LIGHTLE, RANEY, STREIT & STREIT, LLP

Attorneys at Law
211 West Arch
Searcy, Arkansas 72143-5331

Telephone 501-268-4111
Direct Fax No. 501-279-7733

DONALD P. RANEY
SUSANNAH R. STREIT
JONATHAN R. STREIT

J. E. Lightle, Sr. (1932-45)
J. E. Lightle, Jr. (1936-88)
Cecil A. Tedder, Jr. (1957-78)

November 6, 2018

Mr. Don Hamrick
c/o Patsy Hayes
322 Rouse Street
Kensett, AR 72082

Ref: Kensett v. Don Hamrick

Dear Mr. Hamrick,

I have reviewed 28 USC §1455 concerning the removal of a state criminal prosecution to federal court you have referred to in various emails sent to me. My take on the documents you need to attempt such a removal are copies of all process, pleadings and orders served upon you in the state court action.

Here is a copy of the Affidavit which commenced the Kensett District Court proceeding; a copy of the emails referred to in the affidavit along with your voluminous email dated February 28, 2018. You will also find enclosed a copy of the warrant served on you for the pending charges of Obstructing Governmental Operations and Harassing Communications.

The enclosed documents would appear to me to be the only documents which fall under the headings of process and pleadings. To my knowledge no orders have been entered in this proceeding.

This will also serve to send you a copy of everything I intend to use document wise against you at the proceeding set for November 27th.

Sincerely

Donald P. Raney

Donald P. Raney

cc: Kensett District Court

AFFIDAVIT

PAGE 1 OF 2

STATE OF ARKANSAS **COUNTY OF WHITE** **CITY OF KENSETT**

I _Laura Balentin__ do solemnly swear that __Don Hamrick_in said county of White, did on or about the _28th____day of _March__, ____2018_____commit the offense of:

§ 5-71-209 Harassing Communications (harass - annoy - alarm) class A § 5-54-102(a)(1) Obstructing Governmental Operation (hinder performance) class C

The facts tending to establish the grounds for assurance of a Warrant of Arrest in this matter are as follows:

On Wednesday February 28, 2018 I received several email messages to be forwarded to the court from Mr. Don Hamrick to my email that gets used for water dept business it is not necessarily a personal email but it was created by me for water dept use only and does not belong to the city, I advised Mr. Hamrick that email was not for court communications and I do not forward emails to the court, he continued to harass and somewhat threaten that when he was elected mayor he was going to fire me from my positions with the city. On March 10, 11, & 12 Mr. Hamrick continued to email me about my "attitude" and sent many pages of supposed documents pertaining to his court case which is now closed through our court which I have stated does not concern me during the hours of 8am-430pm M-F or through this email he continues to flood with his requests.

And pray a warrant from said District Court, to arrest and bring Don Hamrick
Before the said court to be dealt with according to law.

Laura Balentine
Signature of Affiant

Address Phone Number

Sworn to and subscribed before me this 12th day of March, 2018

David P. Carey

2

Prosecuting Attorney Donald P. Raney pc approved 3-12-18
Donald Raney

District Court Judge _____, District Court of Kensett
Judge Mark Derrick

WARRANT OF ARREST

WARRANT #: WR-18-165

STATE OF ARKANSAS
COUNTY OF WHITE COUNTY
CITY OF KENSETT

White Co District Court - Kensett Div
P.O. Box 305
202 S.E. First Street
Kensett, Arkansas 72082
(501)742-3191

Name: Hamrick, Donald Lee Jr
Address: 322 Rouse St
Kensett, Arkansas 72082

Home: (501)742-1346
Work:
Party #: 1626

Race: White Hair: Height: 0.00 DOB: 09/15/55 SSN:
Sex: Male Eye: Weight: 0 DL: TN / 136180142
Alias: Employer:

The State of Arkansas To Any Sheriff, Policeman, Constable, Coroner, Jailer, Or Marshal In The State Of Arkansas, Greeting. It Appearing That There Are Reasonable Grounds For Believing That The Above-Named Person Has Committed The Offense(s) Listed Below. You Are Therefore Commanded To Arrest And Bring The Above-Named Person Before Mark Derrick Judge of the White Co District Court - Kensett Div To Be Dealt With According To Law.

Given Under My Hand And Seal Of Said Court This 5th Day Of March, 2018

*** CASH BOND ONLY ***

Mark Derrick
Judge / ~~Clerk~~ of the Court

*** MUST APPEAR ***

WARRANT DETAILS

Issue Date	Case Number	Charge Doc Number	Description	Cash Only	Bond Amt	Warrant Fee	Total
Affidavit							
03/13/18	CR-18-231	WR-18-165	Harassing Communications Repeatedly	Yes	$2,145.00	$0.00	$2,145.00
03/13/18	CR-18-230	WR-18-165	Obstructing Governmental Oper. - Non Force	Yes	$615.00	$0.00	$615.00
			CITY OF KENSETT TOTALS:		**$2,760.00**	**$0.00**	**$2,760.00**

*** CASH BOND ONLY ***

*** MUST APPEAR *** **TOTAL TO COLLECT:** **$2,760.00** **$0.00** **$2,760.00**

I Certify That I Served This Warrant Of Arrest By Then And There Taking Into My Custody The Above-Named Person On The 9th Day Of June, 2018

Matt Duke 712
Officer of Service

Service Fee: $_____
Mileage Fee: $_____
Total Fees: $_____

City Court Date: 7-24-18
City Court Time: 9 AM

County Court Date: _____
County Court Time: _____

****

Filed This 11th Day Of June, 2018

Christina Dobson
Clerk of the Court

Gmail Laura Balentine <lbalentine.kensett@gmail.com>

MORE QUESTIONS FOR CITY ATTORNEY HEATH RAMSEY

1 message

Don Hamrick <ki5ss@yahoo.com> Sun, Mar 11, 2018 at 9:47 PM
To: "kensettmayor@yahoo.com" <kensettmayor@yahoo.com>, Christina Alberson <calberson.kensett@gmail.com>, John Pollard - Kensett Chief of Police <chiefjpollard4@yahoo.com>, Laura Balentine <lbalentine.kensett@gmail.com>

PRINT ATTACHED ON LEGAL SIZE (8.5 x 14 inch) PAPER.

I have Microsot Visio (flow charts), Microsoft Onenote (notebook), Microsoft Office 2016. I am using these programs for my study of the Arkansas Municipal Code (Title 14 Local Government; Subtitle 3 Municipal Government; Chapters 36-62); and Arkansas Code, Title 7 Elections. I am compiling the text of these Chapters into my own handbook using Microoft Word, Visio, and Onenote with my own notations.

SEE THE ATTACHED for my updated Kensett City Hall Organization Chart. This edition questions the number of 6 Council Members. The Arkansas Code says 5. Is there a conflict with the law here or are the 6 council members authorized by another Arkansas Code or Kensett Ordinance authorized by an Arkansas Code?

Can the City Attorney Heath Ramsey or anyone in Kensett City Hall fill in the missing information for my **Kensett City Hall Organization Chart**?

On Sunday, March 11, 2018, 12:23:14 PM CDT, Don Hamrick <ki5ss@yahoo.com> wrote:

SEE ATTACHED PDF (In 8.5 X 14 inch landscape dimension)

KENSETT CITY HALL ORGANIZATION CHART.pdf
121K

5

Gmail Laura Balentine <lbalentine.kensett@gmail.com>

COMPLAINT OF FLOODING DITCHES

6 messages

Don Hamrick <ki5ss@yahoo.com> Wed, Feb 28, 2018 at 12:57 PM
To: Tamara Jenkins <tjenkinsoem@gmail.com>, Carla Johnson <cjohnson@gmail.com>, Christina Aleberson <calberson.kensett@gmail.com>, Laura Balentine <lbalentine.kensett@gmail.com>

SEE ATTACHED

Laura Balentine, presuming Christina still has my email address blocked, please forward the attached to the mayor and town council.

COMPLAINT TO WHITE COUNTY OEM.pdf
1335K

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To: Don Hamrick <ki5ss@yahoo.com>

I do not work for the street department, garbage department, or the court I do not forward emails, this particular email address is for water dept business only! Please refrain from emailing me sir.

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Your request is, however, a proper response, except for your attitude and omission of the Public Works Department email address.

[Quoted text hidden]

Laura Balentine <lbalentine.kensett@gmail.com> Wed, Feb 28, 2018 at 1:38 PM
To: Don Hamrick <ki5ss@yahoo.com>

Sir my response was in no way out of line or presented with an attitude and the city does not have what you continue to refer to as a public works Department but the street and sanitation department does not have an email address if you need something addressed through them I would suggest a phone call to the city hall.

[Quoted text hidden]

Don Hamrick <ki5ss@yahoo.com> 5.1 Wed, Feb 28, 2018 at 3:09 PM

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DON HAMRICK
NEXT MAYOR OF KENSETT

[Quoted text hidden]

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[Quoted text hidden]

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14

Don Hamrick
322 Rouse Street, Kensett, Arkansas 72082

Wednesday, February 28, 2018

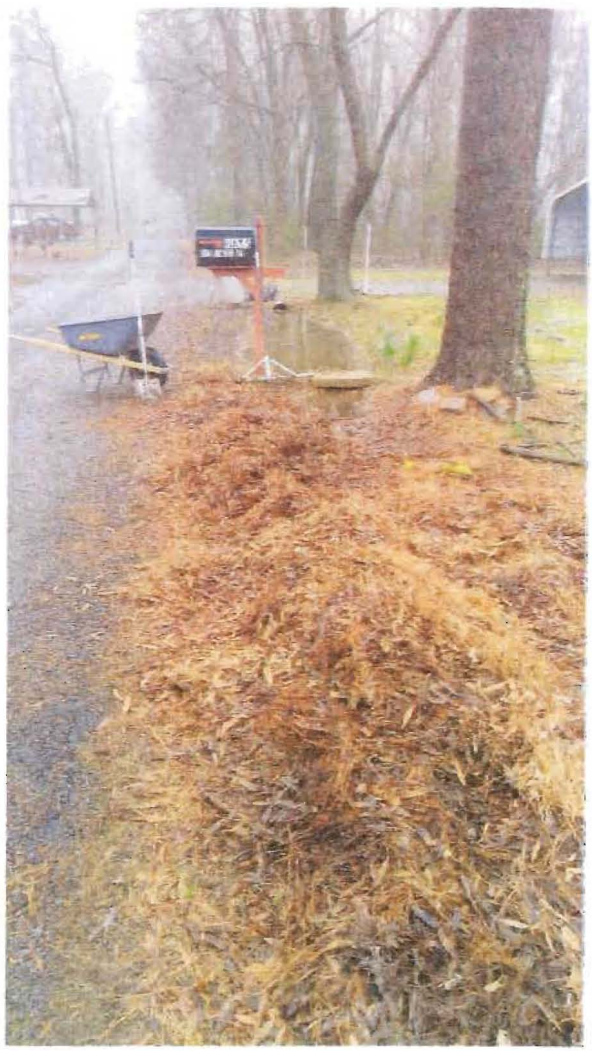
Email: ki5ss@yahoo.com

Tamara Jenkins, Coordinator
White County Office of Emergency Services
2301 East Line Road
Searcy, AR 72143

"See Something? Say Something!"
But Nothing Gets Done!
Then Do Something That's Legally Correct & Proper!

That title applies not only to the federal, state, and county level of governments concerning suspiciously threating and dangerous things or events but it also applies to mundane, routine, and boring things such as blocked neighborhood ditches in violation of a federal, state, and/or county flood control program.

Yes! Nothing has been done about my suggestion to improve the drainage of ditches in Kensett. I have complained of this during draught and flood seasons and nothing gets done. Maybe it is because my boring complaint is a boring topic for its boring redundancy. A redundancy is also boring in itself! (*The redundant humor is intended for its redundancy*). How many times do I have to complain? To the point of redundancy. *Jeezopete!*

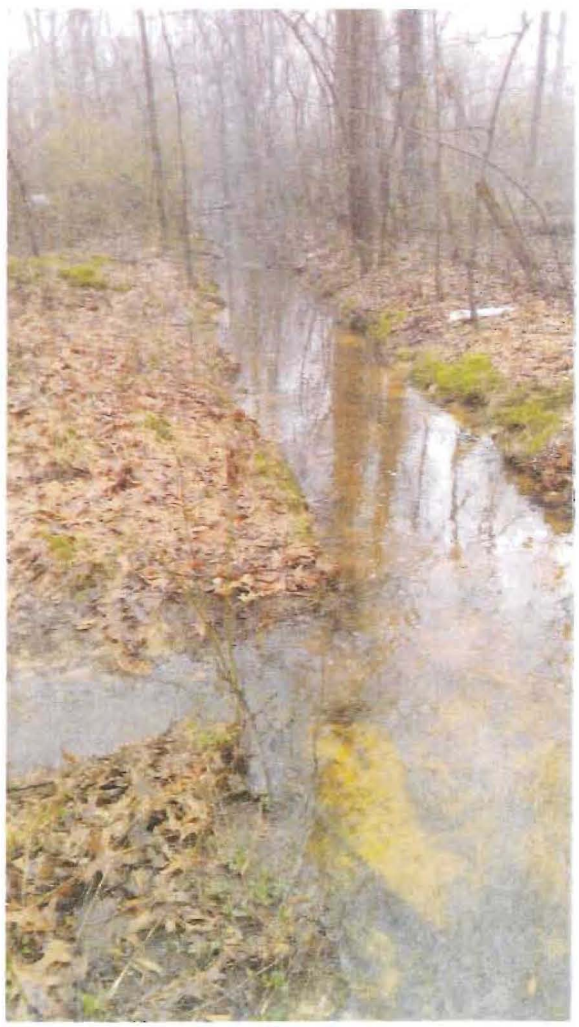


What Did I Do
That's Legally Correct & Proper?

Today, I made another attempt to get the flooded Rouse Street ditch rain water to flow into the neighborhood's main ditch at the dead-end of Rouse Street as the following phots show:

Yesterday, I bought a $50 wheel-barrow at Lowe's and I began clearing the ditch at my residence at 322 Rouse Street shown at right. The wheelbarrow speeds up the transfer of leaves and pine needles from Rouse Street to Doniphan Street for the 3rd Monday of each month's run of City of Kensett's vacuum truck. The following photos show my attempt to clear the leaves from my residence to the dead-end with my landscaping rake.

15



The photo below shows the Venturi Effect of this ditch (*smaller width*) with faster flow compared to the *larger width* ditch upstream and the *larger width* main ditch downstream.

16

The photo below shows my property at the corner of Rouse Street and Doniphan Street. The lemon-yellow gas line warning post and the yellow flags along Rouse Street planted directly in the what would be a ditch if it were further down Rouse Street were a direct result of my 811 call for surveys from the utilities last fall. The spray paint markings are new as of yesterday after I bought the wheelbarrow at Lowe's yesterday morning.

About the Piles of Tree Branches

During the first week of April, next month, I will pay Asplundh Wood Chipping Service $600 to chip all the piles of pine tree branches and other wood types in my yard and straddling the ditch. I will have Asplundh throw the chips back into my yard so I can later spread and till the chips back into the soil. I will then remove pine tree stumps. And when I can afford it, I will then haul in one or two dump truck loads of topsoil to spread and slope the new topsoil so future rain water will flow toward the ditches. I will then either throw grass seed or buy rolls of sod for my yard.

The spray paint markings at the intersection of Rouse Street and Doniphan Street imply that the City of Kensett is preparing to replace the drain pipe under Rouse Street. The drain pipe apparently got crushed on the gas warning post side of the drain pipe by the weekly garbage truck making their left turn North onto Doniphan Street after backing down Rouse Street to pick up garbage. I appreciate the forthcoming replacement of the drain pipe. But the apparent apathy of the City of Kensett over clogged and blocked ditches in the neighborhood is the subject of this complaint.

Conclusion

It is not my job to clean neighborhood ditches, even if it is to help alleviate flooding during rainy days for the benefit of the neighborhood. That's the job of the Coordinator of the White County Office of Emergency Management when the City of Kensett ignores or refuses that job. This complaint is my attempt to keep the City of Kensett and White County Government accountable for their inactions in their mundane and boring obligations to their citizens.

Sincerely,

Don Hamrick

Don Hamrick

17

Gmail Laura Balentine <lbalentine.kensett@gmail.com>

VARIOUS

1 message

Don Hamrick <ki5ss@yahoo.com> Sat, Mar 10, 2018 at 9:38 PM
To: Laura Balentine <lbalentine.kensett@gmail.com>

YOU STATED: In your February 28 email: ". . . the city does not have what you continue to refer to as a public works Department but the street and sanitation department does not have an email address . . ."

MY REBUTTAL: Online from the Arkansas Municipal League: Kensett City Officials lists "Steve Brown" as the Director of Public Works. Can you clarify why you assert "Street and Sanitation Department." Which is the correct job title?

IN YOUR NEXT EMAIL YOU STATED: ". . . and what you are returning to me is considered **personally threatening and harassing** and if you continue to do so I will have no other choice but to pursue an affidavit for said charges.

MY REBUTTAL: My emails to you? NO WAY were they personally threatening or harassing. I am running for Mayor of Kensett. My comments to you were strictly **political** under the First Amendment right to freedom of speech because you are a public employee accountable to the people of Kensett on the possibility that I might be elected Mayor of Kensett. My comments to you were, and are based on the language and tone of your emails. Your emails were, in fact, rude and defensive. Your use of the phrase "***personally threatening***" indicates that you tend to exagerate. That seems to be the S.O.P. for the City of Kensett because I was falsely arrested and falsely jailed by John Polard. I was maliciously prosecuted by Don Raney even though the first 9 seconds of the arrest video proved my innocence. I forced Judge Mark Derrick to recuse himself from his hostile display of bias resulting from my Motion for Recusal during the pre-trial stage. The replacement judge, (Special Judge?) Milas Hale falsely convicted me for assualt immediately after I proved my innocence to the charge of Domestic Battery in the 3rd Degree then immediately adjourned. That is an abuse of my due process rights.

I strongly suggest you reconsider your legal threat to pursue an affidavit for your alleged charges based on your exaggeration of your presumed facts not in evidence. I direct your attention to Arkansas Code § 5-54-122. Filing false report with law enforcement agency.

WHY? I know my rights and I know the law, federal and state. SEE THE ATTACHED PDF.

I filed a civil complaint against Judge Mark Derrick in the U.S. District Court in Little Rock. Dismissed by Judge Moody (I am claiming judicial bias because he dismissed my Second Amendment case in 2006 against President Bush). Appealed to the 8th Circuit—dismissed (rubber-stamping the lower federal court). I submitted my Motion for Rehearing. I filed seven Addendums to Motion for Rehearing. The last was my post-false-conviction making a fully developed case on appeal. In my appeal I am demanding certain remedies, the most important is my demand for an FBI Public Corruption

investigation into the Kensett District Court that I have characterized as a kangaroo court.

