–30 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432–33 (1982); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). Thus, a state tort remedy may not be constitutionally inadequate on the ground that it confronts a statutory immunity. *See* Daniels v. Williams, 474 U.S. 327, 342–43 (1986) (Stevens, J., concurring in the judgment); Rittenhouse v. DeKalb County, 764 F.2d 1451, 1458 (11th Cir. 1985); Daniels v. Williams, 720 F.2d 792, 797–99 (4th Cir. 1983), *on reh'g*, 748 F.2d 229 (4th Cir. 1984) (en banc), *aff'd on other grounds*, 474 U.S. 327 (1986).

51. U.S. CONST. amend. IV.

52. For an opinion taking the view that the label "malicious prosecution" is irrelevant to a Fourth Amendment claim, see Frantz v. Vill. of Bradford, 245 F.3d 869, 875–77 (6th Cir. 2001). Subsequent decisions of the Sixth Circuit, however, have declined to follow *Frantz* on the ground that it was unfaithful to prior circuit precedent. *See* Thacker v. City of Columbus, 328 F.3d 244, 258–59 (6th Cir. 2003); Darrah v. City of Oak Park, 255 F.3d 301, 308–11 (6th Cir. 2001).

53. Gerstein v. Pugh, 420 U.S. 103, 119 (1975); *accord*, *Albright*, 510 U.S. at 282–83 (Kennedy, J., concurring in the judgment); Costello v. United States, 350 U.S. 359, 362–64 (1956).

54. *See* Gauger v. Hendle, 349 F.3d 354, 362–63 (7th Cir. 2003), *overruled in part on other grounds by* Wallace v. City of Chicago, 440 F.3d 421 (7th Cir. 2006), *aff'd sub nom.* Wallace v. Kato,

decision in *Wallace v. Kato*,[55] in which the Court analogized a claim seeking damages under the Fourth Amendment for an allegedly wrongful warrantless arrest to a tort action for false imprisonment, for which no damages attributable to deprivations of liberty occasioned by legal process may be recovered.[56]

An arrest on a warrant unsupported by probable cause, in contrast, could give rise to liability for confinement pursuant to legal process under this rule. The Supreme Court has held that officers who obtain a warrant without probable cause can be held liable if their reliance on the warrant was objectively unreasonable and therefore sufficient to defeat the defense of qualified immunity ordinarily afforded to the police.[57] Still, it is unclear whether an unconstitutional arrest would give rise to damages for an ensuing prosecution and conviction. As we have seen, once the arrestee appears before a judge and becomes subject to the custody of the court, there is a significant question of whether the arresting authorities' "seizure" for purposes of the Fourth Amendment is at an end. Moreover, decisions about whether to prosecute the arrestee, and whether he will be convicted, are

549 U.S. 384 (2007); Hector v. Watt, 235 F.3d 154, 157–60 (3d Cir. 2000); Townes v. City of New York, 176 F.3d 138, 147–48 (2d Cir. 1999); Brooks v. City of Winston-Salem, 85 F.3d 178, 181–82 (4th Cir, 1996); Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 4 (1st Cir. 1995). *Cf.* Jones v. City of Jackson, 203 F.3d 875, 880 (5th Cir. 2000) (Fourth Amendment inapplicable when defendant was held on a valid bench warrant); Torres v. McLaughlin, 163 F.3d 169, 174–75 (3d Cir. 1998) (seizure for purposes of the Fourth Amendment does not include post-conviction incarceration). *But cf.* Russo v. City of Bridgeport, 479 F.3d 196, 205–09 (2d Cir. 2007) (pretrial detention pursuant to legal process violated the Fourth Amendment).

55. 549 U.S. 384 (2007).

56. *Id.* at 388–91. Justice Ginsburg had earlier suggested that an arrestee who is later detained pursuant to legal process may be subjected to a continuing seizure making the entire period of detention actionable under the Fourth Amendment. *See Albright*, 510 U.S. at 279 (Ginsburg, J., concurring). This view, however, takes no account of the fact that once the arrestee is placed under the control of a court, the arrestee's seizure by the arresting officers would seem to be over. The concept of a "continuing seizure" did not subsequently enjoy much favor in the circuits. *See* Castellano v. Fragozo, 352 F.3d 939, 959 (5th Cir. 2003) (en banc); Lee v. City of Chicago, 330 F.3d 456, 463–65 (7th Cir. 2003); Nieves v. McSweeney, 241 F.3d 46, 55–56 (1st Cir. 2001); Riley v. Dorton, 115 F.3d 1159, 1162–63 (4th Cir. 1997) (en banc). In any event, this theory made no appearance in *Wallace*, in which the Court held that a Fourth Amendment claim accrues for purposes of the statute of limitations as soon as an arrestee is brought before a judicial officer and detained pursuant to legal process. 549 U.S. at 391, 397. That holding is squarely inconsistent with Justice Ginsberg's earlier view that the limitations period on a Fourth Amendment claim does not begin to run until the suspect is released from custody, *see Albright*, 510 U.S. at 279 (Ginsburg, J., concurring), and may well be the death knell for the "continuing seizure" theory.

57. *See* Malley v. Briggs, 475 U.S. 335, 341–46 (1986). Similarly, the Fourth Amendment forbids police officers to obtain a warrant through intentionally or recklessly false statements or omissions that are material to the determination of probable cause. *See* Franks v. Delaware, 438 U.S. 154, 164–72 (1978). An officer who obtains an arrest warrant in violation of this rule may well be liable for deprivations of liberty occasioned by the warrant because they relate to an interest protected by the Fourth Amendment. *See, e.g.*, McSherry v. City of Long Beach, 560 F.3d 1125, 1130 (9th Cir. 2009); Wilkins v. DeReyes, 528 F.3d 790, 798–99, 801–02 (10th Cir. 2008).

quite separate from the decision to obtain a warrant. A Fourth Amendment claim based on the issuance of a defective warrant could readily support an award of damages for the arrest or search authorized by the warrant, but whether it could also sustain an award of damages for an ensuing prosecution and conviction is more doubtful. As we will see, it seems unlikely that an arresting officer can be held liable for a prosecutor's independent and subsequent decision to pursue a prosecution, which is itself immunized, or for a jury's independent decision to convict.

A somewhat more promising theory of malicious prosecution as a constitutional tort is based on the due process requirement that exculpatory information be disclosed to the defense. Under *Brady v. Maryland*,[58] the suppression of exculpatory information deprives a criminal defendant of due process when there is a reasonable probability that the suppression affected the outcome of the trial.[59] Because an element of a *Brady* violation is that the failure to disclose exculpatory evidence was material to the conviction,[60] it seems that a conviction in violation of *Brady* should be considered a compensable constitutional injury.[61] This same point, however, creates considerable doubt about whether an individual who was not convicted can mount a due process claim for damages associated with an allegedly wrongful prosecution that did not produce a conviction. Indeed, some courts have rejected such claims.[62] Others have recognized such claims, albeit without much explanation of how they fit into the *Brady* framework.[63]

Prosecutorial immunity, however, remains a problem. The Supreme Court has held that a prosecutor's decision about whether to disclose exculpatory evidence falls within the scope of absolute immunity for decisions about how to go about proving the prosecution's case.[64] An action

58. 373 U.S. 83 (1963).

59. *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 280–82 (1999); Kyles v. Whitley, 514 U.S. 419, 434–35 (1995); United States v. Bagley, 473 U.S. 667, 682 (1985).

60. As the Court has explained: "[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281.

61. *See, e.g.*, Zahrey v. Coffey, 221 F.3d 342, 349–55 (2d Cir. 2000).

62. *See, e.g.*, Becker v. Kroll, 494 F.3d 904, 923–24 (10th Cir. 2007); Morgan v. Gertz, 166 F.3d 1307, 1310 (10th Cir. 1999); Rogala v. District of Columbia, 161 F.3d 44, 55–56 (D.C. Cir. 1998) (per curiam); Flores v. Satz, 137 F.3d 1275, 1277–78 (11th Cir. 1998); Taylor v. Waters, 81 F.3d 429, 435–36 (4th Cir. 1996); McKune v. City of Grand Rapids, 842 F.2d 903, 907 (6th Cir. 1988).

