Bound By Oath | Season 2 | Episode 10, Part I: Prosecutors, Perjurers, and Other Non-"Persons"

John: Hello and welcome to Episode 10 of Season 2 of Bound By Oath. If this is your first time listening, please back up and start with Episode 1, which is entitled They're Going to Kill This Man. I am John Ross of the Institute for Justice's Center for Judicial Engagement, and on this episode we return to the subject of absolute immunity. On Part 1, we'll talk about prosecutorial immunity.

> **Justice Powell**: A prosecuting attorney is absolutely immune from a suit for damages under Section 1983 for action taken within the scope of his prosecutorial duties.

John: You cannot sue a prosecutor for prosecuting. If they fail to turn over exculpatory evidence, or use perjured testimony, or even prosecute someone that they know to be innocent, all of that clearly violates the Constitution. But they are totally immune from civil liability.

Margaret Johns: In my view, the two justifications that the Supreme Court offered for prosecutorial immunity are baloney. There's nothing to support them.

John: And on Part 2, we'll talk about perjury. If a police officer or any other kind of government official lies on the witness stand at trial, that also violates the Constitution. But you can't sue over it.

> **Justice Blackmun**: Do you think that Congress meant to punish perjurers when it passed the Ku Klux Klan Act of 1871?

Harriet Lipkin: Your Honor, there is certainly evidence in the legislative history that Congress was concerned about perjury when it was--

Justice Blackmun: There was a lot of evidence, wasn't there?

Harriet Lipkin: Yes, there was evidence of that, Your Honor.

Justice Blackmun: Not just some, there was a lot.

John: Also on Part 2 of this episode, which we'll release in a few days, we'll talk about another group of officials -- officials who are not judges but who the courts have nonetheless cloaked with absolute judicial immunity, or so-called quasi-judicial immunity. That group includes social workers, parole hearing officers, mental health experts, land use officials, and members of occupational licensing boards, among others. People whose roles or job titles generally did not exist in the 19th century.

Alexa Gervasi: The Supreme Court has said repeatedly that if an absolute immunity did not exist at common law in 1871, courts should not be granting absolute immunity today.

John: On this episode, we're going to return to some themes that we've talked about earlier this season. For instance, the Supreme Court has said that there are essentially two kinds of justifications for immunities. One, whether officials would have historically enjoyed immunity at common law. And two, whether there are good policy justifications today for officials to continue to enjoy those immunities. Also, we'll return to the idea that when Congress passed Section 1983 and said that every person acting under color of state law could be held liable for constitutional violations, it meant what it said and thus created a brand new cause of action independent from common law. But given that the Supreme Court has ruled otherwise, has the Court done a particularly good job of applying the common law? First though, before we dive into the caselaw, we're going to hear from one modern-day victim of a malicious prosecution

who took his case all the way to the Supreme Court -- someone who stood up for what he thought was right, annoyed some politically powerful people in his community, and, for his troubles, found himself charged with crimes that were entirely fabricated by a prosecutor and a perjurer.

BBO Montage

Charles Rehberg: I'm Charles Rehberg. I was born at Phoebe Putney Memorial Hospital in Albany, Georgia. I lived there all of my life.

John: Charles Rehberg is a retired certified public accountant who spent most of his career in the field of health care finance. ...

Charles Rehberg: … either as a auditor of hospitals, a chief financial officer of a hospital, or consultant to hospitals, or as a practice administrator for a group of surgeons.

John: And in 2003, he had occasion to look into the finances of Phoebe-Putney Memorial Hospital -- the hospital, it just so happened, where he had been born. Charles and a group of six surgeons were trying to open a new outpatient surgery center in Albany. But they got some intense pushback.

Charles Rehberg: We had a lot of lot more than expected opposition from the local hospital, Phoebe Putney Memorial Hospital.

John: In Georgia, and in many other states, you need to get permission from the state before you can open a new health care facility, add more beds to your hospital, or buy equipment like

an MRI machine, and more. And in practice, the requirement essentially gives big, established players in the industry, like Phoebe, veto authority over new competition, no matter how small.

Charles Rehberg: All of that opposition caused me to just wonder why are they fighting this so hard? This is such a small piece of business compared to what they do. Most of what general surgeons do, in fact, is done in the hospital anyway.

John: All six of the doctors who were trying to start the outpatient center with Charles also worked at Phoebe. One of them, Dr. John Bagnato, was the chief of surgery at Phoebe. Their plan was just to offer minor procedures where patients could come and go in the same day -- a new service that's more convenient at a lower price.

Charles Rehberg: My curiosity kind of got the best of me. And I started looking at some information on the hospital through their tax returns, financial statements, state filings. There are a variety of different documents that, if you know where to look, you can find that give you a good bit of information.

John: And what Charles found, just from publicly available documents, was that the executives and board members at Phoebe Putney were, in his view, betraying the community.

Charles Rehberg: One of the more shocking things was the way that indigent patients were often treated.

John: The hospital is a 501c3 nonprofit. It doesn't pay taxes. Because it's supposed to have a charitable mission. But at Phoebe charity was a literal last resort.

Charles Rehberg: So what would happen was that the hospital would pursue collecting these individuals pretty harshly. They would go through, first, collection agencies that would call them and call them and send letters and do all the threats that collection agencies do. And then if that failed in a lot of cases they would proceed to file lawsuits against the patients to try to recover their assets or garnish their wages. And when you're looking at a 501c3 organization what I expected to find was that they would have charity programs in place where people could apply for reduced cost or free care if they could demonstrate financial need. But that didn't seem to be the case.

John: Instead, what the hospital did was send collection agencies after people and try to garnish their wages, and then if that didn't work they'd give up and say, okay we'll write that off as charity.