Where I was falsely convicted as an innocent defendant that begs the question for the FBI. How many innocent defendants were convicted before me?

All this is part my my campaign platform:

Make Kensett a Corruption Free Zone.

Gmail Laura Balentine <lbalentine.kensett@gmail.com>

VARIOUS

1 message

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KENSETT CITY HALL ORGANIZATION CHART

Contact Information
202 S.E. First St.
KENSETT, AR 72082
Phone: (501) 742-5156
Fax: (501) 742-3297

Meetings: Third Tuesday Each Month
Web Site: Official Web Site
Email: kensettmayor@yahoo.com

SOURCES
Arkansas Municipal League
Kensett City Hall Website

ONLINE SERVICES

White County Personal Property Tax
https://www.ark.org/whitecounty/index.php

White County Real Estate Tax
https://www.ark.org/whitecounty/index.php

Don Hamrick, Candidate for Mayor of Kensett,
Below are my legal questions for the City Attorney Heath Ramsey to answer.
Please cite the Arkansas Code that authorizes these dual position jobs.

The same double dipping question for ***Christina Alberson***.

MANAGING & PLANNING

MAYOR OF KENSETT, ARKANSAS
Alan Edge

CITY ATTORNEY
Heath Ramsey

ASSISTANT TO THE MAYOR
Christina Alberson? *

RECORDER/TREASURER
Melissa Brown

COUNCIL MEMBERS
Keith Baker
Clarence Chatmon
Kenneth Cooperwood
Don Fuller
Ella Watson
D. P. Williams

EMERGENCY SERVICES

POLICE CHIEF
John Polard
ASSISTANT POLICE CHIEF
Derek Balentine
INVESTIGATOR/OFFENDER REGISTRY
Laura Balentine? **

FIRE CHIEF
Tommy Jones

ANIMAL SERVICES
Melissa Clark
Animal Control Officer

KENSETT DISTRICT COURT

DISTRICT JUDGE
Mark Derrick

DISTRICT COURT CLERK
Christina Alberson? *

INFRASTRUCTURE MAINTENANCE

DIRECTOR OF PUBLIC WORKS
Steve Brown
Building Permits & Inspections
- Conducting building construction inspections
- Issuing building permits
- Issuing certificate of occupancy permits
- Reviewing building plans
- Working directly with the Planning and Zoning Commission

PARKS & RECREATION DEPARTMENT
- **PARK FACILITIES**
- **PARKS PROGRAMS**

WATER UTILITIES
Water & Sewage Department Clerk ***Laura Balentine?*** **
- Meter Reading
- Meter Rates & Policies
- Water Quality Report*

**Annual Drinking Water Report is currently available at*
www.healthy.arkansas.gov/eng/ccr588.pdf
or in our office at 202 SE 1st St.

STREET SUPERINTENDENT
David Free

SANITATION & RECYCLING DEPARTMENT

STATE ONLINE SERVICE

Car Tag/Registration Renewals || http://www.arkansas.gov/dfa/star_intro.html
Hunting and Fishing Licenses || https://www.ark.org/agfc/license/index.php
Sex Offender Registry || http://www.acic.org/soff/index.php
Child Support Payments || http://www.arkansas.gov/dfa/child_support/ocse_index.html
Arkansas Vacation Kit || http://www.arkansas.com/helpful-info/free-vacation-kit/
Arkansas Trails Search || http://www.arkansas.gov/ha/trails/index.php

LEGALITY IN QUESTION
DOUBLE DIPPING?
Can ***Laura Balentine* Be Both a Kensett Police Officer AND an Employee of Kensett Water & Sewage Department?

No. 18-1053

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DON HAMRICK
322 ROUSE STREET
KENSETT, AR 72082
v.
JUDGE MARK DERRICK (recused)
KENSETT DISTRICT COURT
KENSETT, AR 72082

RE: U.S. District Court, Eastern Dist. AR, No. 4:17-MC-00018-JM
RE: Kensett District Court, Case No. RPS #17-00012

DEMAND FOR WRIT OF ERROR CORAM NOBIS TO THE U.S. DISTRICT COURT, LITTLE ROCK UNDER 28 U.S. CODE § 2201(A) CREATION OF REMEDY AND 28 U.S. CODE § 2202 - FURTHER RELIEF AS MY SUMMARY ADDENDUM TO MOTION FOR REHEARING

Friday, March 7, 2018

Because I am not an attorney I use law review articles to speak for me on particular issues concerning subject matter jurisdiction for the federal court and for the Kensett District Court, Kensett, Arkansas.

My *MOTION FOR REHEARING* is based on my *DEMAND FOR WRIT OF ERROR CORAM NOBIS* to the *U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, LITTLE ROCK*, and the *EIGHTH CIRCUIT* remanding the case **NOT TO JUDGE MOODY OF THE DISTRICT COURT FOR JUDICIAL BIAS, BUT TO THE CHIEF JUDGE**. It is my intent and purpose for the appended *COMPLAINT OF FALSE CONVICTION OF A FACTUALLY INNOCENT DEFENDANT* to the U.S. District Court, Little Rock to serve as both my civil complaint for damages (not withstanding the Federal Tort Claims Act) and as my criminal complaint for a court ordered FBI Public Corruption investigation and prosecution of Judge Mark Derrick, Judge Milas Hale, and Prosecutor Don Raney for a variety of federal and state offenses including **false arrest, false imprisonment, malicious prosecution, false conviction of a factually innocent defendant, and violations of my constitutional and statutory rights under *18 U.S. CODE § 241 CONSPIRACY AGAINST RIGHTS* and *18 U.S. CODE § 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW*.**

My demand for *WRIT OF ERROR CORAM NOBIS* to the *EIGHTH CIRCUIT* with my intention that the writ is to be relayed to the *U.S. DISTRICT COURT, LITTLE ROCK* is based on my federal

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and state constitutional rights as a free citizen of the United States and the State of Arkansas. **Denial of my demand *WRIT OF ERROR CORAM NOBIS* will be construed as an affirmation of my status as a non-citizen, a slave, with no enforceable rights as described on pages 2 and 3 of the appended Complaint to the U.S. District Court.**

My demand is also based on the *PRINCIPLE OF LEGALITY IN A CRIMINAL PROCEDURE* for my protection against prosecutorial and judicial bias and misconduct that should have protected me from *false arrest, false imprisonment, malicious prosecution, false conviction of a factually innocent defendant, and violations of my constitutional and statutory rights.* But as you see, the *PRINCIPLE OF LEGALITY IN A CRIMINAL PROCEDURE* did not protect me this far. I construe this failure of protection to allege that my status is now and has been since 2002 that of a non-citizen, a slave, with no enforceable rights because I have tried to enforce my rights in the federal courts without success. **The legality of the cause and effect principle means that I am a slave with no enforceable rights in violation of the Thirteenth and Fourteenth Amendments to the U.S. Constitution. The federal courts stand in violations of my rights as a free citizen of the United States. (AGAIN, *See pages 2-3 of the appended Complaint to the U.S. District Court Little Rock*) This is a logical and a legal claim. Therefore, I have successfully STATED A CLAIM TO WHICH I HAVE A RIGHT TO A JUDICIAL REMEDY.**

My mother has emotional/behavior problems, Oppositional Defiant Disorder, Intermittent Explosive Disorder, Histrionics Disorder, anger issues, all making her prone to making false accusations out of passing anger and paranoia (suspecting early stage of Alzheimer's and Dementia). I am my mother's live-in caregiver. I was arrested January 18, 2017 during one of my mother's raging anger episodes, the police claiming Domestic Battery in the 2nd Degree but altering the arrest ticket to 3rd Degree. I did not commit any offense against my mother.

Being a caregiver to my own mother is a sacred right in the King James Bible, Exodus 20:12 "*Honour thy father and thy mother: that thy days may be long upon the land which the Lord thy God giveth thee.*" This sacred right is protected by the Privileges and Immunities Clause of the U.S. Constitution and the Fourteenth Amendment.

Citing Margaret Z. Johns, *UNSUPPORTABLE AND UNJUSTIFIED: A CRITIQUE OF ABSOLUTE PROSECUTORIAL IMMUNITY*, 80 Fordham Law Review 509 (2011).[1] *See* pages 36–37 of the appended Complaint to the U.S. District Court, Little Rock:

> Congress—buttressed by the constitutional authority of the Fourteenth Amendment, which was ratified in 1868—expanded the scope of the 1866 Act by adding the civil liability provision of the *KU KLUX KLAN ACT* of 1871, which **prohibited any person from depriving any citizen of the rights, privileges, and immunities secured by the Constitution.**[2]

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[1] Available at: http://ir.lawnet.fordham.edu/flr/vol80/iss2/4

[2] *KU KLUX KLAN ACT OF 1871*, ch. 22, § 1, 17 Stat. 13, 13 (codified at 42 U.S.C. § 1983). The 1871 Act also included criminal penalties for conspiring to violate civil rights, authorized the President to send

These remedial provisions were intended to be broadly construed. Thus, Representative Shellabarger declared:

> **This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. . . . [T]he largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.** [3]

As this history shows, when § 1983 was adopted in 1871, the common law did not recognize absolute prosecutorial immunity. In fact, prosecutors were liable in common law tort actions for malicious prosecution.

Therefore, I add another Claim for a judicial remedy, the violation of my First Amendment right to religious freedom as applied to my false arrest, false imprisonment, and false conviction for an offence I did not commit and for the false conviction for an offense I was not originally arrested for, Domestic Battery in the 2nd or 3rd Degree since being a caregiver to one's own mother is a religious right under Exodus 20:12.

APPENDED: COMPLAINT OF FALSE CONVICTION OF A FACTUALLY INNOCENT DEFENDANT

Submitted

Don Hamrick
322 Rouse Street
Kensett, Arkansas 72082
Email: ki5ss@yahoo.com
Phone: (501) 742-1340

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military forces to suppress violence aimed at depriving civil rights of citizens and other persons, and authorized the suspension of habeas corpus for a limited time. *Id.* §§ 2–4, 17 Stat. at 13–15.

[3] *CONG. GLOBE, 42ND CONG., 1ST SESS.* APP'X 68 (1871); *see also id.* at 217 (remarks of Sen. Thurman) (expressing his opposition by remarking that "there is no limitation whatsoever upon the terms that are employed [in § 1983], and they are as comprehensive as can be used"); CONG. GLOBE, 42ND CONG., 1ST SESS. 800 (remarks of Rep. Perry) ("Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied."); *id.* at 476 (remarks of Rep. Dawes) (the person who "invades, trenches upon, or impairs one iota or tittle of the least of [constitutional rights], to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor").

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
500 West Capitol Avenue, Little Rock, Arkansas 72201

Don Hamrick 322 Rouse Street Kensett, AR 72082 **PLAINTIFF**	) **CASE NUMBER**))) **CIVIL CASE FOR DAMAGES**) ***28 U.S. Code § 1331 - FEDERAL QUESTION***
v.	) 28 U.S. Code § 1343(a)(1)-(4) CIVIL RIGHTS) 28 U.S. Code § 1455(a) PROCEDURE FOR REMOVAL OF CRIMINAL PROSECUTIONS
Judge Milas Hale (Special Judge) Kensett District Court 101 NE First Street Kensett, AR 72082	) 28 U.S. Code § 1651 WRITS) 28 U.S. Code § 1652 STATE LAWS AS RULES OF DECISION) 28 U.S. Code § 1657 - PRIORITY OF CIVIL ACTIONS) 28 U.S. Code § 1915(a)(1) PROCEEDINGS IN FORMA PAUPERIS) 28 U.S. Code § 2201(a) CREATION OF REMEDY
Judge Mark Derrick (Recused Judge for judicial bias) Kensett District Court 101 NE First Street Kensett, AR 72082	) 28 U.S. Code § 2202 - FURTHER RELIEF) 28 U.S. Code § 2283 - STAY OF STATE COURT PROCEEDINGS) 42 U.S. Code § 1981(a) & (c) EQUAL RIGHTS UNDER THE LAW) 42 U.S. Code § 1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS) 42 U.S. Code § 1985(2) & (3) CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS) 42 U.S. Code § 1986 ACTION FOR NEGLECT TO PREVENT
Prosecutor Don Raney Kensett District Court 101 NE First Street Kensett, AR 72082 **DEFENDANTS**	) 42 U.S. Code § 1988 PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS)) **FEDERAL CRIMES (ALLEGATIONS VS DEFENDANTS)**) 18 U.S. Code § 241 CONSPIRACY AGAINST RIGHTS) 18 U.S. Code § 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW
	)) **FRCvP Rule 5.1. Constitutional Challenge to a Statute**) **28 U.S.C § 2403(a) & (b) Intervention by United States [and] a State; Constitutional Question**

COMPLAINT OF FALSE CONVICTION OF A FACTUALLY INNOCENT DEFENDANT

RELATED CASES

RE: 8th Circuit, No. 18-1053 (Pending Motion for Rehearing)

RE: U.S. District Court, Eastern Dist. AR, No. 4:17-MC-00018-JM (Wrongfully Dismissed)

RE: Kensett District Court, Case No. RPS #17-00012 (Falsely Convicted)

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INTRODUCTION

Having No Enforceable Rights in Federal Courts is Slavery

LATIN: Caveat! Dominus foederati atrii habet in factus est parte sputa! Adfecte nulla urgeri righto inquit sum ast habens servolus.

TRANSLATED: Beware! The federal court has become the slaver! With no enforceable rights I am but a slave.

Even when I have law review articles addressing particular issues for me (because I am not an attorney) I still get ignored and dismissed because I am not an attorney. That is the epiphany of judicial bias and corruption.

In all of the federal civil rights cases I have filed (2002-2006) for the Second Amendment right to openly and concealed carry in intrastate and interstate travel (nationwide) from a merchant seaman's perspective, every one of these cases were dismissed. I appealed all the way up to the U.S. Supreme Court, TWICE, without an attorney to represent me. I had two U.S. Courts of Appeals with opposing opinions on the Second Amendment. One Court of Appeals said the Second Amendment is an individual right. The other said it is not an individual right. An employee at the U.S. Supreme Court told me that having two opposing opinions from two U.S. Courts of Appeal on the same issue *guaranteed* that my case will get placed on the docket to be heard. **My appeal was denied!**

Apparently my appeal was too much of a political hot potato, as I intended it to be, for the U.S. Supreme Court because they presumptively do not believe National Open/Concealed Carry under the Second Amendment will stop mass murder. *See*, Heather A. Butler, *WHY DO SMART PEOPLE DO FOOLISH THINGS? INTELLIGENCE IS NOT THE SAME AS CRITICAL THINKING AND THE DIFFERENCE MATTERS,* Scientific American | Behavior & Society, October 3, 2017. Available at www.scientificamerican.com/article/why-do-smart-people-do-foolish-things/

Now, when I am an innocent defendant representing myself at the Kensett District Court in Arkansas, the two judges, (*I forced the first judge to recuse himself for judicial bias; the replacement judge presumptively convicted me on a lesser offense in retaliation for forcing the first judge's recusal (my political opinion)*) both ignored my exculpatory motions proving my constitutional protections from false arrest, false imprisonment, and false conviction; and proving my innocence. (*That is a Fact!*)

All of this amounts to an undeniable conclusion that I have no enforceable rights in any court. Having no enforceable rights portrays me to be a slave with no enforceable rights at all. There is distinctly the undeniable existence of judicial bias, prejudice, or perhaps hatred against civil plaintiffs and innocent defendants getting falsely convicted in retaliation for representing themselves in local, state, and federal court. (*Excuse my redundancy*). **It's the nature of the beast, I suspect. I am now forced to use Bold Font to emphasize facts supporting my rights and facts proving my innocence. *Otherwise, I will get ignored and dismissed again!***

If the U.S. District Court for the Eastern District of Arkansas dismisses this civil complaint herein then the U.S. District will confirm my status as a slave with no enforceable rights at all.

Citing from Jerry Bonanno, *FACING THE LION IN THE BUSH: EXPLORING THE IMPLICATIONS OF ADOPTING AN INDIVIDUAL RIGHTS INTERPRETATION OF THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION*, 29 Hamline L. Rev. 461, Summer, 2006:

> . . . abolitionist Frederick Douglass argued against limited readings of the term "the people," which contributed to the constitutional survival of slavery.[4] Mr. Douglass questioned interpretations that substituted a part of the people for the whole people.[5]
>
> He wrote that such selective readings of the term disregarded "the plain and commonsense reading of the instrument itself; by showing that the Constitution does not mean what it says, and says what it does not mean.56[6]

Citing Frederick Douglass. [1857] (1985). "*THE SIGNIFICANCE OF EMANCIPATION IN THE WEST INDIES.*" Speech, Canandaigua, New York, August 3, 1857; collected in pamphlet by author. In THE FREDERICK DOUGLASS PAPERS. SERIES ONE : SPEECHES , DEBATES, AND INTERVIEWS. Volume 3: 1855-63. Edited by John W. Blassingame. New Haven: Yale University Press, p. 204:

> "Let me give you a word of the philosophy of reform. The whole history of the progress of human liberty shows that all concessions yet made to her august claims, have been born of earnest struggle. The conflict has been exciting, agitating, all-absorbing, and for the time being, putting all other tumults to silence. It must do this or it does nothing. If there is no struggle there is no progress. Those who profess to favor freedom and yet depreciate agitation, are men who want crops without plowing up the ground, they want rain without thunder and lightening. They want the ocean without the awful roar of its many waters."
>
> "This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will. Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them, and these will continue till they are resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress. In the light of these ideas, Negroes will be hunted at the North, and held and flogged at the South so long as they submit to those devilish outrages, and make no resistance, either moral or physical. Men may not get all they pay for in this world; but they must certainly pay for all they get. If we ever get free from the oppressions and wrongs heaped upon us, we must pay for their removal. We must do this by labor, by suffering, by sacrifice, and if needs be, by our lives and the lives of others."

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[4] Stephen P. Halbrook, *THAT EVERY MAN BE ARMED : THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 54 at 104 (Univ. of N.M. Press 1984) (citing 5 Frederick Douglass, LIFE AND WRITINGS 201, 375 (Foner ed., 1950)).

[5] *Ib.*

[6] Id. (citing 2 Frederick Douglass, LIFE AND WRITINGS 56, 201, 420 (Foner ed., 1950)).

PARTIES

1. PLAINTIFF:

Don Hamrick, 322 Rouse Street, Kensett Arkansas, 72082 (*falsely charged with an offense I did not commit, but having proved my innocence of that offense and that charge was dismissed Judge Milas Hale instantly blindsided me by convicting me of a lesser offense at the last second before adjournment without a continuance to prepare for that lessor offense.*)

2. DEFENDANTS:

Judge Milas Hale, Judge Mark Derrick (*recused for judicial bias*), and **Prosecutor Don Raney**, are all members of the Kensett District Court, 101 NE First Street, Kensett, AR 72082.

