IN THE KENSETT DISTRICT COURT

101 NE First Street, Kensett , AR 72082

Laura Balentine, Police Officer AND Kensett Water Dept. Clerk Kensett Police 101 NE 1st St Kensett, Arkansas 72082	)	CASE NO. CR-18-230 WR-18-165 Obstructing Governmental Operations - Non Force
v.	)	CASE NO. CR-18-231 WR 18-165 Harassing Communications Repeatedly
Don Hamrick 322 Rouse Street Kensett, AR 72082	)	**Friday, November 9, 2018**

NOTICE OF REMOVAL OF CASE

TO THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS IN LITTLE ROCK

28 U.S. CODE § 1651 – WRITS (ALL WRITS ACT)[1]

(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 § 1443 - CIVIL RIGHTS CASES: Any of the following civil actions or **criminal prosecutions**, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) **Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States**, or of all persons within the jurisdiction thereof;

(2) **For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law**.

[1] Joan Steinman, *THE NEWEST FRONTIER OF JUDICIAL ACTIVISM: REMOVAL UNDER THE ALL WRITS ACT*, 80 Boston University Law Review 773 at 793 (2000) (The *Younger* issue [(*Abstention Doctrine*)], however, typically does not arise in cases where *ALL WRITS* removal is at issue, and when it has been raised, the courts have rejected its applicability. *See In re Agent Orange Prods. Liab. Litig*., 996 F.2d 1425, 1432 (2d Cir. 1993), cert. denied, *Ivy* v. *Diamond Shamrock Chern. Co*., 510 U.S. 1140 (1994) (rejecting applicability of *Younger* doctrine where All Writs removal was also at issue).

28 U.S. Code § 1455(a) NOTICE OF REMOVAL: A defendant or defendants 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 or defendants in such action.

28 U.S. Code § 1455(b) REQUIREMENTS:

(1) A notice of removal of a criminal prosecution shall be filed not later than 30 days after the arraignment in the State court, **or at any time before trial**, whichever is earlier, **except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time**.

(2) A notice of removal of a criminal prosecution shall include **all grounds for such removal**. A failure to state grounds that exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 11(b) Representations to the Court.

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an … **unrepresented party** certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

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1. GROUNDS FOR REMOVAL

A. MY INTENDED TWO-PART U.S. SUPREME COURT APPEALS ON MY FALSE CONVICTION AND NATIONAL OPEN CARRY

My two intended U.S. Supreme Court Appeals are included herein by reference. The Table of Contents and Table of Authorities from both parts of my Appeals here included herein for referencing convenience:

U.S. SUPREME COURT INTENDED APPEAL: PART 1: FALSE CONVICTION

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U.S. SUPREME COURT INTENDED APPEAL: PART 2: NATIONAL OPEN CARRY

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B. CONSTITUTIONAL GROUNDS FOR REMOVAL

i. John Pollard, Chief of Police for the City of Kensett, Don Raney, Prosecutor, Judge Mark Derrick of White County and post-recusal Judge Milas Hale, Pulaski County,

Sherwood District Court violated my constitutional rights when I did not commit any offense against anyone, especially my veteran mother, age 83, now age 85. The constitutional rights violated are listed here:

- **COMMON DEFENSE CLAUSE & PRIVILEGES IMMUNITIES CLAUSE:** Being a Coast Guard veteran and a family-based caregiver to my own U.S. Air Force veteran mother, age 83, now age 85, is protected from false arrest from police misconduct, malicious prosecution, and false conviction.

- **FIRST AMENDMENT RIGHTS TO FREELY ASSEMBLE AS A FAMILY-BASED CAREGIVER TO MY OWN MOTHER AND MY FIRST AMENDMENT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES**: Prosecutor Don Raney included my appeal to the U.S. Court of Appeals, 8th Circuit, dated March 7, 2018, titled: "*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*" This federal appeal is included with a series of emails I sent under the *FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES* in response to my request for copies in accordance with 28 U.S. Code § 1455. The copies Prosecutor Don Raney supplied fall under my First Amendment right to Petition the Government for Redress. Prosecutor Don Raney is **attempting to criminalize** the *FIRST AMENDMENT*, the *COMMON DEFENSE CLAUSE* and the *PRIVILEGES AND IMMUNITIES CLAUSE* that protect family-based caregivers, especially American veterans who are family-based caregivers to their own veteran mothers and fathers.

- **CRIMINAL VIOLATIONS BY THE CITY OF KENSETT OF THE FOLLOWING LAWS**:

  ARKANSAS CODE § 5-2-205. CAUSATION
  ARKANSAS CODE § 5-2-401. CRIMINAL LIABILITY GENERALLY.
  ARKANSAS CODE § 5-2-402. LIABILITY FOR CONDUCT OF ANOTHER GENERALLY.
  ARKANSAS CODE § 5-2-403. ACCOMPLICES.
  ARKANSAS CODE § 5-3-201. CONDUCT CONSTITUTING ATTEMPT.
  ARKANSAS CODE § 5-3-202. COMPLICITY.
  ARKANSAS CODE § 5-3-301. CONDUCT CONSTITUTING SOLICITATION
  ARKANSAS CODE § 5-3-401. CONDUCT CONSTITUTING CONSPIRACY.
  ARKANSAS CODE § 5-3-402. SCOPE OF CONSPIRATORIAL RELATIONSHIP.
  ARKANSAS CODE § 5-3-403. MULTIPLE CRIMINAL OBJECTIVES.
  ARKANSAS CODE AT § 20-8-601. FINDINGS (ALZHEIMERS)
  42 U.S. CODE § 11201(8) & (9) FINDINGS (ALZHEIMERS)
  42 U.S. CODE § 2000d–4a - "PROGRAM OR ACTIVITY" AND "PROGRAM" DEFINED
  42 U.S. CODE § 2000d–7 - Civil Rights Remedies Equalization
  18 U.S. CODE § 241 - CONSPIRACY AGAINST RIGHTS
  18 U.S. CODE § 242 - DEPRIVATION OF RIGHTS UNDER COLOR OF LAW
  18 U.S. CODE § 245(B)- FEDERALLY PROTECTED ACTIVITIES

C. THE INCIDENT CAUSING MY FALSE ARREST & MY FALSE CONVICTION

i. My mother has behavior issues, *OPPOSITIONAL DEFIANT DISORDER, INTERMITTENT EXPLOSIVE DISORDER,* and *Histrionic Personality Disorder*.[2]

ii. The "Specifiers" for Oppositional Defiant Disorder are found to be that it is common for individuals with *OPPOSITIONAL DEFIANT DISORDER* to show symptoms only at home and only with family members.

iii. The diagnostic Criteria for Intermittent Explosive Disorder are recurring behavioral outbursts representing the failure to control aggressive impulses as manifested by either of the following: Verbal aggression (i.e., temper tantrums, tirades, verbal arguments …). The magnitude of aggressiveness expressed during the recurrent outbursts is grossly out of proportion to the provocations or to any precipitating psychosocial stressors. The recurrent aggressive outbursts are not premeditated (i.e., they are impulsive and/or anger-based).

iv. The diagnostic Criteria for Histrionic Personality Disorder is a pervasive pattem of excessive emotionality and attention seeking.

v. Joyce A. Simmons, APRN at ARCare, 606 Wilbur D. Mills North, Kensett, Arkansas provided me with her "*TO WHOM AT MAY CONCERN*" letter stating that she saw signs of Alzheimer's while she was examining my mother. Joyce Simmons' recommended in her letter that Dr. Ransom refer my mother to the *UNIVERSITY OF ARKANSAS MEDICAL SCIENCE* (UAMS) for further evaluation.

vi. I told my mother that I deliver the "To Whom it May Concern" letter her doctor. She exploded into raging rant that I went behind her back to do that. She prides herself to believe she does not have any symptoms of Alzheimers. She wants her reputation to be pristine, even against medical evidence.

vii. My mother got so angry that she got up out of her recliner, her arms flying about in anger as she stormed up to me face to face sizing me up as if to fight but she looked at the letter in my right hand and made a grab for it but only managed to tear a small piece of it from the top. I lightly grabbed her right wrist with my left hand and with my right hand I peeled the piece of that letter from her fisted left hand. She has a psychological hatred of being "manhandled" even when she is the aggressor on the offense. She became so furious that she went back to her recliner and called 911 for the Kensett Police to have me arrested for Arkansas Code § 5-26-305 *DOMESTIC BATTERING IN THE THIRD DEGREE*. An element of Oppositional Defiant Disorder is Vindictiveness. She lied to the police. I got arrested. The police claimed that they have a policy of arrest the man whenever they are called to a domestic battery scene, even the female is the offender. But Arkansas Code § 5-26-305(a)(1)-(4) for *DOMESTIC BATTERING IN THE THIRD DEGREE* does not include that gender bias as an element for arrest. Hence, my false arrest.

viii. The Arkansas Code § 5-26-305(a)(1)-(4) for *DOMESTIC BATTERING IN THE THIRD DEGREE* requires physical injuries. I did not injure my mother. She had bruises on her arms from a recent visit to the White County Medical Center's Emergency Room for excessive

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[2] See, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (DSM5). (*OPPOSITIONAL DEFIANT DISORDER,* pp. 426–463; *INTERMITTENT EXPLOSIVE DISORDER*, pp. 466; and *HISTRIONIC PERSONALITY DISORDER,* pp. 667–668.)

dizziness, requiring blood draws. She bruises very easily at age 83. She is now age 85. When the nurse came to take her for a brain scan my mother refused and demanded to be discharged. My suspicion was that she was afraid to learn that the brain scan would prove Alzheimer's.

2. PROSECUTOR DON RANEY'S ANSWER TO MY 28 U.S.C. § 1455 REQUEST

Prosecutor Don Raney's Answer to My 28 U.S.C. § 1455 Request for Documents		
PAGES	**CONTENTS**	**CATEGORY**
1	Don Raney's Cover Letter	Standard
2-3	Laura Ballentine's Affidavit for Arrest Warrant (**ILLEGAL**)	**Insufficient**
4	Arrest Warrant (**ILLEGAL**)	**Insufficient**
5-14	Series of Emails I Sent	First Amendment
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18-21	Series of Emails I Sent	First Amendment
22, 76	Diagram of Kensett City Hall Org Chart Showing Irregularities	First Amendment
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MY OBSERVATIONS OF DON RANEY'S CRIMINAL ERRORS

PROBLEM NO. 1: AFFIDAVIT (top of page 2). FIRST PARAGRAPH: Claim swearing offense occurred **March 28, 2018**.