63. *See, e.g.*, Jones v. City of Chicago, 856 F.2d 985, 993–94 (7th Cir. 1988). However, that circuit shows signs of retreating from that position. *See* Bielanski v. County of Kane, 550 F.3d 632, 644–45 (7th Cir. 2008). Another circuit has opined that the fact that a defendant was not convicted merely reduces the damages available on a due process claim, rather than barring it altogether. *See* Haupt v. Dillard, 17 F.3d 285, 287–88 (9th Cir. 1994).

64. *See* Van de Kamp v. Goldstein, 129 S. Ct. 855, 861 (2009); Kalina v. Fletcher, 522 U.S. 118,

against investigative personnel, however, remains available. Law enforcement personnel performing what are thought to be investigative functions are granted only a qualified immunity that offers no protection from liability for violations of clearly established law.[65] On this basis, some courts have held that police officers and other investigative personnel can be held liable for a failure to disclose exculpatory information as required by *Brady*.[66]

These decisions, however, do not grapple with the difficulties that inhere in such a claim. The Court has never placed a *Brady* obligation on the police or other investigators. To the contrary, it has held that the *prosecutor* has a duty to learn of and disclose exculpatory information known to police and other investigators, not that the investigators have a duty to

124–25 (1997); Imbler v. Pachtman, 424 U.S. 409, 431 n.34 (1976). It is settled, in contrast, that a prosecutor acting in an investigative capacity lacks absolute immunity, *see* Buckley v. Fitzsimmons, 509 U.S. 259, 272–76 (1993), and there is a split of authority on the question of whether a prosecutor's conduct during the investigative phase is protected by immunity when it is directed at producing evidence to be used at a subsequent trial. *Compare* Cousin v. Small, 325 F.3d 627, 633–35 (5th Cir. 2003) (granting immunity), Higgason v. Stephens, 288 F.3d 868, 877–78 (6th Cir. 2002) (same), Moore v. Valder, 65 F.3d 189, 194 (D.C. Cir. 1995) (same), *and* Kohl v. Casson, 5 F.3d 1141, 1146–47 (8th Cir. 1993) (same) *with* McGhee v. Pottawattamie County, 547 F.3d 922, 932–33 (8th Cir. 2008) (no immunity for actions prior to charging and acquisition of probable cause), *cert. granted sub nom.* Pottawattamie County v. McGhee, 556 U.S. __ (2009) (No. 08-1065), Broam v. Bogan, 320 F.3d 1023, 1033–34 (9th Cir. 2003) (no immunity for acts as part of investigation to determine whether there was probable cause to charge), Milstein v. Cooley, 257 F.3d 1004, 1010–11 (9th Cir. 2001) (no immunity for fabricating evidence to be used in subsequent prosecution), Zahrey v. Coffey, 221 F.3d 342, 349–55 (2d Cir. 2000) (no immunity for actions prior to charging and acquisition of probable cause), *and* Hill v. City of New York, 45 F.3d 653, 662–63 (2d Cir. 1995) (no immunity for fabricating evidence to be used in subsequent prosecution). The Supreme Court's recent decision granting immunity to supervisory prosecutors on a claim that they had failed to properly train or supervise their subordinates with respect to the duty to disclose exculpatory information on the ground that the supervisory acts and omissions at issue, even if administrative in some sense, were directed at the manner in which trials are conducted. *See Van de Kamp*, 129 S. Ct. at 861–64. This suggests that the line of cases recognizing immunity now has the upper hand. In any event, whatever the limitations on immunity, it seems plain that the vast majority of claims against prosecutors arising from exonerations will be barred by prosecutorial immunity. For this reason, some commentators argued that absolute immunity should be abolished or limited in order to create an effective civil remedy for the exonerated. *See, e.g.*, Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 123–53 (2005); Douglas J. McNamara, Buckley, Imbler *and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 ALB. L. REV. 1135, 1138 (1996); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 57-59 (2009).

65. *See, e.g.*, *Buckley*, 509 U.S. at 272–76; Burns v. Reed, 500 U.S. 478, 492–96 (1991); Malley v. Briggs, 475 U.S. 335, 342–44 (1986).

66. *See, e.g.*, Steidl v. Ferman, 494 F.3d 623, 630–31 (7th Cir. 2007); Castellano v. Fragozo, 352 F.3d 939, 956–58 (5th Cir. 2003) (en banc); Newsome v. McCabe, 256 F.3d 747, 752–53 (7th Cir. 2001), *on reh'g*, 260 F.3d 824 (7th Cir. 2001); McMillian v. Johnson, 88 F.3d 1554, 1559–60 (11th Cir. 1996); Sanders v. English, 950 F.2d 1152, 1162 (5th Cir. 1992). For scholarly defenses of this theory, see Michael Avery, *Paying for Silence: The Liability of Police Officers under Section 1983 for Suppressing Exculpatory Evidence*, 13 TEMP. POL. & CIV. RTS. L. REV. 1, 29–41 (2003); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 69-75.

make disclosures to the prosecutor.[67] This allocation of responsibility makes good sense; in a world in which police officers need not be lawyers, no one can have confidence that they could comply with *Brady* by recognizing the exculpatory value of information, except perhaps in the clearest cases. Prosecutors, not investigators, have the necessary expertise to know whether information might negate an element of an offense, provide an affirmative defense, impeach the credibility of witnesses, or otherwise undermine the prosecution's case.[68] In other words, when it comes to *Brady*, it is the prosecutor and not the investigator who is the "cheapest cost avoider" best positioned to minimize the likelihood of an unfair trial.[69] Indeed, the courts to consider the question have rejected the imposition of a duty on police to identify and disclose exculpatory evidence to the prosecutors.[70] To be sure, it makes some sense to hold investigators liable when they take affirmative steps to conceal or destroy evidence or otherwise to prevent prosecutors from discharging their *Brady* obligations; indeed, the lower courts seem to be moving in that direction by limiting liability to cases involving some sort of bad faith conduct that prevents prosecutors from discharging their *Brady* obligations.[71] But, absent such proof, *Brady* provides questionable support for circumventing prosecutorial immunity

67. *See* Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006) (per curiam); Strickler v. Greene, 527 U.S. 263, 280–81 (1999); Kyles v. Whitley, 514 U.S. 419, 437 (1995).

68. One jurist made the point this way:

> The *Brady* duty is framed by the dictates of the adversary system and the prosecution's legal role therein. Legal terms of art define its bounds and limits. The prosecutor must ask such lawyer's questions as whether an item of evidence has "exculpatory" or "impeachment" value and whether such evidence is "material." It would be inappropriate to charge police with answering these same questions, for their job of gathering evidence is quite different from the prosecution's task of evaluating it. This is especially true because the prosecutor can view the evidence from the perspective of the case as a whole while police officers, who are often involved in only one portion of the case, may lack necessary context. To hold that the contours of the due process duty applicable to the police must be identical to those of the prosecutor's *Brady* duty would thus improperly mandate a one-size-fits-all regime.

Jean v. Collins. 221 F.3d 656, 660 (4th Cir. 2000) (en banc) (Wilkinson, C.J., concurring).

69. By the "cheapest cost avoider," I refer to the familiar concept of "the party best suited to make the cost-benefit analysis and act upon it." *See* Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L. J. 1055, 1062 (1972).

70. *See* Clemmons v. Armontrout, 477 F.3d 962, 966 (8th Cir. 2007); Villasana v. Wilhoit, 368 F.3d 976, 979 (8th Cir. 2004); Broam v. Bogan, 320 F.3d 1023, 1033 (9th Cir. 2003); Mowbray v. Cameron County, 274 F.3d 269, 278 (5th Cir. 2001); McMillian v. Johnson, 88 F.3d 1554, 1567 (11th Cir.1996); Walker v. City of New York, 974 F.2d 293, 299 (2d Cir. 1992).