JURISDICTION

This case arises under the First, Sixth, Ninth, and Tenth Amendments to the Constitution of the United States and under the federal laws listed in the caption of this complaint.

CONSTITUTIONAL CHALLENGE

This case presents federal questions within this court's jurisdiction pursuant to the *FRCvP RULE 5.1. CONSTITUTIONAL CHALLENGE TO A STATUTE* and *28 U.S.C § 2403(a) & (b) INTERVENTION BY UNITED STATES [AND] A STATE; CONSTITUTIONAL QUESTION*

Citing *Schermerhorn* v. *State of Arkansas*, 2016 Ark. App. 395 (September 14, 2016) *An ironclad rule of law is that an appellant must raise an issue in the circuit court and support it with a sufficient argument and legal authority, if there is any, to preserve it for an appeal. Raymond v. State, 354 Ark. 157, 162, 118 S.W.3d 567, 571 (2003). This is true even when the issue concerns the constitutionality of a statute. Id. If a particular theory was not presented to and ruled upon by the circuit court, then the theory will not be reviewed on appeal. Id. In other words, an appellant has the burden of providing a record sufficient to demonstrate reversible error. Id.*

DECLARATORY JUDGMENT

The court has the authority to issue a declaratory judgment under *28 U.S.C. § 2201 CREATION OF REMEDY* and to issue injunctive relief under *28 U.S. CODE § 1343(A)(1)-(4) CIVIL RIGHTS* and *FEDERAL RULES OF CIVIL PROCEDURE - RULE 65 INJUNCTIONS AND RESTRAINING ORDERS.* But I still demand a jury trial.

CONSTITUTIONAL AMENDMENTS

Amendment I

> Congress shall make no ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of *the nature and cause of the accusation*; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment IX

> The enumeration in the Constitution, *of certain rights, shall not be construed to deny or disparage others retained by the people.*

Amendment X

> The *powers* not delegated to the United States by the Constitution, nor prohibited by it to the states, are *reserved* to the states respectively, or *to the people*.

U.S. DISTRICT COURT

28 U.S. Code § 1331 - FEDERAL QUESTION

> *The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.)*

28 U.S. Code § 1343(a)(1)-(4) CIVIL RIGHTS

> *The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:*
>
> *(1) To recover damages for ... deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;*
>
> *(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;*
>
> *(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;*
>
> *(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.)*

28 U.S. Code § 1455(a) PROCEDURE FOR REMOVAL OF CRIMINAL PROSECUTIONS

A defendant ... desiring to remove any criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such prosecution is pending a notice of removal signed pursuant to RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant ... in such action.

28 U.S. Code § 1651 WRITS

(a) *The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.*

(b) *An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.*

28 U.S. Code § 1652 STATE LAWS AS RULES OF DECISION

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S. Code § 1657 - PRIORITY OF CIVIL ACTIONS

(a) *Notwithstanding any other provision of law, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any action brought under chapter 153 or section 1826 of this title, any action for temporary or preliminary injunctive relief, or any other action if good cause therefor is shown. For purposes of this subsection, "good cause" is shown if a right under the Constitution of the United States or a Federal Statute (including rights under section 552 of title 5) would be maintained in a factual context that indicates that a request for expedited consideration has merit.*

28 U.S. Code § 1915(a)(1) PROCEEDINGS IN FORMA PAUPERIS

Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such ***prisoner*** [7] *possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.*

28 U.S. Code § 2201(a) CREATION OF REMEDY

In a case of actual controversy within its jurisdiction, ... as determined by the administering authority, any court of the United States, upon the filing of an

[7] OBJECTION: Proceeding In Forma Pauperis is not limited to prisoners. The error implying that Proceeding In Forma Pauperis is limited to prisoners must be corrected.

appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S. Code § 2202 - FURTHER RELIEF

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.)

28 U.S. Code § 2283 - STAY OF STATE COURT PROCEEDINGS

*A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or **where necessary in aid of its jurisdiction**, or to protect or effectuate its judgments.*

42 U.S. Code § 1981(a) & (c) EQUAL RIGHTS UNDER THE LAW

(a) Statement of Equal Rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(c) Protection Against Impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S. Code § 1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. ... .

42 U.S. Code § 1985(2) & (3) CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

(2) Obstructing Justice; Intimidating Party, Witness, or Juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any

verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, 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 within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S. Code § 1986 ACTION FOR NEGLECT TO PREVENT (*Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.*

42 U.S. Code § 1988 PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS:

(a) APPLICABILITY OF STATUTORY AND COMMON LAW

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the

protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.)

FEDERAL CRIMES

18 U.S. Code § 241 CONSPIRACY AGAINST RIGHTS

If two or more persons conspire to ... oppress, ... any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined under this title or imprisoned not more than ten years, or both; ... .

18 U.S. Code § 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

VENUE

Venue properly rests in the U.S. District Court for the Eastern District of Arkansas under *28 U.S. CODE § 1391(B)(1) VENUE GENERALLY.*

Citing The Law Review Articles Herein is My Requisite Part of Stating a Claim

CHALLENGING THE CONSTITUTIONALITY OF A STATE & FEDERAL LAW

I hereby challenge the constitutionality of the following *FEDERAL LAWS* and the following *ARKANSAS STATE LAWS* in accordance with *28 U.S.C § 2403(a) & (b) INTERVENTION BY UNITED STATES [AND] A STATE; CONSTITUTIONAL QUESTION* and FRCvP *RULE 5.1. CONSTITUTIONAL CHALLENGE TO A STATUTE*:

THE FALSE ARREST/IMPRISONMENT/CONVICTION QUESTION:

U.S. Code
Title 42 - The Public Health and Welfare
Chapter 118 - Alzheimer's Disease and Related Dementias Research
Subchapter I - General Provisions

42 U.S. Code § 11201 - Findings

> The Congress finds that—(8) the responsibility for care of individuals with Alzheimer's disease and related dementias **falls primarily on their families, and the care is financially and emotionally devastating**;

QUESTION: I am not challenging the constitutionality of this law. But I am asking:

> *Does this law provide constitutional protection against false arrest, false imprisonment, and false conviction under the PRIVILEGES AND IMMUNITIES CLAUSE OF THE U.S. CONSTITUTION AND THE CONSTITUTION OF THE STATE OF ARKANSAS for a family-based, live-in caregiver, i.e., a 62-year-old son (me, a U.S. Coast Guard veteran) being a caregiver to my 84-year-old mother (Korean War Air Force veteran) and step-father (Korean War Army combat veteran, now deceased from a natural cause)?*

This is the essential core issue to my defense at the Kensett District Court, that I have been characterizing as a kangaroo court for all the apparent violations of my substantive and procedural due process rights in the face of my exculpatory evidence false arrest, false imprisonment (13 days at the White County Jail), and false conviction on a lesser charge that blindsided me at the last second before adjournment.

My mother's personality disorders compels her to lie out of anger. Her 911 call claiming domestic battery was a lie; as the first 9 seconds of the arrest video proves her propensity to reactively lie in a state of anger. This exculpatory evidence was ignored by the prosecutor and both judges; *sua sponte* dismissal with prejudice and expungement of my record would have the compelling thing to do. But this is Kensett's kangaroo court where the prosecutor and judges have a public reputation of convicting everyone they can that come before them.

QUESTION: Do I presume correctly that my false arrest, false imprisonment at the county jail for 13 days, and my false conviction of a lesser crime are **acts of *ultra vires***[8] by the Kensett Police, the Prosecutor, and Judge Mark Derrick (*recused himself in response to my Motion for Recusal for Judicial Bias against me as a defendant representing myself*), and the replacement Judge Milas Hale then the entire case the Kensett court had against me can be overturned and my record expunged, provided that I have the right to constitutional protection under the *PRIVILEGES AND IMMUNITIES CLAUSE OF THE U.S. CONSTITUTION AND THE CONSTITUTION OF THE STATE OF ARKANSAS* as a caregiver to my 84-year-old mother. Correct?

LAW REVIEW ARTICLE: Samuel R. Gross, ***CONVICTING THE INNOCENT***, 4 Annual Review of Law and Social Science 173-92, at 189-190 (2008). CONCLUSION (excerpt): We do know that convictions of innocent defendants are a regular occurrence in the most serious criminal cases. . . . **We have little direct information about false convictions for lesser crimes—misdemeanors**, routine felony guilty pleas, juvenile adjudications—**but they may well consist overwhelmingly of commonplace investigative and bureaucratic errors. If so, then most false convictions are just ordinary products of everyday criminal prosecution and adjudication**, as most traffic accidents are ordinary products of everyday driving. . . . **Whatever we do, however, some false convictions will continue to occur. For those cases, the lesson of the past 30 years is clear. We must be more willing to reconsider the guilt of convicted defendants when substantial new evidence of innocence emerges**.

CHALLENGING ABSOLUTE IMMUNITY FOR PROSECUTORS

Citing Bidish Sarma, *AFTER 40 YEARS, IS IT TIME TO RECONSIDER ABSOLUTE IMMUNITY FOR PROSECUTORS?*, American Constitution Society (blog), July 19, 2016[9]

> Four decades ago, the U.S. Supreme Court implemented a major, nationwide policy that consolidated prosecutorial authority: it granted prosecutors absolute immunity for acts committed in their prosecutorial role. This decision sheathed prosecutors in protective armor while they pursued criminal convictions through an era of crime-related hysteria, and it eroded one of the few mechanisms available to hold prosecutors accountable. Considering the growing call to acknowledge and address an epidemic of

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[8] ***Ultra vires***. Latin, meaning "*beyond the powers*." *Ultra vires* describes actions taken by Kensett District Court, that exceed the scope of power given by the laws of the State of Arkansas. When referring to the acts of the Kensett District Court the U.S. Constitution and the Constitution of the State of Arkansas are the measuring sticks of the proper scope of power. **And when the Kensett District Court commits acts of *ultra vires* the Kensett District Court becomes a kangaroo court.** A false conviction is, by definition, an act of *ultra vires*.

[9] www.acslaw.org/acsblog/after-40-years-is-it-time-to-reconsider-absolute-immunity-for-prosecutors

prosecutorial misconduct,[10] now is a critical time to reflect on *Imbler* v. *Pachtman*[11] and evaluate whether it holds up to modern-day scrutiny.

In *Imbler*, the Supreme Court held that prosecutors are generally entitled to absolute immunity from civil liability under the federal civil rights statute, 42 U.S.C. § 1983, for actions, taken in their role as prosecutors, that may have violated the rights of a criminal defendant. Absolute immunity is exactly what it sounds like—a blanket and unconditional grant of protection from civil liability. A related doctrine, qualified immunity, also protects government officials from liability, but as the Supreme Court explained in *Harlow* v. *Fitzgerald*,[12] only if "their conduct does not violate clearly established statutory or constitutional rights . . . ." Put simply, qualified immunity protects government officials who abide by the rules (although the law defines those rules very narrowly). Absolute immunity protects them from civil liability even when they break the rules.

As some on the *Imbler* Court worried,[13] courts have applied absolute immunity broadly, even foreclosing civil suits in cases where prosecutors intentionally violate their constitutional obligation to turn over exculpatory evidence to defendants as required by *Brady* v. *Maryland*.[14]

SCOTUS's *Imbler* decision has been critiqued over the years. The opinion turned on two key considerations: (1) the Court's view of immunities "historically accorded the relevant official at common law;" and (2) "considerations of public policy" underlying that historical rule. The Court's view about the historical role of absolute immunity for prosecutors has largely been debunked by scholars and by none other than Justice Scalia who, in a concurring opinion joined by Justice Thomas, once observed[15] that "[t]here was, of course, no such thing as absolute prosecutorial immunity when §1983 was enacted."

. . .

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[10] The Editorial Board, *RAMPANT PROSECUTORIAL MISCONDUCT*, New York Times | Sunday Review | Editorial, January 4, 2014

> In the justice system, prosecutors have the power to decide what criminal charges to bring, and since 97 percent of cases are resolved without a trial, those decisions are almost always the most important factor in the outcome. That is why it is so important for prosecutors to play fair, not just to win. **This obligation is embodied in the Supreme Court's 1963 holding in *Brady* v. *Maryland*, which required prosecutors to provide the defense with any exculpatory evidence that could materially affect a verdict or sentence.**
>
> **Yet far too often, state and federal prosecutors fail to fulfill that constitutional duty, and far too rarely do courts hold them accountable.**

[11] *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

[12] *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

[13] *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

[14] *Brady* v. *Maryland*, 373 U.S. 83 (1963)

[15] *Kalina* v. *Fletcher* 522 U.S. 118 (1997)

One of the main justifications for absolute immunity is that it protects the independence of government officials who enjoy the privilege. While this justification appears persuasive for officials in the legislature and the judiciary, three factors undercut the idea that it is necessary to protect prosecutors.

First, qualified immunity doctrine has become significantly more protective since the Court decided *Imbler*. One commentator has explained[16] that "[q]ualified immunity in the 1970s focused on the official's state of mind, a question to be resolved at trial. Over the years, the Court had transformed qualified immunity into an objective test that shielded officials from any involvement in litigation as long as their conduct did not violate a 'clearly established' right." This change combines with other doctrinal developments to culminate in Professor Erwin Chemerinsky's[17] observation that "the [Supreme] [C]ourt has made it much harder for plaintiffs to overcome qualified immunity and hold government officers liable for constitutional violations." For this reason, it is difficult to believe that qualified immunity somehow fails to prevent the bulk of "harassment by unfounded litigation" upon which the Court premised its selection of absolute immunity.

Second, prosecutors are now widely indemnified. Even if they were to be found liable, they would not bear the financial burden personally, their employers—the government—would. Forty years ago,[18] just twenty states had indemnification laws that would cover § 1983 liability. Since then, states that already had indemnification laws on the books have largely expanded their scope, and "at least twenty-five more states and the District of Columbia have added their own indemnification statutes, protecting government employees, including prosecutors, from the threat of personal liability that the *Imbler* Court so feared."

Third, the heads of most District Attorneys' offices are elected officials. There are valid reasons to be concerned about a system that elects prosecutors, and the reality of prosecutorial elections calls into question the *Imbler* Court's conclusion that prosecutors are independent government officials whose decisions do not account for public opinion and should be shielded from liability.

Absolute immunity for prosecutors did not make much sense in 1976, and it makes no sense❖ today. Revisiting the doctrine does not entail a constitutional change; instead, the Court simply needs to update its view on absolute immunity's applicability (or correct its interpretation of the federal statute). Increasingly, we have recognized that prosecutorial discretion in

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[16] See Karen McDonald Henning, The Failed Legacy of Absolute Immunity Under Imbler: Providing a Compromise Approach to Claims of Prosecutorial Misconduct, 48 Gonz. L. Rev. 219 (2013).

[17] Erwin Chemerinsky, *HURT BY A GOVERNMENT OFFICIAL? SCOTUS IS MAKING IT HARDER AND HARDER TO SUE*, American Bar Association | U.S. Supreme Court, June 24, 2014. *www.abajournal.com/news/article/chemerinsky_its_harder_to_sue_goverment_officials/*

[18] John P. Taddei, *BEYOND ABSOLUTE IMMUNITY: ALTERNATIVE PROTECTIONS FOR PROSECUTORS AGAINST ULTIMATE LIABILITY FOR § 1983 SUITS*, 106 Northwestern University School of Law, 1883-1926 (2012). https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1097&context=nulr

charging and plea bargaining invisibly resides at the center our criminal justice system. If we are serious about reducing mass incarceration or, more modestly, improving the system's fairness, we need accountability for the actors who have been authorized to charge, try, and convict. To this point, there has been little more than moral hazard and prosecutorial impunity.

❖Citing Evan Bernick, *IT'S TIME TO END PROSECUTORIAL IMMUNITY*, Huffington Post | The Blog, August 12, 2015.[19]

Prosecutorial misconduct is a reality. So is the lack of any meaningful legal recourse for its victims. Over at The Daily Beast, Jay Michaelson uses the one-year anniversary of the shooting death of Michael Brown in Ferguson, Missouri to draw attention to this pressing and increasingly well-documented problem.

Michaelson notes that among the "*most important*" impediments to holding prosecutors accountable for abuses of their authority is the fact that "*prosecutors are granted immunity for most kinds of misconduct.*"

While federal law authorizes civil suits against government officers who violate constitutional and statutory rights, the Supreme Court has insulated prosecutors against liability by holding that they are entitled to absolute immunity from civil damages for actions taken as advocates. Prosecutors may use false evidence, **suppress exculpatory evidence**,[20] and elicit misleading testimony in probable cause hearings, **without fear that they will be held personally liable, even if they intentionally and maliciously violate the rights of innocent people**.

There is no place for unchecked government power in a constitutional republic dedicated to the protection of individual freedom, and the human costs of prosecutorial impunity have proven staggering. There is compelling evidence that significant numbers of innocent people have been convicted and even sent to death row as a result of prosecutorial misconduct that virtually always goes unsanctioned and unpunished. Simply put, when prosecutors violate our rights, no judge-created rule should prevent them from being held civilly liable.

Where did absolute prosecutorial immunity come from? The Civil Rights Act of 1871, or "Section 1983," as it is commonly known, **allows citizens to sue public officials for violating their legal rights, and it says nothing about immunity of any kind. Instead, the law states says that "every person" who is acting under color of law who causes a "deprivation of any rights... secured by the Constitution and laws, shall be liable to the party injured**."

In *Imbler* v. *Patchman* (1976), a case involving the deliberate introduction of false testimony by a prosecutor, the Supreme Court relied on historical understandings and policy reasons in creating a defense of absolute

[19] www.huffingtonpost.com/evan-bernick/its-time-to-end-prosecuto_b_7979276.html.

[20] My Emphasis. Prosecutor Don Raney suppressed (did not enter my exculpatory evidence into evidence at trial) resulting in my conviction of a lesser misdemeanor.

immunity for prosecutors for actions taken "in initiating a prosecution and in presenting the State's case."

The Court reasoned that Congress must have intended to retain well-established common-law immunities when it adopted Section 1983 as part of the Civil Rights Act of 1871, in part because the threat of civil liability would deter prosecutors from vigorously pursuing justice and because other remedies are (supposedly) available to keep prosecutors in check, **including professional discipline and criminal prosecution**.[21]

None of these of these justifications are convincing. The claim that Congress intended to retain existing common-law immunities in enacting Section 1983 is implausible, particularly given the conditions that prevailed in 1871 — conditions in which, as one congressmen put it at the time, "Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress."

The Civil Rights Act of 1871 was one of a series of Enforcement Acts pushed by Republican supporters of Reconstruction that sought to put an end to an unprecedented campaign of terror by the Ku Klux Klan — a campaign aided and abetted by state officials who were unable and often unwilling to protect black citizens and their white supporters.