PROBLEM NO. 2: AFFIDAVIT (bottom of page 2). Don Raney claims "Sworn to and subscribed before me this **March 12, 2018**. That's 16 days before Problem No. 1. ***Don Raney must be a psychic!***

PROBLEM NO. 3: AFFIDAVIT (top of page 3). Don Raney approved **March 12, 2018**.

PROBLEM NO. 4: AFFIDAVIT (top of page 3). **NOT SIGNED BY JUDGE MARK DERRICK**.

THERE'S SOME PSYCHIC STUFF GOING ON HERE! OR MORE LIKE KANGAROO COURT STUFF!!

PROBLEM NO. 5: ARREST WARRANT (top of page 4) Dated March 13, 2018.

PROBLEM NO. 6: ARREST WARRANT (top half page 4) Dated March 15, 2018; Signed by Judge Mark Derrick.

PROBLEM NO. 7: ARREST WARRANT (bottom half page 4) My arrest occurred June 9th, 2018 resulting from a minor vehicle finder-binder in the parking lot of the Dollar General Store. That three months after the issuance of the Arrest Warrant. That delay from the issuance of the Arrest Warrant to the happenstance of a vehicle finder-bender constitution

MY COUNTER-CRIMINAL OFFENSES ALLEGED: It is clear to me that Laura Ballentine, Prosecutor Don Raney, and Judge Mark Derrick committed the criminal offense of **False Swearing** under **Arkansas Code § 5-53-103**.

Prosecutor Don Raney is attempting to criminalize the First Amendment right to freedom of speech and the right to petition the government for redress of grievances! In other words, Don Raney prefers I keep my mouth shut on the corruption going on in Kensett.

3. CASES INCLUDED IN THIS NOTICE OF REMOVAL

- Kensett District Court RPS #: 17-00012 Domestic Battery in the 2nd Degree (Overchard) but changed to 3rd Degree; **CAVEAT**: *FALSE ARREST, MALICIOUS PROSECUTION, & FALSE CONVICTION DUE TO POLICE INCOMPETENCE AND POLICE MISCONDUCT; PROSECUTORIAL INCOMPETENCE AND PROSECUTORIAL MISCONDUCT; JUDICIAL INCOMPETENCE AND JUDICIAL MISCONDUCT*
- Kensett District Court Case No. CR-18-230; WR-18-165 *OBSTRUCTING GOVERNMENTAL OPERATIONS (NON FORCE)*; **CAVEAT**: *POLITICALLY MOTIVATED ARREST*
- Kensett District Court Case No. CR-18-231; WR-18-165 *HARASSING COMMUNICATIONS REPEATEDLY*; **CAVEAT**: *POLITICALLY MOTIVATED ARREST*
- The Dismissal of My Complaint Against Judge Mark Derrick and Judge Milas Hale to the *ARKANSAS JUDICIAL DISCIPLINE COMMITTEE* with my intent to get them disbarred.
- The Dismissal of My Complaint Against Prosecutor Don Raney at the *ARKANSAS OFFICE OF PROFESSIONAL CONDUCT* with my intent to get him disbarred
- The Dismissal of my Civil Complaint to the U.S. District Court for the Eastern District of Arkansas, Case No. 4:17-MC-18-(Judge Moody), filed October 10, 2017,
- The Dismissal of my Appeal to the U.S. Court of Appeals for the 8th Circuit, Case No. 18-1053, Denied, January 17, 2018.
- I Attempted to file my two-part Appeal to the U.S. Supreme Court three times but each time the appeal was administratively returned for miscellaneous filing errors. The two-part SOTUS appeal is append herein as my supporting evidence for

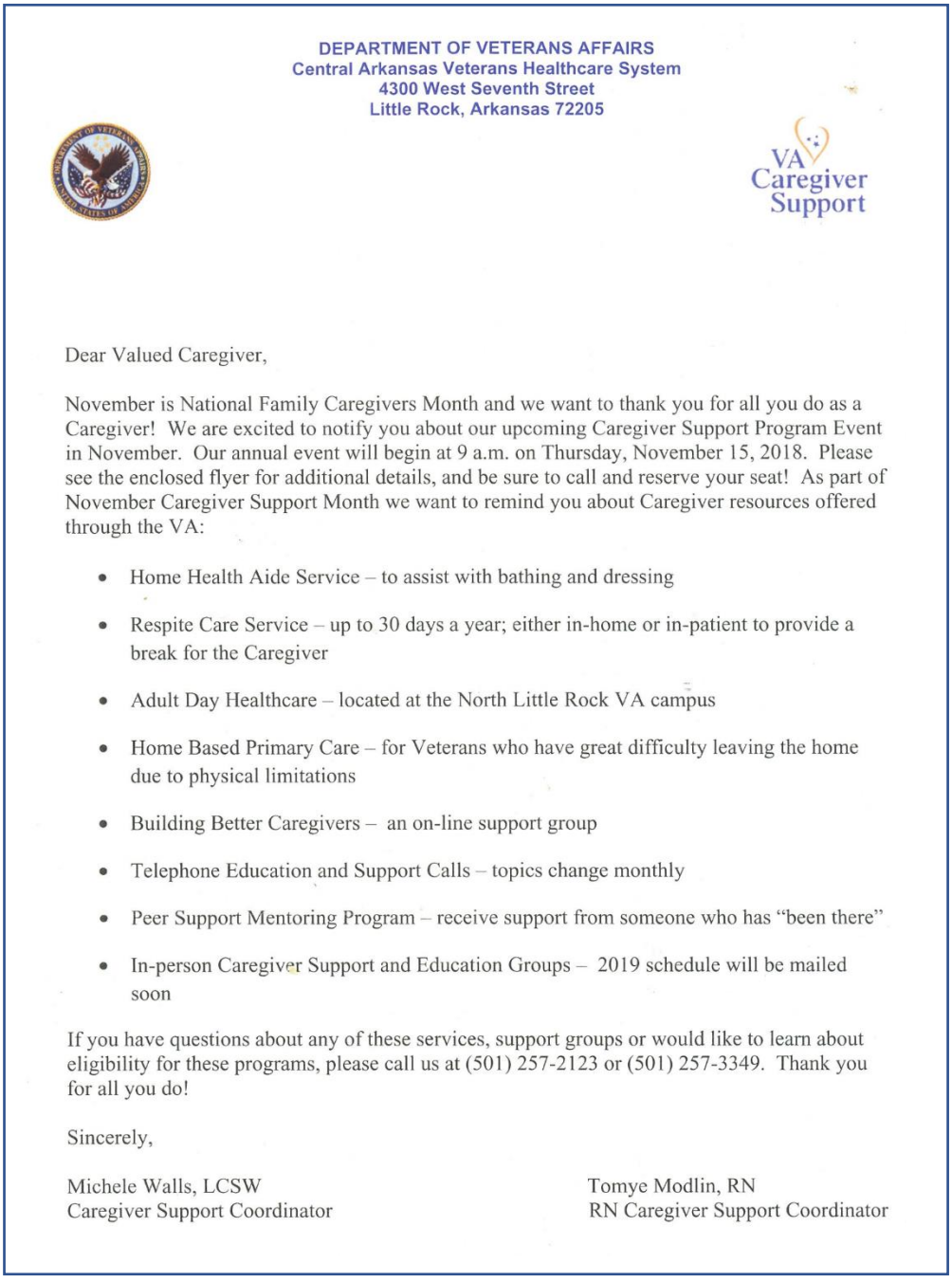
4. REMEDIES DEMANDED

In the 2017 case I am demanding my *FALSE ARREST, MALICIOUS PROSECUTION*, and my *FALSE CONVICTION* in the first case and my next two 2018 cases for *POLITICALLY MOTIVATED FALSE ARREST* for *OBSTRUCTING GOVERNMENTAL OPERATIONS (NON FORCE)* and *HARASSING COMMUNICATIONS REPEATEDLY* (trial date set November 23) be *DISMISSED WITH PREJUDICE AND MY RECORDS EXPUNGED* because I am *FACTUALLY INNOCENT* in all three cases.

5. RIGHTS CLAIMED UNDER THE CONSTITUTION OF THE UNITED STATES

A. THE CONSTITUTIONAL RIGHT TO BE A VA REGISTERED FAMILY-BASED CAREGIVER

The right to be a VA registered family-based caregiver to my own 85-year-old mother without fear of false arrest, malicious prosecution, or wrongful or false conviction resulting from police misconduct and from the prosecutor failing to do his due diligence to make sure the charges match the alleged conduct, when I have not committed any offenses as my mother's caregiver or as a private citizen.



DEPARTMENT OF VETERANS AFFAIRS
Central Arkansas Veterans Healthcare System
4300 West Seventh Street
Little Rock, Arkansas 72205

VA Caregiver Support

Dear Valued Caregiver,

November is National Family Caregivers Month and we want to thank you for all you do as a Caregiver! We are excited to notify you about our upcoming Caregiver Support Program Event in November. Our annual event will begin at 9 a.m. on Thursday, November 15, 2018. Please see the enclosed flyer for additional details, and be sure to call and reserve your seat! As part of November Caregiver Support Month we want to remind you about Caregiver resources offered through the VA:

- Home Health Aide Service – to assist with bathing and dressing
- Respite Care Service – up to 30 days a year; either in-home or in-patient to provide a break for the Caregiver
- Adult Day Healthcare – located at the North Little Rock VA campus
- Home Based Primary Care – for Veterans who have great difficulty leaving the home due to physical limitations
- Building Better Caregivers – an on-line support group
- Telephone Education and Support Calls – topics change monthly
- Peer Support Mentoring Program – receive support from someone who has "been there"
- In-person Caregiver Support and Education Groups – 2019 schedule will be mailed soon

If you have questions about any of these services, support groups or would like to learn about eligibility for these programs, please call us at (501) 257-2123 or (501) 257-3349. Thank you for all you do!