71. *See* Dominguez v. Hendley, 545 F.3d 585, 589–90 (7th Cir. 2008); White v. McKinley, 519 F.3d 806, 813–14 (8th Cir. 2008); *Clemmons*, 477 F.3d at 966; Villanana, 368 F.3d at 980; *Jean*, 221 F.3d at 662–63. *See also* Newsome v. McCabe, 260 F.3d 824, 825 (7th Cir. 2001) ("[P]olice need not spontaneously reveal to prosecutors every tidbit that with the benefit of hindsight (and the context of other evidence) could be said to assist defendants. . . . But if the right characterization of the defendants' conduct is that they deliberately withheld information, seeking to misdirect or mislead the prosecutors and the defense, then there is a genuine constitutional problem."), *on rehearing*, 260 F.3d 824 (2001) (per curiam).

through civil actions against investigators.[72]

There is an additional problem with the *Brady* theory as a means of establishing police liability for a wrongful conviction. Many forms of police misconduct, such as falsifying or coercing a confession, involve no concealment of exculpatory information from the accused; when the accused was present or otherwise aware of the police conduct at issue, no exculpatory information has been concealed from the accused even if he may have some difficulty convincing a jury to believe his version of events. In such circumstances, it makes little sense to characterize the police conduct as involving the suppression of exculpatory information, as a number of courts have concluded.[73]

Brady is not the only due process theory available to an exonerated criminal defendant. For example, it is possible to characterize many claims of misconduct involving the fabrication of false or misleading evidence as a denial of the right to a fair trial though the use of false evidence.[74] A prosecutor's efforts during the investigative phase to obtain false or misleading evidence might similarly be thought a due process violation that lacks absolute prosecutorial immunity because it occurs during the investigative rather than the judicial phase.[75] It is not clear, however, that the use of false evidence should be thought a denial of due process. It is something of a commonplace that due process requires no more than a fair trial; as the Supreme Court once wrote, "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial."[76] This point might be thought to acknowledge the reality that witnesses do not always tell the truth; as one court put it: "The Constitution does not require that police testify *truthfully*; rather 'the constitutional rule is that the defendant

72. Moreover, the Due Process Clause is not implicated by mere negligence. *See* Davidson v. Cannon, 474 U.S. 344, 348 (1986). Thus, a negligent failure of police officers to disclose information is not actionable. *See* Porter v. White, 483 F.3d 1294, 1307–08 (11th Cir. 2007).

73. *See* Carvajal v. Dominguez, 542 F.3d 561, 566–68 (7th Cir. 2008); Harris v. Kuba, 486 F.3d 1010, 1016–17 (7th Cir. 2007); Sornberger v. City of Knoxville, 434 F.3d 1006, 1029 (7th Cir. 2006); Washington v. Wilmore, 407 F.3d 274, 282 (4th Cir. 2005); Gauger v. Hendle, 349 F.3d 354, 360 (7th Cir. 2003), *overruled in part on other grounds by* Wallace v. City of Chicago, 440 F.3d 421 (7th Cir. 2006), *aff'd sub nom.* Wallace v. Kato, 549 U.S. 384 (2007).

74. *See, e.g.*, Gregory v. City of Louisville, 444 F.3d 725, 737 (6th Cir. 2007); *Washington*, 407 F.3d at 282–84; Limone v. Condon, 372 F.3d 39, 44–45 (1st Cir. 2004); Moran v. Clark, 359 F.3d 1058, 1060 (8th Cir. 2004); Pierce v. Gilchrist, 359 F.3d 1279, 1300 (10th Cir. 2004); Ricciuti v. New York City Transit Auth., 124 F.3d 123, 129–30 (2d Cir. 1997); Riley v. City of Montgomery, 104 F.3d 1247, 1253 (11th Cir. 1997).

75. *See supra* note 64.

76. United States v. Hasting, 461 U.S. 499, 508–09 (1983).

is entitled to a trial that will enable jurors to determine where the truth lies.'"[77] On this view, the protections that the Constitution offers the innocent are the requirements of arrest on probable cause and a speedy and fair trial, rather than a guarantee of truthful prosecution witnesses.[78] No doubt, the fabrication of evidence is reprehensible, but the Due Process Clause does not address all governmental abuses of power, but only those involving deprivations "of life, liberty, or property, without due process of law."[79] In the criminal process, such a deprivation does not occur when evidence is fabricated; it occurs when an accused is taken into some form of custody, and that is a seizure addressed by the Fourth Amendment and not the Due Process Clause.[80] A conviction works an additional deprivation of liberty, but due process is usually understood to require no more than a fair trial, and as we have seen, the hurdles for holding police or prosecutors liable for a deprivation of that right are substantial.

Still, the Supreme Court has reserved the question whether due process forbids prolonged pretrial deprivation in the face of plain indications of innocence,[81] and, when it comes to the fabrication of evidence in particular, there is a plausible theory to support due process liability. The Due Process Clause has long been understood to forbid deprivations of liberty accomplished by official conduct thought to "shock the conscience,"[82] and the creation or use of false evidence might be thought to fall within this prohibition much like a prosecutor's knowing use of perjured testimony is thought to be a denial of due process.[83]

It is quite unclear that such a constitutional claim can be brought, however, without the need to rely on conduct that falls within the scope of prosecutorial or witness immunity. The fabrication of evidence that produces an unwarranted arrest or other form of constitutionally unreasonable seizure may give rise to liability under the Fourth Amendment, although prosecutors enjoy immunity from such claims since they arise from charging decisions.[84] As for liability for a wrongful conviction, the fabrication of evidence by police or prosecutors may not create constitutional liability for

77. *Sornberger*, 434 F.3d at 1029 (quoting Buie v. McAdory, 341 F.3d 623, 625–26 (7th Cir. 2003)).

78. *See* Baker v. McCollan, 443 U.S. 137, 145–46 (1979).

79. U.S. CONST. amend. V, XIV, § 1.

80. *See supra* note 50.

81. *See Baker*, 443 U.S. at 145.

82. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 846–48 (1998); Rochin v. California, 342 U.S. 165, 172–74 (1952).

83. *See, e.g.*, Limone v. Condon, 372 F.3d 39, 45–48 (1st Cir. 2004); Pierce v. Gilchrist, 359 F.3d 1279, 1298–1300 (10th Cir. 2004); Spurlock v. Satterfield, 167 F.3d 995, 1005–06 (6th Cir. 1999).

84. *See* Kalina v. Fletcher, 522 U.S. 118, 129 (1997).

a wrongful conviction unless that evidence is used at trial. Absent proof establishing that the fabricated evidence was actually used to secure a conviction, it seems difficult to explain how the fabrication could be said to have deprived the accused of the due process right to a fair trial, or proximately caused the damages associated with the verdict. For example, the Court has held that even when investigators use an unnecessarily suggestive procedure to induce an eyewitness to identify a suspect, due process is not offended as long as the record as a whole indicates that the identification is accompanied by adequate indicia of reliability.[85] The Court observed: "Unlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest."[86] Thus, improper investigative conduct may well not be actionable absent proof of its impact on the accused's right to a fair trial. Indeed, a number of courts have rejected due process claims based on allegedly improper investigative techniques absent proof of their prejudicial effect at trial.[87]

A criminal-defendant-turned-civil-plaintiff's effort to establish liability based on the use of false or otherwise improper evidence at trial, moreover, encounters powerful immunity defenses. We have seen that the prosecutor is entitled to immunity for his decisions about what evidence will be used at trial.[88] If an element of a due process violation involving the fabrication or otherwise unconstitutional acquisition of evidence is its use at trial, given that the prosecutor's decision to use evidence at trial is immunized, immunity could well preclude the action altogether. In *Van de Kamp v. Goldstein*,[89] for example, the Court held that an action against supervisory prosecutors for their failure to adopt office policies that would provide criminal defendants with access to exculpatory information was

85. *See* Manson v. Brathwaite, 432 U.S. 98, 110–14 (1977). *Cf.* Siegert v. Gilley, 500 U.S. 226. 233–34 (1991) (allegedly malicious defamation of former public employee did not violate due process because it did not occur in connection with the employee's termination and therefore did not infringe a constitutionally protected interest).

