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The Case Against Section 1983 Immunity for Witnesses Who Conspire with a State Official to Present Perjured Testimony

Jennifer S. Zbytowski

INTRODUCTION

After spending nearly six years on death row for a crime he did not commit, Walter McMillian is now a free man. In December of 1987 he was indicted, along with Ralph Bernard Myers, for capital murder.¹ Although he held two jobs, had no history of violence, and had no record of serious crime, McMillian was accused of participating in the well-publicized slaying of a young woman.² On June 3, 1987, McMillian's alleged accomplice, Myers, was arrested for the murder, and in a lengthy tape-recorded interview with the police he repeatedly denied any knowledge of McMillian's involvement in the crime.³ Four days later, McMillian was also arrested for the murder. In an extraordinary move, McMillian was placed on death row before his trial had even begun.⁴

During the year before McMillian's trial, Myers told four state doctors on separate occasions that he felt pressure from the police to testify falsely against McMillian.⁵ At McMillian's trial, in return for a promise that he would be permitted to plead guilty to a non-capital offense, Myers testified that he waited in a truck while McMillian committed the murder. Myers also testified that McMillian later made incriminating statements regarding the crime.⁶ The only other evidence linking McMillian to the crime was the testimony of two witnesses who received money from the state for testifying that they saw McMillian's truck at the crime scene the morning of the murder.⁷ Despite the lack of physical evidence and the testimony of a dozen witnesses claiming that he was at home the

1. *McMillian v. State*, 616 So. 2d 933, 935 (Ala. Crim. App. 1993).

2. Peter Applebome, *6-year Fight for Freedom For Alabama Man Wins Release After Ordeal*, SAN DIEGO UNION-TRIBUNE, Mar. 3, 1993, at A-1.

3. *McMillian*, 616 So. 2d at 942-45.

4. *McMillian v. Johnson*, 878 F. Supp. 1473 (M.D. Ala. 1995).

5. The prosecution was made aware of Myers's statements through the doctors' reports but, like Myers's June 3 interview with the police, these reports were withheld from the defense. *McMillian*, 616 So. 2d at 938, 945.

6. As the court that later overturned McMillian's conviction put it, "Myers was the key witness for the prosecution. Without his testimony, the state could not have obtained a conviction." *McMillian*, 616 So. 2d at 937.

7. David Cole, *Ultimate Innocence and the Ultimate Penalty*, THE RECORDER, Apr. 14, 1993, at 8.

morning of the murder,⁸ McMillian was convicted and sentenced to death.

After five unsuccessful appeals, the state of Alabama finally conceded that McMillian never should have been convicted.⁹ Myers himself had admitted that police officers had told him what to say at McMillian's trial.¹⁰ The other two prosecution witnesses also eventually recanted their inculpatory testimony.¹¹

Following his release, McMillian filed a civil suit seeking redress for his harm.¹² In such a suit, a plaintiff is unlikely to succeed against the various state officials involved because police officers, prosecutors, and judges are generally protected against section 1983¹³ damage suits by the doctrine of official immunity.¹⁴ Therefore, whether *witnesses* are entitled to immunity for conspiring with state officials to present perjured testimony is of crucial importance to claimants like McMillian, because witnesses may be the only parties liable for damages under section 1983.¹⁵

8. Applebome, *supra* note 2, at A-1.

9. The Court of Criminal Appeals of Alabama reversed McMillian's conviction on February 23, 1993. *McMillian*, 616 So. 2d at 949. Specifically, the court found that McMillian's constitutional rights had been violated because the prosecutor failed to disclose to the defense Myers's June 3 interview with the police, the doctors' reports indicating that Myers might give false testimony against McMillian, and other exculpatory evidence. 616 So. 2d at 942-48.

10. 616 So. 2d at 935.

11. *McMillian v. Johnson*, 878 F. Supp. 1473, 1488 (M.D. Ala. 1995).

12. An action was filed against the sheriff, investigators, corrections officials, and the county for damages caused by their role in McMillian's illegal arrest, trial, conviction, and detainment. *McMillian*, 878 F. Supp. at 1485.

13. 42 U.S.C. § 1983 (1988).

14. Under the Supreme Court's § 1983 immunity doctrine, the immunity of the state-employed conspirator will depend on the function he or she performs, which could vary greatly in the context of a witness-state conspiracy to present perjured testimony. The Supreme Court has not precisely defined the contours of the immunity that attaches to the functions of state officials. Nevertheless, the Supreme Court would probably grant immunity to a prosecutor who conspired to present perjured testimony, as long as probable cause to prosecute had been established before the conspiracy. See *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2616 & n.5 (1993) (holding that a prosecutor who solicited fabricated testimony to present to a grand jury acted as an "investigator" because probable cause for the prosecution had not been established, and therefore the prosecutor was not entitled to absolute immunity). While McMillian's suit is still in the pretrial stage, so far official immunity has shielded the defendants from most of the claims brought under § 1983. *McMillian*, 878 F. Supp. at 1544-45.

15. The immunity granted to witness co-conspirators would have to be absolute because the act of conspiring to present perjured testimony cannot be characterized as good faith or reasonable conduct that is protected by qualified immunity. See *infra* note 55 (distinguishing absolute and qualified immunity). Moreover, if the conduct of witness conspirators is granted immunity from a § 1983 damages claim in federal court, state courts cannot be relied on to provide an effective remedy because even if a state-law remedy exists, state courts are not a neutral forum for witness-state conspiracy litigation.

It is impossible to determine how often witness-state *conspiracies*¹⁶ to fabricate testimony actually occur, but a report on miscarriages of justice shows that approximately one-third of erroneous convictions studied were the result of perjured testimony by prosecution witnesses.¹⁷ Those who have been victimized by a conspiracy to present perjured testimony often seek to recover their damages through section 1983,¹⁸ one of the most widely invoked federal remedies today.¹⁹

16. This Note uses the term *witness-state conspiracy* to describe an agreement between a state official and a witness to present perjured testimony at a judicial proceeding. The term *witness conspirator* refers to a witness who participates in a witness-state conspiracy. A witness may enter into an agreement to falsify testimony with any state official who has a personal or political interest in the outcome of a particular dispute. The conspiracy may involve either a civil or criminal proceeding, but typically takes place in the setting of a criminal trial. Because all § 1983 witness-state conspiracy claims addressed by the circuit courts to date have been concerned with false testimony designed to inculcate a criminal (or juvenile) defendant, this Note assumes that such inculpatory conspiracies are the norm and limits its analysis to them.

17. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 60 (1987) (finding that 117 of 350 erroneous convictions were caused by perjured testimony of prosecution witnesses). While the available studies do not specifically address witness-state conspiracies, they do demonstrate that perjured testimony by prosecution witnesses significantly contributes to wrongful convictions. See, e.g., JEROME FRANK & BARBARA FRANK, NOT GUILTY (1957) (discussing cases in which innocent defendants were convicted); MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE (1992) (documenting erroneous convictions in capital cases); EDWARD D. RADIN, THE INNOCENTS 130-45 (1964) (analyzing the reasons criminal defendants are wrongfully convicted, including "frame-ups" by lying witnesses).

18. See, e.g., Snelling v. Westhoff, 972 F.2d 199, 200 (8th Cir. 1992) (per curiam) (alleging that witnesses conspired with prosecutor to present false testimony at a criminal trial), *cert. denied*, 113 S. Ct. 977 (1993); Miller v. Glanz, 948 F.2d 1562, 1570 (10th Cir. 1991) (alleging that witnesses conspired with state officials to give false testimony at a criminal trial); Wilkins v. May, 872 F.2d 190, 192 (7th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990) (alleging that police witnesses conspired to give false testimony at a criminal trial); Malachowski v. City of Keene, 787 F.2d 704, 711 (1st Cir. 1986) (per curiam) (alleging that police sergeant conspired with other state officials to give false testimony in instituting an unwarranted juvenile delinquency proceeding), *cert. denied*, 479 U.S. 828 (1986); Macko v. Byron, 760 F.2d 95 (6th Cir. 1985) (per curiam) (alleging that witnesses conspired with state officials to give false and incomplete grand jury testimony); San Filippo v. United States Trust Co., 737 F.2d 246, 248 (2d Cir. 1984) (alleging that witnesses conspired with district attorney to give false grand jury testimony), *cert. denied*, 470 U.S. 1035 (1985).