Sincerely,

Michele Walls, LCSW
Caregiver Support Coordinator

Tomye Modlin, RN
RN Caregiver Support Coordinator

B. THE RIGHT TO CLAIM PROTECTION AGAINST FALSE ARREST, MALICIOUS PROSECUTION, OR WRONGFUL OR FALSE CONVICTION UNDER THE *COMMON DEFENSE CLAUSE*, THE *PRIVILEGES AND IMMUNITIES CLAUSE* AND THE *FIRST AMENDMENT* RIGHT TO FREELY ASSEMBLE AS A VA REGISTERED FAMILY-BASED CAREGIVER TO MY OWN MOTHER.

C. THE RIGHT TO CLAIM PROMPT JUDICIAL RULINGS ON MY MOTIONS TO DISMISS WITH PREJUDICE AND EXPUNGE MY RECORD, ESPECIALLY MY EXCULPATORY MOTIONS CONTAINING EVIDENCE PROVING MY INNOCENCE FROM JUDGE MARK DERRICK AND POST-RECUSAL JUDGE MILAS HALE AS PART OF MY PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS.

D. THE RIGHT TO FILE MY MOTIONS AND PLEADINGS WITH THE KENSETT COURT CLERK BY EMAIL AND THE RIGHT NOT TO HAVE MY EMAIL BLOCKED BY ANYONE AS THAT WOULD BE A CRIMINAL ACT OF OBSTRUCTION OF JUSTICE.

E. THE RIGHT TO A PROPER AND LEGAL REMEDY TO CIVIL AND CRIMINAL VIOLATIONS OF MY FEDERAL AND STATE CONSTITUTIONAL AND STATUTORY RIGHTS UNDER COLOR OF LAW.

F. THE RIGHT TO FILE CRIMINAL COMPLAINTS AGAINST THOSE WHO VIOLATE MY FEDERAL AND STATE CONSTITUTIONAL AND STATUTORY RIGHTS UNDER COLOR OF LAW.

6. RIGHTS CLAIMED UNDER THE CONSTITUTION OF ARKANSAS

ARTICLE 2 DECLARATION OF RIGHTS

§ 2. Freedom and independence.

> All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

§ 3. Equality before the law.

> The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition.

§ 4. Right of assembly and of petition.

> The right of the people peaceably to assemble, to consult for the common good; and to petition, by address or remonstrance, the government, or any department thereof, shall never be abridged.

§ 13. Redress of wrongs.

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase; completely, and without denial; promptly and without delay; conformably to the laws.

§ 18. Privileges and immunities -- Equality.

The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

ARTICLE 3 FRANCHISE AND ELECTIONS

§ 2. Right of suffrage.

Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited, except for the commission of a felony, upon lawful conviction thereof. [As amended by Const. Amend. 85.]

§ 6. Violation of election laws -- Penalty.

Any persons who shall be convicted of fraud, bribery, or other willful and corrupt violation of any election law of this State, shall be adjudged guilty of a felony, and disqualified from holding any office of trust or profit in this State.

ARTICLE 19 MISCELLANEOUS PROVISIONS

§ 6. Dual office holding prohibited.

No person shall hold or perform the duties of more than one office in the same department of the government at the same time, except as expressly directed or permitted by this Constitution.

7. ARKANSAS JUDICIAL CODES VIOLATED

Canon 1

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Canon 2

A judge shall perform the duties of judicial office impartially, competently, and diligently.

Rule 1.1 - Compliance With The Law

Rule 1.3 - Avoiding Abuse Of The Prestige Of Judicial Office

Rule 2.2 - Impartiality And Fairness

A. A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

B. A judge may make reasonable accommodations, consistent with the law and court rules, to facilitate the ability of all litigants to be fairly heard.

8. ARKANSAS RULES OF PROFESSIONAL CONDUCT VIOLATED

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client

Rule 3.3. Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal; or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or had engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4. Fairness To Opposing Party And Counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5. Impartiality And Decorum Of The Tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Rule 3.8. Special Responsibilities Of A Prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this rule.

COMMENT: [1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory

proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[5] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (e) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (e) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[6] The issuance of a grand jury indictment ordinarily indicates probable cause for the prosecutor to proceed. This rule covers the Attorney General and staff, Prosecuting Attorneys and staffs, City Attorneys and staffs and all others who exercise prosecutorial functions.

Rule 4.3. Dealing with Unrepresented Person.

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

(b) A person to whom limited scope representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for the purposes of this rule unless the opposing lawyer has been provided with a written notice of the limited scope representation. If such notice is provided, the person is considered to be unrepresented regarding matters not designated in the notice of limited scope representation.

COMMENT:

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents

a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Rule 8.3. Reporting Professional Misconduct.

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) This rule shall not apply to a member or employee of the Lawyer Assistance Committee ("the Committee") of the Arkansas Judges and Lawyers Assistance Program ("JLAP") or a volunteer serving pursuant to Rule 4 of the Rules of JLAP regarding information received in one's capacity as a Committee member, employee, or volunteer. However, the "duty to report" outlined in paragraphs (a) and (b) above is reinstated if, in good faith, the JLAP committee member, employee, or volunteer, has: reason to believe that an attorney participating in the JLAP program is failing to cooperate with said program; is engaged in criminal behavior or the threat thereof; or, is otherwise in violation of paragraphs (a) and (b) of this rule which is beyond or succeeds the behavior upon which the attorney's participation in JLAP was initially based.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official; or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

9. ARKANSAS CODE: TITLE 5 CRIMINAL OFFENSES ALLEGED

ARKANSAS CODE § 5-1-111. BURDEN OF PROOF | DEFENSES AND AFFIRMATIVE DEFENSES | PRESUMPTION.

(a) Except as provided in subsections (b), (c), and (d) of this section, no person may be convicted of an offense unless the following are proved beyond a reasonable doubt:

(1) **Each Element of the Offense**;

(2) ~~Jurisdiction;~~

(3) ~~Venue; and~~

(4) ~~The commission of the offense within the time period specified in § 5-1-109~~.

(b) ~~The state is not required to prove jurisdiction or venue unless evidence is admitted that affirmatively shows that the court lacks jurisdiction or venue~~.

(c)

(1) **The issue of the existence of a defense does not need to be submitted to the jury unless evidence is admitted supporting the defense**.

(2) **If the issue of the existence of a defense is submitted to the jury, the court shall charge that any reasonable doubt on the issue requires that the defendant be acquitted.**

(3) A "defense" is any matter:

(A) Designated a defense by a section of the Arkansas Criminal Code;

(B) Designated a defense by a statute not a part of the Arkansas Criminal Code; or

(C) Involving a~~n excuse or~~ justification peculiarly within the knowledge of the defendant on which he or she can fairly be required to introduce supporting evidence.

(d)

(1) The defendant shall prove an affirmative defense by a preponderance of the evidence.

(2) An "affirmative defense"[3] is any matter designated an affirmative defense by a:

(A) Section of the Arkansas Criminal Code; or

(B) Statute not a part of the Arkansas Criminal Code.

(e) When the Arkansas Criminal Code or a statute not a part of the Arkansas Criminal Code provides that proof of a particular fact gives rise to a presumption as to the existence of a fact that is an element of the offense, the provision has the following consequences:

(1) If there is evidence of the fact giving rise to the presumption, the issue as to the existence of the presumed fact shall be submitted to the jury unless the court determines that the evidence as a whole **precludes a finding beyond a reasonable doubt of the presumed fact**; and

(2)

(A) If the issue as to the existence of the presumed fact is submitted to the jury, the court shall charge that evidence of the fact giving rise to the presumption is for the jury's consideration under all the circumstances of the case and to be weighed in determining the issue.

(B) However, the evidence of the fact giving rise to the presumption alone does not impose a duty of finding the presumed fact, even if the evidence is unrebutted.

ARKANSAS CODE § 5-2-205. CAUSATION.

Causation may be found when the result would not have occurred but for the conduct of the defendant operating either alone or concurrently with another cause unless:

(1) The concurrent cause was clearly sufficient to produce the result; and

(2) The conduct of the defendant was clearly insufficient to produce the result.

ARKANSAS CODE § 5-2-401. CRIMINAL LIABILITY GENERALLY.

A person may commit an offense either by his or her own conduct or that of another person.

ARKANSAS CODE § 5-2-402. LIABILITY FOR CONDUCT OF ANOTHER GENERALLY.

A person is criminally liable for the conduct of another person if:

(1) The person is made criminally liable for the conduct of another person by the statute defining the offense;

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[3] BLACK'S LAW DICTIONARY: AFFIRMATIVE DEFENSE: "*Part of an answer to a charge or complaint in which a defendant takes the offense and responds to the allegations with his/her own charges, which are called "affirmative defenses." These defenses can contain allegations, take the initiative against statements of facts contrary to those stated in the original complaint against them, and include various defenses based on legal principles*."

(2) The person is an accomplice of another person in the commission of an offense; or

(3) Acting with a culpable mental state sufficient for the commission of the offense, the person causes another person to engage in conduct that would constitute an offense but for a defense available to the other person.

ARKANSAS CODE § 5-2-403. ACCOMPLICES.

(a) A person is an accomplice of another person in the commission of an offense if, with the purpose of promoting or facilitating the commission of an offense, the person:

(1) Solicits, advises, encourages, or coerces the other person to commit the offense;

(2) Aids, agrees to aid, or attempts to aid the other person in planning or committing the offense; or

(3) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to prevent the commission of the offense.

(b) When causing a particular result is an element of an offense, a person is an accomplice of another person in the commission of that offense if, acting with respect to that particular result with the kind of culpable mental state sufficient for the commission of the offense, the person:

(1) Solicits, advises, encourages, or coerces the other person to engage in the conduct causing the particular result;

(2) Aids, agrees to aid, or attempts to aid the other person in planning or engaging in the conduct causing the particular result; or

(3) Having a legal duty to prevent the conduct causing the particular result, fails to make a proper effort to prevent the conduct causing the particular result.

ARKANSAS CODE § 5-3-201. CONDUCT CONSTITUTING ATTEMPT.