86. *Manson*, 432 U.S. at 113 n.13. For this reason, a number of circuits have held that damages liability is inappropriate for the use of unduly suggestive identification techniques absent a showing that they undermined the fairness of an ensuing trial. *See, e.g.*, Alexander v. City of South Bend, 433 F.3d 550, 555–56 (7th Cir. 2006); Pace v. City of Des Moines, 201 F.3d 1050, 1055 (8th Cir. 2000); Hutsell v. Sayre, 5 F.3d 996, 1004–05 (6th Cir. 1993).

87. *See, e.g.*, *Alexander*, 433 F.3d at 555–56; Michaels v. New Jersey, 222 F.3d 118, 122–23 (3d Cir. 2000); *Pace*, 201 F.3d at 1055; Buckley v. Fitzsimmons, 20 F.3d 789, 796–97 (7th Cir. 1994); *Hutsell*, 5 F.3d at 1004–05. *Cf.* Buckley v. Fitzsimmons, 509 U.S. 259, 281 (1993) (Scalia, J., concurring) ("[P]etitioner cites, and I am aware of, no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution.").

88. *See supra* text at note 64.

89. 129 S. Ct. 855 (2009).

barred by prosecutorial immunity because "an individual prosecutor's error in the plaintiff's specific criminal case constitutes an essential element of the plaintiff's claim."[90]

For similar reasons, claims involving the fabrication of evidence by investigators might well be barred by witness immunity. It is well settled that witnesses are afforded absolute immunity for their testimony even in cases alleging due process violations based on the use of perjured or otherwise false evidence.[91] Although, prior to *Van de Kamp*, some courts held that the pretrial misconduct of investigators cannot be shielded by witness immunity,[92] it is difficult to understand how fabricated evidence could establish liability for a wrongful conviction absent proof that the evidence was used at trial to secure the conviction. The witness who testifies about the fabricated evidence, however, is immunized. Pretrial conduct aimed at producing the fabricated evidence may be entitled to immunity on the same theory embraced in *Van de Kamp*—an element of the constitutional tort would require reliance on the immunized testimony about the fabricated evidence to establish the relationship between the fabrication and the subsequent conviction. This approach to immunity is powerfully suggested not only by *Van de Kamp*, but also by the line of cases holding that a conspiracy to commit perjury enjoys immunity because it can cause injury only to the extent that the conspiracy produces an immunized testimonial act.[93] Thus, the hurdles to liability on perjury or other fabrication claims, at least when the allegedly false evidence is used to obtain a conviction, are quite high.[94]

90. *Id.* at 862.

91. *See* Briscoe v. Lahue, 460 U.S. 325 (1983).

92. *See, e.g.*, Gregory v. City of Louisville, 444 F.3d 725, 739–42 (6th Cir. 2006); Keko v. Hingle, 318 F.3d 639, 644 (5th Cir. 2003); Paine v. City of Lompoc, 265 F.3d 975, 981 (9th Cir. 2001).

93. *See, e.g.*, Reasonover v. St. Louis County, 447 F.3d 569, 580 (8th Cir. 2006); Mowbray v. Cameron County, 274 F.3d 269, 277 (5th Cir. 2001); Franklin v. Terr, 201 F.3d 1098, 1102 (9th Cir. 1999); Jones v. Cannon, 174 F.3d 1271, 1288 (11th Cir. 1999); Hunt v. Bennett, 17 F.3d 1263, 1267–68 (10th Cir. 1994); Watterson v. Page, 987 F.2d 1, 9 n.7 (1st Cir. 1993);. *But see* San Filippo v. U.S. Trust Co., 737 F.2d 246, 254 (2d Cir. 1984). Some courts have recognized an exception to testimonial immunity for an investigator alleged to be a complaining witness sued on a theory of malicious prosecution on the ground that such witnesses traditionally faced liability for malicious prosecution, although this limitation has been recognized only for pretrial testimony. *See, e.g.*, Harris v. Roderick, 126 F.3d 1189, 1198–99 (9th Cir. 1997); Curtis v. Bembenek, 48 F.3d 281, 285 (7th Cir. 1995); Anthony v. Baker, 955 F.2d 1395, 1400 (10th Cir. 1992); White v. Frank, 855 F.2d 956, 961 (2d Cir. 1988). *But see, e.g.*, *Jones*, 174 F.3d at 1287–88, 1288 n.10; Kulwicki v. Dawson, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992). Even if this limitation on immunity is well-founded, however, liability for a wrongful conviction would seem to require use of immunized trial testimony, and, in any event, there are substantial difficulties in fashioning common law or constitutional tort claims of malicious prosecution against police officers, as we have seen.

94. One commentator, recognizing the obstacles posed by testimonial immunity to any claim based on perjurious testimony, advocates legislation to abolish the immunity for law enforcement witnesses. *See* Goldsmith, *supra* note 42, at 1278–84.

Accordingly, the scope of constitutional liability for erroneous convictions is limited. Prosecutorial immunity will bar virtually all claims against prosecutors based on the manner in which they secured a conviction, and for other law enforcement personnel; witness immunity will bar most claims involving the use of fabricated, perjurious, or otherwise unreliable evidence at trial; and *Brady* claims based on the pretrial suppression of exculpatory evidence are likely to be limited to egregious efforts by investigators to prevent prosecutors from discharging their *Brady* obligations. Absent such a *Brady* claim, moreover, the final bar to liability presents itself.

As we have seen, prosecutors are immunized for their decisions about how to charge and pursue a criminal case, so the only real chance for liability is against investigators. Yet, there is great doubt that an investigator can ever be held liable for obtaining evidence that is subsequently utilized to secure an erroneous conviction. While investigators may frequently obtain evidence in violation of constitutional standards—for example, by unreasonable search and seizure, improper interrogation techniques, or impermissibly suggestive eyewitness identification procedures—when a prosecutor or judge, knowing the relevant facts, makes an independent decision to use the evidence—absent some misconduct by investigators that prevents the prosecutor from discharging his obligation to disclose exculpatory evidence—it is hard to see how the investigator who obtained the evidence can be held liable for its use, as most courts to consider this question have held.[95] The Supreme Court seems to have endorsed that view; in the

95. *See, e.g.*, Wray v. City of New York, 490 F.3d 189, 193–95 (2d Cir. 2007) (prosecutor's decision to offer and judge's decision to admit evidence derived from impermissibly suggestive identification procedure defeated claim against officer); Yarris v. County of Delaware, 465 F.3d 129, 143 (3d Cir. 2006) (detectives not liable for prosecutor's decision to use false evidence they obtained through impermissible interrogation techniques); Murray v. Earl, 405 F.3d 278, 289–93 (5th Cir. 2005) (judge's decision to admit involuntary confession into evidence defeated claim against officer); Shields v. Twiss, 389 F.3d 142, 150 (5th Cir. 2004); Evergary v. Young, 366 F.3d 238, 246–51 (3d Cir. 2004) (judge's decision to authorize seizure of plaintiff's son defeated claim against attorney and officials who obtained order); Townes v. City of New York, 176 F.3d 138, 146–47 (2d Cir. 1999) (judge's ruling to admit evidence obtained in violation of the Fourth Amendment defeated claim against officer); *Jones*, 174 F.3d at 1287 (grand jury's indictment defeated claim against officer based on illegal arrest); Taylor v. Meacham, 82 F.3d 1556, 1563–64 (10th Cir. 1996) (judge's finding of probable cause defeated Fourth Amendment claim against arresting officer); Reed v. City of Chicago, 77 F.3d 1049, 1053–54 (7th Cir. 1996) (indictment defeated Fourth Amendment claim against arresting officer); Barts v. Joyner, 865 F.2d 1187, 1195–96 (11th Cir. 1989) (decision of prosecutor to proceed with prosecution despite illegal detention defeated claim against officer); Hand v. Gary, 838 F.2d 1420, 1427–28 (5th Cir. 1988) (decision of federal agents, prosecutor, and grand jury to proceed on prosecution unsupported by probable cause defeated claim against officer); Dellums v. Powell, 566 F.2d 167, 192–93 (D.C. Cir. 1977) (independent decision by prosecutor to charge defeated malicious prosecution action against police). *But cf.* Gregory v. City of Louisville, 444 F.3d 725, 737 (6th Cir. 2007) (officer could be held liable for use of impermissibly suggestive identification procedure at trial); McKinley v. City of Mansfield, 404 F.3d 418, 436–39 (6th Cir. 2005) (officer could be liable for admission of compelled