19. See 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3573, at 195 n.17 (2d ed. 1984) (stating that § 1983 has become such a prevalent basis for litigation that in 1981 it was necessary to devote an entire volume of the *United States Code Annotated* to its annotations). If a witness-state conspiracy violates a person's right to equal protection of the law, a suit may also be brought under 42 U.S.C. 1985(3) (1988), which originated as section two of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, 13-14. Section 1985(3) is both broader and narrower than § 1983. On the one hand, § 1985(3) is a narrower remedy because it is limited to conspiracies that discriminate on the basis of the victim's membership in a particular class. *United Bhd. of Carpenters Local 610*, 463 U.S. 825, 829 (1983); *Kush v. Rutledge*, 460 U.S. 719, 722-23 (1983) (citing *Griffin v. Breckenridge*, 403 U.S. 88 (1971)). On the other hand, § 1985(3) is a broader remedy because it does not require state action. See *infra* note 75 (reproducing the pertinent part of § 1985(3)). The scope of this Note is specifically limited to witness-state conspiracy claims brought under § 1983.

Circuit courts disagree over whether to grant immunity to witnesses who conspire with a state official to present perjured testimony. Most courts that have been confronted with the issue have granted witness conspirators immunity, arguing that a section 1983 claim based on a witness-state conspiracy is equivalent to a claim based on witness testimony.²⁰ According to these jurisdictions, the Supreme Court has already settled the question of immunity for witness conspirators through its holding in *Briscoe v. LaHue*²¹ that all witnesses have immunity with respect to claims based on their perjured testimony. A Seventh Circuit case illustrates this cursory approach. In *House v. Belford*,²² the court disposed of the witness-state conspiracy claim by stating that the difference “between a conspiracy to present perjured testimony and the act of presenting perjured testimony is a distinction without a difference.”²³ By interpreting *Briscoe* as creating blanket immunity for all acts of witnesses, the majority of circuit courts have not even attempted to utilize the Supreme Court’s approach to section 1983 immunity.²⁴

20. See, e.g., *Snelling*, 972 F.2d at 200; *Miller*, 948 F.2d at 1571; *Wilkins*, 872 F.2d at 192; *Macko*, 760 F.2d at 97.

21. 460 U.S. 325 (1983).

22. 956 F.2d 711 (7th Cir. 1992).

23. 956 F.2d at 720. Another example of this cursory approach is found in the Sixth Circuit case of *Macko*, 760 F.2d at 95. There the court summarily affirmed the lower court’s holding that the plaintiffs had no § 1983 claim for a witness-state conspiracy:

[The trial] [j]udge first considered plaintiffs’ claim that the defendants conspired to and did give false testimony to the grand jury. He concluded that plaintiffs were essentially asserting that they were indicted based on perjured testimony [The] Judge . . . noted that the Supreme Court has recently held, in *Briscoe* . . . that witnesses in judicial proceedings are absolutely immune from civil liability under 42 U.S.C. § 1983 based on their testimony Accordingly, he found that plaintiffs’ claim based on perjured testimony did not sufficiently state a cause of action under 42 U.S.C. § 1983.

....
[The] Judge . . . correctly concluded that plaintiffs’ second amended complaint failed to state a cause of action under 42 U.S.C. § 1983

760 F.2d at 97 (emphasis added; citation omitted).

24. See, e.g., *Snelling*, 972 F.2d at 200; *Wilkins*, 872 F.2d at 192; *Macko*, 760 F.2d at 97. While the Tenth Circuit has employed the Supreme Court’s approach to § 1983 immunity, it has failed to recognize that a common law claim of malicious prosecution would have been available against witness conspirators. *Hunt v. Bennett*, 17 F.3d 1263, 1268 (10th Cir. 1994), cert. denied, 115 S. Ct. 107 (1994); *Miller*, 948 F.2d at 1570. This result is anomalous because the Tenth Circuit has recognized that other witnesses are not entitled to § 1983 immunity when their conduct would have been subject to a malicious prosecution suit at common law. For example, in *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992), the Tenth Circuit held that a sheriff’s deputy who testified falsely before a grand jury and at a preliminary examination was not entitled to immunity because the act fell outside the scope of conduct entitled to immunity under *Briscoe*. The court stated that “in the context of a § 1983 claim for malicious prosecution, a complaining witness is not absolutely immune from testimony given in a pre-trial setting if that testimony is relevant to the manner in which the complaining witness initiated or perpetuated the prosecution.” 955 F.2d at 1401; see also *infra* section I.B (discussing the Supreme Court’s “functional approach” to § 1983 immunity); *infra* section II.A (explaining that a common law cause of action for malicious prosecution would have been available against conspiring witnesses).

In contrast, the Second Circuit has recognized a distinction between witnesses' testimony and witnesses' conspiratorial acts involving testimony, and has held that witnesses' conspiratorial acts are not immune from suit under section 1983.²⁵ While the Second Circuit has understood that *Briscoe's* holding was expressly limited to the substance of witnesses' testimony, it, too, has failed to employ fully the Supreme Court's approach to section 1983 immunity.²⁶ Instead, the Second Circuit has engaged only in an analysis of the policy implications of immunizing witness conspirators.²⁷ It has found that the reasons for granting immunity to witnesses are not applicable when witnesses conspire with state actors to present false testimony.²⁸ In addition, the Second Circuit has recognized that means other than immunity exist to protect honest witnesses from frivolous suits.²⁹

This Note argues that witnesses who conspire with a state official to present perjured testimony at a judicial proceeding should *not* have absolute immunity from a section 1983 suit for damages. Part I provides background information on section 1983 and explains why a witness-state conspiracy satisfies the requirements of a section 1983 cause of action. Part I also summarizes the Supreme Court's doctrinal approach to section 1983 immunity. Finally, Part I examines two Supreme Court cases which are relevant to the issue

25. *Dory v. Ryan*, 25 F.3d 81, 84 (2d Cir. 1994); *San Filippo v. United States Trust Co.*, 737 F.2d 246, 255 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985). The First Circuit has also recognized that the distinction between a § 1983 claim based on false statements by a witness and a § 1983 claim based on a conspiracy involving false statements by a witness may be important. See *Malachowski v. City of Keene*, 787 F.2d 704, 712 (1st Cir. 1986) (*per curiam*), *cert. denied*, 479 U.S. 828 (1986). In *Malachowski*, a juvenile police officer allegedly filed a false juvenile delinquency petition as part of an overarching conspiracy that included various state actors. The court granted immunity to the juvenile officer for his allegedly false statements by drawing an analogy to the immunity granted by the Supreme Court to witnesses, prosecutors, and other state officials for their false statements. The court recognized, however, that the conspiracy claim could not be so easily dismissed because "[the juvenile officer]'s immunity may not extend to allegations that he filed a false delinquency petition as part of an overarching conspiracy." 787 F.2d at 712 (emphasis added). Nonetheless, the First Circuit found that the plaintiffs' conclusory allegations of conspiracy were not supported by sufficient evidence to sustain the claim.

26. See *Dory*, 25 F.3d at 83-84, *modifying* 999 F.2d 679 (2d Cir. 1993); *San Filippo*, 737 F.2d at 254-55; see also *infra* section I.B (discussing the Supreme Court's "functional approach" to § 1983 immunity).

27. The Tenth Circuit is the only circuit granting immunity to witness conspirators that has even mentioned policy considerations. See *Miller*, 948 F.2d at 1570-71; see also *Snelling*, 972 F.2d at 200; *Wilkins*, 872 F.2d at 192; *Macko*, 760 F.2d at 97. The Tenth Circuit's discussion, however, was limited to stating briefly that the justifications in *Briscoe* also applied to witness conspirators, without regard to the countervailing reasons for denying immunity to witness conspirators. *Miller*, 948 F.2d at 1571.

28. *San Filippo*, 737 F.2d at 255.

29. *San Filippo*, 737 F.2d at 255 (noting that "ample protection against costly defense [of baseless § 1983 claims] should ordinarily be provided by the possibility of 12(b)(6) dismissal or summary judgment in defendant's favor").

of immunity for witness conspirators: *Briscoe v. LaHue*,³⁰ and *Malley v. Briggs*.³¹

Part II applies the Supreme Court's section 1983 immunity analysis to witness conspirators and argues that immunity should not be extended to their conduct. Historical research shows that the act of conspiring to present perjured testimony would *not* have been immune from suit at the time that Congress enacted section 1983 and there is no evidence that Congress intended to grant immunity to witness conspirators by enacting section 1983. Furthermore, public policy considerations weigh in favor of allowing section 1983 suits against witness conspirators.

I. WITNESS IMMUNITY UNDER SECTION 1983

Section 1983 provides a federal cause of action against persons acting under governmental authority who have violated an individual's constitutional or federal statutory rights. Despite the broad remedial language of Section 1983, the Supreme Court has held that state officials are often immune from damages for the acts they perform. Two Supreme Court cases — *Briscoe*³² and *Malley*³³ — address immunity for certain conduct of witnesses. *Briscoe* and *Malley*, however, do not indicate whether the conduct of witness conspirators is immune from a section 1983 damages action.