(a) A person attempts to commit an offense if he or she purposely engages in conduct that:

(1) Would constitute an offense if the attendant circumstances were as the person believes them to be; or

(2) Constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as the person believes them to be.

(b) When causing a particular result is an element of the offense, a person commits the offense of criminal attempt if, acting with the kind of culpable mental state otherwise required for the commission of the offense, the person purposely engages in conduct that constitutes a substantial step in a course of conduct intended or known to cause the particular result.

(c) Conduct is not a substantial step under this section unless the conduct is strongly corroborative of the person's criminal purpose.

ARKANSAS CODE § 5-3-202. COMPLICITY.

(a) A person attempts to commit an offense if, with the purpose of aiding another person in the commission of the offense, the person engages in conduct that would establish his or her complicity under § 5-2-402 if the offense were committed by the other person.

(b) It is not a defense to a prosecution under this section that:

(1) The other person did not commit or attempt to commit an offense; or

(2) It was impossible for the actor to assist the other person in the commission of the offense if the actor could have assisted the other person had the attendant circumstances been as the actor believed them to be.

ARKANSAS CODE § 5-3-301. CONDUCT CONSTITUTING SOLICITATION -- CLASSIFICATION.

(a) A person solicits the commission of an offense if, with the purpose of promoting or facilitating the commission of a specific offense, the person commands, urges, or requests another person to engage in specific conduct that would:

(1) Constitute that offense;

(2) Constitute an attempt to commit that offense;

(3) Cause the result specified by the definition of that offense; or

(4) Establish the other person's complicity in the commission or attempted commission of that offense.

(b) Criminal solicitation is a:

(1) Class A felony if the offense solicited is capital murder, treason, or a Class Y felony;

(2) Class B felony if the offense solicited is a Class A felony;

(3) Class C felony if the offense solicited is a Class B felony;

(4) Class D felony if the offense solicited is a Class C felony;

(5) Class A misdemeanor if the offense solicited is a Class D felony or an unclassified felony;

(6) Class B misdemeanor if the offense solicited is a Class A misdemeanor;

(7) Class C misdemeanor if the offense solicited is a Class B misdemeanor; or

(8) Violation if the offense solicited is a Class C misdemeanor or an unclassified misdemeanor.

ARKANSAS CODE § 5-3-401. CONDUCT CONSTITUTING CONSPIRACY.

A person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense:

(1) The person agrees with another person or other persons that:

(A) One (1) or more of the persons will engage in conduct that constitutes that offense; or

(B) The person will aid in the planning or commission of that criminal offense; and

(2) The person or another person with whom the person conspires does any overt act in pursuance of the conspiracy.

ARKANSAS CODE § 5-3-402. SCOPE OF CONSPIRATORIAL RELATIONSHIP.

If an actor knows or could reasonably expect that a person with whom the actor conspires has himself or herself conspired or will conspire with another person to commit the same criminal offense, the actor is deemed to have conspired with the other person, whether or not the actor knows the other person's identity.

ARKANSAS CODE § 5-3-403. MULTIPLE CRIMINAL OBJECTIVES.

If a person conspires to commit a number of criminal offenses, the person commits only one (1) conspiracy if the multiple offenses are the object of the same agreement or continuous conspiratorial relationship.

ARKANSAS CODE AT § 20-8-601. FINDINGS:

(a) The General Assembly finds that:

(1) Alzheimer's disease is a progressive and fatal brain disease that destroys brain cells and causes problems with **memory, thinking, and behavior**;

(2) More than five million four hundred thousand (5,400,000) Americans now have Alzheimer's disease;

(3) Alzheimer's disease is the most common form of dementia and is the sixth leading cause of death in the United States; and

(4) No cure exists for Alzheimer's disease, but treatments for symptoms used in conjunction with appropriate services and support can improve the quality of life for those living with the disease.

10. UNITED STATES CODE: TITLE 18 CRIMINAL OFFENSES ALLEGED

18 U.S. CODE § 241 - CONSPIRACY AGAINST RIGHTS

If two or more persons conspire to ~~injure~~, ***oppress***, ***threaten***, or ***intimidate 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; ~~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, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death~~.

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~~.

18 U.S. CODE § 245(B)- FEDERALLY PROTECTED ACTIVITIES

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(1) any person because he is or has been, or in order to intimidate such person or any other person or **any class of persons** from—

(A) voting or qualifying to vote, qualifying or **campaigning as a candidate for elective office**, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;

(B) participating in or enjoying any benefit, service, privilege, **program**, facility, or activity provided or administered by the United States; [**i.e., VA Caregiver Program**]

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; [**VA Medical Center, Little Rock**]

11. UNITED STATES CODE: TITLE 28 JUDICARY AND JUDICIAL PROCEDURE

28 U.S. CODE § 1657 - PRIORITY OF CIVIL ACTION

(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.

12. UNITED STATES CODE: TITLE 42 THE PUBLIC HEALTH AND WELFARE (CIVIL RIGHTS)

42 U.S. CODE § 1981 - 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.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(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**. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S. CODE § 1985 - 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**.

42 U.S. CODE § 11201(8) & (9) FINDINGS:

The Congress finds that—

(1) Best estimates indicate that between 2,000,000 and 3,000,000 Americans presently have Alzheimer's disease or related dementias;

(2) Estimates of the number of individuals afflicted with Alzheimer's disease and related dementias are unreliable because current diagnostic procedures lack accuracy and sensitivity and because there is a need for epidemiological data on incidence and prevalence of such disease and dementias;

(3) Studies estimate that between one-half and two-thirds of patients in nursing homes meet the clinical and mental status criteria for dementia;

(4) The cost of caring for individuals with Alzheimer's disease and related dementias is great, and conservative estimates range between $38,000,000,000 and $42,000,000,000 per year solely for direct costs;

(5) Progress in the neurosciences and behavioral sciences has demonstrated the interdependence and mutual reinforcement of basic science, clinical research, and services research for Alzheimer's disease and related dementias;

(6) Programs initiated as part of the DECADE OF THE BRAIN are likely to provide significant progress in understanding the fundamental mechanisms underlying the causes of, and treatments for, Alzheimer's disease and related dementias;

(7) Although substantial progress has been made in recent years in identifying possible leads to the causes of Alzheimer's disease and related dementias, and more progress can be expected in the near future, there is little likelihood of a breakthrough in the immediate future that would eliminate or substantially reduce—

(A) the number of individuals with the disease and dementias; or

(B) the difficulties of caring for the individuals;

(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**;

(9) Attempts to reduce the emotional and financial burden of caring for dementia patients is **impeded by a lack of knowledge about such patients**, how to care for such patients, the costs associated with such care, the effectiveness of various modes of care, the quality and type of care necessary at various stages of the disease, and other appropriate services that are needed to provide quality care.

42 U.S. CODE § 2000d–4a - "**PROGRAM OR ACTIVITY**" AND "**PROGRAM**" DEFINED

For the purposes of this subchapter, the term "**program or activity**" and the term "**program**" mean all of the operations of—

(1)

(A) a department, agency, special purpose district, or other instrumentality of a State or of a **local government**; or

(B) the entity of such State or **local government** that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or **local government**;

42 U.S. Code § 2000d–7 - Civil Rights Remedies Equalization

(a) General provision

(1) **A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of**

~~section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.~~], **title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance**.

(2) **In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State**.

13. MOST RECENT EVIDENCE OF CORRUPTION IN KENSETT CITY GOVERNMENT

i. My Online Campaign Blog is background for *GROUNDS FOR REMOVAL*:

https://donhamrickformayorofkensett.wordpress.com/

My campaign blog was titled "*DON HAMRICK FOR MAYOR OF KENSETT*." I lost the election that as become my legal advantage. I changed the title of my campaign blog to "*DON HAMRICK REPORTING ON KENSETT, ARKANSAS CORRUPTION*."

ii. November 5, 2018 My Campaign Blog Post: DO NOT VOTE FOR DON FULLER! HE IS NOT MAYOR MATERIAL EVEN THOUGH HE WAS MAYOR BEFORE! (The day before Election Day).

DO NOT VOTE FOR DON FULLER!

I AM EXPOSING DON FULLER FOR THE TYPE OF PERSON HE REALLY IS.

THE PEOPLE OF KENSETT WANT AND DESERVE A MAYOR WHO RESPECTS THE CANDIDATES RUNNNING AGAINST HIM FOR MAYOR OF KENSETT.

A CANDIDATE FOR MAYOR OF KENSETT IS A MAN OR WOMAN WHO RESPECTS THE PEOPLE OF KENSETT.

WELL, THAT'S THE WAY IT IS SUPPOSED TO BE. NOT WITH DON FULLER! I DON'T CARE IF HE WAS MAYOR BEFORE. HE IS A POLITICIAN WHO WILL BE YOUR BEST FRIEND TO YOUR FACE BUT BACKSTAB YOU THE FIRST CHANCE HE GETS.

THE FOLLOWING EMAILS WILL EXPOSE DON FULLER FOR WHO HE REALLY IS.

The following is an exchange of emails between Don Fuller and I in my attempt to get Don Fuller to present the opportunity for the City of Kensett's City Council to negotiate with the man/wife owners to sell the old Cotton Gin to the City of Kensett and convert the Cotton Gin into a community center for the people of Kensett. My purpose in this endeaver is honest and in the best interests for the people of Kensett.

But read Don Fuller's emails to see how he is only interested in his own political gain with no concern for the people of Kensett.

Nov 2 at 11:43 PM
FROM: DON HAMRICK
TO: Don Fuller AND Kenneth Cooperwood

I met the owner of the cotton gin again today in a drive-by happenstance. There are only two owners of the cotton gin. A man and wife. They still don't know what they want to do with the cotton gin. They are leaning toward selling the cotton mill. They would like to see it become a community center rather that a city hall. I agree. The man does not yet know what price to sell the cotton gin.

They bought the cotton gin to keep the Dollar General company from buying it. He told me that Dollar General would have bulldozed the cotton gin and would have built a new Dollar General store from the ground up. He prefers to keep the cotton gin in its present condition for historical significance.

The owner has been cleaning up the interior. He got the wiring back to working condition. It is the perfect time for the City Council to start negotiating with the owners of the cotton gin.