course of holding that the absence of probable cause must be pleaded and proven in a civil case alleging that an unsuccessful prosecution was undertaken at the behest of postal inspectors in retaliation for the plaintiff's exercise of his constitutional rights, the Court wrote: "Evidence of an inspector's animus does not necessarily show that the inspector induced the action of a prosecutor who would not have pressed charges otherwise."[96]

To be sure, the law of torts has long thought that when a wrongdoer injures another, he is liable for all reasonably foreseeable risks created by that injury, much as one who inflicts negligent injury remains liable for the full extent of the victim's injuries even if they are aggravated when a treating physician commits malpractice.[97] Still, in the personal injury case, the wrongdoer had a duty to refrain from injuring the victim in the first place—a duty that necessarily included an obligation not to expose the victim to the reasonably foreseeable risks associated with the injury. The Restatement of Torts makes the point this way: "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby."[98] It is more than a little difficult to argue that when police officers and other investigators gather inadmissible evidence, they create a likelihood that the evidence will be wrongly admitted in a judicial proceeding. Investigators are responsible for gathering evi-

statement at subsequent proceeding).

96. Hartman v. Moore, 547 U.S. 250, 263 (2006). One scholar, without discussion of *Hartman*, has argued that as long an investigator is a "substantial factor" in producing a wrongful conviction, the causation element can be satisfied. *See* Teressa E. Ravenell, *Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims*, 81 TEMP. L. REV. 689, 721-26 (2008). Indeed, in *Malley v. Briggs*, 475 U.S. 335 (1986), the Court rejected the view that a police officer cannot be liable for a search unsupported by probable cause if authorized by a warrant, holding that when the officer could not have reasonably believed that the warrant application was supported by probable cause, the officer can be held liable for an ensuing search under the general tort principle that an individual is liable for the natural and probable consequences of his actions. *See id.* at 344-45 and n.7. It is unclear, however, whether this rationale has any application outside the context of the Fourth Amendment. Although officers may make judgments about search and seizure without the intervention of a prosecutor, when it comes to injuries that occur as a consequence of a prosecutor's judgment about matters within the scope of legal expertise—such as whether evidence gathered by the police is admissible, or must be disclosed to the defense—it is far from clear that investigators are even a "substantial factor" in the prosecutor's decision, absent proof that investigators have misled the prosecutor or otherwise compromised the prosecutor's ability to make an independent decision.

97. This is the approach taken by one student commentator critical of the cases recognizing a causation defense. *See* Joel Flaxman, Note, *Proximate Cause in Constitutional Torts: Holding Interrogators Liable for Fifth Amendment Violations at Trial*, 105 MICH. L. REV. 1551, 1563–72 (2007).

98. RESTATEMENT (SECOND) OF TORTS § 449 (1965). The Supreme Court has utilized common law rules governing compensable losses to determine what damages are recoverable in constitutional tort litigation. *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986); Carey v. Piphus, 435 U.S. 247, 253–58 (1978).

dence, not for deciding how it will be used at a trial. Investigators are neither trained nor charged with gathering only admissible evidence—it is up to prosecutors to determine what information—among all gathered in the course of an investigation—is appropriate for use at trial. Defense counsel and the trial judge provide additional safeguards against the use of inadmissible evidence.

The duty imposed on investigators, in short, is simply not a duty to gather only admissible evidence—even inadmissible evidence may ultimately aid an investigation or provide information with some collateral evidentiary value.[99] Investigators are properly placed under a duty not to prevent prosecutors and others from discharging their own obligations, but otherwise, investigators bear no responsibility for the course that judicial proceedings may take.[100] If the accused receives a fair trial, even if evidence obtained by investigators is wrongfully admitted in evidence, they have not deprived prosecutors of the opportunity to evaluate the evidence, the accused of a fair opportunity to seek exclusion of the evidence, the trial judge to evaluate its admissibility, and the jury to assess its probative weight, which is all the Constitution ordinarily requires.[101] The cases refus-

99. For example, even evidence obtained in violation of the Fourth Amendment can be used to impeach a defendant's testimony. *See* United States v. Havens, 446 U.S. 620, 624–28 (1980).

100. *Malley v. Briggs*, 475 U.S. 335 (1986), provides a useful illustration of the point. In that case, the Court held that officers who had presented a plainly deficient warrant application were not absolved of liability for damages caused by the issuance and execution of the warrant because they could not have reasonably relied on the decision of the judge to issue the warrant. *See id.* at 345–46. The Fourth Amendment places officers under a duty to refrain from unreasonable search and seizure, and hence the officers, when they executed the warrant, violated a duty that the Constitution imposed on them. The Fourth Amendment, however, imposes no duty on the officers to ensure that the evidence obtained as a result of the warrant is not used in a criminal case. Questions about the admissibility of evidence are left to the lawyers in the first instance and ultimately the judge. Moreover, the "use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" United States v. Leon, 468 U.S. 897, 906 (1984) (quoting United States v. Calandra, 414 U.S. 338, 354 (1974) (brackets in original)); *accord, e.g.*, Pa. Bd. of Prob. & Parole v. Scott, 528 U.S. 357, 362–63 (1998); Arizona v. Evans, 514 U.S. 1, 11 (1995).

101. For a similar argument concerning the limitations on damages liability for constitutional torts, see John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1470–77 (1989). Teressa Ravenell, in contrast, questions whether a causation defense should be available to a public official who has been denied qualified immunity because such a defendant has engaged in culpable misconduct. *See* Ravenell, *supra* note 96, at 729–33. She identifies, however, no principle of tort law that relaxes causation requirements on the basis of culpability; and, as we have seen, there is reason to question whether investigators should be thought culpable for decisions about whether evidence they have gathered should be admitted, given that this issue is beyond the scope of their expertise or responsibilities. One student commentator, recognizing that ordinary principles of proximate causation preclude police liability for the admission of a fabricated confession at trial, argues that the use of a fabricated confession necessarily involves a fraud on the judicial process. *See* Mitchell P, Schwartz, Comment, *Compensating the Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1134–37 (2003). But, any testimony about the confession is immunized, as we have seen, and it is only through such immunized testimony that a fabricated confession could undermine the fairness of a trial. Moreover, as we have also seen, a fabricated confession

ing to award damages associated with an ensuing prosecution on a Fourth Amendment claim against arresting officers rest on just this point—the legally relevant risk that an unreasonable search and seizure creates is to the privacy and dignitary interests of the victim of the search, not a risk of an unfair or unwarranted prosecution.[102]

In sum, the obstacles to the use of constitutional and common law tort claims as a means for creating fault-based liability for wrongful prosecutions and convictions are formidable. An exonerated-criminal-defendant-turned–civil-plaintiff may recover in limited circumstances, but it seems quite clear that the law as it is currently configured comes nowhere close to a regime in which the government has an incentive to undertake all practicable means of avoiding wrongful prosecutions and convictions.[103]

For those who believe that the common law evolves toward rules that create optimal incentives for potential defendants to invest in loss prevention, the failure of the common law to develop such rules in the case of wrongful prosecutions and convictions should be an indication that tort law is ill-suited to achieving this objective. Still, one could imagine a world in which prosecutorial and testimonial immunity were abolished, and all law enforcement personnel were liable for any conduct that amounted to "negligent prosecution"—a failure to exercise reasonable care to avoid prosecuting or convicting the innocent. It remains to consider the efficacy of such a legal regime for reducing the risk of wrongful prosecution or conviction.