A. *The Operation of Section 1983*

"No federal statute is more important in contemporary American law than 42 U.S.C. § 1983."³⁴ Section 1983 originated as section one of the Civil Rights Act of 1871, a statute designed by Congress to enforce the Fourteenth Amendment.³⁵ The language of section 1983 is broad enough to encompass every violation of federal law. It reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

30. 460 U.S. 325 (1983).

31. 475 U.S. 335 (1986).

32. 460 U.S. 325 (1983).

33. 475 U.S. 335 (1986).

34. 1 MARK A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION § 1.1 (2d ed. 1991).

35. Specifically, § 1983 was modeled after section two of the Civil Rights Act of 1866, which created criminal penalties for certain acts performed "under color of any law." SHELTON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION § 1.03 (2d ed. 1986). Congressional mistrust of the states' factfinding processes and the invidious activities of the Ku Klux Klan prompted the enactment of the Civil Rights Act of 1871. 1 SCHWARTZ & KIRKLIN, *supra* note 34, § 1.3. The remedy provided by § 1983, however, is not limited to class-based discrimination.

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured³⁶

Although dormant for ninety years, section 1983 is now widely invoked against defendants who have violated a person's federal rights while acting under governmental authority.³⁷ By providing a neutral federal forum, section 1983 has become an important means to check the conduct of state and local governments and officials.

There are two elements of a section 1983 claim. First, the plaintiff must allege that a right provided by either the United States Constitution or by a federal statute has been violated.³⁸ Section 1983 does not create substantive rights, but only establishes a civil remedy to enforce preexisting federal law.³⁹ Second, a section 1983 claim can only be brought against a defendant who has acted "under color of state authority."⁴⁰ In other words, a valid complaint requires a showing of some nexus between the acts of the defendant and state authority.⁴¹

The Supreme Court has liberally construed the state action requirement of section 1983 so that a private person who conspires with a state official is considered to be acting under color of state law.⁴²

[A] private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. . . . It is enough that [the private person] is a willful participant in joint activity with the State or its agents."⁴³

36. 42 U.S.C. § 1983 (1988).

37. In 1961, the Supreme Court opened the floodgates to § 1983 litigation by interpreting § 1983 to allow damage suits against state officers. *Monroe v. Pape*, 365 U.S. 167 (1961). Cf. 2 THOMAS I. EMERSON ET AL., *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1078-79 (student ed. 1967) (noting that between 1871 and 1920 only twenty-one § 1983 suits were entertained in federal courts). A plaintiff may ordinarily seek either damages or equitable relief under § 1983, but the Supreme Court recently held that a § 1983 claim cannot be used to overturn a criminal conviction. *Heck v. Humphrey*, 114 S. Ct. 2364 (1994).

38. 13B WRIGHT ET AL., *supra* note 19, § 3573.2. However, where Congress has explicitly expressed intent to exempt a federal statutory right from the protection of § 1983, such intent must be respected. *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 21 (1981); 13B WRIGHT ET AL., *supra* note 19, § 3573.2.

39. The remedy is available to vindicate federal rights, regardless of whether the defendant specifically intended to violate the rights of the plaintiff. *Monroe*, 365 U.S. at 172; 13B WRIGHT ET AL., *supra* note 19, at 203-04.

40. *Monroe*, 365 U.S. at 171-72.

41. *Monroe*, 365 U.S. at 171-72.

42. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150-52 (1970) (holding that a conspiracy with a state official is sufficient to satisfy the state action requirement of § 1983).

43. *Adickes*, 398 U.S. at 152 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

Thus, when a private person conspires with a state actor to deprive an individual of federal rights, the private person essentially becomes a state actor.

A claim that a witness conspired with a state official to present perjured testimony satisfies the requirements of a section 1983 cause of action: a federally protected right of the plaintiff has been violated under color of state law.⁴⁴ First, a person who has been harmed by a witness-state conspiracy has been deprived of liberty or property without due process of law, and, perhaps, has also been denied equal protection of the law.⁴⁵ Second, a witness-state conspiracy is performed under color of state law. Although witnesses do not act under color of state law merely by testifying at a judicial proceeding, the Supreme Court has explicitly recognized that witnesses who conspire with a prosecutor or other state official could satisfy the state-action requirement of section 1983.⁴⁶ Therefore, unless granted immunity for their conspiratorial acts, witness conspirators are subject to an action for damages under section 1983.

B. *The Supreme Court's Approach to Section 1983 Immunity*

Despite the fact that the actual language of section 1983 does not grant any immunities, the Supreme Court has construed section 1983 so as to immunize certain conduct from section 1983 claims for damages. Since 1951, the Supreme Court has approached the issue of section 1983 immunity from the premise that Congress, in enacting the Civil Rights Act of 1871, was fully aware of the then-existing

44. Each circuit addressing the immunity of witness conspirators has accepted, with little or no discussion, that section 1983 creates a cause of action against witness conspirators unless such witnesses are entitled to immunity. *See Snelling v. Westhoff*, 972 F.2d 199 (8th Cir. 1992) (per curiam), *cert. denied*, 113 S. Ct. 977 (1992) (addressing claim that witnesses conspired with prosecutor to present false testimony at a criminal trial); *Miller v. Glanz*, 948 F.2d 1562 (10th Cir. 1991) (addressing claim that witnesses conspired with state officials to give false testimony at a criminal trial); *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989), *cert. denied*, 493 U.S. 1026 (1990) (addressing claim that police witnesses conspired to give false testimony at a criminal trial); *Malachowski v. City of Keene*, 787 F.2d 704 (1st Cir. 1986) (per curiam), *cert. denied*, 479 U.S. 828 (1986) (addressing claim that police sergeant conspired with other state officials to give false testimony in instituting an unwarranted juvenile delinquency proceeding); *Macko v. Byron*, 760 F.2d 95 (6th Cir. 1985) (per curiam) (addressing claim that witnesses conspired with state officials to give false and incomplete grand jury testimony); *San Filippo v. U.S. Trust Co.*, 737 F.2d 246 (2d Cir. 1984) (addressing claim that witnesses conspired with district attorney to give false grand jury testimony).

45. None of the circuits addressing witness-state conspiracies have questioned allegations that the conspiracy violated the plaintiff's due process or equal protection rights. *See generally Snelling*, 972 F.2d at 199, *Miller*, 948 F.2d at 1562; *Wilkins*, 872 F.2d at 190; *Malachowski*, 787 F.2d at 704; *Macko*, 760 F.2d at 95; *San Filippo*, 737 F.2d at 246.

46. *Briscoe v. LaHue*, 460 U.S. 325, 330 n.7 (1982) (noting that "[i]t is conceivable . . . that nongovernmental witnesses could act 'under color of law' by conspiring with the prosecutor or other state officials"); *see also supra* notes 42-43 and accompanying text (explaining that a private individual who conspires with a state official acts under color of state law).

common law immunities and did not silently intend the Act to abridge those immunities "well grounded in history and reason."⁴⁷

To decide whether particular conduct is entitled to immunity, the Supreme Court first looks to the common law as it existed in 1871 to determine whether the conduct or analogous conduct would have been subject to a cause of action. If the conduct would have been immune from civil suit at common law, the Supreme Court examines the legislative history and purposes of the Civil Rights Act of 1871⁴⁸ for any indication that Congress intended to abrogate the immunity by passing the Act. Even if the Court is satisfied that Congress did not intend to abolish the particular immunity, it nevertheless analyzes the proposed immunity in light of public policy considerations.⁴⁹

As it has developed over the past forty years, the Supreme Court's immunity analysis focuses entirely on the particular function performed by the defendant, and not on the defendant's status

47. *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (holding that a legislative factfinding committee is absolutely immune from a § 1983 action for damages caused by the performance of its legislative duty). The Supreme Court has summarized the underlying rationale of its § 1983 immunity doctrine as follows:

[S]ince 1951, when this Court decided *Tenney v. Brandhove* . . . it has been settled that the all-encompassing language of § 1983 . . . is not to be taken literally.

"It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum One important assumption underlying the Court's decisions in this area is that members of the 42nd Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."

Briscoe, 460 U.S. at 330 (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)) (citations omitted).

48. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871).