I strongly recommend the two of you bring this opportunity to the city council. I want to see the cotton gin preserved as a historical building to serve as a community center for everyone in Kensett.

DON

Nov 4 at 6:17 AM
FROM: DON FULLER
TO: Don Hamrick

FYI. Don as a real estate broker I got the buyer and seller together and made the deal on the land purchase for the Dollar General store back in my previous mayor administration. I will reiterate if I am elected mayor I will explore and evaluate the possibility of purchasing and turning the gin into a community center ? Many things have to come to play for this to efficiently be done. Oh, I noticed you changed your mind from the gin being a city hall to a community center as I proposed? Have a good day!

Nov 4 at 6:35 AM
FROM: DON FULLER
To: Don Hamrick

fyi. I received no funds for pulling the land deal together on the dollar store property. I only received my mayor's pay. $550.00 per month. I wanted you to know that. On a much more serious note it really disturbs me that we will never know if Edge and/or Cooperwood has a possible drug issue?

Nov 4 at 7:35 AM
FROM: DON HAMRICK
To: Don

You had NOTHING to do with my "change of mind." I suggested two choices to the owner. A community center or the new city hall. The owner prefers the Cotton Gin become a community center. I agree because that is HIS preference. NOT YOURS. I suggest you keep things in perspective according to their proirities and credits. The credit goes to the owner.

Nov 4 at 7:40 AM
FROM: DON HAMRICK
To: Don Fuller

I saw Asa Hutchinson on a couple of TV News segments. In both segments he admitted the Arkansas Ethics Commission has nearly no enforcement authority. That is something I discovered first hand with the Ethics Commission over the "Paid For By" label complaint I filed. Their reaction was to drag their feet I accused directly to the Director of the Ethics Commission that the Ethics Commission is a "paper tiger.

That's got to change

Nov 4 at 10:18 AM
FROM: DON HAMRICK
To: Don Fuller

WHY WAIT? You can get the ball rolling at the next council meeting! OH! I know! You are all about getting credit as mayor when you actually don't deserve the credit. You prefer to steel credit that you don't deserve.

Let me guess! You have NOT presented the Cotton Gin proposal to the council yet! Right? I believe that is the truth about you. Your own email gave you away on your political manipulations.

Nov 4 at 6:08 PM
FROM: DON FULLER
To: Don Hamrick

I don't make rash moves ever buckaroo. Sounds like you may be getting some of the proceeds if it sells before a certain time? Right! Maybe? I swear you are the strangest fellow I ever been in conversation with. I see what people are telling me about you! Strange? Multi personalities?

PSYCHOLOGICAL PROFILE ON DON FULLER'S EMAIL ABOVE:

Don Fuller writes, "I don't make rash moves ever buckaroo." Don Fuller presents himself as an emotionally balanced, logical and ratioinal person. That is what he wants the readers to believe. But that is his deception. The rest of the insulting paragraph is undeniable proof that he does, in fact, make rash moves.

Don Fuller called me a "buckaroo." Examples of a buckaroo are a cowboy, a cowhand, a cowman, a cowpoke, a cowpuncher, a wrangler, a broncobuster. Since each of those are honest and honorable professions I do not take offense to being called a buckaroo. But since I have never been a buckaroo I have to say that Don Fuller lied by his attempted insult. Hence, he has proved himself to be a rude, offensive, liar. I am not a buckaroo. Never was.

The rest of the paragraph, "Sounds like you may be getting some of the proceeds if it sells before a certain time? Right! Maybe? I swear you are the strangest fellow I ever been in conversation with. I see what people are telling me about you! Strange? Multi personalities?" is your basic "character assassination."

Why am I the strangest fellow he has ever been in conversation with? Well, he is a politician. The difference between he and I is that I am not a politician. I am a logical, analytical, pragmatist. I use critical thinking combined with Occam's Razor to find the simplest solution to problems. And for him to write, "I see what people are telling me about you! Strange? Multi personalities?" That could very well be because Don Fuller associates with only his like-minded friends. They are not accustomed to an honest, logical, analytical pragmatist who solves

problems in an upfront, straight-up honest manner with no political double dealing with people I talk to. To Don Fuller? That would be Strange for him. Don Fuller sees the world as a politician. And he sees people who are not politicians as “Strange.”

What do you expect of Don Fuller. He tried to steel credit for the opportunity to acquire the Cotton Gin and convert it into a community center as his idea. But the truth is it is the man & wife owners of the Cotton Gin are the ones who want the Cotton Gin converted into a community center. NOT DON FULLER.

NO! DON FULLER IS NOT THE MAN FOR MAYOR OF KENSETT.

Nov 4 at 8:32 PM
FROM: DON HAMRICK
To: Don Fuller

NO ACCUSATIONS HERE | JUST MY PERSONAL OPINIONS OF YOU

YOU chicken shit, conniving, credit-stealing, passive-aggressive, snake slimming through the grass politician digressing to mudslinging from the pig populated mud holes! You have no sense of a personal code of conduct about you. You are an opportunistic slime ball. I had my suspicions about you long ago through your emails. I studied behavioral psychology for years as my educational hobby.

I gave you every opportunity for you and the committee to make a deal for the Cotton Gin. I bet you didn’t even bring it to the committee’s attention because of your own political gain for latter if by chance you win the election.

I have nothing to gain financially with the man/wife owners of the Cotton Gin. I don’t even have their personal contact information.

I now fully understand why the people of Kensett don’t like you. You are personally rude and offensive with your jealous suspicions and resentments.

You bragged that you were the realtor for Dollar General Store. The owner told me that the Dollar General Store was going to bulldoze the Cotton Gin down to the foundation. The man/wife bought the Cotton Gin to save it from destruction.

I will make inquiries into how to make the Cotton Gin an historic landmark, it if isn’t already.

DON HAMRICK
Independent Candidate for Mayor of Kensett

The following is my post-election email I posted to my campaign blog:

> **[*NUMBER OF VOTERS NOT VOTING REVISED*] KENSETT IS A GOVERNMENT OF THE MINORITY. THE ELECTION FOR MAYOR OF KENSETT IS UNCONSTITUTIONAL FOR THE CORRUPTION AND VOTER SUPPRESSION INVOLVED.**
>
> Date:Wednesday, November 7, 2018, 7:59 AM CST
>
> From: Don Hamrick
> To: Carla Ervin – Local Election Official – White County Clerk,
> Rebecca McCoy, White County Prosecutor
> Steve Watts, Editor, The Daily Citizen
> Publisher David Damerow, Publisher, The Daily Citizen
> Paige Cushman, Reporter, The Daily Citizen
> Tracy Whitaker, Reporter, The Daily Citizen
>
> SUBJECT: KENSETT ELECTION NUMBERS
>
> The question on my allegation of voter fraud in the election for Mayor of Kensett is how much corruption is too much corruption? And at what level and duration of that corruption will be treated as a prosecutable crime. Or will apathy prevail once again?
>
> Corruption of every kind is reported in the news everywhere. My observations of patterns of corruption in Kensett City Government and in the operation of Kensett District Court as a kangaroo court has proved the Boiled Frog Theory in the election for Mayor of Kensett.
>
> The facts from the election for Mayor of Kensett are that **495 (57.29%)** of the **864** registered voters of Kensett did not vote. Why didn't they vote can be investigated by asking that question to the **495** registered voters.
>
> The Searcy Daily City can investigate that question.
>
> Corruption in Kensett has become the norm. We are living in a culture of corruption because it is tolerated. Someone in a prosecutorial position will have to take the initiative to do something about the "**wave of corruption and voter suppression**." I am a nobody of no political importance. My allegations of corruption get ignored even though my allegations are true.
>
> Through my self-education in psychology on normal and abnormal patterns of behavior in how and why people behave the way they do and in combination with my instinctive common sense I knew I did not have a chance to win the election for Mayor of Kensett. But I had to run for Mayor of Kensett as an outsider to the norm of Kensett City Government's corruptive operation to get the behavioral evidence of corruption and voter suppression I needed. I succeeded! The two links below are my core evidence of corruption and voter suppression: The Kensett City Government in addition to Judge Mark Derrick (facing a class action law suit for running a debtors' prison) and Prosecutor Don Raney prosecuting and convicting innocent defendants along with the actual guilty defendants. Remember the Richard Chambliss open carry at Bald Knob's McDonalds?

https://donhamrickformayorofkensett.wordpress.com/2018/11/07/don-fuller-won-the-election-only-from-the-apathy-of-the-majority-of-the-nonvoting-registered-voters-corruption-thriving-in-kensett/

https://donhamrickformayorofkensett.wordpress.com/2018/11/05/do-not-vote-for-don-fuller-he-is-not-mayor-material-even-though-he-was-mayor-before/

The question now is will my allegations of criminal corruption in the Kensett City Government be taken seriously?

The Arkansas Election Commission can void the election for Mayor of Kensett or any other election where the number of registered voters who did not vote are in the 80% to 90% is shown. In that situation, our system of government is a government by the minority. Not by the majority.

In my opinion, the election for Mayor of Kensett is unconstitutional for the corruption and voter suppression involved.

DON FULLER WON THE ELECTION ONLY FROM THE APATHY OF THE MAJORITY OF THE NONVOTING REGISTERED VOTERS! CORRUPTION AND VOTER SUPRESSION IS THRIVING IN KENSETT

THE VOTES

	NOV. 7		NOV 6 @ 7:30 PM	
MAYOR	**VOTES**	**%**	**VOTES**	**%**
DON FULLER	**162**	**38%**	**70**	**49.30%**
ALLEN EDGE	**100**	**37%**	**31**	**21.83%**
KENNETH COOPERWOOD	**98**	**23%**	**39**	**27.46%**
DON HAMRICK	**9**	**2%**	**2**	**1.41%**

A runoff election between Fuller and Edge may be called.

MY ANALYSIS

2010 CENSUS POPULATION FOR KENSETT = **1,648**

TOTAL REGISTERED VOTERS IN KENSETT = **864**

TOTAL VOTES CAST = **369**

TOTAL REGISTERED VOTERS WHO DID NOT VOTE = **495** = **57.29%**

MY OPINION ON THE NUMBERS

It looks like Don Fuller's close friends voted for him. Don Fuller has **162** friends. Kenneth Cooperwood has **98** close friends. Allen Edge has **100** close friends

That means **369** votes out of **864** registered voters were cast for the trio. That means **495 (57.29%)** of the **864** registered voters actually voted. A

turnout of **57.29%** of the registered Kensett voters means corruption and voter suppression is thriving in Kensett.