Given the scope of the threat posed by the Klan and the fact that much of the group's activity was sanctioned by officials who either belonged to it or were sympathetic to it, it is no surprise that, as the Imbler majority candidly observed, the Civil Rights Act of 1871, aka Section 1983, "creates a species of tort liability that on its face admits of no immunities." Further, even if Congress did intend to retain existing common-law immunities, absolute prosecutorial immunity was not among them. The first case affording prosecutors absolute immunity was not decided until 1896!

Nor are the policy justifications articulated for prosecutorial immunity compelling. A policy of zero accountability for injustice is hardly calculated to encourage the pursuit of justice by prosecutors. Even assuming that there is a risk of over-deterring officials, governments could indemnify prosecutors if courts find that prosecutors have violated the Constitution.

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[21] My complaint to *ARKANSAS OFFICE OF PROFESSIONAL CONDUCT*? Not in my case! The *OFFICE OF PROFESSIONAL CONDUCT* did nothing, as far as I know. I am left with the impression that they swept my complaint under the rug to preserve the status quo for prosecutor corruption and misconduct. My complaint against Judge Mark Derrick to the *JUDICIAL DISCIPLINE COMMISSION* did no good. The Commission found no wrongdoing even after I presented ample evidence to the contrary. I accused the Commission of preserving the status quo for judicial corruption and judicial misconduct. I submitted my post-false conviction complaint to the Judicial Discipline Commission combining the recused Judge Mark Derrick with the replacement Judge Milas Hale based on my allegations of FALSE CONVICTION. I dared the commission to find no wrongdoing this time.acxh My present complaint herein is my attempt to initiating an FBI Public Corruption investigation. My previous attempts? The FBI Little Rock Duty Special Agent Brown could not hide is prejudice after learning I was a defendant representing myself at the pretrial stage. My post-false conviction complaint to the FBI Little Rock is pending. I don't expect the FBI Little Rock will be initiating a Public Corruption investigation based on my complaint. I am a nobody because I don't have an attorney representing me.

It is difficult to think of a proposition more damaging to public perception of the criminal justice system than that prosecutors would not do their jobs at all if they had to face the same kind of liability for not merely negligent but intentional misconduct that other professionals face — misconduct that lands innocent people in jail for years and tears families apart.

Finally, none of the alternative remedies mentioned by the Court has proven remotely adequate. Prosecutorial misconduct is rarely grounds for reversal of conviction — under the harmless error standard, a defendant who shows that a prosecutor failed to disclose exculpatory evidence in violation of his obligations under the rule set out by the Supreme Court in Brady v. Maryland (1963), must show "that there is a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed."

Even when a reversal is granted, prosecutors rarely face repercussions. Professional discipline of misbehaving prosecutors is exceedingly rare, and criminal charges against them are almost never brought, even in cases where they have suborned perjury from witnesses and committed perjury. As Ninth Circuit Court of Appeals Judge Alex Kozinski recently put it in a provocative and incisive recent article, "Who exactly is going to prosecute prosecutors?"

More fundamentally, absolute immunity is at odds with the premises upon which the very authority of the Constitution rests. According to the Framers' premises, government is not self-justifying—it is a means to an end, namely, the security of individual rights. But, as Chief Justice John Marshall explained in Marbury v. Madison (1803), this end cannot be realized "if the laws furnish no remedy for the violation of a vested legal right." Civil actions against the government can help protect rights, not only by ensuring that government officials are held accountable for violating them, but by bringing information to light, through the discovery process and through impartial, evidence-based judicial engagement at trial, that makes broader, rights-protective policy changes possible. If immunity is granted, there is no discovery process and there is no trial.

Section 1983's language is broad, unequivocal, and unambiguous. Ensuring that prosecutors are held accountable for breaching their ethical duties and violating citizens' rights would not require a constitutional amendment. It would only require reading a duly enacted federal law to mean what it says and not reading into the law policy choices that Congress never made.

If the Supreme Court is unwilling to revisit *Imbler*, Congress can revise Section 1983 to specify that prosecutors who deprive citizens of constitutional or statutory rights are liable to those people just like the rest of us are when we injure someone through negligence or intentional misconduct. It is time to abolish a rule that stands as an affront, not only to the letter of federal law, but to our aspirations towards a just legal order.

THE FOLLOWING LAW REVIEW ARTICLE
HAS A DIRECT RELEVANCE TO MY FALSE CONVICTION,
DUE TO PROSECUTORIAL & JUDICIAL MISCONDUCT ALLEGATIONS

Citing Margaret Z. Johns,* *UNSUPPORTABLE AND UNJUSTIFIED: A CRITIQUE OF ABSOLUTE PROSECUTORIAL IMMUNITY*, 80 Fordham Law Review 509 (2011).[22]

* Senior Lecturer, University of California, Davis, School of Law; University of California, Davis, School of Law, J.D., 1976; University of California, Santa Barbara, B.A., 1970. I am grateful for the opportunity to participate in the Fordham Law Review's symposium on official and municipal liability for constitutional and tort liability, which was inspired and initiated by Professor Thomas H. Lee and flawlessly organized by Mari Byrne. I am indebted to John R. Cuti with whom I co-authored an amicus brief in *Van de Kamp v. Goldstein* from which much of the historical analysis in Part III is derived. Elizabeth McKechnie, my library liaison, provided invaluable research support. My friend and colleague, Carter C. White, contributed numerous valuable suggestions. And, as always, I relied on my family for support and encouragement—especially Bob and Daisy.

INTRODUCTION

Since John G. Roberts, Jr., became Chief Justice of the U.S. Supreme Court on September 29, 2005,[23] the Court has shown a keen interest in civil rights actions against prosecutors and their immunity from liability. Specifically, the Court has granted certiorari in one case involving municipal liability for prosecutorial misconduct,[24] and three cases addressing issues of prosecutorial liability and immunity.[25] But despite this attention to these issues, it would be premature to ascribe an agenda to the Roberts Court based on the two decisions it has handed down to date.[26] So rather than analyzing such a possible agenda, this Article will discuss three points where the analysis of prosecutorial immunity should be focused:

> (1) the significant problem of prosecutorial misconduct and the lack of effective deterrent and corrective mechanisms;

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[22] Available at: http://ir.lawnet.fordham.edu/flr/vol80/iss2/4

[23] *BIOGRAPHIES OF CURRENT JUSTICES OF THE SUPREME COURT*, U.S. Supreme Court, http://www.supremecourt.gov/about/biographies.aspx [last visited March 6, 2018 by Plaintiff Don Hamrick].

[24] *See Connick* v. *Thompson*, 131 S. Ct. 1350 (2011) (municipal liability for failure to train based on violations of the duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963)).

[25] *See Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, (2011) (considering the U.S. Attorney General's immunity for using a material witness warrant to detain a suspected terrorist); *Pottawattamie County* v. *McGhee*, 129 S. Ct. 2002, 2002 (2009) (case dismissed after settlement following oral argument); *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855 (2009); *see ALSO BOUNDARIES OF PROSECUTORIAL IMMUNITY TO BE TESTED IN UPCOMING SUPREME COURT CASE*, N. Cal. Innocence Project Newsl. (Santa Clara Law, Santa Clara, Cal.), Summer 2010, at 1 [hereinafter *BOUNDARIES OF PROSECUTORIAL IMMUNITY*], *available at* http://law.scu.edu/ncip/file/NCIP_Newsletter_Summer2010_web.pdf (reporting that *McGhee* was settled for $12 million for two wrongfully convicted men).

[26] *See Connick*, 131 S. Ct. at 1365–66 (2011) (holding that a municipality was not liable for a single *Brady* violation); *Van de Kamp*, 129 S. Ct. at 858–59 (2009) (holding that a prosecutor was entitled to absolute immunity for failing to adopt an information management system regarding informants).

(2) the absence of any historical justification for the doctrine of absolute prosecutorial immunity; and

(3) the confusion and conflicts created by the current prosecutorial immunity doctrine.

First, while the vast majority of prosecutors are dedicated, honest public servants who serve us all by prosecuting criminals and protecting us from crime, instances of prosecutorial misconduct are both substantial and significant.[27] Recent reports have evaluated the frequency of prosecutorial misconduct, the extent to which prosecutorial misconduct leads to wrongful convictions, and the ineffectiveness of mechanisms designed to deter, remedy, or punish prosecutorial misconduct.[28] The conclusions are clear: prosecutorial misconduct is a significant problem; it leads to a substantial number of wrongful convictions; and our system lacks effective mechanisms to deter or remedy prosecutorial misconduct.7[29]

Second, in Supreme Court decisions analyzing the civil rights liability of prosecutors, a primary reason for extending absolute immunity to prosecutors today is historical.[30] In 1976, the Supreme Court concluded that the major federal statute for the protection of civil rights—42 U.S.C. § 1983, which was adopted by Congress in 1871 during the violence and chaos of Reconstruction—was intended to preserve the absolute immunities enjoyed by public officials under the existing common law.[31] But in 1871, prosecutors did *not* enjoy absolute immunity.[32] In fact, the first case affording prosecutors absolute immunity was not decided until twenty-five years *after* the adoption of § 1983.[33] Indeed, in 1871, the Reconstruction Congress adopted § 1983 in part to address the abusive practice in the South of prosecuting Union officers and officials who were attempting to establish and enforce civil rights for newly freed slaves.[34] In other words, the 1871 Congress did not intend to immunize prosecutors from liability. To the contrary, Congress intended to subject prosecutors to civil liability for using criminal prosecutions to thwart Reconstruction and deprive newly freed

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[27] *See infra* Part I. PROSECUTORIAL MISCONDUCT IS A SIGNIFICANT PROBLEM LACKING EFFECTIVE DETERRENT OR REMEDIAL SAFEGUARDS

[28] *See infra* Part I. PROSECUTORIAL MISCONDUCT IS A SIGNIFICANT PROBLEM LACKING EFFECTIVE DETERRENT OR REMEDIAL SAFEGUARDS

[29] *See infra* Part I. PROSECUTORIAL MISCONDUCT IS A SIGNIFICANT PROBLEM LACKING EFFECTIVE DETERRENT OR REMEDIAL SAFEGUARDS

[30] *Burns* v. *Reed*, 500 U.S. 478, 489–90 (1991); *Imbler* v. *Pachtman*, 424 U.S. 409, 421–24 (1976).

[31] *Imbler*, 424 U.S. at 417–18.

[32] Margaret Z. Johns, *RECONSIDERING ABSOLUTE PROSECUTORIAL IMMUNITY*, 2005 BYU L. REV. 53, 107–22; *see infra* Part II. ABSOLUTE PROSECUTORIAL IMMUNITY IS HISTORICALLY UNJUSTIFIED.

[33] *See generally Griffith* v. *Slinkard*, 44 N.E. 1001 (Ind. 1896).

[34] *See infra* Part II. ABSOLUTE PROSECUTORIAL IMMUNITY IS HISTORICALLY UNJUSTIFIED.

slaves of their newly gained civil rights.[35] Thus, the notion that absolute immunity is historically justified is just plain wrong.

Third, the current doctrine of prosecutorial immunity is not only questionable as a matter of public policy and unjustified as a matter of history, it also creates confusion and conflicts which cause uncertainty and unnecessarily protracted litigation.[36] Rather than streamlining the process to facilitate the early resolution of claims as was intended, the doctrine complicates and prolongs the process.[37] Specifically, the current doctrine affords prosecutors qualified immunity in some instances and absolute immunity in others. [38] But the difficulty of drawing lines between cases where qualified immunity applies and those where absolute immunity applies generates needless litigation.[39] Within eighteen months, the Roberts Court granted certiorari in two prosecutorial immunity cases.[40] Both cases illustrate the conflicts and complexities of the current prosecutorial immunity doctrine.[41] A simplified approach—applying qualified immunity in all cases—would serve public policy, respect historical understandings, and simplify and streamline civil rights litigation.

This Article considers each of these points. First, in **Part I,** [*PROSECUTORIAL MISCONDUCT IS A SIGNIFICANT PROBLEM LACKING EFFECTIVE DETERRENT OR REMEDIAL SAFEGUARDS*] it evaluates the mounting evidence that prosecutorial misconduct is the cause of a substantial number of wrongful convictions, and existing legal mechanisms are insufficient to deter or remedy that misconduct. **Part II** [*ABSOLUTE PROSECUTORIAL IMMUNITY IS HISTORICALLY UNJUSTIFIED*] considers the lack of historical justification for the Supreme Court's recognition of the absolute prosecutorial immunity doctrine. Finally, **Part III** [*THE PROSECUTORIAL IMMUNITY DOCTRINE CREATES CONFLICTS AND CONFUSION THAT COULD BE ELIMINATED BY THE UNIFORM APPLICATION OF QUALIFIED IMMUNITY*] addresses the unnecessary conflicts and confusion generated by the current doctrine of prosecutorial immunity and the benefits of its replacement with the uniform application of qualified immunity.

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[35] *See infra* Part II. ABSOLUTE PROSECUTORIAL IMMUNITY IS HISTORICALLY UNJUSTIFIED.

[36] *See infra* Part III. THE PROSECUTORIAL IMMUNITY DOCTRINE CREATES CONFLICTS AND CONFUSION THAT COULD BE ELIMINATED BY THE UNIFORM APPLICATION OF QUALIFIED IMMUNITY.

[37] *See infra* Part III. THE PROSECUTORIAL IMMUNITY DOCTRINE CREATES CONFLICTS AND CONFUSION THAT COULD BE ELIMINATED BY THE UNIFORM APPLICATION OF QUALIFIED IMMUNITY.

[38] *See infra* Part III. THE PROSECUTORIAL IMMUNITY DOCTRINE CREATES CONFLICTS AND CONFUSION THAT COULD BE ELIMINATED BY THE UNIFORM APPLICATION OF QUALIFIED IMMUNITY.

[39] *See infra* Part III. THE PROSECUTORIAL IMMUNITY DOCTRINE CREATES CONFLICTS AND CONFUSION THAT COULD BE ELIMINATED BY THE UNIFORM APPLICATION OF QUALIFIED IMMUNITY.

[40] *Ashcroft* v. *al-Kidd*, 131 S. Ct. 415, 415 (2010); *Pottawattamie County* v. *McGhee*, 129 S. Ct. 2002, 2002 (2009) (settled and dismissed after oral argument).

[41] *See infra* Part III. THE PROSECUTORIAL IMMUNITY DOCTRINE CREATES CONFLICTS AND CONFUSION THAT COULD BE ELIMINATED BY THE UNIFORM APPLICATION OF QUALIFIED IMMUNITY.

I. PROSECUTORIAL MISCONDUCT IS A SIGNIFICANT PROBLEM LACKING EFFECTIVE DETERRENT OR REMEDIAL SAFEGUARDS

A. Prosecutorial Misconduct Is a Significant Problem

As the 2009 report of the Justice Project observed, "**prosecutorial misconduct was a factor in dismissed charges, reversed convictions, or reduced sentences in at least 2,012 cases since 1970.**"[42] From 1992–2011, using DNA evidence, the Innocence Project at Benjamin N. Cardozo School of Law has exonerated 273 people who were wrongfully convicted[43] **and has reported that prosecutorial misconduct is a leading cause of these wrongful convictions.**[44] One Innocence Project report concluded that 250 innocent people exonerated by DNA evidence had served 3,160 years in prison.26[45] According to Northwestern University's Center on Wrongful Convictions, about 50 people each year are exonerated in both DNA and non-DNA cases.[46] The director of *Cardozo Law School's Jacob Burns Ethics Center* **reported that of 180 DNA exonerations, 43 percent involved allegations of prosecutorial misconduct.**[47]

These conclusions are borne out by two recent California reports. In 2007, the *California Commission on the Fair Administration of Justice*, established by the *California State Senate* to study ways to prevent wrongful convictions, issued its report.[48] The Commission found that in the preceding decade, **California appellate courts found prosecutorial misconduct in 443 cases.**[49] Of these cases, the courts found the misconduct had been harmless in 390 cases, but had reversed convictions in 53 cases.[50] Most

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[42] John F. Terzano et al., *Justice Project, Improving Prosecutorial Accountability: A Policy Review 2* (2009), available at http://amlawdaily.typepad.com/JusticeProjectReport.pdf.

[43] . Know the Cases, *Innocence Project*, http://www.innocenceproject.org/know/ (last visited Oct. 20, 2011).

[44] See Emily M. West, *Innocence Project, Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases* 1 (2010), *available at* http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf; *see also* Johns, Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. at 59–63 **(summarizing studies of wrongful convictions and prosecutorial misconduct)**.

[45] Innocence Project, ***250 Exonerated: Too Many Wrongfully Convicted 3*** (2010), available at http://www.innocenceproject.org/docs/InnocenceProject_250.pdf.

[46] Kevin Davis, *The Real World*, ABA J., Jan. 2011, at 51, 53.

[47] *Panelists Examine Why Prosecutors Are Largely Ignored by Disciplinary Officials*, 74 U.S.L.W. 2526, 2526 (Mar. 7, 2006) (quoting Professor Ellen Yaroshefsky).

[48] Cal. Comm'n on the Fair Admin. Of Justice, *Report and Recommendations on Reporting Misconduct 3* (2007), *available at* http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL REPORT ON REPORTING MISCONDUCT.pdf.

[49] Id.

[50] *Id.*

recently, in 2010, the *NORTHERN CALIFORNIA INNOCENCE PROJECT* released its study of prosecutorial misconduct,[51] the most comprehensive review of state prosecutorial misconduct in the United States.[52] The Innocence Project reviewed more than 4,000 California state and federal appellate decisions between 1997–2009 alleging prosecutorial misconduct.[53] The study found that in about 3,000 cases, the courts did not find prosecutorial misconduct; **but that in 707 cases, the courts did find such misconduct**.[54] Moreover, in another 282 cases, the courts did not resolve the question.[55] The finding of 707 cases of misconduct is significant—**it equates to one case of prosecutorial misconduct each week in California alone**.[56] **This study was followed up by an annual report for 2010 documenting 130 judicial findings of prosecutorial misconduct in 102 cases, 26 of which resulted in reversals of convictions, orders for new trial, or orders barring prosecution evidence**.[57]

But these reports grossly underestimate the instances of prosecutorial misconduct for several reasons. First, only about 3 percent of felony cases actually go to trial, so there will be no judicial scrutiny of 97 percent of cases, almost all of which are resolved through guilty pleas.[58] Second, for the first five years of the eleven-year study, more than 90 percent of the California appellate decisions were not entered into legal databases.[59] Third, findings of misconduct at the trial court level (but not discussed in appellate decisions) are inaccessible.[60] **Finally, the numbers fail to reflect the instances of prosecutorial misconduct that were never discovered or appealed**.[61]

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[51] See generally Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009* (2010), *available at* http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online version.pdf.

[52] *Id.* at 2.

[53] *Id.*

[54] *Id.*

[55] *Id.* In many of these cases, the court declined to review the claim of misconduct because defense counsel had failed to object to the misconduct at trial. *Id.* at 38, 40.

[56] *Id.* at 2.