Charles Rehberg: That's really not the way it's supposed to work. Charity is something that actually has to be given up front. You can't aggressively try to collect the debts and then, when you fail, just decide to call it charity.

John: And to Charles, it certainly seemed like the hospital could afford to be more charitable.

Charles Rehberg: I discovered what we felt like we're enormous executive salaries over there. We discovered they were sitting on just enormous stockpiles of cash.

John: And then there were the trips to the Caribbean.

Charles Rehberg: I learned also that the hospital had accounts in the Cayman Islands. And that was pretty surprising to find. Hospital executives were frequently flying to the Cayman

Islands. They would charter jet planes. And they would fly down there and hold various meetings and what have you. Later in discovery, we found what we considered were some pretty serious abuses of expenses where, during these trips, there were a lot of personal expenses and so forth, that the hospital was paying on behalf of these people that went on these trips.

John: Fancy dinners, golf, sportswear, cigars. And at the same time Phoebe's board was living the high life, they were pleading poverty in the community and at the legislature.

Charles Rehberg: They hold events where they solicit contributions from the public. And people are probably going to be less likely to want to contribute money to an organization that's actually probably the wealthiest organization in the entire community. In general when dealing with politicians and lobbying for Medicaid changes and things like that the hospital industry as a general rule does try to show itself as being somewhat poorer than they are. They're always making the case that they need more funds.

John: To Charles none of that sat right. So he and one of his partners, Dr. John Bagnato, decided to do something about it.

Charles Rehberg: It struck me that people needed to know. So it occurred to me -- I think I will send out a fax and I will just star 69 or whatever on the fax machine. So it shows no phone number on the other end to be anonymous.

John: From September of 2003 to March of 2004, Charles and Dr. Bagnato sent out faxes with the information about Phoebe that they'd gleaned from public records and that they took care to ensure did not contain embellishments or misrepresentations.

Charles Rehberg: If I made a statement anywhere in those faxes, I could back it up. It's my nature that I'm not going to go out on a limb and say something I can't defend.

John: They called the faxes Phoebe Factoids, and they sent them to local businesses and community leaders.

Charles Rehberg: And so I put that information out in the community anonymously. And it really upset them. They did not like that coming out. They did not like the public discussion of it. For the first time in years, the local press actually began taking a look at them and what they were doing. Whereas in the past almost anything reported about the hospital came from a press release that they issued. So it really changed things for them. They were under some scrutiny, and they didn't like it. And they responded really, really harshly. Through their attorney they hired a series of private investigators who they were most of them were former FBI agents. And they tried multiple ways to determine who I was.

John: But they didn’t get anywhere.

Charles Rehberg: Without subpoena power, they just weren't able to turn up who we were.

John: Until the hospital turned to a friend in government. After hitting a dead end, they asked Ken Hodges, the head prosecutor in the county, to help them out.

Charles Rehberg: They approached his office and solicited his help in conducting an investigation. Even though this clearly wasn't anything criminal. What seems to have happened was, in fact, we discovered that there were a lot of political contributions made in this timeframe

to Ken Hodges by the various hospital board members and executives. Mr. Hodges' wife actually obtained a position at the hospital as kind of a video spokesperson doing video, TV shows, and so forth for the hospital. And it looks like this series of favors was rewarded with an investigation.

> **News anchor**: Dougherty District Attorney Ken Hodges helped Phoebe Putney hospital go after the author of the Phoebe Factoids. Hodges admits he took information, gained by a criminal grand jury subpoena and gave it to the hospital.
> **Ken Hodges**: There's nothing that I've done that's unethical.
> **Reporter**: Hodges received thousands of dollars in campaign contributions from people who work for the hospital. And Hodge's wife was recently hired by Phoebe.

John: With the government's subpoena power at their disposal, Phoebe was able to determine Charles Rehberg and John Bagnato's identities.

Charles Rehberg: The DA's office with no grand jury convened, began issuing what were claimed to be grand jury subpoenas to telephone companies and email providers and so forth to try to discover exactly who we were. And they did, in fact, get that information.

John: Which the hospital used to sue Charles and Dr. Bagnato. But not without some shenanigans first.

Charles Rehberg: These former FBI agents approached me in a very police-like manner after work one day. They flew up in their car and blocked off my vehicle where I couldn't leave. They jumped out. Yelling my name and holding this big stack of papers and asking are you Charles Rehberg? We've got information you're going to be sued.

John: They tried to hustle Charles into their SUV.

Charles Rehberg: They actually wanted me to get in their vehicle, leave, and go to some motel where they had set up a video camera where their apparent plan was to sweat some kind of confession out of me.

John: And they brought his family into it.

Charles Rehberg: Telling me I should cooperate with them for not only for my good, but for the good of my lovely wife Wanda, and my children, my family. And that just came across as a threat. So anyway, I didn't do any of that. Instead I called an attorney, which they had warned me not to do. They had warned me not to contact an attorney or anyone else, which I found to be very, very intimidating kind of behavior.

John: Charles learned later that the investigators had him under surveillance.

Charles Rehberg: One thing I learned was that they had followed me around for a period of time, as well as my wife, even as she took our children to school and gymnastics lessons and things like that.

John: And creepy things started happening around the house.

Charles Rehberg: And there were some other like really strange things that happened that I can only attribute to something that they did. One example was my wife kept a very regular schedule. She was gone certain days, at certain times. One day, the schedule changed a little

bit, and she pulled up at our house at a time which you normally wouldn't have been there. And to her surprise, there was a telephone man out back of our house working on where our line comes in. And she went and asked him why was he there and what was he doing? And he said, Well, we had an order from you to install a new phone line. And I'm just here to put that in. Well, that was completely not true. We did not order another phone line. And one of the things I learned from some experts later on is that an investigator or someone who's wanting to do illegal phone surveillance can have a second line installed and there's this window of opportunity until you discover this and and discover that you have the second line you didn't order that all of your calls can be monitored. So that was a really odd thing. And we have to feel like it directly related to the activities of those investigators.