I believe the Kensett City Government has operated corruptively for so long that the majority of the People of Kensett became disgusted with the elections in the past. The **495** registered voters in this election gave up and did not vote.

Not even an outsider, like me, coming in to run for mayor of Kensett to stir things up generated any interest in the 495 non-voting registered voters to go vote.

The apathy level is sky high. That means 495 registered voters didn't give damn. They are all fed up with the corruption in Kensett City Government.

MY SUSPICIONS OF CORRUPTION AND VOTER SUPPRESSION HAVE BEEN PROVEN CORRECT.

QUESTIONS FOR:

Carla Ervin
Local Election Official – White County Clerk

AND

Rebecca McCoy
White County Prosecutor

Can my analysis of the vote totals for Mayor of Kensett sustain an allegation that the election was rigged by years of corruption and the growing apathy of the increasing registered voters?

https://donhamrickformayorofkensett.wordpress.com/2018/11/07/don-fuller-won-the-election-only-from-the-apathy-of-the-majority-of-the-nonvoting-registered-voters-corruption-thriving-in-kensett/

What are the chances of getting the election for Mayor of Kensett ruled Null and Void due to corruption and voter suppression, and another election scheduled?

JUDICIAL NOTICE: The Arkansas Code § **5-26-301** ***LEGISLATIVE INTENT*** for *DOMESTIC BATTERING IN THE THIRD DEGREE* states:

"To the extent that any protected class of persons defined under this subchapter is afforded protection by any other existing or future statute of this state, this subchapter does not prevent a prosecution under any such existing or future statute."

CONSTITUTIONAL CHALLENGE OF ARKANSAS CODE § 5-26-305 *DOMESTIC BATTERING IN THE THIRD DEGREE* (POTENTIAL CIVIL CASE IN FEDERAL COURT FOR DAMAGES)

I challenge the Constitutionality of this statute (§ 5-26-305) as unconstitutionally vague and overbreadth because, as a son and caregiver to my mother with Stage 4 Alzheimer's/Dementia, I have the constitutional protection from FALSE ARREST and FALSE IMPRISOMENT when there is no evidence supporting the arrest and confinement under the privileges and immunities clause of the *U.S. CONSTITUTION* and the *CONSTITUTION OF THE STATE OF ARKANSAS* as a "protected class of citizen."

THE KENSETT POLICE OFFICERS ON SCENE

I do not have the names of the Kensett Police officers arriving on scene in response to my mother's 911 call. But one of the officers told me that any time they are called to a domestic battery scene that the "man" must be arrested even if he is innocent.

JUDICIAL NOTICE: The Arkansas Code § 5-26-305 *DOMESTIC BATTERING IN THE THIRD DEGREE* has no such gender-biased mandate. The officer's statement reflects prejudice and a lack of knowledge of, or when to apply, the law and perhaps it even reflects erroneous training on Domestic Battery, that it can be committed by either gender regardless of the relationship, and that an allegation of Domestic Battery from an elderly person with Alzheimer's when there is no evidence of physical injury cannot be prosecuted in court due to mental defect from Alzheimer's.

When I tried to explained the situation that I am her son and I am her caregiver because she has Stage 4 Alzheimer's another officer contradicted me by stating that I am not a caregiver. I looked at that officer for his stupidity but said nothing as the arrest continued with the handcuffs.

NO CHOICE FOR THE JUDGE BUT TO DISMISS WITH PREJUDICE IN THE INTEREST OF JUSTICE

The above are the true facts of the matter from my perspective. Under these facts the charge of *DOMESTIC BATTERING IN THE THIRD DEGREE* and the corresponding *NO CONTACT ORDER* must be dismissed with prejudice and no filing of alternative charges permitted in the interest of justice.

My mother regained her memory enough to recognize her erroneous behavior and dropped the charge of *DOMESTIC BATTERING IN THE THIRD DEGREE*. The Kensett Chief of Police was instrumental in correcting a constitutional wrong by getting me released from the White County Detention center after nearly two weeks of unlawful and unconstitutional confinement. But the violation of my constitutional rights has already been inflicted.

***Rand* v. *State of Arkansas*,**

191 F. Supp. 20
US District Court for the Western District of Arkansas,
February 16, 1961

[page 22]

The law has long been established that there is no common-law right to remove an action from a state court to a federal court, and *removal may be had only as authorized by an act of Congress*. This rule is stated in 45 Am.Jur., Removal of Causes, Sec. 3, as follows:

> There is no common-law right of removal of a cause from a state to a United States court. The right exists only by virtue of and to the extent authorized by act of Congress. It cannot rest on the mere convenience of the parties, nor can it be exercised in any case not falling within the terms of the act authorizing it. So, a suit commenced or pending in a state court must remain there unless and until *cause is shown under some act of Congress for its transfer to a Federal court and proper proceedings to remove it are taken*.

In 1 Moore's Federal Practice, Sec. 0.60[9] (2d Ed. 1960), it is noted:

> * * * *The right to remove an action from a state court to the federal district court is a statutory right; and under the present removal statutes only a defendant can*
>
> [page 23] *remove. In some situations removal is broader, in others narrower, than original jurisdiction, although, in general, removal is keyed to original jurisdiction*. *Shamrock Oil & Gas Corp*. v. *Sheets*, 1941, 313 U.S. 100, 61 S. Ct. 868, 85 L. Ed. 1214.

The petitioner does not specifically allege which of the removal statutes is relied upon to confer jurisdiction on this court. The general removal statute, 28 U.S.C.A. § 1441, is not applicable since it is specifically limited to civil actions. However, it appears from a reading of the petition that the petitioner seeks to rely on **28 U.S.C.A. § 1443**, which provides:

> *Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending*:
>
> (1) *Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof*;
>
> (2) *For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law*.

Section 1443 is discussed in 2 Cyc. of Fed. Procedure, Secs. 3.81 and 3.82. In Section 3.81 it is stated:

> In conferring the right of removal of causes against persons denied civil rights, it was intended to protect against state action and that alone. In other words the statute has reference to a constitutional or legislative denial of equal rights, or an inability to enforce them resulting therefrom. It is only when some state law, ordinance, regulation or custom hostile to these rights is alleged to exist that a removal can be had under this provision, and defendant in the action or prosecution in the state court cannot have the cause removed under this provision where it does not appear that the constitution or laws of the state deny or prevent him from enforcing in the judicial tribunals of such state his equal rights as secured to him by the Federal Constitution and laws. If a state law impairs equal rights so guaranteed to defendant, however, the right of removal exists, as where laws in relation to grant and petit juries discriminate against persons of certain races in violation of the United States Constitution and laws. An alleged inequality of position before the courts of the state as between plaintiff and defendant, arising from the fact that the plaintiff is a state and the defendant an individual, was held to be no denial of equal civil rights within the meaning of the removal provision under discussion. ~~State laws against 'bookmaking' and 'poolselling' do not work a denial of defendant's equal civil rights so as to warrant the removal of a prosecution against him for such offense, where they do not, as claimed by defendant, subject white persons who make, register and record bets and wages on horse races to one kind of punishment and penalty, and other persons to some other kind, contrary to federal law.~~

In Section 3.82 it is stated:

> * * * The removal provision under consideration does not contemplate a removal where neither the constitution nor laws of the state deny the litigant his civil rights, but where there is a criminal misuse or violation of the state law by some subordinate officer which results in depriving the litigant of the rights which the state law accords to him. ~~Alleged existence of race prejudice, interfering with a fair trial, is not ground for removal, where the prejudice~~
>
> [page 24] ~~cannot be attributed to the state constitution or laws~~.
> * * *

It is therefore apparent that to justify a removal under 28 U.S.C.A. § 1443, the *petitioner must show a denial or inability to enforce his civil rights which results from the constitution or laws of the state, and it is only when such hostile state constitutional provisions or state legislation exist which interfere with the party's right to defense that he can have the case removed to a federal*

court. *Commonwealth of Kentucky* v. *Powers*, 1906, 201 U.S. 1, 26 S. Ct. 387, 50 L. Ed. 633. See generally 45 Am.Jur., ***REMOVAL OF CAUSES***, Sec. 109.

….

[page 25]

As stated in 2 Cyc. of Fed. Procedure, Sec. 3.82:

> *Denials of equal rights resulting from the constitution or laws of a state must be distinguished from those caused by the acts of judicial or administrative officers. The wrong in the one case is the direct and necessary result of the state law, of its necessary operation proprio vigore,* while in the other it results from the administration of the law. In the former case, the action is removable*, and in the latter it is not.

[*Latin: *proprio vigore* = By its own force; by its intrinsic meaning.]

No doubt the petitioner anticipates difficulties in obtaining a fair and impartial trial because, as she claims, of inflamed public sentiment, but that is a question of fact to be determined by the trial court having jurisdiction to try the offense with which she is charged. If the constitutional rights of the petitioner are denied or invaded by the court, appellate jurisdiction can and will correct the wrong.

It is incumbent upon the state court to afford the petitioner a fair and impartial trial, and if it fails to discharge this obligation, a remedy may be obtained by appeal to the Arkansas Supreme Court or ultimately to the Supreme Court of the United States. See Gibson v. State of Mississippi, 1896, 162 U.S. 565, 16 S. Ct. 904, 40 L. Ed. 1075.