[57] Maurice Possley & Jessica Seargeant, N. Cal. Innoncence Project, First Annual Report: Preventable Error—Prosecutorial Misconduct in California 2010, at 3 (2011), *available at* http://www.veritasinitiative.org/wp-content/uploads/2011/03/ProsecutorialMisconduct_FirstAnnual_Final8.pdf.

[58] Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 3,* (2010), available at http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online version.pdf.

[59] *Id.* at 10–11.

[60] *Id.* at 3.

[61] *Id.*

The failure to discover prosecutorial misconduct is especially likely in cases of *Brady* violations.[62] In 1963, the Supreme Court held that prosecutors have the duty to disclose exculpatory evidence to defendants.[63] **But the failure to do so is a prevalent example of prosecutorial misconduct.**[64] As the Innocence Project observed:

> When prosecutors make the decision as to whether evidence is Brady material, **their belief that the defendant is guilty can create a distorting prism through which they tend to view the evidence inaccurately as a red herring or irrelevant. *Brady* violations are, by their nature, difficult to uncover; they become apparent only when the withheld material becomes known in other ways.**[65]

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[62] *See Brady* v. *Maryland*, 373 U.S. 83, 86 (1963); *see also Imbler* v. *Pachtman*, 424 U.S. 409, 443–44 (1976) (White, J., concurring) ("The judicial process will by definition be ignorant of the [*Brady*] violation when it occurs; and it is reasonable to suspect that most such violations never surface. It is all the more important, then, to deter such violations by permitting damage actions under 42 U.S.C. § 1983 to be maintained in instances where violations do surface.").

[63] *Brady*, 373 U.S. at 86.

[64] Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 36–38, 65, (2010), *available at* http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online version.pdf. A study of all 5,760 capital convictions in the United States found that 16 percent of reversals in post-conviction proceedings were for *Brady* violations. *Id.* at 37. The *CALIFORNIA INNOCENCE PROJECT* study found 66 cases of *Brady* violations. *Id.* Indeed, of the six instances of discipline for prosecutorial misconduct from 1997–2009, all *six* involved *Brady* violations. *Id.* at 55. Other instances of *Brady* violations escaped any discipline. *Id.* at 55–56. *But see* Rachel E. Barkow, *ORGANIZATIONAL GUIDELINES FOR THE PROSECUTOR'S OFFICE*, 31 Cardozo L. Rev. 2089, 2092 (2010) (explaining the reasons an honest prosecutor may fail to disclose exculpatory evidence).

[65] Kathleen M. Ridolfi & Maurice Possley, *N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009*, at 36 *(2010)*. Because *Brady* violations are so difficult to discover and police, scholars have suggested various preventative and corrective reforms. *Available at* http://law.scu.edu/ncip/file/ProsecutorialMisconduct_ BookEntire_online version.pdf. *See* Alafair S. Burke, *REVISITING PROSECUTORIAL DISCLOSURE*, 84 Ind. L.J. 481, 499 (2009) (explaining that the *Brady* materiality requirement leads to the systematic under-disclosure of exculpatory evidence and proposing a prophylactic open-file rule); Sara Gurwitch, *WHEN SELF-POLICING DOES NOT WORK: A PROPOSAL FOR POLICING PROSECUTORS IN THEIR OBLIGATION TO PROVIDE EXCULPATORY EVIDENCE TO THE DEFENSE*, 50 Santa Clara L. Rev. 303, 320–21 (2010) (arguing that the indictment should be dismissed in cases where willful *Brady* violations have prejudiced the defendant).

For these reasons, *Brady* violations often go undetected.[66] For example, in one recent California case,[67] the Court of Appeal reversed a defendant's conviction for child molestation because the deputy district attorney withheld a videotape of the victim's medical exam supporting the defense expert's conclusion that no sexual assault had occurred.[68] The discovery of that one undisclosed videotape led to the discovery of more than *3,000* other videotapes that had never been turned over to other defendants.[69]

While the frequency of prosecutorial misconduct is difficult to determine, the fact of prosecutorial misconduct imposes extraordinary costs and consequences on the criminal justice system. First, of course, are the devastating consequences for the innocent person wrongfully convicted as a result of prosecutorial misconduct. Simply put, their lives are ruined. Many have spent years in prison before being exonerated.[70] Many innocent people are currently in prison who have yet to be—and may never be—exonerated. Innocent people

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[66] The hidden nature of *Brady* violations is especially problematic. *See* Barkow, *supra* note 45, at 2092–94. In many other categories of prosecutorial misconduct, the misconduct occurs in open court where defense counsel and the trial court have an opportunity to observe and correct the misconduct, and the appellate court has an opportunity to review it based on the trial court record. These categories of misconduct include

> eliciting inadmissible evidence in witness examination; vouching for a witness's truthfulness; testifying for an absent witness; misstating the law; arguing facts not in evidence; mischaracterizing evidence; shifting the burden of proof; impugning the defense; arguing inconsistent theories of prosecution; appealing to religious authority; offering personal opinion; [and] engaging in discriminatory jury selection . . . .

Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 25, (2010).

[67] *People* v. *Uribe*, 76 Cal. Rptr. 3d 829 (Ct. App. 2008).

[68] *Id.* at 846–47. *See* Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 20, (2010) (citing Tracey Kaplan, *SEX ABUSE CONVICTION DISMISSED, DA BERATED CITING "NUMEROUS ACTS OF MISCONDUCT," JUDGE ORDERS MAN FREED AFTER SERVING FOUR YEARS OF A POSSIBLE LIFE SENTENCE*, San Jose Mercury News, Jan. 7, 2010, at 1A). On remand, the case was dismissed; the dismissal is now on appeal. *Id.*

[69] *See* Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 20, (2010) (citing Tracey Kaplan, *JUDGE ORDERS NEW TRIAL IN SECOND CASE AS BEFORE, TAPE OF EXAM WASN'T GIVEN TO DEFENSE*, SAN JOSE MERCURY NEWS, Oct. 30, 2009, at 1B). Another example is the case of Alan Gell who was exonerated after "nine years in prison and half of that on death row" for murder. *See* Robert P. Mosteller, *EXCULPATORY EVIDENCE, ETHICS, AND THE ROAD TO THE DISBARMENT OF MIKE NIFONG: THE CRITICAL IMPORTANCE OF FULL OPEN-FILE DISCOVERY*, 15 Geo. Mason L. Rev. 257, 263 (2008). Prosecutors withheld witness statements that the victim was seen alive after Gell was with him and that they were creating stories to disguise their own involvement. *Id.* At 264–65.

[70] *KNOW THE CASES: BROWSE PROFILES*, Innocence Project, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (found new location, February 4, 2018) (documenting all the cases of exoneration by DNA evidence).

in prison lose their freedom, their ties to family and friends, their employment, their educational opportunities and job skills, and often their physical and mental health.[71]

Crime victims and their families also suffer as a result of prosecutorial misconduct. Enduring the lengthy appellate process, reversals of convictions, and retrials is emotionally wrenching. Where the defendant is exonerated, the victim knows that the criminal perpetrator has escaped justice and is likely still at large. And even where the prosecutorial misconduct does not result in exoneration, the prosecutor's case has often been undermined by the passage of time; the ultimate sentence of the defendant will often be reduced through a plea bargain since the prosecutor will be unable to retry the case.[72]

Where prosecutorial misconduct has caused the wrongful conviction of innocent people, the danger to public safety is obvious: the real criminals remain free to commit other crimes. Specifically, in cases of DNA exonerations, authorities have found that many of the true criminals committed other crimes while innocent people were incarcerated for their original crimes.[73] A horrifying example is the case of Kevin Green.[74] In 1980, Green was wrongfully convicted for assaulting his pregnant wife and murdering her unborn baby.56[75] He served sixteen years in prison until he was exonerated.57[76] By that time, the police had discovered that the real criminal was Gerald Parker, who had committed five murders before the attack on Green's wife.58[77] While Green was being wrongfully prosecuted and convicted, Parker continued to commit violent crimes, including raping a thirteen-year-old girl.59[78]

As the Innocence Project study found, prosecutorial misconduct burdens taxpayers in several ways. First, prolonged criminal prosecutions—sometimes lasting decades through appeals and retrials—are enormously expensive.[79] Second, the cost of incarcerating defendants through lengthy

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[71] *See* Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 66, (2010); Adam I. Kaplan, Comment, *THE CASE FOR COMPARATIVE FAULT IN COMPENSATING THE WRONGFULLY CONVICTED*, 56 UCLA L. REV. 227, 232 (2008); *see also* Janet Roberts & Elizabeth Stanton, *A LONG ROAD BACK AFTER EXONERATION, AND JUSTICE IS SLOW TO MAKE AMENDS*, N.Y. Times, Nov. 25, 2007, at 38.

[72] Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 70, (2010)

[73] *Id.* at 71.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* at 67–68. In one case—which has been litigated for thirty years—a defendant was granted a retrial on murder charges because the prosecutor failed to disclose exculpatory evidence and introduced false evidence. *Id.* at 68. The cost of prosecution has exceeded $1 million. *Id.*

prosecutions—as well as the cost of incarcerating innocent people who are wrongfully convicted—is substantial. In California, incarceration costs $45,000 per year per inmate.[80] In addition, the taxpayers may be liable for damages in civil lawsuits[81] and under wrongful imprisonment statutes.[82]

Finally, prosecutorial misconduct erodes the integrity of, and public confidence in, the criminal justice system as a whole.[83] **The undermining of the public's confidence is exacerbated by the fact that minorities and the poor suffer the most from prosecutorial misconduct.**65[84] **In our system, the prosecutor "is the representative . . . of a sovereignty whose . . . interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."**[85] As the Innocence Project observed:

> **Prosecutorial misconduct is wrong. It is not excusable as a means to convict the guilty, and it is abhorrent in the conviction of the innocent. It has no place in a criminal justice system that strives to be fair, to accurately convict the guilty and to protect the innocent. It undercuts the public trust and impugns the reputations of the majority of prosecutors, who uphold the law and live up to their obligations to seek justice.**[86]

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[80] *Id.* at 68.

[81] *Id.* at 66. While establishing civil liability is extremely difficult because of the immunity doctrine, if immunity can be overcome, potential liability can be very high. *Id.* at 66, 68–70.

[82] *Id.* at 70.

[83] *Id.* at 71.

[84] Jim Dwyer et al., *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 318 (2003) (explaining that prosecutorial misconduct happens more frequently in the conviction of black men); Arthur L. Rizer III, *THE RACE EFFECT ON WRONGFUL CONVICTIONS*, 29 Wm. Mitchell L. Rev. 845, 856–58 (2003); Ephraim Unell, Note, *A RIGHT NOT TO BE FRAMED: PRESERVING CIVIL LIABILITY OF PROSECUTORS IN THE FACE OF ABSOLUTE IMMUNITY*, 23 GEO. J. LEGAL ETHICS 955, 956–57 (2010).

[85] *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

[86] Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 6, (2010)

B. EXISTING DETERRENT AND REMEDIAL MECHANISMS ARE INEFFECTIVE

In 1976, when the Supreme Court adopted **absolute prosecutorial immunity**, it concluded that the burden and distraction of potential civil liability was not warranted because other deterrent and remedial mechanisms would be adequate to safeguard the accused's rights.[87] Specifically, the Court pointed to "the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies";[88] the prospect of professional discipline;[89] and the potential criminal liability of prosecutors for violating the accused's rights.[90] **But as the following discussion will explain, these deterrent and corrective mechanisms are entirely inadequate.**

First, the courts' remedial powers are not available in the 97 percent of cases that never go to trial, so the protections of trial and appellate court scrutiny are only available in 3 percent of cases.[91] **Moreover, even when prosecutorial misconduct is found by the courts of appeals, the offense is found to be harmless in most of those cases, so the conviction stands. In fact, for the 707 cases in California where prosecutorial misconduct was found to have been committed, the appellate courts found the error to be harmless and upheld the conviction in nearly 80 percent of the cases.**[92]

In his article outlining the limited ability of appellate courts to police prosecutorial misconduct, Judge D. Brooks Smith of the Third Circuit described the doctrine of harmless error as "the elephant in the room."[93] **A finding of "harmless error" is not equivalent to a finding of trivial error.**[94] **Indeed, harmless error**

[87] *See Imbler* v. *Pachtman*, 424 U.S. 409, 425–29 (1976); *see also Burns* v. *Reed*, 500 U.S. 478, 492 (1991) ("'[T]he safeguards built into the judicial system tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct.'" (alteration in original) (quoting *Butz* v. *Economou*, 438 U.S. 478, 512 (1978))).

[88] *Imbler*, 424 U.S. at 427.

[89] *Id.* at 428–29.

[90] *Id.*

[91] Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 10, (2010)

[92] *Id.* at 12–13.

[93] D. Brooks Smith, *POLICING PROSECUTORS: WHAT ROLE CAN APPELLATE COURTS PLAY?*, 38 HOFSTRA L. REV. at 836–40 (2010) ("The nature of harmless error review and concomitant limitations on our supervisory authority profoundly limit the reach of a court of appeals when it confronts most claims of prosecutorial misconduct.").

[94] Harmless error is found where the court finds that despite the constitutional error, an automatic reversal of the conviction is not constitutionally required; harmful error is found where the error has resulted in a miscarriage of justice because "'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" Kathleen

cases often reveal serious prosecutorial misconduct.[95] For example, in one California case, the court found harmless error despite the prosecutor's repeated and persistent misconduct in pursuing an improper line of questioning.[96] In the court's view, the prosecutor "instilled a poison which the defense could not drain from the case."[97] But the conviction was, nonetheless, affirmed. The Innocence Project study documents a number of cases where egregious misconduct was found to be harmless.[98] **When they label such prosecutorial misconduct as harmless error, the trial and appellate courts neither deter nor remedy that misconduct.**

Moreover, in cases of harmless error, professional discipline also fails to punish or deter misconduct in many states. [***MY EMPHASIS – The same holds true in Arkansas in my case***] For example, in California, a court is only required to report prosecutorial misconduct where there is a reversal or modification of the judgment as a result of the misconduct.80[99] The majority of the 707 instances of misconduct found by the Innocence Project were not required to be reported because 548 of them were not covered by the limited statutory reporting requirement.[100] Indeed, in the thirteen-year period covered by the study, there were no reports of discipline for any of those 548 instances, all of which were found to be harmless error.[101]

In a number of cases where prosecutorial misconduct was found to be harmless, the accused were in fact innocent.[102] In a 2010 study of persons exonerated by DNA evidence, the issue of prosecutorial misconduct had been raised in sixty-five of them, but rejected in thirty-four of them.[103] In the thirty-one cases where the courts found prosecutorial

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M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 19, (2010) (quoting *People* v. *Watson*, 299 P.2d 243, 254 (Cal. 1956)). This is a high hurdle to overcome since a showing that the error may well have influenced the outcome is insufficient.

[95] *Id.* at 21–23, 26–28, 31, 36–37.

[96] *See People* v. *McKenzie*, No. A112837, 2007 WL 2193548, at *9 (Cal. Ct. App. Aug. 1, 2007); Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 21, (2010).

[97] *McKenzie*, 2007 WL 2193548, at *8.

[98] Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 22–24, (2010).

[99] *See* Cal. Bus. & Prof. Code § 6086.7 (West 2003 & Supp. 2011); Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 22, (2010).

[100] Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 48, (2010).

[101] *Id.* at 22, 48.

[102] *Id.* at 64.

[103] *Id.* at 65.

misconduct, it was found to be harmless in nineteen cases.[104] Of these sixty-five cases of wrongful convictions, only twelve found harmful error.[105] Yet all sixty-five of these people were actually innocent.

The failure of the courts or disciplinary bodies to deter or remedy prosecutorial misconduct is equally apparent in cases where harmful error is found.[106] **Despite their statutory obligation to report prosecutorial misconduct in cases of harmful error, judges routinely ignore their responsibility.** Specifically, **California judges are required to report prosecutorial misconduct that results in reversals,**[107] **but a review of thirty cases in which convictions had been reversed for prosecutorial misconduct revealed that *not a single one* had been reported to the state bar.**[108] **Moreover, from 1997–2009, appellate courts found 159 instances of harmful prosecutorial misconduct,**[109] **but only six prosecutors were disciplined for misconduct during criminal proceedings.**[110]

The lack of discipline for prosecutorial misconduct is remarkable. In California, attorneys were publicly disciplined 4,741 times from 1997–2009.92 But only ten instances of public discipline involved prosecutors, and only six of those cases involved the handling of a criminal case.[111] **To put those numbers in perspective, appellate courts found prosecutorial misconduct in over 700 criminal cases,**

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[104] *Id.*

[105] *Id.*

[106] Rachel E. Barkow, *ORGANIZATIONAL GUIDELINES FOR THE PROSECUTOR'S OFFICE*, 31 Cardozo L. Rev. 2095, (2010) (explaining that a nationwide study of all reported cases found only twenty-seven where prosecutors were disciplined for unethical behavior that compromised the fairness of a trial (citing Fred C. Zacharias, *THE PROFESSIONAL DISCIPLINE OF PROSECUTORS*, 79 N.C. L. Rev. 721, 751 tbl.VI, 753 tbl.VII (2001))).

[107] Cal. Bus. & Prof. Code § 6086.7 (West 2003 & Supp. 2011).

[108] Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 49, (2010) (Citing Cal. Comm'n on the Fair Admin. of Justice, Final Report (Gerald Uelmen ed., 2008), *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf); *see also* Rachel E. Barkow, *ORGANIZATIONAL GUIDELINES FOR THE PROSECUTOR'S OFFICE*, 31 Cardozo L. Rev. at 2096, (2010) (providing some reasons why judges may be reluctant to report prosecutors to disciplinary bodies); Pamela A. MacLean, *SINS OF OMISSION*, Cal. Law., Aug. 2009, at 26, 26–30 (discussing the commission findings of misconduct, failure to disclose exculpatory evidence, and a failure to report prosecutorial misconduct).

[109] Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at* 18, (2010).

[110] *Id.* at 16.

[111] *Id.*

but only six prosecutors were disciplined.[112] **In other words, less than 1 percent of the prosecutors formally found to have engaged in misconduct faced any professional sanction for it.**[113]

Even where prosecutors were repeatedly found to have engaged in prosecutorial misconduct, they were still not reported or disciplined.[114] The Innocence Project report found sixty-seven prosecutors whom appellate courts had found to have committed misconduct repeatedly—some as many as five times, but only a few were disciplined.[115] There is a certain irony in this lack of discipline of those charged with enforcing the law: prosecutors escape discipline while non-prosecutors are vigorously disciplined.[116] For example, one attorney was suspended for twenty months for bouncing a check in his personal account,[117] and a criminal defense attorney was suspended for two years for crossing the line between zealous advocacy and contempt of court.[118] But deputy district attorney Rosalie Morton was never disciplined even though she was repeatedly found to have engaged in prosecutorial misconduct, resulting in the reversal of three convictions under the harmful error standard.[119]

Putting recent findings in historical context, the lack of professional discipline is clear. Prior to 2005 in California—the largest bar association in the United States[120]—"not a single prosecutor was disciplined for [mis]conduct in a criminal case."[121] And, "**to date, no California prosecutor has been disbarred for prosecutorial misconduct**."[122] In 1976, the Supreme Court confidently asserted, "[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."[123] **In 2011, we know that this is simply not true. In reality, prosecutors who engage in misconduct—even**

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[112] *Id.*

[113] *Id.* at 3.