John: A few days after the private investigators confronted Charles at his office, the hospital filed a lawsuit against Charles and his partner, Dr. Bagnato.

Charles Rehberg: Within a few days, they filed this lawsuit, and they did it with a lot of fanfare. They held a press conference, put my name out there with all these allegations. calling me a liar and so forth. And they actually filed a civil RICO suit for $66 million against me.

John: So Charles filed a countersuit with allegations of his own.

Charles Rehberg: I felt it was very important to defend myself, my reputation. And this counterclaim gave me the right to discovery.

John: Ultimately, the hospital dismissed its lawsuit, and Charles agreed to settle his counterclaims as well. But not before the hospital turned over thousands of pages of documents, which revealed the role that the district attorney, Ken Hodges, had played. For

instance, the DA and his chief investigator had prepared a series of grand jury subpoenas on official letterhead requesting Charles' telephone records and emails. But the subpoenas were fake.

Charles Rehberg: In fact, there was not even a grand jury impaneled. There was there was no grand jury looking at this.

John: The phone companies and internet provider didn't know that, though. So they charged the DA's office their usual fee, and they turned over the information.

Charles Rehberg: There are certain costs associated with the DA's office issuing subpoenas. The phone companies, they charge the DA's office for the production of the documents that are requested. And then the hospital would pay the bills for it. And we actually found those direct reimbursements of that. It was a public prosecutor's office being used for a very private purpose. So once that information came out, it hit the press and it caused a bit of an uproar. And I think that that uproar actually pushed the DA's office to try to somehow legitimize all of this that they did by going forward with the actual prosecution.

John: In December of 2005, at the behest of Ken Hodges, Charles and Dr. Bagnato were indicted on completely bogus, made-up, nonsense charges. Here's Ken Hodges talking to local news:

> **Ken Hodges**: \Mr. Rehberg, Mr. Bagnato did nothing wrong they don't have to worry about criminal prosecution. I don't understand what the worry would be if they haven't done anything wrong.

John: To avoid the appearance of a conflict of interest, Ken Hodges recused himself and a prosecutor from another district took over the case. But Hodges remained intimately involved, and his chief investigator, James Paulk, testified to a grand jury -- a real one this time -- that Charles and Dr. Bagnato had burglarized and assaulted a Phoebe hospital board member at his home.

Charles Rehberg: I mean we never even had been to his home. I didn't even know where his home was. It was just bizarre.

John: And there were also six counts of making harassing phone calls.

Charles Rehberg: They somehow tried to construe sending these faxes out as that they were harassing phone calls. Yet none of the people had complained or ever made a complaint to any law enforcement agency that they had received a fax that they felt harassed by.

John: Typically in an assault case, the police department will investigate and then pass the case on to district attorney's office for prosecution. But here, no one from the police department was involved. And no one did any investigating. Ken Hodges just made a bunch of stuff up.

> **NPR host**: Here's NPR legal affairs correspondent Nina Totenberg.
> **Nina Totenberg**: The evidence leading to the indictment was presented to the grand jury by the DA's chief investigator James Paulk. Paulk's lawyer, John Jones concedes, that Paulk did not investigate the alleged assault or the alleged burglary. Indeed, he concedes now that there was no burglary and there was no assault. In short, Jones says Paulk was following orders from the district attorney.

Charles Rehberg: What they did was they indicted us actually three separate times. And as a judge would throw out the charge, they would go back and get another grand jury, re-indict us, get thrown out again, go back, re-indict us and get thrown out for the third and final time.

John: After three indictments plus an arrest, the case was finally dropped.

Charles Rehberg: Because of the felony charges -- I'm a licensed CPA -- I would have been stripped of my CPA license. Dr. Bagnato is a licensed physician. A felony would have stripped him of his physician's license. So there was a lot on the line. And even as odd as these charges were and as obviously false as it was, it was still just terribly disturbing and intimidating to have that kind of thing put up against you when you broke no laws.

John: So Charles filed a lawsuit under Section 1983 asserting a number of different constitutional claims. He argued that using fake grand jury subpoenas to uncover Charles' identity, see who he called, and read his emails violated the Fourth Amendment. He argued that pursuing criminal charges without probable cause -- and giving false testimony to the grand jury in support of those charges -- also violated the Fourth Amendment. And he argued that the whole ordeal was retaliation, in violation of the First Amendment, for Charles truthfully criticizing the hospital. Charles sued both Ken Hodges, the prosecutor, and James Paulk, the investigator. And he also sued the out-of-town prosecutor who took over the case when Ken Hodges recused. And in 2012, one of his claims made it to the U.S. Supreme Court. We're going to take a quick break. And before we return to Charles' case, we're going to talk about how in spite of Congress' intent, prosecutors came to be protected by absolute immunity.

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BREAK

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Margaret Johns: *Yaselli* is the first time the United States Supreme Court recognized absolute prosecutorial immunity. So in that sense, it's a big case. In fact, it's a very tiny case. It's like 10 lines long. I mean, I'm not. I'm not kidding. That's all it is.

John: That's Professor Margaret Johns of the University of California, Davis School of Law.

Margaret Johns: And what it relied on -- it cited two cases and it didn't describe them at all. And both of them were judicial immunity. Neither one of them was prosecutorial immunity.