49. The multi-step approach to § 1983 immunity has been consistently employed by the Supreme Court since 1951. *Malley v. Briggs*, 475 U.S. 335 (1986), and *Briscoe*, 460 U.S. at 325, which are discussed *infra* section I.C, exemplify the Supreme Court's immunity analysis. See also 1 SCHWARTZ & KIRKLIN, *supra* note 34, § 9 (examining the Supreme Court's approach to § 1983 immunity). Although the Supreme Court has often expressed a reluctance to discuss public policy in deciding whether to grant § 1983 immunity, see, e.g., *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2618 (1993) ("We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy.") (quoting *Tower v. Glover*, 467 U.S. 914, 922-23 (1984)), the Court has in fact relied on public policy as a partial justification for its decisions in most § 1983 immunity cases. See, e.g., *Burns v. Reed*, 500 U.S. 478, 490 (1991) ("In addition to finding support in the common law, we believe that absolute immunity for a prosecutor's actions in a probable-cause hearing is justified by the policy concerns articulated in *Imbler*"); *Malley*, 475 U.S. at 343 ("In the case of the officer applying for a warrant, it is our judgment that the judicial process will on the whole benefit from a rule of qualified rather than absolute immunity."); *Briscoe*, 460 U.S. at 342-43 ("[T]o the extent that traditional reasons for witness immunity are less applicable to governmental witnesses, other considerations of public policy support absolute immunity more emphatically for such persons than for ordinary witnesses."). One explanation of these conflicting statements is that perhaps the Court does not want to be characterized as an "active judiciary," but it also does not want to appear to adhere blindly to the common law of 1871.

or title.⁵⁰ Hence, section 1983 immunity analysis is often described as a “functional approach.”⁵¹ Under this functional approach, the Supreme Court has decided that judges,⁵² prosecutors,⁵³ and police officers,⁵⁴ have immunity from section 1983 damages for most of the actions they perform as part of their jobs.⁵⁵ The case law is clear that section 1983 immunity attaches only to those individual functions that have been historically privileged — the functions of judging, prosecuting, or policing. Not every action of a judge, prosecutor, or police officer is immune: actions which are not historically privileged are actionable.⁵⁶ When two parties conspire together to violate another’s federal rights, the acts of each conspirator must be separately examined to determine whether immunity attaches. Because section 1983 immunity analysis is functional, co-conspirators cannot “borrow” each other’s immunity.⁵⁷

50. See *Briscoe*, 460 U.S. at 342 (emphasizing that previous “cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant”).

51. The Supreme Court has conclusively rejected a titular approach to immunity in favor of a functional approach. In fact, in 1986 the Supreme Court itself stated that the “[functional] approach to questions of immunity under § 1983 is by now well established.” *Malley*, 475 U.S. at 339.

52. *Pierson v. Ray*, 386 U.S. 547 (1967) (holding that judges have absolute immunity when defending § 1983 claims for acts performed in their judicial capacities).

53. *Imbler v. Pachtman*, 424 U.S. 409 (1976) (holding that prosecutors have absolute immunity from § 1983 suits when they act within the scope of their prosecutorial duties).

54. *Malley*, 475 U.S. at 339 (holding that police officers have qualified immunity for all actions that meet the “objective reasonableness” standard).

55. Whether the conduct is entitled to “qualified” or “absolute” immunity depends on the type of immunity afforded to the conduct at common law. *Malley*, 475 U.S. at 342 (stating that “[s]ince the statute on its face does not provide for any immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871”). Qualified immunity generally only protects the good faith and reasonable actions of a defendant, while absolute immunity completely bars a suit without any inquiry into the merits. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS §§ 114-15 (5th ed. 1984).

56. See, e.g., *Burns v. Reed*, 500 U.S. 478 (1991) (holding that a prosecutor who advises police with respect to a criminal investigation is functioning as an “investigative officer” and therefore does not have absolute immunity); *Forrester v. White*, 484 U.S. 219 (1988) (holding that a state court judge does not have absolute immunity for demoting and dismissing a probation officer because the judge is functioning as an “administrator”); *Malley v. Briggs*, 475 U.S. 335 (1986) (holding that a police officer does not have absolute immunity for giving false affidavit testimony in seeking an arrest warrant because he is functioning as a “complaining witness”).

57. For example, a recent Supreme Court case dealt with a § 1983 suit alleging that a state court judge issued an injunction because of the judge’s conspiracy with interested parties. Although the Supreme Court dismissed the action against the judge on the basis of judicial immunity, the co-conspirators were not insulated from liability. The Supreme Court recognized that the effects on the judge and the public as a result of its decision were substantial, yet the Court held “that the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons.” *Dennis v. Sparks*, 449 U.S. 24, 31-32 (1980).

The Supreme Court has cautioned many times that section 1983 immunity is to be used sparingly.⁵⁸ Prior cases have recognized that almost any act of a state official could be characterized as relating in some way to a function protected by immunity, yet the Supreme Court has declined to grant such expansive immunity.⁵⁹ Instead, immunity has been reserved for those acts "closely associated with the judicial process."⁶⁰ Only such conduct can be justifiably protected in light of the countervailing interests of the injured party.⁶¹

C. *Briscoe, Malley, and Their Aftermath*

The Supreme Court first addressed the immunity of witnesses in *Briscoe v. LaHue*.⁶² *Briscoe* granted witnesses immunity from section 1983 suits, but this immunity was limited to the act of testifying. Three years later, *Malley v. Briggs*⁶³ held that while the act of testifying is immune, witnesses who obtain arrest warrants without probable cause through testimony in a complaint and supporting affidavit are not entitled to absolute immunity.

1. *Briscoe: The First Word on Witness Immunity*

The Supreme Court characterized the precise question presented by the *Briscoe* cases as "whether § 1983 creates a damages remedy against police officers for their *testimony* as witnesses."⁶⁴ Although *Briscoe*'s holding specifically addressed the immunity of a police officer witness for his false testimony, most of

58. See *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2613 (1993) ("Not surprisingly, we have been 'quite sparing' in recognizing absolute immunity. . . .") (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)).

59. *Burns v. Reed*, 500 U.S. 478, 495 (1991).

60. *Burns*, 500 U.S. at 495; see also *Buckley*, 113 S. Ct. at 2614; *Malley v. Briggs*, 475 U.S. 335, 342 (1986); *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

61. See, e.g., *Forrester*, 484 U.S. at 223, 227 (discussing "the undeniable tension between official immunities and the ideal of the rule of law" and stating that "immunity is justified and defined by the *functions* it protects and serves"); *Briscoe v. LaHue*, 460 U.S. 325, 345 (1983) (noting that "[a]s is so often the case, the answer must be found in a balance between the evils inevitable in either alternative" (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950))).

62. 460 U.S. 325 (1983).

63. 475 U.S. 335 (1986).

64. *Briscoe*, 460 U.S. at 329 (emphasis added). The *Briscoe* opinion actually addressed two cases in which damages were sought under § 1983. In the first case, petitioner *Briscoe*, a convicted burglar, filed a section 1983 claim against a police officer for allegedly violating *Briscoe*'s constitutional right to due process by committing perjury at *Briscoe*'s trial. The police officer had testified that in his opinion *Briscoe* was one of no more than 50 to 100 people in Bloomington, Indiana whose thumbprint would match the partial thumbprint found at the scene of the crime. *Briscoe* argued that the testimony was false because the Federal Bureau of Investigation and the state police considered the partial thumbprint to be too incomplete to be of value. 460 U.S. at 326-27. In the second case consolidated in *Briscoe*, petitioners *Vickers* and *Ballard* were jointly tried and convicted of sexual assault. They alleged that a police officer deprived the petitioners of their constitutional rights to due process and a fair trial by falsely suggesting in his trial testimony that the petitioners had been

the opinion discussed whether lay witnesses were entitled to immunity for the act of testifying. The Supreme Court explained that its analysis was not limited to police officer witnesses because, under a functional approach, immunity depends on the function performed, not on the status of the defendant.⁶⁵ A police officer's act of committing perjury is no different from that of any other witness.

The Court found that "§ 1983 does not allow recovery of damages against a private party for testimony in a judicial proceeding" for two reasons.⁶⁶ First, "when a private party gives *testimony* in open court in a criminal trial, that act is not performed under 'color of law.'"⁶⁷ The Court specifically noted, however, that it had to go beyond the color-of-law analysis to consider whether private witnesses may ever be held liable for damages under section 1983 for giving false testimony because nongovernmental witnesses could conceivably act under color of law by conspiring with a state official.⁶⁸

Second, the Supreme Court found that private witnesses cannot be liable for section 1983 damages arising from their testimony because, under a functional analysis, witnesses have absolute immunity from such suits.⁶⁹ In accordance with established section 1983 immunity doctrine, the *Briscoe* Court began by examining whether the common law, as it existed in 1871, granted witnesses absolute immunity from a suit for false testimony. *Briscoe* identified common law cases and treatises stating that the causes of action of libel and slander were not available in 1871 against witnesses who committed perjury at a judicial proceeding — even if the witness had done so maliciously.⁷⁰ In fact, the Court found that neither American nor English common law allowed any action for defamatory remarks made by witnesses.⁷¹

Having determined that witnesses in 1871 were immune from suit over their testimony, the *Briscoe* Court turned to the legislative history of section 1983 to determine whether section 1983 sought to abolish that immunity. The Court focused its inquiry on the predecessor statute of section 1983 — section one of the Civil Rights Act

able to harmonize their stories before making exculpatory statements to the police. 460 U.S. at 327.