III.

As we have seen, the cheapest cost avoider when it comes to wrongful convictions will generally be the prosecutor. Yet, there are reasons to doubt the efficacy of damages liability as a means of influencing prosecutorial behavior. Since indemnification is likely in the context of public employment, the threat of personal liability is unlikely to alter prosecutorial behavior.[104] To be sure, if one rejects Professor Levinson's claim that damages

does not seem to violate *Brady*, since no facts about the confession have been concealed from the accused. If the accused receives a fair opportunity to attack the confession, it is unclear how due process has been denied. It may be that fabrication of evidence should instead be deemed a due process violation as "conscience-shocking," but testimonial immunity may nevertheless bar such a claim.

102. *See* cases cited *supra* note 54.

103. One study found that 41% of the first 200 persons exonerated by DNA evidence received some form of compensation, although this figure includes compensation provided under no-fault statutes. *See* Garrett, *supra* note 29, at 120–21.

104. *See supra* text at notes 11–12. In addition, most prosecutors are likely to lack the assets necessary to satisfy large judgments against them personally. Indeed, the classic justification for the vicarious liability of employers for the torts of their employees acting within the scope of employment is that the

liability has no predictable effect on governmental behavior, the threat of governmental liability is likely to create a political incentive to invest in loss prevention.[105] The potency of this incentive in the context of criminal prosecution, however, is open to question.

In all but three states and the District of Columbia, prosecutors hold office as independent elected officials.[106] Elected prosecutors who do not levy taxes or appropriate revenues, in turn, lack the direct political accountability for tax and spending policy experienced by legislators. For that reason, elected prosecutors and their staff are likely to be less sensitive to the budgetary implications of prosecutorial policy. Moreover, even aside from electoral pressures, most prosecutors stay in office a relatively short time and are likely to experience immediate career-enhancing consequences from high-profile convictions, so prosecutors are likely to be more concerned with the effect that important convictions may have on their own careers than with the long-term budgetary implications of the exposure to liability that aggressive prosecutorial tactics may create.[107] Police departments are similarly likely perceive far more political pressure to make cases than to limit liability. Thus, the assumption that exposure to liability will deter prosecutorial and police misconduct, though indulged by many commentators,[108] considerably oversimplifies the crosscutting pressures faced by those in law enforcement.[109]

It is quite unclear that the political incentives that liability creates to avoid overly aggressive tactics will not be offset by countervailing political considerations. For example, the available empirical evidence derived from the documented exonerations to date suggests that the leading cause of erroneous convictions is mistaken eyewitness testimony.[110] Based on ex-

risk that employees will prove to be judgment proof and would lead to suboptimal investments in loss prevention absent the incentives created by vicarious liability. *See, e.g.*, POSNER, *supra* note 4, at § 6.8; Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 608–09 (1988).

105. *See supra* text at notes 13–14.

106. *See* Steven W. Perry, *Prosecutors in State Courts, 2005*, BUREAU JUST. STAT. BULL., 10, 11 (2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/psc05.pdf.

107. *See* Dunahoe, *supra* note 13, at 59–67; Shelby A.D. Moore, *Who Is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. TEX. L. REV. 801, 825–30 (2006).

108. *See, e.g.*, Garrett, *supra* note 66, at 99–101; Goldsmith, *supra* note 42, at 1270, 1279–83.

109. If, contrary to the view advanced above, prosecutors and police were quite sensitive to liability, then civil liability might have the anomalous result of causing prosecutors to become even more reluctant to acknowledge wrongful convictions and agree to exonerations.

110. *See, e.g.*, Daniel Givelber, *Lost Innocence: Speculation and Data about the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1189 (2005); Gross et al., *supra* note 29, at 542–44; Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, *in* CRIME AND JUSTICE: A REVIEW OF RESEARCH 10 (Michael Tonry ed., 2005); Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*,

periments in simulated conditions, experts in the field argue that the risk of error is reduced when witnesses view suspects sequentially rather than simultaneously, and when identification procedures are administered by a "blind" official who does not know the target of the investigation.[111] Nevertheless, the limited data gathered to date on identification procedures involving real witnesses suggests that when sequential identification procedures are used, the rate at which the suspect is identified goes substantially down and the rate at which an innocent "filler" is identified goes substantially up.[112] It may be that that the sequential procedure and the use of an investigator previously unknown to the witnesses increases the stress of the identification procedure, increasing the error rate. To be fair, there are enormous disputes about the methodology of these real-world experiments,[113] and in all likelihood more research is needed.[114] Still, if there is a serious risk that in the stressful world of real eyewitnesses, it is simply too difficult to make an identification when sequential and blind procedures are used, the political cost of such a reform to those engaged in law enforcement would be enormous. We have seen that damages liability cannot be expected to produce an efficient result in the public sector; all it can do is create some political incentive to avoid liability.[115] If a prosecutor can avoid erroneous identifications only by taking precautions that also allow the guilty to evade identification, however, the political incentive to avoid liability may be more than offset by the political incentive to convict the guilty.

These problems are only heightened by the inability to identify the error rate associated with given police or prosecutorial tactics. It is enormously difficult to calculate error rates in the criminal process since exonerations are only likely in a small subset of cases in which conclusive

105 MICH. L. REV. 241, 253–56 (2006).

111. *See, e.g.*, Dawn McQuiston-Surrett, Roy S. Malpass & Colin G. Tredoux, *Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory*, 12 PSYCHOL., PUB. POL'Y & L. 137, 137–38 (2006).

112. *See id.* at 161–62.

113. *Compare* Timothy P. O'Toole, *What's the Matter with Illinois? How an Opportunity Was Squandered to Conduct an Important Study on Eyewitness Identification Procedures*, CHAMPION, Aug. 2006, at 18, Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3 (2008), *and* Gary L. Wells, *Field Experiments on Eyewitness Identification: Toward a Better Understanding of Pitfalls and Prospects*, 32 LAW & HUM. BEHAV. 6 (2008) *with* Sheri H. Mecklenburg, Patricia J. Bailey & Mark R. Larson, *The Illinois Field Study: A Significant Contribution to Understanding Real World Eyewitness Identification Issues*, 32 LAW & HUM. BEHAV. 22 (2008) *and* Stephen J. Ross & Roy S. Malpass, *Moving Forward: Response to "Studying Eyewitness Investigations in the Field"*, 32 LAW & HUM. BEHAV. 16 (2008).

114. *See, e.g.*, Brian L. Cutler & Margaret Bull Covera, *Introduction to Commentaries on the Illinois Pilot Study of Lineup Reforms*, 32 LAW & HUM. BEHAV. 1 (2008).

115. *See supra* text at notes 13–15.

evidence of innocence are likely to be available, such as DNA evidence.[116] Few efforts have been made to calculate error rates in even this subset of cases; one recent effort, focusing on capital rape-murders in the 1980s, calculated an error rate of between three and five percent.[117] Given the unusually stressful process of eyewitness identification in these extremely violent crimes, moreover, it may well be that the eyewitness error rate is lower for most other crimes. Regardless, there is no data identifying the error rate associated with particular prosecutorial tactics, much less data that will inform prosecutors whether their conviction rates will go down if they take precautions to avoid these errors. Thus, it is nearly impossible for prosecutors to make responsible predictions about the consequences of reforming their practices in order to reduce the risk of wrongful convictions. Reforms might reduce the error rate, but they also might have even greater political costs if they increase the difficulties of convicting the innocent.