John: In 1927, in the case of *Yaselli v. Goff*, the Supreme Court said absolute judicial immunity should be extended to prosecutors. It didn't say why. It just cited two earlier opinions about judges, one of which we talked about on Episode 8, *Bradley v. Fisher*.

Jeffrey Shaman: The Supreme Court in *Bradley versus Fisher* decided in 1872 says, well, the state of the law up to now was that absolute judicial immunity was well established and uniformly followed. But again, the Supreme Court was was inaccurate.

John: The Supreme Court's opinion in *Yaselli* may not have been very detailed, but the opinion it affirmed from the U.S. Court of Appeals for the Second Circuit did contain some reasoning.

Margaret Johns: The lower court decision, which *Yaselllli* affirmed, starts out with a fairly long discussion of judicial immunity. And then it says, we think the same thing should be applied to prosecutors.

John: It said that not only were judges absolutely immune from civil suits, but so were jurors and grand jurors and witnesses. So given that pretty much everyone else in the courtroom enjoyed absolute immunity, prosecutors should too. Prosecutors may not be judges, but their role was quote “quasi-judicial,” and it was important that they do their jobs quote “freely and fearlessly.”

Margaret Johns: Their justification was they were trying to protect the judicial process from people second guessing it after the fact. And then suing the prosecutor because they don't like the result and that turning into a whole spiral of litigation.

John: The case arose out of the federal prosecution of the president of a steamboat company, called the Italian Star Line. The company, which was formed by Italian-American immigrants with the intent of sailing to Italy and back, had purchased a steamboat from the federal government and agreed to pay in installments. But after the sale, officials demanded a huge lump sum payment that was not part of the agreement. The company refused to pay, and its president Paul Yaselli was prosecuted for defrauding the government on the grounds that he had paid a bribe to a United States Shipping Board official to push through the sale of the boat for less than it was worth -- $215 per deadweight ton instead of $220. But after the prosecution made its case, a federal judge directed the jury to acquit because there was no evidence of a bribe or of fraud. Paul Yaselli then filed a lawsuit arguing that the prosecution, led by a prosecutor named Guy Goff, had been malicious. By the the time suit had reached federal appeals court, Guy Goff had become U.S. Senator Goff representing West Virginia. So it’s

possible that having a sitting U.S. Senator as the defendant did not bode well for the first prosecutorial immunity case to reach the Supreme Court. And it's also possible that, however baseless the prosecution was, it seemed to the courts to be an issue of national security. In 1920, when the Italian Star Line bought the boat, Italian anarchists had just set off bombs in Washington, D.C., and elsewhere, and the federal government was rounding up and deporting Italian immigrants without much regard to their guilt or innocence on the orders of U.S. Attorney General A. Mitchell Palmer, who, as it happens, had personally appointed Goff to investigate Yaselli. So maybe the steamboat company, which was going to be bringing more Italian immigrants to the U.S., got caught up in the larger affairs of the moment. Or maybe the government really did think Yaselli, who actually was a former federal prosecutor himself, had committed fraud. In any event, the holding in the case -- that federal prosecutors would be absolutely immune from suit -- left open the question of whether state and local prosecutors could still be held liable. Because unlike with federal prosecutors, Congress had legislated. And in 1871, when Congress passed Section 1983, the very last thing Congress would have wanted to do was give state prosecutors total immunity for violating the Constitution.

Margaret Johns: There was thousands of cases where Southern prosecutors were prosecuting soldiers and Reconstruction workers for enforcing Reconstruction, for enforcing anti-slavery laws. So when Congress adopted the law in 1871, they knew this. That's what they were reacting against. The whole point of Section 1983 was to impose federal liability where it had never existed before.

John: After the Civil War, remedies that had long existed at common law to protect against baseless prosecutions had been rendered meaningless in southern courts. And Congress was well aware of the problem. In 1865, in a report urging Congress to pass an early version of what became the 14th Amendment, the Joint Committee on Reconstruction wrote that the

Amendment was necessary because federal officials and pro-Union Southerners were being prosecuted relentlessly in state courts. According to a former Alabama state court judge, testifying before Congress in 1866, quote: “[a] Union man is liable to be accused of anything, of larceny, burglary, or anything else, and although there is not the least foundation for the charge, an indictment is found against him, simply because he is a Union man.” In Kentucky, within a year of the end of the war, former Confederates filed over three thousands prosecutions against Union officers. So many that one commander, who was a frequent target of such suits, quipped in a letter to the Attorney General that quote: “Congress will have to pass a law extending my life -- lengthen it out a few thousand years that I may [serve] this punishment.” Instead, Congress passed the 14th Amendment. And a few years later, it passed Section 1983 to enforce the 14th Amendment by creating a new remedy against officials like southern prosecutors who were violating the Constitution.

Margaret Johns: The notion that Congress intended to protect Southern prosecutors is just nonsense. It's exactly opposite of what they were trying to do. They knew that state judges would not be enforcing state malicious prosecution laws. So Congress said: We can. We'll come up with our own remedy. And they came up with 1983. So the idea that Congress at the time was thinking about preserving state common law is just malarkey.

John: Nevertheless, as we talked about on Episode 8, starting in 1951 and repeatedly since, the Supreme Court has said when Congress passed Section 1983, it did not intend for its new remedy to be a clean break with common law norms. So if an official would have enjoyed immunity at common law in 1871, the Court said, there was a strong presumption that they should under Section 1983 as well. But in 1871, the criminal justice system looked really different than it does today.

Margaret Johns: In the 1800s if somebody committed a crime against you you went and hired a lawyer to prosecute them. That's way prosecutions worked. It was private prosecution. It was hired by the victim or the victim's family. And that was common. State governments were tiny, and county governments were tiny. There weren't a lot of public employees.