[114] *Id.* at 57–58.

[115] *Id.* at 3, 57.

[116] *Id.* at 59–60.

[117] *Id.* at 59.

[118] *Id.* at 59–60.

[119] *Id.* at 60.

[120] *Id.* at 54.

[121] *Id.* at 56.

[122] *Id.*

[123] *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (1976).

when found to have engaged in misconduct by courts of appeals—are subject to discipline less than 1 percent of the time.[124]

In the past few years, two cases have spotlighted the issue of prosecutorial misconduct: the Duke Lacrosse case and the Ted Stevens case. In 2007, in the Duke Lacrosse case, **the prosecuting attorney was disbarred for misconduct in withholding exculpatory evidence** and making inflammatory public statements.[125] Specifically, despite repeated requests from defense counsel, the prosecutor failed to disclose reports of DNA testing that indicated that the DNA evidence found on the rape victim did not match that of the three defendants in the case.[126] **Withholding exonerating evidence is one of the most common types of prosecutorial misconduct**.[127] **What is unusual is that the state bar acted quickly and decisively to punish the prosecutor**.[128]

In 2009, Attorney General Eric Holder dismissed an indictment against former Senator Ted Stevens because of prosecutorial misconduct.[129] Again, as in the Duke Lacrosse case, **the prosecutors repeatedly failed to provide evidence to defense counsel despite court orders to do so**.[130] Attorney General Holder ordered an internal review of the prosecutors' conduct, and the trial judge handling the case appointed its own prosecutor to investigate whether the government prosecutors should face criminal contempt charges.[131] He stated that "[i]n twenty-five years on the bench I have never seen anything approaching the mishandling and misconduct that I have seen in this case."[132] Again, unfortunately, the response of Attorney General Holder and Judge Emmett Sullivan in addressing the misconduct is more remarkable than the misconduct itself.[133]

The possibility of criminal consequences is the last remedy cited by the Supreme Court in determining that civil rights liability is unnecessary to deter prosecutorial misconduct.[134] **This theoretical deterrent is in**

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[124] Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 3,* (2010).

[125] John F. Terzano *et al., JUSTICE PROJECT, IMPROVING PROSECUTORIAL ACCOUNTABILITY: A POLICY REVIEW 2* at 9, (2009), *available at* http://amlawdaily.typepad.com/JusticeProjectReport.pdf.

[126] *Id.*

[127] *Id.* at 2, 9.

[128] *Id.* at 9.

[129] *Id.* at 12.

[130] *Id.*

[131] *Id.*

[132] *Id.* (alteration in original).

[133] *Id.* at 2, 12.

[134] *See Imbler* v. *Pachtman*, 424 U.S. 409, 428–29 (1976).

practice nonexistent. The Court pointed out that government officials, including prosecutors, can be criminally prosecuted for violating constitutional protections under 18 U.S.C. § 242.[135] **But it failed to cite a single case where prosecutors had actually been held criminally liable.**[136] **In fact, in the 150 years since its adoption in 1866,**[137] **it appears that only one prosecutor has been convicted under this statute.**[138]

In short, despite the Supreme Court's confidence in 1976 that existing legal mechanisms were sufficient to offset the dangers of granting prosecutors absolute immunity,[139] **current studies have established that existing safeguards and remedies are totally inadequate.** First, since 97 percent of the cases never go to trial, 97 percent of defendants lack the protections of trial court supervision, appellate review, and collateral proceedings.[140] **Second, many instances of prosecutorial misconduct—including *Brady* violations—are extremely difficult to uncover and never come to light in court proceedings. Third, even where cases go to trial and prosecutorial misconduct is established on appeal, it is rarely found to constitute harmful—and therefore reversible—error. Fourth, even where prosecutorial misconduct is found on appeal to constitute harmful and reversible error, it is rarely reported to disciplinary bodies. Prosecutors are almost never subjected to professional discipline—even where the misconduct constitutes harmful error. And finally, criminal prosecutions for prosecutorial misconduct virtually never happen.**

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[135] *Id.* at 429.

[136] *See id.*

[137] Section 242 was originally adopted as part of the CIVIL RIGHTS ACT of 1866. *See* ch. 31, 14 Stat. 27, 27. It was readopted after the passage of the FOURTEENTH AMENDMENT as part of the 1871 Ku Klux Klan Act. *See Monroe* v. *Pape*, 365 U.S. 167, 180–85 (1961); *see also* Harry A. Blackmun, *SECTION 1983 AND FEDERAL PROTECTION OF INDIVIDUAL RIGHTS—WILL THE STATUTE REMAIN ALIVE OR FADE AWAY?*, 60 N.Y.U. L. Rev. 1, 5, 7 (1985).

[138] *Brophy* v. *Comm. on Prof'l Standards*, 442 N.Y.S.2d 818, 818 (App. Div. 1981); *see* Richard A. Rosen, *DISCIPLINARY SANCTIONS AGAINST PROSECUTORS FOR* BRADY *VIOLATIONS: A PAPER TIGER*, 65 N.C. L. REV. 693, 703 n.56, 726 (1987); Brooks Smith, *POLICING PROSECUTORS: WHAT ROLE CAN APPELLATE COURTS PLAY?*, 38 Hofstra L. Rev. at 840 (2010) (observing that the Supreme Court's reminder that criminal prosecution was available for prosecutorial misconduct "seems small comfort to an appeals court that confronts prosecutorial wrongdoing, the lion's share of which does not rise to the level of a criminal offense").

[139] *See Imbler*, 424 U.S. at 425–29.

[140] Kathleen M. Ridolfi & Maurice Possley, N. *CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009*, at 10, (2010).

II. ABSOLUTE PROSECUTORIAL IMMUNITY IS HISTORICALLY UNJUSTIFIED

In litigation under the major federal civil rights statute, 42 U.S.C. § 1983, prosecutors enjoy either absolute or qualified immunity depending on the function they are performing at the time of their alleged misconduct.[141] **When acting as advocates, prosecutors receive absolute immunity even when they have acted intentionally and maliciously.**[142] When acting as investigators or administrators, prosecutors receive qualified immunity, which protects them from liability **unless they violated clearly established law of which a reasonable prosecutor would have known.**[143] In adopting this scheme, the Supreme Court relied heavily on historical justifications. **This section explains that the Court's historical justification for recognizing absolute prosecutorial immunity is just plain wrong.**

Section 1983—section 1 of the Ku Klux Klan Act—was adopted in 1871 to provide a federal civil remedy for civil rights violations. The Court has repeatedly held that § 1983 must be interpreted in light of its historical context. **While noting that § 1983's text provides for no immunities, the Court has concluded that Congress intended to preserve the well-established common law immunities that existed when the statute was enacted.**[144] **But the Court has stressed that when "a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under § 1983."**[145] **Moreover, because the undisputed purpose of § 1983 was to *create* liability for unlawful conduct of state officials, the Court has always emphasized that it would confer absolute immunity sparingly.**[146]

The common law as of 1871 did *not* confer absolute immunity for prosecutorial misconduct. Indeed, no court adopted absolute prosecutorial immunity until 1896—twenty-five years *after* the adoption of § 1983.[147] In fact, in 1871, although the office of the public

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[141] *See Kalina* v. *Fletcher*, 522 U.S. 118, 127–29 (1997); *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268–69 (1993); *Burns* v. *Reed*, 500 U.S. 478, 486 (1991).

[142] *See Kalina*, 522 U.S. at 124; *Imbler*, 424 U.S. at 427.

[143] *Buckley*, 509 U.S. at 268–70.

[144] *See Tenney* v. *Brandhove*, 341 U.S. 367, 376–77 (1951) (upholding legislative immunity).

[145] *Burns*, 500 U.S. at 498 (Scalia, J., concurring in part and dissenting in part).

[146] *See Imbler*, 424 U.S. at 434 (White, J., concurring) ("[T]o extend absolute immunity to any [class] of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create.").

[147] *See Griffith* v. *Slinkard*, 44 N.E. 1001, 1001–02 (Ind. 1896) (holding that a prosecutor was entitled to absolute immunity); *see also Burns*, 500 U.S. at 499 (Scalia, J., concurring in part and dissenting in part).

prosecutor existed, the private prosecution of crimes was widespread,[148] **and both public and private prosecutors were liable for *malicious prosecution*.**[149] **Indeed, as one court observed, it was especially appropriate and necessary to hold prosecutors liable for malicious prosecutions given their power and the need to hold them accountable for the abuse of that power.**[150]

Although the common law did *not* provide absolute immunity for persons responsible for a criminal prosecution, prosecutors were protected from excessive liability because the elements of the cause of action were difficult to prove. **To establish a claim for malicious prosecution, the plaintiff had to prove that the prosecutor acted without probable cause and with malice.**[151] This high bar for liability served the policy of encouraging persons to act as private prosecutors to protect the community. Given the burdens of proof, an action for malicious prosecution essentially incorporated the elements of qualified immunity.[152] If the plaintiff satisfied the heavy burden of proof, however, the plaintiff would "ordinarily be handsomely rewarded. . . . [for] the outrageous character of the defendant's conduct."[153]

While the common law in 1871 allowed tort actions against prosecutors for malicious prosecution, this remedy was meaningless in the South following the Civil War because the former Confederate states were aggressively using civil and criminal prosecutions to obstruct federal enforcement of civil rights. During Reconstruction, Congress sought to restructure the nation by

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[148] *See* Margaret Z. Johns, *RECONSIDERING ABSOLUTE PROSECUTORIAL IMMUNITY*, 2005 BYU L. Rev. at 108–14.

[149] *Id.* at 113; *see Parker* v. *Huntington*, 68 Mass. (2 Gray) 124, 127–28 (1854) (holding that where plaintiff accused the District Attorney and another defendant of lying to the court to obtain his indictment for perjury, "[t]he plaintiff can maintain his case by proof of a malicious prosecution by both or either of the defendants").

[150] *Wood* v. *Weir*, 44 Ky. (5 B. Mon.) 544, 547 (1845) ("It is contended, that *this rule* [**recognizing liability for malicious prosecution**] will expose attorneys to perplexing litigation, to the manifest injury of the profession. If it should, the law knows no distinction of persons; a different rule cannot, as to them, be recognized by this Court, from that which is applicable to others. Besides, this is a numerous class, powerful for good or evil, and holding them to a strict accountability, will have the effect to exalt and dignify the profession, **by purging it of ignorant, meretricious and reckless members.**").

[151] *1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS* 480–81 (1859); *see 3 WILLIAM BLACKSTONE*, COMMENTARIES *126; *MARTIN L. NEWELL, A TREATISE ON THE LAW OF MALICIOUS PROSECUTION, FALSE IMPRISONMENT, AND THE ABUSE OF LEGAL PROCESS* 21–22 (1892); Fowler Harper, *MALICIOUS PROSECUTION, FALSE IMPRISONMENT AND DEFAMATION*, 15 TEX. L. REV. 157, 165–70 (1937).

[152] *Kalina* v. *Fletcher*, 522 U.S. 118, 133 (1997) (Scalia, J., concurring).

[153] Fowler Harper, *MALICIOUS PROSECUTION, FALSE IMPRISONMENT AND DEFAMATION*, 15 Tex. L. Rev. at 170 (1937).

eliminating slavery,[154] granting former slaves citizenship,[155] and providing effective redress for the deprivation of civil rights.[156] But this effort met fierce and violent resistance.[157] Former Confederates seized control in many parts of the South and launched aggressive campaigns against newly freed slaves, Republicans, Union supporters, and federal officials.[158] These anti-Reconstruction campaigns included state-sanctioned criminal prosecutions of Union officers and federal officials for attempting to enforce federal laws.[159]

Southern states used their judicial systems to frustrate Reconstruction and intimidate federal officers. Federal officials often were criminally prosecuted for arresting southern violators of the Civil Rights Acts.[160] Southern prosecutors also targeted Union military commanders and officials of the Freedmen's Bureau who sought to enforce the 1866 Civil Rights Act.[161] News of these malicious prosecutions reached the highest officials in Washington. For example, in 1866, United States Attorney Benjamin H. Bristow wrote to Attorney General James Speed to explain that, in the South, state prosecutions were being initiated against Union supporters and federal officials in an apparently concerted attempt to force them to leave the state.[162] In Kentucky, as one newspaper explained,

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[154] U.S. CONST. amend. XIII, § 1; *AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY* 358–59 (2005).

[155] U.S. CONST. amend. XIV, § 1; *AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY* 380–81 (2005).

[156] *KU KLUX KLAN ACT OF 1871*, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (2006)); *AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY* at 362, 81 (2005).

[157] Gabriel J. Chin & Randy Wagner, *THE TYRANNY OF THE MINORITY: JIM CROW AND THE COUNTER-MAJORITARIAN DIFFICULTY*, 43 HARV. C.R.-C.L. L. REV. 65, 88–89 (2008); James Forman, Jr., *JURIES AND RACE IN THE NINETEENTH CENTURY*, 113 YALE L.J. 895, 914–26 (2004); Russell Glazer, Comment, *THE SHERMAN AMENDMENT: CONGRESSIONAL REJECTION OF COMMUNAL LIABILITY FOR CIVIL RIGHTS VIOLATIONS*, 39 UCLA L. REV. 1371, 1371–73 (1992); Eric A. Harrington, Note, *JUDICIAL MISUSE OF HISTORY AND § 1983: TOWARD A PURPOSE-BASED APPROACH*, 85 TEX. L. REV. 999, 1004–06 (2007).

[158] *AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY* 377–78 (2005).; Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. at 88–89 (2008); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. at 914–26 (2004); Russell Glazer, Comment, *The Sherman Amendment: Congressional Rejection of Communal Liability for Civil Rights Violations*, 39 UCLA L. REV. at 1371–73 (1992); Eric A. Harrington, Note, *Judicial Misuse of History and § 1983: Toward a Purpose-Based Approach*, 85 TEX. L. REV. at 1004–06 (2007).

[159] *See S. EXEC. DOC. NO.* 39-2, at 5 (1865) (describing groups of "incorrigibles" who "persecute Union men and negroes whenever they can do so with impunity"); David Achtenberg, *With Malice Toward Some:* United States v. Kirby, *Malicious Prosecution, and the Fourteenth Amendment*, 26 RUTGERS L.J. 273, 275 (1995).

[160] *SEE ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS*, 1866–1876, at 23 (2005).

[161] *See* 1 *MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 441 (2d ed. 2002) (describing reports of "countless" lawsuits by Southerners against federal officials).

[162] David Achtenberg, *WITH MALICE TOWARD SOME:* UNITED STATES V. KIRBY, *MALICIOUS PROSECUTION, AND THE FOURTEENTH AMENDMENT*, 26 Rutgers L.J. 273, 275 (1995).

Confederates and their sympathizers "have possession of the courts; they constitute the juries; they are legislators, judges, magistrates, sheriffs, constables, jurors, and with the spirit of disloyalty, they intend to take vengeance upon those who have been zealous in the cause of the Union."[163]

General John M. Palmer, the Union military commander in Kentucky, wrote directly to Attorney General Speed to relate that he had repeatedly been indicted for "aiding slaves escape" merely because he had issued travel passes to former slaves.[164] As he explained, "there are twenty thousand crimes for which I am punishable and Congress will have to pass a law extending my life—lengthen it out a few thousand years that I may [serve] this punishment."[165] More than three thousand prosecutions were brought in Kentucky alone against former Union soldiers.[166]

In response to this flood of prosecutions, General Ulysses S. Grant issued an order forbidding state courts from prosecuting federal officials for actions taken within the scope of their authorized duties.[167] The Order further sought to curb state prosecutors' abuse of the judicial system by requiring them to treat freed slaves in the "same manner and degree" as every other citizen.[168] These abuses of the judicial system were so pervasive that, as part of the first Civil Rights Act, Congress gave federal authorities the power to take control of state criminal prosecutions if a fair result could not be achieved.[169] During the first year this law was in effect, the Commissioner of the Freedman's Bureau, the agency charged with handling the administration of cases removed from state court, estimated that their courts handled 100,000 complaints concerning abusive state actions.[170]

Congress, too, was well aware of Southern prosecutors' aggressive abuse of the judicial process. During the debates on the 1866 amendments to the Habeas Corpus Suspension Act, Senator Lyman Trumbull, Chair of the Judiciary Committee, urged action because "thousands" of "loyal men" were subjected to baseless civil and criminal prosecutions.[171] As Congress debated

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[163] *Id.* at 298.

[164] *Id.* at 299.

[165] *Id.*

[166] *See Cong. Globe, 39th Cong., 1st Sess.* 2054 (1866) (remarks of Sen. Wilson) (attributing the numerous prosecutions to Kentucky's refusal to transfer such cases to federal court).

[167] *See* General Grant's Orders, General Orders, No. 3, War Dep't, Adjunct General's Office, Washington, D.C., (Jan. 12, 1866), *reprinted in* Edward McPherson, *The Political History of the United States During the Period of Reconstruction* 122–23 (Washington, Solomons & Chapman 2d ed. 1875).

[168] *Id.*

[169] *See Civil Rights Act of 1866*, ch. 31, 14 Stat. 27, 27.

[170] *See* Patricia Allan Lucie, *Freedom and Federalism: Congress and Courts 1861–1866*, at 166 (1986).

[171] *See Cong. Globe, 39th Cong., 1st Sess.* 1983 (remarks of Sen. Trumbull). Senator Trumbull knew the common law of his time, including that prosecutors could be liable for their actions in tort. During his service as a Justice of the Illinois Supreme Court, he wrote an opinion holding that "the

the Civil Rights Act of 1866, representatives expressed concern about the vexatious use of prosecutions against Union supporters and federal officials.[172] In recommending the passage of the Fourteenth Amendment, the Joint Committee on Reconstruction stated:

> Southern men who adhered to the Union are bitterly hated and relentlessly persecuted. In some localities prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere as soon as the United States troops are removed.[173]

To counter this anti-Union resistance, Congress sought a way to hold hostile Southern officials accountable. In April 1866, Congress passed the Civil Rights Act, which provided for criminal penalties against any person who caused the deprivation of the rights of former slaves.[174] But the violence continued unabated.[175] Therefore, Congress—buttressed by the constitutional authority of the Fourteenth Amendment, which was ratified in 1868—expanded the scope of the 1866 Act by adding the civil liability provision of the Ku Klux Klan Act of 1871, which **prohibited any person from depriving any citizen of the rights, privileges, and immunities secured by the Constitution.**[176] **These remedial provisions were intended to be broadly construed**. Thus, Representative Shellabarger declared:

> **This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. . . . [T]he largest latitude consistent with the words employed is uniformly given in construing such statutes and**

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law secures every person from unfounded arrests, maliciously instituted against him without probable cause." Jacks v. Stimpson, 13 Ill. 701, 704 (1852).