Fault-based liability might reduce the error rate in the criminal process, but in light of the countervailing political considerations and the limited sensitivity of prosecutors to liability for which they will receive indemnification, the magnitude of liability would have to be fairly substantial to have much hope of such an outcome. Yet, the greater the magnitude of liability, the greater the harm to third parties dependent on the ability of government to finance other public goods and services; as we have seen, liability is likely to divert resources from other important governmental programs.[118] It is far from clear that whatever incremental gain in incentive to avoid wrongful convictions that might be achieved by a regime of fault-based liability would justify the harm to innocent third parties dependent on governmental programs that would be harmed by governmental damages liability.

Equally important, one can question the magnitude of the incremental incentive to reduce the risk of wrongful conviction that exposure to liability would create. After all, exonerations themselves have a political cost. There is no conviction-of-the-innocent lobby in our politics; police and prosecutors who prosecute or convict the innocent face political accountability once an exoneration occurs.[119] Indeed, since the wave of DNA exonera-

116. *See, e.g.*, Gross et al., *supra* note 29, at 529–40.

117. *See* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007).

118. *See supra* text at notes 27–31.

119. This is the answer to the claim that civil litigation should be encouraged because it will expose police or prosecutorial misconduct, thereby imposing a political cost for such behavior. *See* Garrett, *supra* note 66, at 102–03. The exoneration itself will expose the same misconduct in a particularly

tions, there has been a wave of reform legislation in the states, with forty-six states and the Federal Government creating statutory rights of access to physical evidence for purposes of DNA testing.[120] Greater availability of DNA testing probably is a politically optimal reform—it is likely to reduce erroneous convictions without increasing the acquittal rate in a politically unacceptable fashion. For this reason, it should be unsurprising that the political process produced this reform without the need of any dramatic expansion civil liability. It is far from evident that expanded civil liability will produce more radical reforms that pose the politically unacceptable risk of rendering law enforcement less able to convict the guilty. Whatever the political incentive to minimize liability, the political incentive to investigate and prosecute aggressively is likely to be at least as powerful, and probably more so.

Moreover, the political pressure for aggressive law enforcement is not the only factor that undermines the efficacy of civil liability as a means for altering prosecutorial behavior. In addition, the professional norms for prosecutors are likely to render civil liability of limited importance. Prosecutors are expected to concern themselves with their professional obligations to seek justice in the criminal process, not their potential liability to an investigative target.[121] Given prevailing professional norms and incentives, the prosecutor's central concern is to bring solid cases. Prosecutors who bring unwarranted charges risk both political and professional embarrassment. The likelihood that a prosecutor otherwise willing to engage in such misconduct would be deterred only by the remote threat of civil liabil-

dramatic context. Civil litigation, moreover, cannot produce the exoneration itself, which is rather a predicate to bringing a civil suit under current law. The favorable termination requirement for a malicious prosecution action requires an exoneration before suit can be brought. *See* RESTATEMENT (SECOND) OF TORTS §§ 658–61 (1965). The Supreme Court has also imposed a favorable-termination requirement as a predicate for constitutional tort litigation seeking damages for an allegedly wrongful conviction. *See* Heck v. Humphrey, 512 U.S. 477, 486–89 (1994). Altering this requirement would itself create many problems, since it would permit the use of civil litigation to undermine an otherwise valid criminal judgment ordinarily entitled to preclusive effect. Moreover, it is far from clear that the potential for recovering damages is necessary to create an incentive for convicted defendants to seek exoneration. The recent wave of DNA exonerations seems to demonstrate that convicted defendants are able to mount exoneration claims through the criminal process itself. Given that the exoneration itself has political consequences, the incremental value of ensuing civil litigation as a means of exposing government misconduct—especially given that most civil litigation is quietly settled— is open to serious question. Moreover, if civil litigation is truly effective at disclosing governmental misconduct with adverse political consequences for incumbents, that would only heighten the incentive to settle these cases quietly, preferably with an obligation of confidentiality attached to the settlement, an outcome that could well produce excessive diversion of public resources from alternate uses that may well have greater social utility. *See* Rosenthal, *supra* note 11, at 829.

120. *See* Dist. Att'y Office v. Osborne, 129 S. Ct. 2308, 2316–17, 2322 (2009).

121. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Prosecution Function Standards 3-3.4, 3-3.9 & 3-3.11 (3d ed. 1993).

ity—for which indemnification would be likely in any event—is probably not great.

In the wake of these complexities, an argument that civil liability for wrongful prosecutions and convictions will reduce the risk of error in the criminal process is fraught with peril.[122] Even if Professor Levinson is wrong to doubt the deterrent effects of governmental damages liability in the main, he is certainly right that the government responds to political and not economic incentives. Given the enormous political incentive to be tough on crime, the efficacy of the political incentives created by damages liability is highly doubtful, at least when it comes to the government's use of precautions that might reduce the risk of wrongful prosecution and conviction while simultaneously reducing its ability to convict the guilty.

The problems that inhere in the use of civil liability as a means of reducing erroneous conviction mirror the problems with most of the reforms proposed in this area. For the most part, we do not know what the consequences would be of reforming current prosecutorial and investigative practices. Any number of reforms might reduce the rate of erroneous convictions, but at some cost to the ability to convict the guilty. We have seen that the use of sequential and blind identification techniques may reduce the ability of witnesses to make even accurate identifications, but one might consider another example. The use of accomplice testimony has been identified as a factor contributing to erroneous convictions and, for this reason, Alexandra Natapoff has argued that judges should be granted greater authority to bar the testimony of an accomplice the judge finds to be unreliable.[123] The efficacy of this proposal is open to question—judges have for decades had the obligation to make an independent finding that a confession was voluntarily made before it can be placed before a jury,[124]

122. The deontological argument for fault-based liability based on the asserted moral obligation of a wrongdoer to compensate a victim might be thought to supply a more powerful justification for liability than an instrumental argument. Indeed, the advocates of corrective justice use this very argument to support fault-based liability, putting instrumental justifications aside. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 303–85 (1992); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 143–70 (1995); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 571–73 (1972). But corrective justice justifications are problematic in the public sector. Because the economic burden of public-sector liability is placed on the taxpayers, rather than the wrongdoer or the owner of a firm for whose benefit the wrongdoer acted, the corrective justice justification for public-sector liability is attenuated at best. *See* Rosenthal, *supra* note 11, at 825–26. To be sure, the public benefits in a general sense from the operations of the criminal justice system, but the tax system spreads the loss even to those who have voted against the incumbent officeholders, and spreads the loss based on tax liability rather than the one-person-one-vote regime that determines who is politically accountable for criminal justice policy. *See id.* at 827.

123. *See* Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE L. REV. 107, 122–23 (2006).

124. *See* Jackson v. Denno, 378 U.S. 368, 387 (1964).

yet we are told that false confessions induced by coercive interrogation techniques remain ubiquitous.[125] But if this proposal were reformulated as a standard of care enforceable through the civil damages liability, what could we expect the consequences to be?

Prosecutors rarely bring cases that they expect to lose; the professional and personal consequences of such a course of action are generally unacceptable. It is therefore reasonable to assume that even in a no-liability regime, the cases in which prosecutors use accomplice testimony are those in which the prosecutor is confident in his ability to establish the reliability of the testimony—prosecutors interested in winning would bring cases that rely on accomplice testimony only when they conclude that the accomplice testimony, in combination with other evidence, is sufficient to establish guilt beyond reasonable doubt. The supposition that the prosecutor would forego such a prosecution because of the risk of civil liability seems dubious—a prosecutor who believes he can establish guilt beyond a reasonable doubt is unlikely to be deterred by the threat of civil liability for the use of an unreliable accomplice. The prosecutor could still bring the case but abstain from using the accomplice's testimony to reduce exposure to liability, but foregoing the use of evidence that the prosecutor otherwise considers useful in obtaining a conviction would increase the risk of an acquittal—a powerful disincentive to forego use of the supposedly error-avoiding precaution.[126]

Thus, only if a prosecutor decides that the cost of risking liability through the use of accomplice testimony exceeds the benefit of proceeding to trial with all of the available evidence can civil liability be expected to alter prosecutorial tactics. But, the prosecutor who foregoes accomplice testimony accepts a greater risk of acquittal—or abandons altogether a winnable case—to reduce a risk of civil liability in a case which the prosecutor has already concluded that he can win if the accomplice testimony is used. Yet, in such cases, the threat of civil liability may have little force; a conviction precludes civil liability, and, even if, contrary to expectations, the defendant is exonerated and then sues, the prosecutor is likely be in-

125. *See, e.g.*, Richard A. Leo, *False Confessions: Causes, Consequences, and Solutions*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 36, 44–47 (Saundra D. Westervelt & John A. Humphrey eds., 2001); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 173–79 (1987); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 901–62 (2004); Gross et al., *supra* note 29, at 544-46; Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 512–520 (2006).