John: Public prosecutors, paid for by taxpayers, were generally pretty rare.

Margaret Johns: Public prosecutors -- to the extent there were any -- they were really stretched thin. They weren't well paid. They didn't have a staff to help them prepare. They had to travel. They had to cover a lot of counties -- like hundreds of miles, seeing the victim like that morning.

John: Given how different the system was in the 1800s, it's far from clear that cleaving to common law norms from that era makes for an ideal starting place for constitutional litigation today. A private lawyer sued for malicious prosecution would have had to pay for his defense and any judgment against him himself. Today we know government officials don't pay litigation costs. But this is the Supreme Court's sandbox, and we're all just playing in it. In 1951, the Court said legislators would have been absolutely immune from suit in 1871, so they would be under Section 1983. And in 1967, it said that judges would have been absolutely immune and further that police officers would have been qualifiedly immune, which, as we discussed on Episodes 6 and 8, was not really true. But, putting that to the side, what did the common law say about immunity for public prosecutors? In 1976, the Supreme Court took a look. In the case of *Imbler v. Pachtman*.

> **Roger Hanson**: Presented before the Court today is the case of *Imbler vs Pachtman* … in this particular case, there has been an allegation in the complaint of knowing use of perjury.

John: That's the lawyer for Paul Imbler, who was convicted and then exonerated of murder, arguing at the Supreme Court.

> **Roger Hanson**: This man did ten years for this crime. Four years on death row, six more in maximum security. … while his children grew up.

John: In 1961, Paul Imbler was a 44-year-old truck driver who tried to rob a gas station with a plastic gun. He didn't get any money, and a few days later he turned himself in to the police, who immediately suspected him of a different crime committed two weeks earlier: the murder of the owner of a small grocery store in Los Angeles.

> **Roger Hanson**: He was within seven days being executed on one occasion, within 21 days being executed on the second occasion.

John: But on closer inspection, the two crimes weren't that similar. Paul Imbler had tried to commit a robbery. The murder in the grocery store, on the other hand, seemed more like an execution. The murderer had walked into the store, shot the victim without saying a word, and ran, leaving the cash register untouched. And then there was the evidence from the scene. The murderer left behind a jacket that witnesses said had hung loosely on him. But it was three sizes too small for Imbler, and it was not made available to the defense. Inside the jacket's pocket, investigators found a razor case with a fingerprint that was definitely not Imbler's. The fingerprint was also withheld from the defense. To make its case, the prosecution relied on an eyewitness.

> **Roger Hanson**: Unquestionably, the prosecutor in this case knew of certain false statements that were being made by his witness and he chose not for whatever reasons he had at that time to correct them.

John: The witness testified that he had had a little trouble with the law in the past and had once voluntarily committed himself to a mental hospital. But he had since gone to college, earned two degrees, and was earning a respectable living as an engineer. But in fact, the witness had multiple felony convictions, not just the one the jury heard about. And his troubles with the law were not in the past. While he was on the witness stand, police officers were at that very moment waiting for him outside the courtroom to arrest him for writing fraudulent checks. Also, he hadn't gone to a mental hospital voluntarily; he'd been sent there by a court that had adjudicated him to be not guilty -- in one of his previous cases -- by reason of insanity. Moreover, he was not an engineer and didn't have any college degrees. Instead, at the time of the murder, he worked for an illegal gambling and loan sharking business that the murder victim had operated out of his grocery store. All of which, had the jury known about it, surely would have made him seem less credible. And the prosecutor, according to Imbler, knew it.

> **Roger Hanson**: This man surely is put on knowledge on what he was doing is not only is wrong biblically, but is wrong legally.

John: After years of appeals, a federal judge overturned Imbler's conviction, finding that the prosecutor had made quote: "reckless use of highly suspicious false testimony." The U.S. Court of Appeals for the Ninth Circuit upheld the judge's ruling, and the Supreme Court refused to hear the state of California's appeal. The state then declined to retry Paul Imbler. Finally a free man, he filed a Section 1983 lawsuit alleging that the prosecutor had violated his constitutional rights.

> **Roger Hanson**: Now, in this particular case as the Court perhaps knows there has been numerous contentions made that it is going to open the floodgates to litigation.

John: At oral argument and in the briefing, Imbler's lawyer repeatedly addressed a theme we've talked about on past episodes. If the Supreme Court agreed to allow Imbler's suit to proceed to trial, wouldn't that throw open up the floodgates to meritless lawsuits? Wouldn't every defendant with an axe to grind turn around and sue the prosecutor?

> **Roger Hanson**: The point is simply that if you have done as extensive litigation as we have done on this particular case, it then gets around the contention that they are being required to respond to a frivolous type of claim.

John: And Imbler's lawyer said no, this case was about a man whose conviction had been overturned after a finding of prosecutorial misconduct. Not that many people get exonerated, and a narrow ruling allowing people in Imbler's shoes to sue would not have opened any floodgates. But Imbler's lawyer also argued that the Court could -- and should -- rule more broadly and allow, for instance, people who had been prosecuted but not convicted to sue as well.

> **Roger Hanson**: I think there are many safety valves that can be accorded here …. Certain pretrial hearings can be held, whereby the plaintiff would be required to make a rather significant showing.

John: Because trial courts are perfectly capable of screening out cases where there isn't sufficiently compelling evidence that a prosecutor was malicious. It is not easy to survive a

motion to dismiss or a motion for summary judgment, both of which have to happen before a case gets to a jury.

> **Roger Hanson**: I don't ask the Court and I do not think it is really necessary to ask the Court to say, yes, the floodgates ought to be opened to allow any sort of lawsuit to be filed against the public prosecutor.