[172] *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 2065 (remarks of Sen. Doolittle) (describing the widespread nature of the problem of unfounded prosecutions against federal officials); *see also* Achtenberg, *supra* note 141, at 338–42 ("[F]or the 39th Congress, the problem of baseless prosecutions . . . was a pressing current crisis that provoked vigorous debate and decisive legislative action.").

[173] REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39TH CONG., 1ST SESS. xvii–xviii (1866).

[174] CIVIL RIGHTS ACT OF 1866, ch. 31, 14 Stat. 27.

[175] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863–1877, at 342 (1988) (quoting the former Governor of Louisiana as complaining in October 1866 that "murder and intimidation are the order of the day in this state").

[176] KU KLUX KLAN ACT OF 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified at 42 U.S.C. § 1983). The 1871 Act also included criminal penalties for conspiring to violate civil rights, authorized the President to send military forces to suppress violence aimed at depriving civil rights of citizens and other persons, and authorized the suspension of habeas corpus for a limited time. *Id.* §§ 2–4, 17 Stat. at 13–15.

constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. [177]

As this history shows, when § 1983 was adopted in 1871, the common law did not recognize absolute prosecutorial immunity. In fact, prosecutors were liable in common law tort actions for malicious prosecution. Moreover, in adopting the Ku Klux Klan Act, Congress was addressing the widespread practice in the South of using civil and criminal prosecutions to thwart Reconstruction and the enforcement of federal civil rights laws. State tort actions for malicious prosecution were meaningless in the face of this abuse of power, so a federal remedy was required. **Congress did not intend to insulate Southern prosecutors from liability for these abusive practices; on the contrary, it intended to provide a federal civil rights remedy against them for prosecutorial misconduct. In 1871, Congress did not intend to provide immunity for prosecutorial misconduct, but rather intended to create a federal remedy establishing prosecutorial liability.**

Indeed, while prosecutors were liable for malicious prosecution when § 1983 was adopted in 1871, the doctrine of absolute prosecutorial immunity was unheard of for another twenty-five years, until a state court in Indiana adopted it in *Griffith v. Slinkard*.[178] Even after *Griffith*, the common law regarding absolute prosecutorial immunity was not settled for decades. For example, while Indiana adopted the doctrine in 1896, the next year Kentucky concluded that prosecutors could be liable if they acted with malice or corrupt motives.[179] **This split in authority persisted into the 1920s.**[180] California rejected

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[177] *CONG. GLOBE, 42ND CONG., 1ST SESS.* APP'X 68 (1871); *see also id.* at 217 (remarks of Sen. Thurman) (expressing his opposition by remarking that "there is no limitation whatsoever upon the terms that are employed [in § 1983], and they are as comprehensive as can be used"); CONG. GLOBE, 42ND CONG., 1ST SESS. 800 (remarks of Rep. Perry) ("Now, by our action on this bill we have asserted as fully as we can assert the mischief intended to be remedied."); *id.* at 476 (remarks of Rep. Dawes) (the person who "invades, trenches upon, or impairs one iota or tittle of the least of [constitutional rights], to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor").

[178] 44 N.E. 1001 (Ind. 1896).

[179] *Arnold* v. *Hubble*, 38 S.W. 1041, 1041 (Ky. Ct. App. 1897).

[180] Douglas J. McNamara, Buckley, IMBLER *AND STARE DECISIS: THE PRESENT PREDICAMENT OF PROSECUTORIAL IMMUNITY AND AN END TO ITS ABSOLUTE MEANS*, 59 ALB. L. REV. 1135, 1169 (1996). *See generally* ANNOTATION, *IMMUNITY OF PROSECUTING OFFICER FROM ACTION FOR MALICIOUS PROSECUTION*, 34 A.L.R. 1504 (1925) (recognizing the split in authority and collecting cases); Note, *THE CIVIL LIABILITY OF A DISTRICT ATTORNEY FOR QUASI-JUDICIAL ACTS*, 73 U. PA. L. REV. 300 (1925).

absolute prosecutorial immunity in 1908,[181] and Hawaii held that a public prosecutor could be liable for malicious prosecution and rejected the doctrine of absolute prosecutorial immunity in 1916.[182] Oregon waffled a bit and then accepted the doctrine in 1924.[183] **In the federal system, absolute prosecutorial immunity was not recognized until 1927.**[184] **In other words, absolute prosecutorial immunity was not well established in 1871 and was not generally adopted until fifty years after the enactment of § 1983.**

In 1871 Congress could not have intended to retain a common law rule that did not yet exist.[185] And it certainly did not intend to insulate prosecutors from liability for malicious prosecutions, since that was one of the tactics of southern defiance to Reconstruction that the Ku Klux Klan Act was intended to remedy.

To the extent that the doctrine of absolute prosecutorial immunity purportedly rests on historical understandings, it is insupportable.

III. THE PROSECUTORIAL IMMUNITY DOCTRINE CREATES CONFLICTS AND CONFUSION THAT COULD BE ELIMINATED BY THE UNIFORM APPLICATION OF QUALIFIED IMMUNITY

>>>>>[SECTION III Omitted here for brevity of this complaint]<<<<<

CONCLUSION

The doctrine of absolute prosecutorial immunity in federal civil rights actions is unsupportable. From the point of view of public policy, absolute prosecutorial immunity leads to wrongful prosecutions and convictions, ruins the lives of the wrongly accused, subjects crime victims to the painful and protracted relitigation of their experiences, **impairs public safety, wastes public resources,**

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[181] *Carpenter* v. *Sibley*, 94 P. 879, 879 (Cal. 1908).

[182] *Leong Yau* v. *Carden*, 23 Haw. 362, 369 (1916).

[183] Oregon Supreme Court decisions provide perhaps the best example of how unsettled the question of absolute immunity for prosecutors was for more than fifty years after 1871. In 1924, that court, sitting *en banc*, refused to grant a prosecutor absolute immunity, holding that a prosecutor who with intention falsely accused someone of a crime could be held liable in tort. *Watts* v. *Gerking*, 222 P. 318, 321 (Or. 1924) (*en banc*). Months later, on reargument, a divided court reversed itself, withdrew its earlier decision, and held that the prosecutor was protected by absolute immunity for the exercise of his quasi-judicial position. *Watts* v. *Gerking*, 228 P. 135, 141 (Or. 1924) (*en banc*).

[184] *See generally Yaselli* v. *Goff*, 275 U.S. 503 (1927).

[185] *See Kalina* v. *Fletcher*, 522 U.S. 118, 124 n.11 (1997) (noting that *Imbler* did not cite pre-1871 cases and relied primarily on "policy considerations").

and undermines public respect for, and confidence in, the criminal justice system. Moreover, absolute prosecutorial immunity is historically unjustified. Section 1983 was adopted to provide a federal civil rights remedy against Southern prosecutors who were using criminal prosecutions to deny newly freed slaves their civil rights, and to punish and deter Union officers and officials from enforcing those civil rights. **It was not intended to shield prosecutors from liability; on the contrary, it was intended to subject them to liability. And finally, the doctrine generates conflicts and confusion that complicate and prolong civil rights actions for prosecutorial misconduct**.

In place of absolute immunity, qualified immunity should be uniformly applied. Qualified immunity would protect honest prosecutors from unwarranted litigation **while affording victims of deliberate prosecutorial misconduct a remedy for the willful violation of their civil rights**. Qualified immunity would be consistent with the common law as it existed in 1871 and with the purposes underlying the adoption of § 1983—providing a federal civil rights remedy for malicious prosecutions. And the uniform application of qualified immunity would simplify and streamline the law by providing an objective standard that could be applied at the early stages of litigation to protect prosecutors not only from liability, but also from the burden of litigation.

CHALLENGING FEDERAL LAWS

(1). 28 U.S. CODE § 1914 DISTRICT COURT; FILING AND MISCELLANEOUS FEES; RULES OF COURT

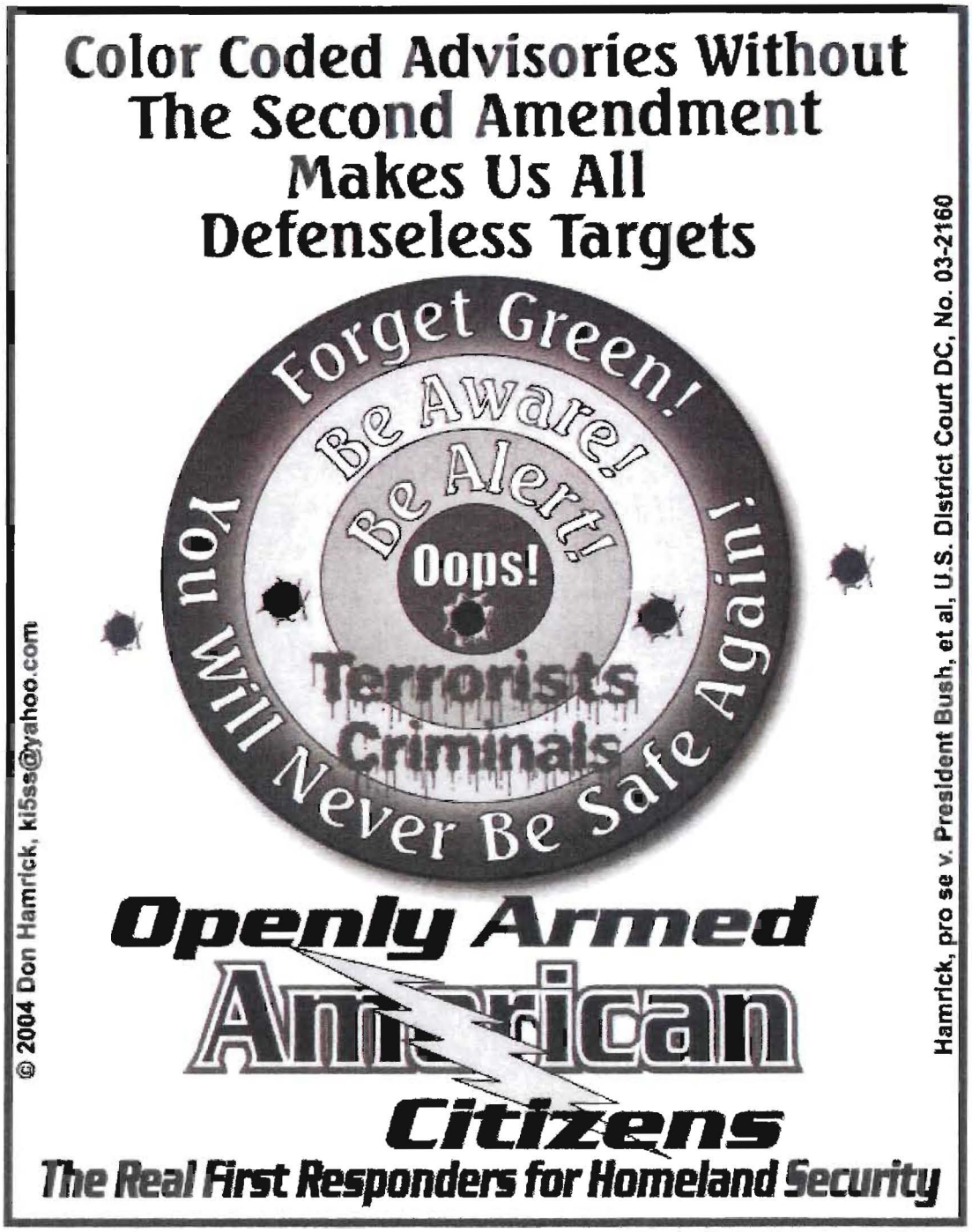
(a) The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350, except that on application for a writ of habeas corpus the filing fee shall be $5.

(b) The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States.

(c) Each district court by rule or standing order may require advance payment of fees.

THE CONSTITUTIONAL CHALLENGE:

In 2002-2003, the U.S. District Court for the District of Columbia for my civil case for the Second Amendment rights of merchant seamen to openly carry and carry concealed in intrastate and interstate travel, *Hamrick* vs. *President Bush*, was $125 (*if I recall correctly*). Today, in 2018, the U.S. District Court for the Eastern District of Arkansas's filing fee is $350 with an additional $50 administrative fee for a total of $400.



Without knowing reasons for the repetitiously increasing filing fee for the last 16 years I am left with my political opinion that the increasing filing fee to $400 is discriminatory against low income citizens, regardless of the right to file *in forma pauperis*. It is my experienced observations that there is a distinct judicial bias against *pro se* civil plaintiffs filing civil rights cases. Why do I say that?

In 2006, I filed a civil case, *Hamrick* v. *United Nations, President Bush, Michael Chertoff* Secretary of Homeland Security, *Admiral Thad Allen*, Commandant of the Coast Guard, et al. in the U.S. District Court for the Eastern District of Arkansas, Case No. 1:06cv0044. At some point in time my case became inactive because the original judge assigned to my case became ill and eventually died. My case got reassigned to Judge Moody. And because of his increased case load he immediately dismissed my case without a reason.

In 2017, I filed a civil case against Kensett District Court Judge in the U.S. District Court, Eastern Dist. AR, No. 4:17-MC-00018-JM (Wrongfully Dismissed). The case was assigned to Judge Moody. The same judge that dismissed my Second Amendment case in 2006 (*see paragraph above*). For Judge Moody to dismiss the two cases by the same civil plaintiff implies judicial bias against the same civil plaintiff. In both cases, I filed *pro se* and *in forma pauperis*.

CHALLENGING ARKANSAS STATE LAWS

(1). ARKANSAS RULES OF EVIDENCE: RULE 303 PRESUMPTIONS IN CRIMINAL CASES.

(a) Scope.

Except as otherwise provided by statute, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts **or of guilt**, are governed by this rule.

(b) Submission to Jury.

The court is not authorized to direct the jury to find a presumed fact against the accused. **If a presumed fact establishes guilt** or **is an element of the offense** or **negatives a defense**, the court may

submit the question of guilt or of the existence of the presumed fact to the jury, but only if a reasonable juror on the evidence as a whole, including the evidence of the basic facts, **could find guilt** or **the presumed fact beyond a reasonable doubt**. If the presumed fact has a lesser effect, the question of its existence may be submitted to the jury provided the basic facts are supported by substantial evidence or are otherwise established, unless the court determines that a reasonable juror on the evidence as a whole could not find the existence of the presumed fact.

THE CONSTITUTIONAL CHALLENGE:

RULE 303 advocates the PRESUMPTION OF GUILT to a greater degree over the PRESUMPTION OF INNOCENCE. It is this PRESUMPTION OF GUILT **while ignoring exculpatory evidence proving my innocence (*PRESUMPTION OF INNOCENCE*) in my motions for dismissal with prejudice and expunge my record that dominated at the Kensett District Court. This is one of the core causes of innocent defendants of misdemeanor offenses getting falsely convicted for offenses they did not commit**. How many innocent defendants before me got convicted? This requires a criminal investigation into the Kensett District Court by the FBI's Public Corruption Division in Little Rock.

RULE 303 violates the checks and balance system of our constitutional form of government and court procedures. How else can it be explained that innocent people

on death row get exonerated (*other than the advancements in DNA evidence*)? Prosecutorial Misconduct (*ignoring evidence proving innocence*) is most likely the primary cause of false convictions. Absolute immunity for prosecutors and judges is next on my list of constitutional challenges.

The Presumption of Innocence must be added to RULE 303 to preserve the constitutional checks and balance system to restore "*in the interest of justice*" in State and local court proceedings.

THE MISH-MASH OF LIABILITY RULES FOR CONSTITUTIONAL TORTS

Citing Jeffries Jr., John C., *THE LIABILITY RULE FOR CONSTITUTIONAL TORTS* (Date written: September 1, 2012 | Last revised: 9 Sep 2012). Virginia Law Review, 2013; Virginia Public Law and Legal Theory Research Paper No. 2012-53.[186] ABSTRACT:

> There is no liability rule for constitutional torts. There are, rather, several different liability rules, ranging from absolute immunity at one extreme to absolute liability at the other. **States and state agencies are absolutely immune from damages liability for violations of constitutional rights, no matter how egregious their conduct may be**. The same is true for those who perform legislative, **judicial**, and **certain prosecutorial actions**. **In contrast, local governments are strictly liable for constitutional violations committed pursuant to official policy or custom, even if the right found to have been violated was first recognized after the conduct triggering liability. Most defendants -- including federal, state, and local officers -- are neither absolutely immune nor strictly liable. Instead, they are protected by qualified immunity, a fault-based standard approximating negligence as to illegality**.
>
> This article attempts a unified theory of constitutional torts. Less grandly, it offers a comprehensive normative guide to the award of damages for violation of constitutional rights. It seeks generally to align the damages remedy on one liability rule, a modified form of qualified immunity, with limited deviations justified on functional grounds and constrained by the reach of those functional justifications. The analysis begins with absolute immunity, then proceeds to absolute liability, and concludes with extended consideration of qualified immunity. The argument calls for curtailment of the first two categories and reform of the third. The overall goals are restoration of money damages as an effective means of enforcing constitutional rights; protection against the downside risks of wholly unconstrained damages liability; and rationalization of the law through simplification of existing doctrine.

Citing Bernie Goldberg, ***ROOTING FOR LAUNDRY***, bernardgoldberg.com, Feb. 21, 2018:

> "*I reluctantly have come to believe that most Americans – whether they're members of the chattering class in the media or your next-door neighbor —*

[186] Available at SSRN: https://ssrn.com/abstract=2143180

*have lost the ability, and sometimes even the desire, to persuade anyone to change his or her mind on just about any important issue. Too many of us have put a "**Do Not Disturb**" sign around our necks and don't want to be exposed to any ideas that we don't already hold."*

Bernie Goldberg appeared on Fox News Channel's *AMERICA'S NEWSROOM* Friday morning, March 2, 2018 on the same issues in his *ROOTING FOR LAUNDRY* article. That Fox News Segment is available at *https://twitter.com/AmericaNewsroom/status/969600030192623618*.

Bernie Goldberg's article ***ROOTING FOR LAUNDRY***, is a sociological perspective of human behavior that corroborates my perspective from a psychological view in this federal civil complaint: ***Prior Belief Effect*** (One's own erroneous belief of things and people), ***Confirmation Bias*** (standing fast with one's own erroneous opinion against all contradictory facts), ***Disconfirmation Bias*** (dismissing all contradictory opinions from other people), ***Polarization of Attitudes*** (cause and effect of a false system of belief), and all of that leads to ***Pettifoggery*** (political & legal consequences, such as this federal civil complaint derived from a false arrest, false imprisonment, and false conviction — all based on a lie).