65. 460 U.S. at 342.

66. 460 U.S. at 329.

67. 460 U.S. at 329-30 (emphasis added).

68. 460 U.S. at 330 n.7.

69. 460 U.S. at 330-46. For a detailed discussion of functional analysis, see *supra* section I.B.

70. 460 U.S. at 331-32 & n.11.

71. 460 U.S. at 330-31 & n.10-11.

of 1871.⁷² The Court found nothing in the legislative history of section one to suggest that Congress intended to abrogate immunity for the act of testifying.⁷³

The Court next turned to section two of the Civil Rights Act of 1871, which was the predecessor statute to section 1985(3).⁷⁴ Section two allowed for a cause of action against private conspiracies which deprived a person of equal protection of the laws by presenting perjured testimony.⁷⁵ The Court held that section two's focus on private conspiracies did not imply that Congress intended section one of the Act — now section 1983 — to be used against individual witnesses for their perjured testimony.⁷⁶ Congress primarily designed section two of the Act to provide a remedy against private Ku Klux Klan conspiracies to acquit fellow Klan defendants through perjured testimony or other means.⁷⁷ According to the sponsors of section two, the victims of Klan wrongdoing were deprived of equal protection of the laws if Klan members were systematically acquitted because of private conspiracies.⁷⁸ The *Briscoe* Court noted that section two provided a remedy only for conspiracy, not for the act of giving false testimony itself, because perjury was just one of the possible ways for Klan conspirators to attempt to exculpate a colleague.⁷⁹

Further, by contrasting section one and section two of the 1871 Act, the Court concluded that immunity for the act of testifying was proper. Section one of the Act was aimed only at those actions performed under color of state law, and it neither extended the idea of section two to the act of testifying falsely itself nor mentioned

72. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983 (1988)).

73. 460 U.S. at 336-37.

74. Civil Rights Act of 1871, ch. 2, § 2, 17 Stat. 13, 13-14 (codified as amended at 18 U.S.C. § 241 (1988) and 42 U.S.C. § 1985(3) (1988)).

75. Section 1985(3) applies

[i]f two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons . . . equal protection of the laws

42 U.S.C. § 1985(3) (1988); see also *supra* note 19 (contrasting § 1983 and § 1985(3)).

76. See 460 U.S. at 336-41.

77. 460 U.S. at 336-40. Despite Congress's focus on Klan conspiracies to acquit a defendant through exculpatory testimony, one Senator mentioned the possibility that perjury was being used to convict the innocent. 460 U.S. at 340 n.23 (citing CONG. GLOBE, 42d Cong., 1st Sess. 653 (1871) (statement of Sen. Osborn)). In any event, the actual language of § 1985(3) does not refer to a conspiracy to acquit or convict, but provides a remedy for any conspiracy that violates a person's right to equal protection of the laws.

78. 460 U.S. at 338 & n.19.

79. 460 U.S. at 340.

perjured testimony in any context.⁸⁰ Therefore, the Court reasoned that the Civil Rights Act of 1871 was not intended to abrogate the common law immunity granted to witnesses for perjured testimony, and hence, the act of testifying should be immune under section 1983 as well.

Before concluding its analysis, the *Briscoe* Court turned to the sources of common law authority it had previously identified to see if the reasons for granting immunity to the act of testifying in 1871 also applied to a section 1983 claim.⁸¹ The Court discovered two common law justifications for immunizing the act of testifying: to encourage persons to come forward and testify truthfully, and to protect honest witnesses from frivolous lawsuits. The first reason was undoubtedly the most important.⁸² The fear of liability could destroy the truth-finding process. Witnesses who fear liability stemming from their testimony may not come forward to testify or, once on the stand, may alter their testimony to avoid liability.⁸³ Recognizing that a fair trial requires witnesses to be free to express themselves, the common law courts declared as early as 1772 that "[n]either party, witness, counsel, jury or Judge can be put to answer, civilly or criminally, for words spoken in office."⁸⁴ In addition to the need to prevent such fear from distorting the judicial process, some pre-1871 courts expressed concern that honest witnesses might be subject to liability in the absence of immunity because they would have difficulty proving the truth of their statements.⁸⁵

The *Briscoe* Court held that the common law rationales for immunizing the act of testifying also justified granting immunity from section 1983 claims. Facilitation of the truth-finding function of the judicial proceeding remains the predominant reason witnesses are immune from section 1983 suits that attack the veracity of their testimony:

It is precisely the function of a judicial proceeding to determine where the truth lies. The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately

80. See generally 460 U.S. at 337-41 (noting that "the language of § 1 — now codified as § 1983 — differs from that of § 2 in essential respects, and we find no evidence that Congress intended to abrogate the traditional common-law witness immunity in § 1983 actions").

81. 460 U.S. at 333-36.

82. See 460 U.S. at 332-33 ("[T]he claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible" (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)) (alteration in original)).

83. 460 U.S. at 333.

84. 460 U.S. at 335 (quoting *The King v. Skinner*, 98 Eng. Rep. 529 (K.B. 1772)). The *Briscoe* Court cited to English common law because it formed the basis for the common law of the United States.

85. 460 U.S. at 334 n.13 (citing pre-1871 courts).

resolving factual disputes in criminal (and civil) cases are such that those involved in judicial proceedings should be "given every encouragement to make a full disclosure of all pertinent information within their knowledge."⁸⁶

The Supreme Court felt that functions that are "integral parts of the judicial process" must be immune from suit in order to be performed freely.⁸⁷ Testifying is clearly such a function: nothing could be more integral to the judicial process. *Briscoe* also recognized that, like witnesses at common law, honest witnesses sued under section 1983 for allegedly giving false testimony will often be forced to endure the time and expense of a trial because of the difficulty of summarily dismissing such a claim.⁸⁸ Therefore, the Court concluded that the act of testifying is entitled to immunity under section 1983 and no exception is warranted for police officer witnesses.⁸⁹

2. Malley: *The Recognition of a "Complaining Witness"*

Briscoe was not the final word on the subject of witness immunity. In *Malley v. Briggs*,⁹⁰ the Supreme Court held that a police officer who maliciously and without probable cause obtains an arrest warrant through testimony in a complaint and supporting affidavit is not entitled to absolute immunity from a section 1983 action.⁹¹ The *Malley* Court began its immunity analysis by looking to

86. *Briscoe*, 460 U.S. at 335 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 439 (1976) (White, J., concurring in judgment)).

87. 460 U.S. at 335.

88. The Supreme Court stated that:

[L]awsuits alleging perjury on the stand in violation of the defendant's due process rights often raise material questions of fact, inappropriate for disposition at the summary judgment stage. The plaintiff's complaint puts in issue the falsity and materiality of the allegedly perjured statements, and the defendant witness' knowledge and state of mind at the time he testified. . . . [I]f the truth of the allegedly perjured statement was not necessarily decided in the previous criminal verdict, if there is newly discovered evidence of falsity, or if the defendant concedes that the testimony was inaccurate, the central issue will be the defendant's state of mind. Summary judgment is usually not feasible under these circumstances.

460 U.S. at 343 n.29 (citing CHARLES ALAN WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 99 (3d ed. 1976)).

89. 460 U.S. at 341-46.

90. 475 U.S. 335 (1986).

91. Pursuant to a legal wiretap, state trooper Malley overheard a conversation in which two individuals discussed a party they attended the night before. Some of the slang used in the conversation could have been interpreted to mean that illegal drugs were used at the party. At one point one of the callers mentioned that "Jimmy" and "Louisa" were at the party. On the basis of this and another call, Malley drew up a felony complaint against James and Louisa Briggs, stating they conspired to violate Rhode Island's uniform controlled substance act by having marijuana in their possession during a party at their house. Malley also stated in his affidavit testimony the substance of the two telephone calls and what he interpreted them to mean. Based on the complaint and affidavit, the Briggses were arrested and charged. The evidence against the Briggses constituted appreciably less than probable cause and the charges against them were dropped when the grand jury refused to return an indictment.

the common law of 1871. The Supreme Court found that at the time the Civil Rights Act of 1871 was enacted, witnesses who procured the issuance of an arrest warrant by submitting a complaint did not have immunity if the complaint was made maliciously and without probable cause.⁹² Such witnesses were known as "complaining witnesses," and the fact that they played an active role in initiating prosecution subjected them to a suit for malicious prosecution.