John: The lawyer for the state meanwhile made clear that there was no way Imbler could hold the prosecutor accountable under state law.

> **John Farrell**: He's absolutely immune for malicious prosecution -- that specifies clearly. And the quasi judicial immunity, which we're arguing here, would be also applicable under the California Tort Claims Act.

John: There was also another lawyer at oral argument in *Imbler*. The federal government weighed in as well, and it argued in favor of absolute immunity for prosecutors.

> **Robert Bork**: For these reasons, we think the absolute immunity which a judge has … properly belongs to a prosecutor as well.

John: That was Solicitor General and future Supreme Court nominee Robert Bork, who said that judges might be less willing to overturn convictions if prosecutors could be held liable under Section 1983.

Robert Bork: I think it's true that some courts would be a little loath in a close case to decide that a defendant had been denied his constitutional rights by a prosecutor if that court knew that by doing so he was exposing the prosecutor to a lawsuit for damages.

John: And in 1976, the Supreme Court sided with the government and held unanimously that prosecutors should enjoy total immunity for their prosecutorial acts from claims for damages.

Justice Powell: Allowing such suits would prevent the vigorous and fearless performance of the prosecutor's duties that is essential to the proper functioning of the criminal justice system.

John: That's Justice Powell announcing the Court's decision.

Justice Powell: Although the immunity doctrine leaves the wronged criminal defendant without civil redress, a different rule would disserve the broader public interest.

John: We'll come back to some of the reasons the Court said absolute immunity serves the public interest in a moment. But first, we'll talk about its historical justifications for the doctrine.

Justice Powell: Under the common law, a prosecutor long has enjoyed complete immunity from suits for malicious prosecution.

John: The ruling entirely ignored the history of baseless prosecutions in the South during Reconstruction and Congress' intent to create a new remedy apart from the common law remedies that had proven unfit for the task. Instead, the Court skipped straight to what the

common law said about immunity for prosecutors, and it ruled that indeed prosecutors had enjoyed absolute immunity at common law. But the Court was being extremely slippery.

Margaret Johns: Prosecutorial immunity did not exist in 1871. If they had gone and done the research, they would not have found a prosecutorial immunity case. It did not exist.

John: To paraphrase from an article of Professor Johns': a hypothetical, conscientious congressman researching the common law in 1871 would have found claims for malicious prosecution upheld against public prosecutors, even though there weren't that many public prosecutors back then. Instead, as the Supreme Court acknowledged in *Imbler*, the very first case in American law that granted absolute immunity to prosecutors was decided by the Indiana Supreme Court in 1896 -- 25 years after the passage of Section 1983. The following year, an appeals court in Kentucky went the other way and refused to give a prosecutor immunity, and a few years later courts in California and Hawaii sided with Kentucky. Ultimately, it wasn't until the 1920s that the idea that prosecutors should be immune from suit really became well-settled in the common law.

> **Justice Powell**: Under the common law, a prosecutor long has enjoyed complete immunity from suits for malicious prosecution.

John: So it's true that by the time of the Supreme Court's ruling in *Imbler* there was a tradition of absolute immunity for prosecutors. But that tradition was only a few decades old. And there's no way that Congress in 1871 could have intended to preserve an immunity that did not exist. Nevertheless, the Supreme Court sidestepped its previous rulings that the common law circa 1871 had to be preserved. Perhaps because, in the Court's view, absolute prosecutorial immunity is just a really, really good idea.

> **Justice Powell**: a different rule would disserve the broader public interest.

John: And the Court's reasoning will all be familiar from past episodes. For instance, the Court ruled that the threat of personal liability would undermine prosecutors' independence, and it assumed that prosecutors might face bankruptcy for honest mistakes. Today, we know that's not a reasonable assumption. The Court also said it wasn't just worried about damages -- it was worried that the time prosecutors might spend defending civil suits even before they got to a jury would distract them from their duties. It could quote "impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." Moreover, the Court said that criminal defendants and the public generally had other remedies against prosecutorial misconduct. Here's Justice Rehnquist at oral argument talking to Imbler's lawyer:

> **Justice Rehnquist**: You have some corrective devices available, other than a 1983 action don't you? You have the supervision of the trial judge, your right of appeal in the criminal case, and your right to habeas corpus, which you took advantage of here. That doesn't give you money damages, but it does offer you a route by which you can correct the alleged prosecutorial misconduct.

John: Here's Justice White, pointing out that there could be criminal liability for prosecutors.

> **Justice White**: Is it clear that the knowing use of perjured testimony is a crime … under California law?
> **Roger Hanson**: Yes. There's no question about it.

John: But that said, the Supreme Court was aware that not only had the prosecutor in the *Imbler* case not been prosecuted, he hadn't faced any discipline at all.

> **Roger Hanson**: Nothing has ever happened to this man. He still occupies a significant role in the District Attorney's Office in Los Angeles.
> **Justice White**: Well, I know.

John: Nevertheless, the Court said that each of these other corrective mechanisms and potential remedies were sufficient to deter prosecutorial misconduct. Which maybe in 1976 seemed reasonable, but today we know its not.

Lara Bazelon: When *Imbler* came down in the 1970s, this was when people were actually saying wrongful convictions don't exist. What we know now is that that's not true.

John: That's Professor Lara Bazelon of the University of San Francisco School of Law.

Lara Bazelon: What the Supreme Court is saying in *Imbler* is: Don't worry about the lack of civil liability for prosecutors because the state bar is going to step in and hold prosecutors accountable and is going to discipline them for ethical and constitutional violations.

John: The Court held that quote: "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."