In *Brown* v. *Mississippi*, 1936, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682, the court, beginning at page 285 of 297 U.S., at page 464 of 56 S.Ct., said:

> The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it '*offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental*.' *Snyder* v. [*State of*] *Massachusetts*, 291 U.S. 97 (1934); *Rogers* v. Peck, 199 U.S. 425, 434 [26 S. Ct. 87, 50 L. Ed. 256]. The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. *Walker* v. *Sauvinet*, 92 U.S. 90 [23 L. Ed. 678]; *Hurtado* v. [*People of State of*] *California*, 110 U.S. 516 [4 S. Ct. 111, 28 L. Ed. 232]; *Snyder* v. [*State of*] *Massachusetts*, supra. But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. ***Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal***. The rack and torture chamber may not be substituted for the witness stand. The state may not permit an accused to be hurried to conviction under mob domination where the whole proceeding is but a mask without

> supplying corrective process. *Moore* v. *Dempsey*, 261 U.S. 86, 91 [43 S. Ct. 265, 67 L. Ed. 543]. The State may not deny to the accused the aid of counsel. *Powell* v. [*State of*] *Alabama*, 287 U.S. 45 [53 S. Ct. 55, 77 L. Ed. 158]. ***Nor may a State, through the action***
>
> **[page 26]** ***of its officers, contrive a conviction through the pretense of a trial which in truth is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured***.' *Mooney* v. *Holohan*, 294 U.S. 103, 112 [55 S. Ct. 340, 79 L. Ed. 791]. *And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions*.' *Hebert* v. [*State of*] *Louisiana*, 272 U.S. 312, 316 [47 S. Ct. 103, 71 L. Ed. 270].

In *Moore* v. *Dempsey*, 1923, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543, the court beginning at the bottom of page 90 of 261 U.S., at page 266 of 43 S.Ct., said:

> In *Frank* v. *Mangum*, 237 U.S. 309, 335 [35 S. Ct. 582, 59 L. Ed. 969], it was recognized of course that if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law; and that 'if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.' We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by habeas corpus ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.

At page 287 of 297 U.S., at page 465 of 56 S.Ct., *Brown* v. *State of Mississippi*, supra, the court said:

> ' * * * The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the court is clearly satisfied that such violations

exist, it will refuse to sanction such violations and will apply the corrective.'

Since the court is of the opinion that the constitutional provision and statutes of Arkansas do not impinge on the rights of a defendant in a criminal action pending in a court of competent jurisdiction in Arkansas, the court should not anticipate that the Judge of the Circuit Court within and for the Fourth Circuit of Arkansas, or any of the judicial officers, will so administer the law as to result in a denial of the constitutional rights of the defendant. **The court cannot determine in advance of the trial whether a wrong, so fundamental that it will make the whole proceeding a mere pretense of a trial and render any conviction and sentence wholly void, will occur in the proceeding**. It is difficult to conceive that the entire citizenship of each of the counties in the Fourth Judicial Circuit are so inflamed and so prejudiced against a defendant in a criminal action as to become a party to denying the defendant her fundamental rights as set forth in the 14th Amendment to the Constitution of the United States. *Of course, if in the proceeding either leading up to or during the trial such facts are established, and a conviction results solely therefrom, the defendant is not*

[page 27] *without remedy as stated in the cases herein cited*. But at this time the court is without jurisdiction to retain the case, and therefore an order is being entered today remanding the case to the Benton County Circuit Court whence it was removed.

14. JUDICIAL AND PROSECUTORIAL MISCONDUCT

What is a *Sua Sponte* Order?[4]

There are a number of situations in which a court may make an order in a case that is not in response to a party's request or motion, but of its own initiative. This is important to understand, as it is an exception to the basic principles of legal procedure in the U.S.: (1) the parties to the legal action will direct the litigation, and (2) the judge, or decision-maker, will remain impartial, as well as passive.

A court may step out of its normally passive role in the litigation process if it deems some issue not raised by the parties, which has relevance to the case itself, needs to be decided. **Taking *sua sponte* action is not uncommon, and is generally intended to help ensure the proceedings are fair and proper, and that there is no error in the proceedings which could give rise to a mistrial, or form grounds for an appeal**. Such issues may include:

- Dismissal of a case over which the court has no geographical or subject-matter jurisdiction
- Removal of a case to another judge, if the current judge has a conflict of interest

[4] https://legaldictionary.net/sua-sponte/

- Declare a mistrial
- Bifurcate trial proceedings, even if against the will of the parties (this means splitting the proceedings, which were originally filed on multiple issues, into separate trial proceedings)
- ***Dismissal of a case considered*** ~~to be frivolous~~, ***not having enough evidence to move forward***

AT ISSUE IN THIS MOTION

(1). Do My Pretrial Motions Contain Enough Evidence Proving My Innocence To Warrant a *Sua Sponte* Dismissal With Prejudice Even With My Numerous Motions for Dismissal With Prejudice and Expungement of My Record? ANSWER: YES!

(2). Will the Prosecutor Don Raney and Judges Mark Derrick and Milas Hale prove themselves as idiots for taking an innocent defendant to trial based on a police interview of Patsy Hays at the early stage of Alzheimer and Dementia with Oppositional Defiant Disorder, Intermittent Explosive Disorder, and Histrionics, and prone to lie? ANSWER: YES![5]

(2). Did Judge Hale Deny My Previous Pretrial Motions Containing Evidence of My Innocence That Should Not Have Been Denied? ANSWER: YES!

(3). Did Prosecutor Don Raney Commit Obstruction of Justice? ANSWER: YES!

[5] *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 (*Though often confused with intelligence, critical thinking is not intelligence. Critical thinking is a collection of cognitive skills that allow us to think rationally in a goal-orientated fashion, and a disposition to use those skills when appropriate. Critical thinkers are amiable skeptics. They are flexible thinkers who require evidence to support their beliefs and recognize fallacious attempts to persuade them. Critical thinking means overcoming all sorts of cognitive biases (e.g., hindsight bias, confirmation bias*).) www.scientificamerican.com/article/why-do-smart-people-do-foolish-things/

15. 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[6]

> 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 prosecutorial misconduct,[7] now is a critical time to reflect on *Imbler* v. *Pachtman*[8] 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*,[9] 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.

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

[7] 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**.

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

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

As some on the *Imbler* Court worried,[10] 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*.[11]

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[12] that "[t]here was, of course, no such thing as absolute prosecutorial immunity when §1983 was enacted."

. . .

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[13] 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[14] 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

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

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

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

[13] 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).

[14] 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/*

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,[15] 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 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.[16]

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*."

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[15] 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

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

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**,[17] 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 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**.[18]

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

[18] 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

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.

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

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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.

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.

16. 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).[19]

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

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,[20] 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,[21] and three cases addressing issues of prosecutorial liability and immunity.[22] 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.[23] 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;
>
> (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.

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[20] *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].

[21] *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)).

[22] *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).

[23] *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).

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.[24] 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.[25] 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[26]

Second, in Supreme Court decisions analyzing the civil rights liability of prosecutors, a primary reason for extending absolute immunity to prosecutors today is historical.[27] 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.[28] But in 1871, prosecutors did *not* enjoy absolute immunity.[29] In fact, the first case affording prosecutors absolute immunity was not decided until twenty-five years *after* the adoption of § 1983.[30] 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.[31] 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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[24] *See infra* Part I. PROSECUTORIAL MISCONDUCT IS A SIGNIFICANT PROBLEM LACKING EFFECTIVE DETERRENT OR REMEDIAL SAFEGUARDS

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

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

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

[28] *Imbler*, 424 U.S. at 417–18.

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

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

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

slaves of their newly gained civil rights.[32] 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.[33] Rather than streamlining the process to facilitate the early resolution of claims as was intended, the doctrine complicates and prolongs the process.[34] Specifically, the current doctrine affords prosecutors qualified immunity in some instances and absolute immunity in others.[35] But the difficulty of drawing lines between cases where qualified immunity applies and those where absolute immunity applies generates needless litigation.[36] Within eighteen months, the Roberts Court granted certiorari in two prosecutorial immunity cases.[37] Both cases illustrate the conflicts and complexities of the current prosecutorial immunity doctrine.[38] 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*

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

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

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

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

[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] *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).

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

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.

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**."[39] From 1992–2011, using DNA evidence, the Innocence Project at Benjamin N. Cardozo School of Law has exonerated 273 people who were wrongfully convicted[40] **and has reported that prosecutorial misconduct is a leading cause of these wrongful convictions**.[41] One Innocence Project report concluded that 250 innocent people exonerated by DNA evidence had served 3,160 years in prison.26[42] According to Northwestern University's Center on Wrongful Convictions, about 50 people each year are exonerated in both DNA and non-DNA cases.[43] The director of *CARDOZO LAW SCHOOL'S JACOB BURNS ETHICS CENTER* **reported that of 180 DNA exonerations, 43 percent involved allegations of prosecutorial misconduct**.[44]

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

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

[40] . Know the Cases, *INNOCENCE PROJECT*, http://www.innocenceproject.org/know/ (last visited Oct. 20, 2011).

[41] 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**).

[42] Innocence Project, ***250 EXONERATED: TOO MANY WRONGFULLY CONVICTED 3*** (2010), available at http://www.innocenceproject.org/docs/InnocenceProject_250.pdf.

[43] Kevin Davis, *THE REAL WORLD*, ABA J., Jan. 2011, at 51, 53.

[44] *PANELISTS EXAMINE WHY PROSECUTORS ARE LARGELY IGNORED BY DISCIPLINARY OFFICIALS*, 74 U.S.L.W. 2526, 2526 (Mar. 7, 2006) (quoting Professor Ellen Yaroshefsky).

convictions, issued its report.[45] The Commission found that in the preceding decade, **California appellate courts found prosecutorial misconduct in 443 cases**.[46] Of these cases, the courts found the misconduct had been harmless in 390 cases, but had reversed convictions in 53 cases.[47] Most recently, in 2010, the *NORTHERN CALIFORNIA INNOCENCE PROJECT* released its study of prosecutorial misconduct,[48] the most comprehensive review of state prosecutorial misconduct in the United States.[49] The Innocence Project reviewed more than 4,000 California state and federal appellate decisions between 1997–2009 alleging prosecutorial misconduct.[50] 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**.[51] Moreover, in another 282 cases, the courts did not resolve the question.[52] The finding of 707 cases of misconduct is significant—**it equates to one case of prosecutorial misconduct each week in California alone**.[53] **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**.[54]

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

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[45] 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.

[46] Id.

[47] *Id.*

[48] 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.

[49] *Id.* at 2.

[50] *Id.*

[51] *Id.*

[52] *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.

[53] *Id.* at 2.