Moreover, the *Malley* Court refused to draw an analogy to the immunity afforded a prosecutor at common law because the common law clearly treated complaining witnesses and prosecutors differently with respect to immunity.⁹³ Because the common law at the time of section 1983's enactment did not grant immunity to complaining witnesses and because the Court could not discern any public policy justifications for immunizing the conduct of the state trooper, *Malley* was not entitled to immunity.

II. WHY WITNESS CONSPIRATORS SHOULD NOT BE IMMUNE FROM SECTION 1983 SUITS

This Part argues that under the Supreme Court's functional approach to immunity, witnesses⁹⁴ who conspire with a state official to present perjured testimony should not be granted immunity from a section 1983 claim for damages. Section II.A examines the common law of 1871 and concludes that witness conspirators would not have been immune from civil suit. Instead, witness conspirators would have been subject to a cause of action for malicious prosecution. Section II.B analyzes the legislative history of the Civil Rights Act of 1871 and finds that Congress did not intend to depart from the common law with respect to malicious prosecution claims against witness conspirators. Section II.C concludes that public policy considerations weigh in favor of allowing section 1983 suits against witness conspirators because holding witness conspirators accountable for their actions serves important purposes without unduly burdening the judicial system.

ment. Subsequently, the *Briggses* brought a section 1983 suit for damages, charging that *Malley* violated their rights under the Fourth and Fourteenth Amendments in applying for the arrest warrants. 475 U.S. at 337-38.

92. 475 U.S. at 340-41 & n.3.

93. 475 U.S. at 341-43.

94. This Note does not distinguish between governmental and nongovernmental witnesses because a functional approach, which this Note employs, focuses on the function performed, not the actor. See *supra* section I.B for an explanation of the Supreme Court's functional approach to § 1983 immunity. All witnesses who conspire with a state official to present perjured testimony perform the same function.

A. Common Law Immunity

Application of the Supreme Court's section 1983 immunity doctrine begins with an examination of the common law as it existed in 1871, which reveals that the act of conspiring to present perjured testimony would not have been entitled to immunity. While the act of giving false testimony and the act of conspiring to present false testimony are related in that both involve false testimony, the acts were distinct under the common law. As recognized by *Briscoe*, those witnesses whose sole function was to give testimony were immune from an action for damages in 1871.⁹⁵ By immunizing the act of testifying from the causes of action of slander and libel, common law courts blocked all challenges to the *substance* of witnesses' testimony,⁹⁶ whatever its form.⁹⁷ Witnesses were immune from slander and libel suits because common law courts found that society's interest in encouraging witnesses to testify truthfully by insulating the act of testifying from liability outweighed potential plaintiffs' interests in recovery for damages to their reputations.⁹⁸

In contrast, witnesses who conspired with a state official to present perjured testimony would have been subject to liability at common law. While witness conspirators' actual act of testifying would have been immune, the act of conspiring with state officials to present false testimony would have been subject to an action for damages. As recognized by *Malley*, witnesses who not only testified but played an active role in invoking legal process for illegitimate reasons were commonly known as "complaining witnesses" and subject to a common law action for malicious prosecution.⁹⁹ A common

95. *Briscoe v. Lahue*, 460 U.S. 325, 330-31 (1983).

96. The English rule granted absolute immunity for all utterances of witnesses at judicial proceedings, while American courts often imposed the additional requirement that witnesses' statements be "relevant" to the judicial proceeding. The term "relevant" was broadly defined, however, so as to include any testimony that was reasonably related to the issue of the case. *Briscoe*, 460 U.S. at 330-31 & n.11; KEETON ET AL., *supra* note 55, § 114; Van Vechten Vedeer, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 469-70 (1909).

97. Because witnesses could not be subject to a suit for slander (oral defamation) or libel (written defamation), witnesses were protected with respect to both oral testimony and statements in affidavits. See ARTHUR UNDERHILL & NATHANIEL C. MOAK, *PRINCIPLES OF THE LAW OF TORTS* 119 (Albany, William Gould & Son, 1st Am. ed. 1881) (explaining the difference between slander and libel). Many common law cases held that witnesses were immune from slander and libel actions. See, e.g., *Kidder v. Parkhurst*, 85 Mass. (3 Allen) 393, 396 (1862); *Sands v. Robison*, 20 Miss. (20 S. & M.) 704 (1849); *The King v. Skinner*, 1 Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772); KEETON ET AL., *supra* note 55, § 114; Vedeer, *supra* note 96, at 469-70 nn.17-21.

98. See *Fowler V. Harper, Malicious Prosecution, False Imprisonment and Defamation*, 15 TEXAS L. REV. 157, 168 (1937) (commenting that "the public interest in protecting those who materially assist in the administration of the criminal law so far offsets the interest in reputation alone").

99. *Malley v. Briggs*, 475 U.S. 335, 340-41 (1986). The malicious prosecution suit was well established at the time the Civil Rights Act of 1871 was enacted. See *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 402 (1851) (noting that "[t]he action [for malicious prosecution] has been

law action for malicious prosecution was not limited to cases in which a defendant actually *initiated* legal proceedings.¹⁰⁰ Any person who knowingly and maliciously assisted in continuing a civil or criminal proceeding without probable cause was liable for malicious prosecution.¹⁰¹ In the words of a leading nineteenth-century treatise:

It is not necessary . . . that the defendant in an action for malicious prosecution should be the originator of the prosecution. It is enough to render him liable in damages that he *voluntarily participated* in the prosecution, and that it was carried on with his countenance and approbation¹⁰²

The only difference between one who initiated a judicial proceeding and one who maliciously and knowingly assisted was that the latter was only liable for damages accruing after assistance was rendered.¹⁰³

Witnesses who merely testified falsely in judicial proceedings would not have been liable for common law malicious prosecution because the cause of action required that the defendant actively encourage prosecution. According to treatises from the late nineteenth century, a defendant does not adopt the malicious intent necessary for a common law malicious prosecution claim simply by participating in a judicial proceeding that is continued without probable cause.¹⁰⁴ The defendant must not only know that the judicial proceeding is continuing without probable cause but also maliciously assist another in bringing the judicial process to bear against an undeserving person. Citing cases from both the nineteenth and

extended to civil as well as criminal cases where legal process has been maliciously used against another without probable cause"); *Malley*, 475 U.S. at 340-41; *Briscoe*, 460 U.S. at 350-51 (Marshall, J., dissenting). See generally KEETON ET AL., *supra* note 55, § 119; Vedeer, *supra* note 96, at 489 & nn.80-85; 4 WILLIAM WAIT, ACTIONS AND DEFENSES 337-56 (Albany, William Gould & Son 1878).

100. See 2 C.G. ADDISON ET AL., WRONGS AND THEIR REMEDIES: A TREATISE ON THE LAW OF TORTS 750 (4th Eng. ed. 1876); MELVILLE M. BIGELOW, LEADING CASES ON THE LAW OF TORTS 206 (Boston, Little, Brown & Co. 1875); 4 WAIT, *supra* note 99, at 340; see also *supra* note 24 (stating that the Tenth Circuit has recognized that common law actions for malicious prosecution were available against witnesses who either initiated or perpetuated the prosecution, even though the circuit has failed to realize that malicious prosecution suits would have been available against conspiring witnesses); cf. KEETON ET AL., *supra* note 55, § 119 (although this treatise was published much later than 1871, it also states that a defendant may be liable for malicious prosecution by either initiating or continuing a judicial proceeding).

101. An action for malicious prosecution also required that the underlying judicial proceeding either be terminated in favor of the malicious prosecution plaintiff or abandoned before its conclusion. BIGELOW, *supra* note 100, at 196-97; 4 WAIT, *supra* note 99, at 337.

102. 4 WAIT, *supra* note 99, at 340 (emphasis added) (citing *Stansbury v. Fogle*, 37 Md. 369 (1873)).

103. *Id.*; 2 ADDISON ET AL., *supra* note 100, at 750.