Lara Bazelon: That's basically the operating premise of *Imbler*. And it's false. And I can tell you that by citing statistics that show a tiny, tiny, tiny fraction of prosecutors ever being disciplined in

any sort of way over decades, even though we know of hundreds and hundreds of cases involving official misconduct that they're directly responsible for.

John: For example, the Northern California Innocence Project identified prosecutors in 600 cases in California courts between 1997 and 2009 found by a court to have committed misconduct. The state bar disciplined only six of those prosecutors. And there's every reason to believe that most prosecutorial misconduct goes undiscovered because only 3 percent of criminal prosecutions go to trial. In the other 97 percent of cases, if a prosecutor withholds evidence or commits some other kind of misconduct, it's likely no one is ever going to know once the defendant has pled guilty.

Lara Bazelon: So there's that kind of general, undisputed empirical fact. But then there's also my personal experience, which is that I've decided to stress test that whole idea here in the state of California by bringing bar complaints of my own as an independent outside observer, someone having nothing to do with any of these cases, but learning about them as an academic. And applying the rules and essentially writing up complaints that do the state bar's job for them and include exhibits and arguments that are very, very detailed. And every single one of those complaints has failed.

John: Most recently, in October of 2021.

Lara Bazelon: The prosecutor is an individual named Linda Allen. And in my bar complaint, I talked about two separate cases. The first case involved a man named Jamal Trulove, and she prosecuted him for murder.

John: There was no evidence that Trulove was at the scene of the murder except for the testimony of one eyewitness, whose account changed several times in significant ways.

Lara Bazelon: It was a single ID, a cross-racial ID, a stranger ID. In other words, this was an extremely weak case.

John: But the prosecutor, Linda Allen, told the jury that the witness' inconsistent statements could be explained by the fact that she was afraid for her life.

Lara Bazelon: She said over and over and over again to the jury: you have to believe this witness, you have to believe her, she gave up her whole life. We had to put her in the witness protection program because of the threats that she was facing, strongly implying that those threats came from either Jamal Trulove or his family, and that she had given up her entire life to live in a crummy motel, and constantly be looking over her shoulder. And in fact, the threats were so terrible that the witness' sister and sister's family had also had to be put in witness protection.

John: Jamal was convicted and sentenced to 50 years to life. But in 2014, a state appeals court overturned the conviction because Linda Allen had made all of that up.

Lara Bazelon: There were no facts in the record to support any kind of threats ever having been made to this witness or any justification in fact for putting her in witness protection. Following that decision, which was scalding, she was permitted to try Jamal Trulove again, and she did.

John: At the second trial, the witness testified that she had never been threatened by Jamal or anyone else. And he was acquitted. Ultimately, he spent over six years incarcerated for a crime that he did not commit.

Lara Bazelon: In his civil trial, the jury found that he was actually innocent and that the police had committed serious misconduct to convict him and he was awarded $13 million dollars.

John: He was stabbed while he was in prison, and he was separated from his young children. The real perpetrator has never been identified. That's case #1.

Lara Bazelon: The second case involving Linda Allen was also a murder. And three defendants were charged. She did not turn over a recorded statement by an eyewitness who said that the people who carried out the killing were actually not these three people. It was on a disk labeled number 55. She turned over 51, 52, 53, 54 and 56 and then onward.

John: In his statement, the eyewitness told police he had a terminal illness, and in the four years it took for the district attorney's office finally turn over the disk, he had died. Because of the delay, the defendants' lawyers were unable to interview him, and the three defendants ultimately took plea deals. Linda Allen has never had to face any real accountability for violating the Constitution. But she didn't just violate the Constitution. She also violated the Rules of Professional Conduct of the California state bar, and in *Imbler* the Supreme Court said that would be something prosecutors would have to take seriously.

Lara Bazelon: I filed the Linda Allen complaint in May of 2019. And what the state bar said was with respect to Jamal Trulove, it was too late. They said you exceeded the statute of limitations, which is five years. And they counted to the court of appeals decision, which came down in

January 2014. And they said, well you should have filed by January 2019. And you didn't, you're too late.

John: Which is baffling. His conviction may have been overturned in 2014, but Linda Allen re-prosecuted him, and, according to the state bar's rules, additional proceedings like that mean the deadline to file a bar complaint gets pushed back.

Lara Bazelon: With the *Barnes* complaint, which was the second case, it was even more bizarre. They acknowledged that it was timely by eight months. So it was within the five years, but they said eight months wasn't long enough for them to investigate the case within the five years.

John: The rule is you have five years to file a complaint. The rule is not that both a complaint must be filed and then the bar also completes its investigation in five years.

Lara Bazelon: Which is sort of mind blowing. their reasoning made absolutely no sense. But that was enough to get rid of that complaint.

John: After some appeals, Professor Bazelon asked the California Supreme Court to take up the case. But in October of 2021, in a one-sentence entry on the docket, the court denied the writ. Linda Allen tried to put an innocent person in prison for life. She made stuff up. She hid exculpatory evidence. And she's never been held accountable. Prosecutors can lie and they can cheat and there is no viable remedy for actions committed as part of the scope of their job as prosecutors. However, that does leave the door open just a crack for actions committed outside the scope of their job as prosecutors. In *Imbler*, the Court said prosecutors should only get qualified immunity for non-prosecutorial activities. After in later decisions, the Court began to

flesh out what that meant. In 1991, in the case of *Burns v. Reed*, the Supreme Court confronted another case of wrongful detention.

Alexa Gervasi: *Burns v. Reed* involved a mother in Muncie, Indiana, who was accused of shooting her 7- and 11-year-old sons. And because of that accusation, Cathy Burns spent four months in jail, she lost her job as a police dispatcher, and lost custody of her children for several years.