STATEMENT OF FACTS

This is a well developed case for the U.S. District Court. [*IF REMANDED TO THE U.S. DISTRICT COURT, LITTLE ROCK AS IT IS NOW APPENDED TO MY 8TH CIRCUIT "DEMAND FOR WRIT OF ERROR CORAM NOBIS TO THE U.S. DISTRICT COURT, LITTLE ROCK UNDER 28 U.S. CODE § 2201(A) CREATION OF REMEDY AND 28 U.S. CODE § 2202 - FURTHER RELIEF AS MY SUMMARY ADDENDUM TO MOTION FOR REHEARING"*] It has been remanded from the 8th Circuit in response to my Motion for Rehearing on error of both the U.S. District and the initial dismissal at the 8th Circuit wrongfully affirming the error of the U.S. District Court, Little Rock.

CAUSES OF ACTION

False arrest, false imprisonment, malicious prosecution, false conviction of a factually innocent defendant, and violations of my constitutional and statutory rights under *18 U.S. CODE § 241 CONSPIRACY AGAINST RIGHTS* and *18 U.S. CODE § 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW*.

RELIEF SOUGHT

(1). **MY FIRST PRIORITY FOR RELIEF** is a court order to the FBI Public Corruption Division, Little Rock, to Investigate Prosecutor Don Raney, Judge Mark Derrick, and Judge Milas Hale for violation of my federal and state constitutional rights, and federal and state statutory rights under *18 U.S. CODE § 241 CONSPIRACY AGAINST RIGHTS* and *18 U.S. CODE § 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW*.

(2). Damages under the Federal Tort Claims Act, 28 U.S. Code § 2674 Liability of United States, as to the matter of federal Judge Moody wrongfully dismissing the civil complaint of false arrest, false imprisonment, malicious prosecution at the pretrial stage at the Kensett District Court under 28 U.S. Code § 2283 *STAY OF STATE COURT PROCEEDINGS* and 28 U.S. Code § 1455(a) *PROCEDURE FOR REMOVAL OF CRIMINAL PROSECUTIONS*.

(3). Injunctive Relief:

- Overturn/Reverse my false conviction with prejudice.
- Expunge my record with prejudice.

(4). Jury Trial.

(5). Declaratory Relief as to 42 U.S. Code § 1988 PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS

(6). Declare that the Defendants' actions alleged herein violates Plaintiff's First Amendment freedom of religion and Plaintiff's rights under the Privileges and Immunities Clause to the U.S. Constitution and the Constitution of the State of Arkansas affording the Plaintiff to be protected as a family-based, live-in caregiver to his own mother from false arrest, false imprisonment, malicious prosecution, false conviction of a factually innocent defendant, and protections from violations of my constitutional and statutory rights under *18 U.S. CODE § 241 CONSPIRACY AGAINST RIGHTS* and *18 U.S. CODE § 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW*.

(7). Declare that the Defendants' actions alleged herein violate the following:

42 U.S. Code § 1981(a) & (c) EQUAL RIGHTS UNDER THE LAW
42 U.S. Code § 1983 CIVIL ACTION FOR DEPRIVATION OF RIGHTS
42 U.S. Code § 1985(2) & (3) CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS
42 U.S. Code § 1986 ACTION FOR NEGLECT TO PREVENT
42 U.S. Code § 1988 PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS

18 U.S. Code § 241 CONSPIRACY AGAINST RIGHTS
18 U.S. Code § 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW

(8). Award such other and further relief the Court deems appropriate and just.

Submitted

Don Hamrick
322 Rouse Street
Kensett, Arkansas 72082
Email: ki5ss@yahoo.com
Phone: (501) 742-1340

Statement of Verification

I have read the above complaint and it is correct to the best of my knowledge.

Dated this 16th day of March 7th 2018.

EXHIBIT 1

LAW REVIEW ARTICLES SUPPORTING THIS COMPLAINT

2006

Rodney J. Uphoff, *CONVICTING THE INNOCENT: ABERRATION OR SYSTEMIC PROBLEM?*,[187] U of Missouri-Columbia School of Law Legal Studies Research Paper No. 2006-20 (Posted at papers.ssrn.com: June 27, 2006); (Wisconsin Law Review, Forthcoming); **ABSTRACT**: **In practice, the right to adequate defense counsel in the United States is disturbingly unequal**. Only some American criminal defendants actually receive the effective assistance of counsel. Although some indigent defendants are afforded zealous, effective representation, many indigent defendants and almost all of the working poor are not. The quality of representation a defendant receives generally is a product of fortuity, of economic status, and of the jurisdiction in which he or she is charged. **For many defendants, the assistance of counsel means little more than counsel's help in facilitating a guilty plea**. With luck, money, and location primarily determining whether a defendant has meaningful access to justice in this country, **the promise of equal justice remains illusory**.

Providing defendants access to competent counsel with the time and resources to meaningfully test the prosecution's case is a badly needed step that would enhance the fairness and reliability of our criminal justice system. It is, however, just one step in fixing a "broken system." **For even the presence of a capable defense lawyer does not necessarily ensure that the innocent will, in fact, go free**. Contrary to popular wisdom, our system of justice does not overprotect criminal defendants, thereby minimizing the conviction of the innocent. **Rather, our state criminal justice systems, as they currently operate, inadequately protect those wrongfully accused of crimes.**

Arnold H. Loewy, *SYSTEMIC CHANGES THAT COULD REDUCE THE CONVICTION OF THE INNOCENT*,[188] UNC Legal Studies Research Paper No. 927223 (August 30, 2006): **ABSTRACT**: In an ideal world, juries would always reach the correct result. In theory, we believe that the second best choice is to err on the side of acquitting the guilty rather than convicting the innocent. We say that it is better to acquit ten guilty men than convict one who is innocent. But I'm not sure that we really believe it. Would we really let ten child molesters walk the street to avoid convicting one innocent one? I have my doubts.

Although we think the system is tilted to protect defendants, it may not be. Juries may not really believe in the "presumption of innocence." Furthermore the prosecutor usually has far more resources than the defense. Searches have to be reasonable, but at least the government can conduct them. The defense cannot. More generally, the prosecution has a professional police force investigating for it, and greater access to

[187] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=912310

[188] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=927223

forensic testing. If the prosecutor wishes to frame a suspect (which fortunately is not the norm) it may not be all that difficult.

I conclude with four suggestions that are predicated on the reality that wrongful convictions happen.

> (1) There should be **innocence commissions** set up similar to the British model.
>
> (2) **Defenses should not be artificially limited**. For example, pending the outcome of a U.S. Supreme Court case, a State can (and some do) deny the defendant the opportunity to present evidence that somebody else committed the crime.
>
> (3) As long as we know there are mistakes, capital punishment should be abolished (as most of the civilized world has). And
>
> (4) parole should not be contingent on a person's admitting his guilt. This presents an untenable dilemma for an innocent person, and may actually cause him to spend more time in prison than a similarly-situated guilty one.

2008

Citing: Samual R. Gross, *CONVICTING THE INNOCENT: 4 Annual Review of Law and Social Science 173-192*,[189] (December 1, 2008). **ABSTRACT**: Almost everything we know about false convictions is based on exonerations in rape and murder cases, which together account for only 2% of felony convictions. Within that important but limited sphere we have learned a lot in the past 30 years; outside it, **our ignorance is nearly complete**.[190] This review describes what we now know about convicting the innocent: estimates of the rate of false convictions among death sentences; common causes of false conviction for rape or murder; demographic and procedural predictors of such errors. **It also explores some of the types of false convictions that almost never come to light—innocent defendants who plead guilty rather than go to trial, who receive comparatively light sentences, who are convicted of crimes that did not occur** (as opposed to crimes committed by other people), who are sentenced in juvenile court—in fact, ***almost all innocent defendants who are convicted of any crimes other than rape or murder***. Judging from what we can piece together, the vast majority of false convictions fall in these categories. **They are commonplace events, inconspicuous mistakes in ordinary criminal investigations that never get anything close to the level of attention that sometimes leads to exoneration.**

2009

Fred C. Zacharias (University of San Diego School of Law), Bruce A. Green (Fordham University School of Law), ***THE DUTY TO AVOID WRONGFUL CONVICTIONS: A THOUGHT EXPERIMENT IN THE REGULATION OF PROSECUTORS***,[191] Boston University Law Review,

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[189] https://www.annualreviews.org/doi/abs/10.1146/annurev.lawsocsci.4.110707.172300

[190] My emphasis.

[191] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1336765

Vol. 89, Spring 2009, (Written February 2, 2009; Last revised: July 10, 2009) (San Diego Legal Studies Paper No. 09-007); **ABSTRACT**: ***This Article explores the possible role of the attorney disciplinary process in discouraging prosecutorial conduct that contributes to false convictions. It asks what the impact would be, for better or worse, of disciplining prosecutors for incompetence when they fail to exercise reasonable care to prevent the conviction of the innocent***. The inquiry provides a new vehicle for thinking about ***the nature of the disciplinary process, the work of prosecutors, the challenge of preventing erroneous convictions and, ultimately, the complexities of prosecutorial regulation***.

The Article demonstrates that it would be plausible to interpret the attorney competence rule as encompassing prosecutorial negligence and identifies various potential benefits of doing so. But the Article also identifies and analyzes significant normative and institutional objections that might be raised. The Article concludes that there are serious problems with employing the competence rule as proposed and that these problems are inherent in the use of discipline to regulate prosecutors.

This analysis suggests that the historical under-utilization of discipline in regulating prosecutors may not result exclusively from insufficient resources or a lack of will on the part of disciplinary regulators, as some have argued. The Article's illustration of the inherent limitations of the disciplinary process highlights the need for renewed attention to alternative regulatory processes. **These include civil liability, which currently is foreclosed by prosecutorial immunity doctrines, and more robust internal regulation**.

2011

Citing Marvin Zalman, Matthew J. Larson, Brad Smith, ***CITIZENS' ATTITUDES TOWARD WRONGFUL CONVICTIONS***, 37 Criminal Justice Review 51 (December 8, 2011).[192] **ABSTRACT**: Perhaps no problem challenges the legitimacy of the criminal justice system more than **the conviction of factually innocent individuals**. Numerous highly publicized exonerations that occurred since 1989 have raised the visibility of wrongful conviction, eliciting the attention of both scholars and policy makers. Much of the research in this area focuses on the causes and incidence of the phenomenon. Despite the growing body of research, however, there has been no examination of how citizens view this problem. Using data from a statewide survey of Michigan residents, the present study aims to fill that gap in the literature by reporting on citizens' attitudes regarding the issue of wrongful conviction. Overall, the results of this exploratory study suggest that respondents not only recognize the incidence of wrongful conviction but also believe that such errors occur with some regularity. Further results show that respondents believe wrongful convictions occur frequently enough to justify major criminal justice system reform. Attitudes varied significantly across demographic groups as well. Additional findings and policy implications are discussed.

2013

Citing C. R. Huff & M. Killias editors., ***HOW MANY FALSE CONVICTIONS ARE THERE? HOW MANY EXONERATIONS ARE THERE? | WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE***

[192] http://journals.sagepub.com/doi/abs/10.1177/0734016811428374

SYSTEMS,[193] Routledge, March 2013, U of Michigan Public Law Research Paper No. 316, February 26, 2013 (Last revised: 12 Mar 2013): **ABSTRACT**: The most common question about false convictions is also the simplest: How many are there? The answer, unfortunately, is almost always the same and always disappointing: We don't know. Recently, however, we have learned enough to be able to qualify our ignorance in two important respects. We can put a lower bound on the frequency of false convictions among death sentences in the United States since 1973, and we have some early indications of the rate of false convictions for rape in Virginia in the 1970s and early 1980s. These new sources of information suggest – tentatively – that the rate of false convictions for serious violent felonies in the United States may be somewhere in the range from 1% to 5%. Beyond that – for less serious crimes and for other countries – our ignorance is untouched.

2016

Citing Marvin Zalman, *WRONGFUL CONVICTIONS: A COMPARATIVE PERSPECTIVE*,[194] Wayne State University, May 4, 2016. **ABSTRACT**: Wrongful conviction becomes a social problem when innocence consciousness arises, meaning that a significant number of people view miscarriages of justice as caused by correctible systemic factors, and not as inevitable failures of courts. **The term "wrongful conviction" encompasses procedurally flawed court convictions and the convictions of factually innocent defendants (i.e., false convictions)**. There is no definitive way to measure the incidence of false convictions, but American experts estimate plausible rates of from 1 to 3 percent, which translates to tens of thousands falsely convicted each year. Three case studies — the United States, England, and China — demonstrate that innocence consciousness occurred at different times, subject to different social stimuli, leading to different citizen and governmental responses in each country. **Wrongful convictions are now viewed as a social problem globally**. Wrongful conviction research, conducted mostly by psychologists and lawyers, would benefit from studies by social scientists.

Citing James R. Acker, *TAKING STOCK OF INNOCENCE | MOVEMENTS, MOUNTAINS, AND WRONGFUL CONVICTIONS*,[195] 33 Journal of Contemporary Criminal Justice 8-25, (October 7, 2016). **ABSTRACT**: This article offers a brief overview of the current state of the Innocence Movement. **It begins by reviewing what we know, and do not know, about the incidence of wrongful convictions and their correlates and causes**. It then explores select issues that should receive greater attention to help sustain the Innocence Movement and ensure its advancement. Acknowledging that much has been learned about wrongful convictions and that important reforms have been enacted, **the article concludes by observing that significant challenges remain and must be addressed before efforts to guard against convicting the innocent are relaxed**.

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[193] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2225420

[194] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2899482

[195] http://journals.sagepub.com/doi/abs/10.1177/1043986216673008

Citing Samuel R. Gross, ***WHAT WE THINK, WHAT WE KNOW AND WHAT WE THINK WE KNOW ABOUT FALSE CONVICTIONS***,[196] University of Michigan Law School, U of Michigan Public Law Research Paper No. 537 (February 21, 2017; Last revised: June 3, 2017); Ohio State Journal of Criminal Law, Vol. 14, No. 2, 2017 (Forthcoming); ABSTRACT: **False convictions are notoriously difficult to study because they can neither be observed when they occur nor identified after the fact by any plausible research strategy**. Our best shot is to collect data on those that come to light in legal proceedings that result in the exoneration of the convicted defendants. In May 2012, the National Registry of Exonerations released its first report, covering 873 exonerations from January 1989 through February 2012. By October 15, 2016, we had added 1,027 cases: 599 exonerations since March 1, 2012, and 428 that had already happened when we issued our initial report but were not known to us. In this paper I discuss what can and cannot be learned from the exonerations that we have collected. The cases we find and list are not a complete set of all exonerations that occur—not nearly—but it's clear from the patterns we see in known exonerations that false convictions outnumber exonerations by orders of magnitude. We cannot estimate the rate of false convictions or their distribution across crime categories. **We can confidently say, however, that they are not rare events**—and other research has estimated the rate of false convictions among death sentences at 4.1%, which provides an anchor for estimates of the rate for other violent crimes. **We know that several types of false or misleading evidence contribute to many erroneous convictions** (eyewitness misidentifications, false confessions, bad forensic science, **perjury and other lies**), **as does misbehavior by those who process criminal cases: misconduct by police and prosecutors; incompetence and laziness by defense attorneys**. Beyond that, we cannot say how false convictions are produced. It's clear, however, from the relative prevalence of these factors that the process differs radically from one type of crime to another. Data from one local jurisdiction (Harris County, Texas) strongly suggest that across the country thousands if not tens of thousands of innocent defendants a year plead guilty to misdemeanors and low-level felonies in order to avoid prolonged pretrial detention. And our data clearly show that innocent African Americans are much more likely to be wrongfully convicted of crimes than innocent whites, in part because of higher criminal participation in the African American community and in part because of discrimination.

[196] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921678

KENSETT CITY HALL ORGANIZATION CHART

Contact Information
202 S.E. First St.
KENSETT, AR 72082
Phone: (501) 742-5156
Fax: (501) 742-3297

Meetings: Third Tuesday Each Month
Web Site: Official Web Site
Email: kensettmayor@yahoo.com

SOURCES
Arkansas Municipal League
Kensett City Hall Website

ONLINE SERVICES

White County Personal Property Tax
https://www.ark.org/whitecounty/index.php

White County Real Estate Tax
https://www.ark.org/whitecounty/index.php

The same double dipping question for ***Christina Alberson***.

Don Hamrick, Candidate for Mayor of Kensett,
Below are my legal questions for the City Attorney Heath Ramsey to answer.
Please cite the Arkansas Code that authorizes these dual position jobs.

MANAGING & PLANNING

MAYOR OF KENSETT, ARKANSAS
Alan Edge

CITY ATTORNEY
Heath Ramsey

ASSISTANT TO THE MAYOR
***Christina Alberson?** **

RECORDER/TREASURER
Melissa Brown

COUNCIL MEMBERS
Keith Baker
Clarence Chatmon
Kenneth Cooperwood
Don Fuller
Ella Watson
D. P. Williams

EMERGENCY SERVICES

POLICE CHIEF
John Polard
ASSISTANT POLICE CHIEF
Derek Balentine
INVESTIGATOR/OFFENDER REGISTRY
***Laura Balentine?** ***

FIRE CHIEF
Tommy Jones

ANIMAL SERVICES
Melissa Clark
Animal Control Officer

KENSETT DISTRICT COURT

DISTRICT JUDGE
Mark Derrick

DISTRICT COURT CLERK
***Christina Alberson?** **

INFRASTRUCTURE MAINTENANCE

DIRECTOR OF PUBLIC WORKS
Steve Brown
Building Permits & Inspections
- Conducting building construction inspections
- Issuing building permits
- Issuing certificate of occupancy permits
- Reviewing building plans
- Working directly with the Planning and Zoning Commission

PARKS & RECREATION DEPARTMENT
- **PARK FACILITIES**
- **PARKS PROGRAMS**

WATER UTILITIES
Water & Sewage Department *Clerk* ***Laura Balentine?** **
- Meter Reading
- Meter Rates & Policies
- Water Quality Report*

**Annual Drinking Water Report is currently available at www.healthy.arkansas.gov/eng/ccr588.pdf or in our office at 202 SE 1st St.*

STREET SUPERINTENDENT
David Free

SANITATION & RECYCLING DEPARTMENT

LEGALITY IN QUESTION
DOUBLE DIPPING?
****Can ***Laura Balentine*** Be Both a Kensett Police Officer AND an Employee of Kensett Water & Sewage Department?

STATE ONLINE SERVICE

Car Tag/Registration Renewals || http://www.arkansas.gov/dfa/star_intro.html
Hunting and Fishing Licenses || https://www.ark.org/agfc/license/index.php
Sex Offender Registry || http://www.acic.org/sofl/index.php
Child Support Payments || http://www.arkansas.gov/dfa/child_support/ocse_index.html
Arkansas Vacation Kit || http://www.arkansas.com/helpful-info/free-vacation-kit/
Arkansas Trails Search || http://www.arkansas.gov/ha/trails/index.php