126. To be sure, there are cases in which the informant is so sketchy that his testimony harms more than helps the prosecution's case, but the prosecutor who wants to win will forego this testimony regardless of the threat of civil liability.

demnified anyway, and the prosecutor may be more concerned about the career-enhancing benefits of obtaining a conviction than the budgetary consequences of liability that future officials who have no direct supervisory authority over that prosecutor will face. To be sure, the prosecutor's office is likely to be run by an elected official, but, as we have seen, that elected prosecutor has no direct role in the process of levying taxes and appropriating public funds; the process of political accountability for budgetary decisions works less than perfectly when taxes are levied by different officials than those who control prosecutorial decision-making. Moreover, if the prosecutor refrains from using the accomplice testimony—thereby increasing the chances of an acquittal—that may in itself increase the likelihood that the prosecutor will face civil liability, assuming that prosecutorial immunity has gone by the boards.

Under these circumstances, we may fairly question the likelihood that liability will alter prosecutorial tactics. Given the political potency of aggressive prosecutions that produce convictions—and their career-enhancing advantages for the prosecutors themselves—and the limited political accountability that prosecutors have for taxing and spending, we can have no real confidence that whatever political incentive the threat of civil liability might create to avoid the riskiest prosecutorial tactics would not be offset by the powerful political and professional incentives for prosecutors to put what they regard as their strongest case before a jury, and to prosecute all suspects that they believe a jury is likely to convict. At the end of the day, the incentives of the police and prosecutors will principally be dictated by the sensibilities of juries and voters, not the prospect of civil liability. A prosecutor's office or police department that foregoes what appear to be winnable cases because of the threat of civil liability is likely to be punished at the next election. Conversely, a prosecutor's office or police department that keeps losing cases built on the testimony of dubious accomplice-witnesses is likely to be punished at the next election—civil liability or not.

A similar problem dogs proposals to reduce the risk of wrongful conviction through the use of prophylactic constitutional rules. Due process has traditionally guarded against the risk of wrongful conviction by imposing an extraordinary burden of proof on the prosecution.[127] Beyond that, however, due process regulation becomes problematic. Even if we could calculate the error rate associated with contested investigative or prosecuto-

127. *See, e.g.*, Cage v. Louisiana, 498 U.S. 39, 39–40 (1990) (per curiam); Jackson v. Virginia, 443 U.S. 307, 315 (1979); Addington v. Texas, 441 U.S. 418, 423–24 (1979); *In re* Winship, 397 U.S. 358, 361–64 (1970).

rial practices, such as simultaneous lineups or accomplice testimony, there is no principled basis for determining what error rate should be deemed constitutionally unacceptable, or for determining whether a proposed reform would erect such high hurdles to conviction of the guilty that it should be rejected for that reason. After all, due process has always concerned itself with protection of the innocent, but it accommodates society's interest in maintaining reasonably practicable means for punishing the guilty as well.[128] It is a small wonder that the Court has been reluctant to use the Due Process Clause to impose novel procedural reforms even when they have the potential to reduce the risk of erroneous convictions.[129] To be sure, when it seems evident that a proposed reform is likely to reduce the risk of error without imposing unacceptable burdens on the prosecution, the Court has been willing to depart from historical practice, as seen with the disclosure obligation recognized in *Brady* and its progeny.[130] But when both the risk of error and the consequences of reform are uncertain, the case for reform by judicial fiat in the name of due process is an unhappy one.[131]

This is not to say that civil liability for wrongful prosecutions and convictions is always undesirable. As we have seen, current law, in the main, gives prosecutors a pass, and reserves liability for the most egregious cases of investigative misconduct. That may be about right. Given their political and professional incentives, we cannot expect prosecutors to be attentive to potential civil liability; for that reason, it may be best to leave deterrence of prosecutorial misconduct to the professional embarrassment associated with exonerations, and the potential for professional discipline

128. *Cf.* Clark v. Arizona, 548 U.S. 735, 774 (2006) (upholding prohibition on consideration of evidence of defendant's mental disease and capacity on any issue except insanity, on which the defendant bears the burden of proof, because of doubts about the reliability of such evidence); Montana v. Egelhoff, 518 U.S. 37, 49–51 (1996) (plurality opinion) (upholding statutory bar on consideration of evidence of voluntary intoxication in order to promote punishment and deterrence of unlawful conduct); Patterson v. New York, 432 U.S. 197, 207–08 (1977) (upholding allocation of the burden of proving extreme emotional distress that mitigates murder to manslaughter to the defendant because of the difficulty the prosecution might face in proving the absence of extreme emotional distress).

129. *See* Dist. Att'y Office v. Osborne, 129 S. Ct. 2308, 2320–23 (2009); Medina v. California, 505 U.S. 437, 442-46 (1992). *See generally* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001).

130. For a survey of the history of disclosure obligations in criminal litigation that demonstrates the novelty of the *Brady* obligation as a historical matter, see Michael Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865, 865–67, 893–99 (1968).

131. Much the same as proposals for greater constitutional regulation of interrogation techniques in order to reduce the incidence of false confessions, the second most common cause of erroneous convictions. *See* Gross, et al., *supra* note 29, at 544–46. I have elsewhere argued that because of the difficulty in calculating error rates associated with particular interrogation tactics, it is difficult to know how to regulate interrogations in order to reduce error rates. *See* Lawrence Rosenthal, *Against Orthodoxy:* Miranda *Is not Prophylactic and the Constitution Is not Perfect*, 10 CHAP. L. REV. 579, 616–20 (2007).

in the most serious cases.[132] As for investigators, the threat of liability in the most egregious cases may create some additional political incentive to devote scarce public resources to monitoring and discipline, and when it comes to egregious abuses, it is unlikely that the deterrent effect of liability will be offset by the political advantage of pursuing abusive techniques of which the public is likely to approve.[133] Short of these outliers, however, it is extremely doubtful that the threat of civil liability is likely to reduce the incidence of wrongful conviction.

By and large, it seems that if we are to be saved from the threat of wrongful conviction, only the jury or the voters can do so, by insisting on error-reducing reforms of prosecutorial practices. As Pogo would have said, "We have met the enemy, and he is us."[134]

132. For a recent analysis that gives thoughtful consideration to the efficacy of professional discipline of prosecutors as a means to reduce wrongful convictions, though it also assumes without much discussion the efficacy of civil actions as a means of deterring prosecutorial misconduct, *see* Zacharias & Green, *supra* note 64, at 28–57.

133. Another factor said to reduce the efficacy of tort litigation against the police is the use of confidential settlements. *See* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 775–90 (2004). Although undisclosed settlements may reduce the political consequences of police misconduct, one should not overestimate this effect. On the one hand, as we have seen, any payment to a tort plaintiff exacts a political opportunity cost. On the other, given the political costs of restraining the police, it is far from clear that ensuring that payments to tort plaintiffs are more transparent will lead to meaningful reforms.

134. WALT KELLY, POGO: WE HAVE MET THE ENEMY AND HE IS US (1972).