John: That is my colleague at the Institute for Justice, Alexa Gervasi.

Alexa Gervasi: But ultimately, there was no evidence for these accusations.

John: To get a warrant to search Cathy Burns' house, a prosecutor had told a judge that she had confessed during questioning. But what the prosecutor neglected to mention was that during her supposed confession she was under hypnosis conducted by a grocery-store clerk who had just completed a three-day course in hypnosis.

Alexa Gervasi: And here's the thing she didn't actually confess, she briefly referred to herself in the third person and the investigators were like, close enough. Their theory was she had multiple personalities. And so maybe one of these other personalities had committed the murder. And they were trying to get in touch with the other personality through hypnosis.

John: So Cathy Burns sued and her claims against the prosecutor made it to the Supreme Court.

Alexa Gervasi: When the case reached the Supreme Court, the Court held that part of what the prosecutor had done was entitled to absolute immunity.

John: The Court ruled that asking for a search warrant is something that prosecutors regularly do, and since it is within the scope of a prosecutor's duties it doesn't matter if they do it maliciously or with reckless disregard for someone's constitutional rights.

Alexa Gervasi: It didn't matter that he'd deliberately misled the judge.

John: Separately, though, Cathy Burns had also argued that she should be able to sue the prosecutor for telling police to go forward with the hypnosis in the first place, which was something they had initially had misgivings about.

Alexa Gervasi: On her other claim, the Supreme Court said that giving legal advice to investigators is just part of the investigative role rather than prosecutorial activity. So that's only protected by qualified immunity. So on that claim, the court remanded back to the lower court to decide that claim based on qualified immunity.

John: On remand, the U.S. Court of Appeals for the Seventh Circuit ruled that it wasn't clearly established that using hypnosis in a coercive interrogation was unconstitutional. So -- 10 years after Cathy first filed her suit, 13 years after she'd been put in jail -- the prosecutor got off the hook. And in fact by then he'd been elected to lead the County Attorney's office and one of the investigators who had also misled the judge had been promoted to chief of police. The next case in which the Supreme Court considered whether conduct by a prosecutor was prosecutorial ~~in nature~~ or something else was the case of *Buckley v. Fitzsimmons*.

Alexa Gervasi: In *Buckley versus Fitzsimmons*, which was decided in 1993, a district attorney announced an arrest in a high profile rape and murder case outside of Chicago. But after the suspect had spent 10 months in jail, it came to light that there was no evidence against him and the evidence that had been used up to that point was extremely fishy. There was a bootprint at the scene of the murder, and a series of forensics experts had told the DA they couldn't link that footprint to the suspect.

John: But eventually the DA found a purported expert who said she had developed a method of uniquely identifying people's footprints based on how they walked.

Alexa Gervasi: So even less believable than hypnosis basically.

John: Buckley sued the prosecutor for shopping around for a forensics expert who was allegedly known for her willingness to make stuff up. And the Supreme Court ruled that the prosecutor was not entitled to absolute immunity. Because seeking out experts is investigative rather than prosecutorial in nature.

Alexa Gervasi: Which doesn't make a lot of intuitive sense. It's hard to see how finding experts who are presumably going to testify at a trial is any less a part of a prosecutors job than asking for search warrants. But that's what the Court held.

John: And ultimately, once again, it all come to naught for the plaintiff because on remand, the Seventh Circuit held that the prosecutor was shielded from suit by qualified immunity. Because there was no case on point holding that a prosecutor couldn't shop around for a forensics expert, even one who was in the court's words, "a practitioner of junk science."

Alexa Gervasi: As those two cases illustrate, today we can say that some kinds of conduct is definitely prosecutorial and some is definitely not. But the actual dividing line between the two is hazy and unintuitive. And so lower courts are split on just exactly where the line is in a whole bunch of different scenarios. As one example, in some circuits, prosecutors who fabricate evidence will only receive qualified immunity. In other circuits, however, if the prosecutor uses that fabricated evidence in criminal proceedings, so that it's part of his prosecution, he will receive full absolute immunity. So your rights kind of depend on which state you happen to be in.

John: Ultimately, it's all kind of arbitrary. No matter what a prosecutor does, they are always going to argue they did it in their prosecutorial capacity. And even if a court rules against them on that, they are still protected by qualified immunity. Which is nothing to sniff at.

Charles Rehberg: The DA's office, with no grand jury convened, began issuing what were claimed to be grand jury subpoenas.

John: When Charles Rehberg sued the district attorney in Albany, Georgia he argued that what Ken Hodges had done was investigative activity rather than prosecutorial.

Charles Rehberg: The DA's office, with no grand jury convened, began issuing what were claimed to be grand jury subpoenas.

John: But before we get back to Charles' story, we have to talk about the conduct of the other key figure, the DA's investigator James Paulk, who committed perjury. When Congress passed Section 1983, one thing it plainly had in mind was perjury -- perjury that was going unremedied in southern state courts and that resulted not only in baseless prosecutions of the innocent but

also in the perpetrators of thousands upon thousands of murders and arsons and other outrages going free. In the year 1983, well over 100 years after Congress said there should be a federal remedy against perjury, the Supreme Court finally confronted the question of whether would be a remedy. In the case of *Briscoe v. LaHue*. That's coming up on Part 2. Thanks for listening.

Credits: Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Charles Lipper and Kais Ali at Volubility Podcasting. It is produced by Anya Bidwell and John Ross. For this episode we relied on numerous scholarly works, including by Margaret Johns, Bennett Gershman, Kathleen Ridolfi, Maurice Possley, the National Registry of Exonerations. Audio from the Supreme Court comes from Oyez.