104. 4 WAIT, *supra* note 99, at 340; 2 ADDISON ET AL., *supra* note 100, at 750.

twentieth centuries, one of the leading modern treatises on torts remarks:

The defendant is not liable [for malicious prosecution] merely because of approval or silent acquiescence in the acts of another, nor for appearing as a witness against the accused, even though the testimony be perjured, since the necessities of a free trial demand that witnesses are not to be deterred by fear of tort suits, and shall be immune from liability. On the other hand, if the defendant advises or assists another to begin the proceeding, ratifies it when it is begun in defendant's behalf, or takes any active part in directing or aiding the conduct of the case, the defendant will be responsible.¹⁰⁵

Witnesses who conspire with a state official to present perjured testimony would have been subject to a malicious prosecution suit in 1871 regardless of whether the conspiracy began before or after the proceeding commenced because, by agreeing to give false testimony, witness conspirators maliciously instigate or continue a judicial prosecution without probable cause. In fact, a clear historical link exists between a witness-state conspiracy claim and an action for malicious prosecution. At early common law, the forerunner of an action for malicious prosecution was the writ of conspiracy, which was employed only when witnesses maliciously conspired to abuse legal procedure.¹⁰⁶ Eventually, the suit focused on the abuse of legal process rather than on the combining of two or more persons, and an action on the case was made available against complaining witnesses even if the malicious abuse of process was not part of a conspiracy.¹⁰⁷

Furthermore, as a matter of public policy the common law distinguished between granting immunity for defamatory testimony and holding witnesses liable for malicious prosecution. Common law courts expressly recognized that the need to protect persons from unwarranted legal process — as opposed to mere defamatory words — outweighed the need to protect participants in the judicial system.¹⁰⁸ Unlike a challenge to the substance of witnesses' testi-

105. KEETON ET AL., *supra* note 55, § 119 (citations omitted).

106. See *Briscoe v. LaHue*, 460 U.S. 325, 351 n.7 (1983) (Marshall, J., dissenting); BIGELOW, *supra* note 100, at 190-91; KEETON ET AL., *supra* note 55, § 46; W.V.H. ROGERS, WINFIELD & JOLOWICZ ON TORT 551 (12th ed. 1984); PERCY HENRY WINFIELD, *THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE* 2 (1921).

107. The emphasis on the abuse of criminal — and sometimes civil — process, rather than on the means by which the defendant abused the judicial system, distinguished malicious prosecution from the common law actions of slander and libel. See KEETON ET AL., *supra* note 55, § 119; Harper, *supra* note 98.

108. See, e.g., *Hill v. Miles*, 9 N.H. 9, 14 (1837) ("If such was [the defendant's] purpose it was wholly unwarrantable and illegal; and in such case the defendant cannot protect himself by alleging he made the charge in the due course of legal proceedings . . .") (*overruled by McGrahahan v. Pahay*, 408 A.2d 121 (N.H. 1979)); *Shelfer v. Gooding*, 47 N.C. 169 (1855) (quoting *Flint v. Pike*, 4 B. & C. 473, 481, 107 Eng. Rep. 1136, 1139 (K.B. 1825)) (examining the distinction between slander and malicious prosecution). *Shelfer* states:

mony, a suit for malicious prosecution did not only seek redress for injury to reputation. A suit for malicious prosecution was also aimed at recovering damages sustained as a result of unwarranted restrictions on property or physical freedom.¹⁰⁹

B. *The Legislative History and Purposes of Section 1983*

In determining the scope of section 1983 immunity, the Supreme Court first looks to the common law of 1871, and then to the legislative history of section 1983 to see if Congress meant to change the common law rule. Nothing in the legislative history or purposes of the Civil Rights Act of 1871 suggests that the forty-second Congress intended to depart from the common law with respect to malicious prosecution claims. Section one of the Act — now codified as section 1983 — was designed to provide a broad-based federal remedy for violations of civil rights¹¹⁰ and the congressional debates regarding the Civil Rights Act of 1871 do not suggest that Congress intended to exempt witness conspirators from liability for malicious prosecution.¹¹¹ In fact, the legislative history of section two of the Act — now codified as section 1985(3)¹¹² — indicates that members of the 42d Congress were not only aware of, but concerned about the harm resulting from conspiracies involving perjured testimony.¹¹³ Section two was aimed at the private conspiratorial activities of the Ku Klux Klan, including conspiracies to acquit fellow

And if a counsel, in the course of a cause, utter observations injurious to individuals and not relevant to the matter in issue, it seems to me that he would not therefor be responsible in a common action for slander, but that it would be necessary to sue him in a special action on the case, in which it must be alleged in the declaration and proved at the trial that the matter was spoken maliciously and without probable and reasonable cause. . . . It is manifest then that if [the defendant's] application for the warrant was not an honest one with a view to a criminal prosecution, his words could not be protected as having been made in the course of a legal proceeding.

Shelfer, 47 N.C. at 173, 176. For further discussion of the reasons witness conspirators should not be immune from a suit for damages, see *infra* section II.C.

109. Harper, *supra* note 98, at 160.

110. See *supra* section I.A.

111. See generally CONG. GLOBE, 42d Cong., 1st Sess. (1871) (intermittently referring to these debates).

112. See 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 597-653 (Bernard Schwartz ed., 1970); Civil Rights Act of 1871, ch. 22, § 2, 17 Stat. 13, 13-14 (codified as amended at 42 U.S.C. § 1985(3) (1988)). The pertinent portion of § 1985(3) is reproduced *supra* note 75.

113. Although the *Briscoe* Court expressly refused to extrapolate from the legislative history relating to section two of the 1871 Act, it did so partly because section two was "specifically directed toward private conspiracies" to commit perjury, while the Court was concerned with *witness perjury* — not conspiracy — performed "under color of law." *Briscoe v. LaHue*, 460 U.S. 325, 340-41 (1983). The congressional ideas reflected in section two are relevant in determining the liability of witness conspirators because the conduct targeted by section two is so similar.

Klan members based on perjured testimony.¹¹⁴ Such conspiracies would not have been subject to an action for malicious prosecution because their object was not to bring about unwarranted judicial process, but to *avoid* warranted judicial process.¹¹⁵ Therefore, the fact that section two of the Civil Rights Act of 1871 encompasses more conduct than would have constituted common law malicious prosecution suggests that Congress did not intend to limit malicious prosecution claims, but sought to expand the cause of action to private conspirators in cases involving class-based discrimination.

C. Public Policy Considerations

Witnesses who conspire with state officials to present perjured testimony should be denied immunity as a matter of public policy. Granting immunity to witness conspirators haphazardly and unnecessarily expands the scope of section 1983 immunity recognized in *Briscoe*. Furthermore, failure to hold witness conspirators accountable under section 1983 creates a perverse incentive for individuals to commit perjury and seriously undermines the legitimacy of the legal system. Although allowing damage claims against witness conspirators will entail additional costs to society, these costs are not unduly burdensome. Procedural checks on frivolous lawsuits will minimize the effects of baseless section 1983 actions on the judicial system.

1. Witness Conspirator Accountability Under Section 1983

Allowing section 1983 claims against witness conspirators is not only consistent with the objectives of both section 1983 and the Supreme Court's immunity doctrine, but it also prevents the creation of a perverse incentive to commit perjury and promotes the legitimacy of the judicial system. First, the Supreme Court has declared that section 1983 immunity must be narrowly construed.¹¹⁶ Conduct is entitled to immunity only when strong public interest necessitates such protection.¹¹⁷ Thus, the Supreme Court has reserved immunity for those functions "intimately associated with the

114. Congressmen who supported section two of the Act often cited the testimony of two former Klan members who told an investigating committee that Klan members took an oath to commit perjury to exculpate other Klan members. See CONG. GLOBE, *supra* note 111, at 153, 158, 173, 320-21, 322, 340, 437, 457, 458, 503, 516, 518, 653, 654, 687 (1871).

115. See *Briscoe*, 460 U.S. at 337-38 (noting that § 2 was aimed at preventing unjust acquittals by Klan conspirators).

116. See *supra* notes 58-60 and accompanying text (stating that the Supreme Court has limited the application of § 1983 immunity).

117. See *supra* note 61 and accompanying text (explaining that the Supreme Court decides § 1983 immunity issues by balancing the competing interests).

judicial phase of the criminal process.”¹¹⁸ Both the *Briscoe* Court and the common law granted immunity to witnesses who give false testimony because the act of testifying is intimately associated with the judicial phase of the legal process. In contrast, the common law tort of malicious prosecution recognized in *Malley* involves initiating or actively continuing a legal proceeding. The Supreme Court stated in *Malley* that although a police officer’s act of seeking an arrest warrant is a vital part of the administration of criminal justice, it is not entitled to immunity because the initiation of process by a complaining witness is relatively removed from the judicial phase of criminal proceedings.¹¹⁹ Accordingly, initiating or actively continuing a legal proceeding by conspiring to present perjured testimony is not a function intimately associated with the judicial phase of the legal process. A conspiracy takes place outside of court and is an active effort to misuse legal process. The common law courts came to the conclusion in 1871 that a conspiracy to commit perjury was not sufficiently integral to the judicial process to justify immunity, and therefore allowed malicious prosecution claims against complaining witnesses.¹²⁰ There is no reason for a different result under section 1983, particularly since the Court wants section 1983 immunity to be available only when strong public interests demand it.

Second, weighing the interests involved in a witness conspirator case reveals that granting immunity to witness conspirators is not justified. The balancing of interests with respect to witness conspirators results in a different conclusion than that reached by the *Briscoe* Court with respect to perjury by individual witnesses. The harm caused by witness conspirators is greater than that caused by non-conspiring witnesses, because when witnesses merely give false testimony, the only certain injury is a damaged reputation. Perjured testimony alone may or may not cause unwarranted restrictions on property and personal liberty; it depends on whether such testimony was material to the outcome of the judicial proceeding. In contrast, witness conspirators inevitably cause damage not only to reputation but also to property or personal liberty. The damage to property or personal liberty is certain because witness conspirators play active roles in forcing people to endure unwarranted judicial process, even if the trial does not result in conviction.

Third, granting witness conspirators immunity would create a perverse incentive for individuals to commit perjury. Any person

118. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); see also *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2614 (1993); *Burns v. Reed*, 500 U.S. 478, 493 (1991); *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

119. 475 U.S. at 342-43.

120. See *supra* section II.B.

who conspires to bring about unwarranted legal process would be able to sidestep civil liability simply by testifying. Such a rule would protect the most culpable conspirators instead of deterring them. This absurd result was reached in a Sixth Circuit case where the court found that two witnesses who allegedly conspired with the mayor and the city to present perjured testimony had immunity from a section 1983 suit, but the mayor and the city did not have absolute immunity because the doctrine of witness immunity "shields from liability only those defendants who gave testimony in a judicial proceeding."¹²¹

Finally, the public will perceive the state judicial process as more legitimate if witnesses are held accountable when they conspire with the state itself to misuse the state power. Failure to hold witnesses accountable in such situations could have detrimental effects on the public's respect for the prosecutorial arm of state.

2. *Burden on the Judicial System*

Justice comes with a price. This section argues, however, that there are three reasons why the relatively minor costs imposed on the judicial system by holding witness conspirators liable for damages under section 1983 do not justify granting immunity for their conduct. First, addressing the specific concern of the *Briscoe* Court, holding witness conspirators accountable for their actions will not obstruct the truth-finding function of the courts. In protecting witnesses from section 1983 damage claims which challenge the substance of their testimony, the Supreme Court recognized the need to encourage witnesses to take the stand and testify truthfully.¹²² The proposed rule will not frustrate the goal of the *Briscoe* Court because witnesses' testimony will remain absolutely immune from suit; only the *conspiracy* will be subject to challenge. Further isolating witnesses from liability for their conspiratorial actions can only have a negative impact on the judicial system's search for truth. Despite the close relation, agreeing to present perjured testimony is not part of the act of testifying. The Supreme Court has expressly declined to read immunity so expansively as to protect all acts which can be characterized as related to immune conduct.¹²³ Although perjury may be an undesirable by-product of any judicial proceeding, conspiracy to present perjured testimony presents much more serious problems. When two or more persons collude,

121. *Alioto v. City of Shively*, 835 F.2d 1173, 1174 (6th Cir. 1987).

122. See *supra* section II.B.2 (explaining that the *Briscoe* Court found that the primary common-law reason for protecting the testimony of witnesses — to avoid self-censorship by witnesses — is a valid concern in the context of a § 1983 suit for damages).

123. See *supra* note 59 and accompanying text.

the likelihood of a serious miscarriage of justice multiplies and *Briscoe's* stated goal of the pursuit of truth militates against immunity.

Second, in denying section 1983 immunity in the past, the Supreme Court has been willing to accept the fact that its decision would result in an increased number of suits, as well as some burden on state officials who participated in the activity but are entitled to immunity for their conduct.¹²⁴ Such costs, according to the Court, are not too high of a price to pay for "providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons."¹²⁵ After all, the purpose of the judicial system is to adjudicate disputes, and the immunity afforded state officials is not designed to insulate the official from all aspects of public accountability.¹²⁶ Despite the fact that state officials and witnesses conspire together, functional analysis requires that the immunity of the participants be determined independently.¹²⁷ Thus, to the extent that witnesses cause injury by agreeing to give false testimony, they should be liable for damages under section 1983.¹²⁸

Finally, two procedural requirements will prevent baseless section 1983 witness-state conspiracy suits from becoming unduly burdensome to the judicial system and its participants.¹²⁹ First, due to the specific pleading requirements of conspiracy, a plaintiff cannot simply transform a perjury claim into a claim of conspiracy to commit perjury.¹³⁰ A suit that does not contain sufficiently detailed allegations of an agreement between a witness and a state official to present perjured testimony can be disposed of at an early stage upon a 12(b)(6) motion to dismiss or

124. *Dennis v. Sparks*, 449 U.S. 24, 29-32 (1980). State officials who are granted immunity for their role in a conspiracy are affected by the liability of their co-conspirators because the state officials can still be required to serve as witnesses in suits brought against their co-conspirators.

125. *Dennis*, 449 U.S. at 32.

126. *Dennis*, 449 U.S. at 30-31.

127. See *supra* note 57 and accompanying text (noting that co-conspirators cannot "borrow" each other's immunity).

128. Proving causation and apportioning fault in a witness-state conspiracy case should pose no greater difficulty than that found in other § 1983 suits or tort claims.

129. See *supra* section I.C.1 (explaining that the *Briscoe* Court was concerned with protecting witnesses from the costs of defending baseless § 1983 actions).

130. Many courts which extend absolute immunity to witness conspirators erroneously do so on the grounds that to hold otherwise would simply allow plaintiffs to circumvent *Briscoe's* protection of witnesses on formal grounds. See, e.g., *Miller v. Glanz*, 948 F.2d 1562, 1571 (10th Cir. 1991) ("Instead of suing state witnesses for perjured testimony, a [plaintiff] could simply transform the perjury complaint into an allegation of a conspiracy to do the same."); *Wilkins v. May*, 872 F.2d 190, 192 (7th Cir. 1989) ("Witnesses do have absolute immunity, and [plaintiff's] attempt to circumvent it by charging them with conspiracy is facile and must fail.").

a motion for summary judgment.¹³¹ Hollow, unsubstantiated claims of conspiracy may also be subject to sanctions under Rule 11.¹³²

Second, section 1983 witness-state conspiracy suits will not unnecessarily burden the judicial system because a section 1983 claim cannot be used to collaterally attack a criminal conviction.¹³³ A convicted criminal defendant is more likely to explore all possibilities of release than to concentrate on a meritless damages claim. The limitation on section 1983 suits should be extended to bar any section 1983 claim against witness conspirators unless the underlying judicial proceeding was either dismissed or terminated in favor of the section 1983 plaintiff. Such a requirement is consistent with the elements of a common law malicious prosecution cause of action.¹³⁴

CONCLUSION

Perhaps as a result of the growing caseload of the federal courts, the Supreme Court has limited the number of section 1983 suits by recognizing immunity for some conduct. However, the Court's approach to section 1983 immunity has been cautious: Relying on the common law for guidance, the Supreme Court has left intact the remedy provided by section 1983 where there is compelling need for it.

Victims of witness-state conspiracies have a compelling need to have access to meaningful relief. But such relief will not be available if every participant in a witness-state conspiracy is immune from suit. Although there may be good reasons to grant state officials immunity for their roles in witness-state conspiracies, there is

131. For example, although the Second Circuit has held that witnesses who conspire with a state actor to present false testimony do not have absolute immunity, the Court has relied on the specific pleading requirements of conspiracy to dismiss meritless claims. In *San Filippo*, the court observed:

[A]t no point in the proceedings has plaintiff alleged one shred of evidence in support of his conclusory assertion of conspiracy, beyond the fact that [the prosecutor and the detective] met with defendants prior to their grand jury testimony. We see nothing suspicious or improper in such meetings, which are routine and necessary in preparation of evidence. If the mere allegation of their occurrence is sufficient . . . we agree with [defendants] that virtually every witness for the government could face the burden of defending a costly civil suit charging 'conspiracy' to give false testimony.
San Filippo v. United States Trust Co., 737 F.2d 246, 256 (2d Cir. 1984).

132. FED. R. CRV. P. 11 provides sanctions for frivolous suits.

133. *Heck v. Humphrey*, 114 S. Ct. 2364 (1994).

134. See *supra* note 101 (stating that at common law, a malicious prosecution suit required that the judicial proceeding terminate in a way favorable to the malicious prosecution plaintiff). Although the *Briscoe* Court refused to recognize this qualification as an effective means of limiting the burdens posed by § 1983 claims against witnesses who commit perjury, a defamation suit at common law — unlike a malicious prosecution suit — did not require that the underlying judicial proceeding terminate in a manner favorable to the plaintiff. *Briscoe v. LaHue*, 460 U.S. 325, 344 (1983).

no justification for completely denying relief to victims of such conspiracies by granting immunity to witness conspirators as well. Walter McMillian and others like him can never fully recover the loss resulting from witness-state conspiracies, but witness conspirators should nevertheless be required to help compensate their victims. Consequently, witnesses who conspire with state officials to present perjured testimony should not be immune from section 1983 damage suits.