[54] 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.

scrutiny of 97 percent of cases, almost all of which are resolved through guilty pleas.[55] 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.[56] Third, findings of misconduct at the trial court level (but not discussed in appellate decisions) are inaccessible.[57] **Finally, the numbers fail to reflect the instances of prosecutorial misconduct that were never discovered or appealed**.[58]

The failure to discover prosecutorial misconduct is especially likely in cases of *Brady* violations.[59] In 1963, the Supreme Court held that prosecutors have the duty to disclose exculpatory evidence to defendants.[60] **But the failure to do so is a prevalent example of prosecutorial misconduct**.[61] 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,**

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[55] 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.

[56] *Id.* at 10–11.

[57] *Id.* at 3.

[58] *Id.*

[59] *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.").

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

[61] 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).

difficult to uncover; they become apparent only when the withheld material becomes known in other ways.[62]

For these reasons, *Brady* violations often go undetected.[63] For example, in one recent California case,[64] 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.[65] 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.[66]

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[62] 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. A*vailable 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).

[63] 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).

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

[65] *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.*

[66] *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

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.[67] Many innocent people are currently in prison who have yet to be—and may never be—exonerated. Innocent people 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.[68]

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.[69]

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

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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.

[67] *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).

[68] *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.

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

original crimes.[70] A horrifying example is the case of Kevin Green.[71] In 1980, Green was wrongfully convicted for assaulting his pregnant wife and murdering her unborn baby.56[72] He served sixteen years in prison until he was exonerated.57[73] 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[74] While Green was being wrongfully prosecuted and convicted, Parker continued to commit violent crimes, including raping a thirteen-year-old girl.59[75]

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.[76] Second, the cost of incarcerating defendants through lengthy 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.[77] In addition, the taxpayers may be liable for damages in civil lawsuits[78] and under wrongful imprisonment statutes.[79]

Finally, prosecutorial misconduct erodes the integrity of, and public confidence in, the criminal justice system as a whole.[80] **The undermining of the public's confidence is exacerbated by the fact that minorities and the poor suffer the most from prosecutorial misconduct**.65[81] **In our system, the prosecutor "is the**

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[70] *Id.* at 71.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *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.*

[77] *Id.* at 68.

[78] *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.

[79] *Id.* at 70.

[80] *Id.* at 71.

[81] 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

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."[82] 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.**[83]

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.[84] Specifically, the Court pointed to "the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies";[85] the prospect of professional discipline;[86] and the potential criminal liability of prosecutors for violating the accused's rights.[87] **But as the following discussion will explain, these deterrent and corrective mechanisms are entirely inadequate**.

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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).

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

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

[84] *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))).

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

[86] *Id.* at 428–29.

[87] *Id.*

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.[88] **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.**[89]

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."[90] **A finding of "harmless error" is not equivalent to a finding of trivial error.**[91] **Indeed, harmless error cases often reveal serious prosecutorial misconduct.**[92] 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.[93] In the court's view, the prosecutor "instilled a poison which the defense could not drain from the case."[94] But the conviction was, nonetheless, affirmed. The Innocence Project study documents a number of

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

[89] *Id.* at 12–13.

[90] 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.").

[91] 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 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.

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

[93] *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).

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

cases where egregious misconduct was found to be harmless.[95] **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[96] 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.[97] 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.[98]

In a number of cases where prosecutorial misconduct was found to be harmless, the accused were in fact innocent.[99] 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.[100] In the thirty-one cases where the courts found prosecutorial misconduct, it was found to be harmless in nineteen cases.[101] Of these sixty-five cases of wrongful convictions, only twelve found harmful error.[102] 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

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

[96] *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).

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

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

[99] *Id.* at 64.

[100] *Id.* at 65.

[101] *Id.*

[102] *Id.*

harmful error is found.[103] **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,**[104] **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**.[105] **Moreover, from 1997–2009, appellate courts found 159 instances of harmful prosecutorial misconduct**,[106] **but only six prosecutors were disciplined for misconduct during criminal proceedings**.[107]

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.[108] **To put those numbers in perspective, appellate courts found prosecutorial misconduct in over 700 criminal cases, but only six prosecutors were disciplined**.[109] **In other words, less**

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[103] 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))).

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

[105] 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).

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

[107] *Id.* at 16.

[108] *Id.*

[109] *Id.*

than 1 percent of the prosecutors formally found to have engaged in misconduct faced any professional sanction for it.[110]

Even where prosecutors were repeatedly found to have engaged in prosecutorial misconduct, they were still not reported or disciplined.[111] 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.[112] 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.[113] For example, one attorney was suspended for twenty months for bouncing a check in his personal account,[114] and a criminal defense attorney was suspended for two years for crossing the line between zealous advocacy and contempt of court.[115] 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.[116]

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[117]—"not a single prosecutor was disciplined for [mis]conduct in a criminal case."[118] And, "**to date, no California prosecutor has been disbarred for prosecutorial misconduct**."[119] 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."[120] **In 2011, we know that this is simply not**

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[110] *Id.* at 3.

[111] *Id.* at 57–58.

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

[113] *Id.* at 59–60.

[114] *Id.* at 59.

[115] *Id.* at 59–60.

[116] *Id.* at 60.

[117] *Id.* at 54.

[118] *Id.* at 56.

[119] *Id.*

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

true. In reality, prosecutors who engage in misconduct—even when found to have engaged in misconduct by courts of appeals—are subject to discipline less than 1 percent of the time.[121]

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.[122] 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.[123] **Withholding exonerating evidence is one of the most common types of prosecutorial misconduct**.[124] **What is unusual is that the state bar acted quickly and decisively to punish the prosecutor**.[125]

In 2009, Attorney General Eric Holder dismissed an indictment against former Senator Ted Stevens because of prosecutorial misconduct.[126] Again, as in the Duke Lacrosse case**, the prosecutors repeatedly failed to provide evidence to defense counsel despite court orders to do so**.[127] 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.[128] 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."[129] Again, unfortunately, the response of Attorney General Holder and Judge Emmett Sullivan in

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

[122] 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.

[123] *Id.*

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

[125] *Id.* at 9.

[126] *Id.* at 12.

[127] *Id.*

[128] *Id.*

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

addressing the misconduct is more remarkable than the misconduct itself.[130]

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.[131] **This theoretical deterrent is in 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.[132] But it failed to cite a single case where prosecutors had actually been held criminally liable.[133] In fact, in the 150 years since its adoption in 1866,[134] it appears that only one prosecutor has been convicted under this statute.[135]**

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,[136] 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.[137] **Second, many instances of prosecutorial misconduct—including *Brady* violations—are**

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

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

[132] *Id.* at 429.

[133] *See id.*

[134] 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).

[135] *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").

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

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

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**.

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.[138] **When acting as advocates, prosecutors receive absolute immunity even when they have acted intentionally and maliciously**.[139] 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**.[140] 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**.[141] **But the Court has stressed that when "a tradition of absolute immunity did not exist as of 1871, we have**

[138] *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).

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

[140] *Buckley*, 509 U.S. at 268–70.

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

refused to grant such immunity under § 1983."[142] **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**.[143]

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**.[144] In fact, in 1871, although the office of the public prosecutor existed, the private prosecution of crimes was widespread,[145] **and both public and private prosecutors were liable for *malicious prosecution***.[146] **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**.[147]

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**

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

[143] *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.").

[144] *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).

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

[146] *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").

[147] *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**.").

cause and with malice.[148] 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.[149] 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."[150]

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 eliminating slavery,[151] granting former slaves citizenship,[152] and providing effective redress for the deprivation of civil rights.[153] But this effort met fierce and violent resistance.[154] Former Confederates seized control in many parts of the South and launched aggressive campaigns against newly freed slaves, Republicans, Union supporters, and federal officials.[155] These

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[148] *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).

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

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

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

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

[153] *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).

[154] 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).

[155] *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*

anti-Reconstruction campaigns included state-sanctioned criminal prosecutions of Union officers and federal officials for attempting to enforce federal laws.[156]

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.[157] Southern prosecutors also targeted Union military commanders and officials of the Freedmen's Bureau who sought to enforce the 1866 Civil Rights Act.[158] 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.[159] In Kentucky, as one newspaper explained, 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."[160]

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.[161] 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]

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).

[156] *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).

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

[158] *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).

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

[160] *Id.* at 298.

[161] *Id.* at 299.

this punishment."[162] More than three thousand prosecutions were brought in Kentucky alone against former Union soldiers.[163]

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.[164] 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.[165] 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.[166] 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.[167]

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.[168] As Congress debated the Civil Rights Act of 1866, representatives expressed concern about the vexatious use of prosecutions against Union supporters and federal officials.[169] In recommending the passage of the Fourteenth Amendment, the Joint Committee on Reconstruction stated:

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[162] *Id.*

[163] *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).

[164] *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).

[165] *Id.*

[166] *See CIVIL RIGHTS ACT OF 1866*, ch. 31, 14 Stat. 27, 27.

[167] *See PATRICIA ALLAN LUCIE, FREEDOM AND FEDERALISM: CONGRESS AND COURTS 1861–1866*, at 166 (1986).

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

[169] *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,

> 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.[170]

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.[171] But the violence continued unabated.[172] 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**.[173] **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**

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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.").

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

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

[172] *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").

[173] *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.

defend and give remedies for their wrongs to all the people. [174]

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*.[175] 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.[176] **This split in authority persisted into the 1920s**.[177] California rejected

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[174] *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").

[175] 44 N.E. 1001 (Ind. 1896).

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

[177] 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

absolute prosecutorial immunity in 1908,[178] and Hawaii held that a public prosecutor could be liable for malicious prosecution and rejected the doctrine of absolute prosecutorial immunity in 1916.[179] Oregon waffled a bit and then accepted the doctrine in 1924.[180] **In the federal system, absolute prosecutorial immunity was not recognized until 1927.**[181] **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.[182] **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]<<<<<

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).

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

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

[180] 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*).

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

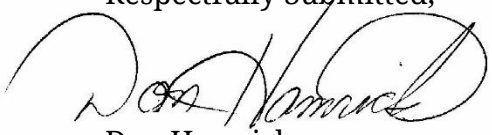
[182] *See Kalina* v. *Fletcher*, 522 U.S. 118, 124 n.11 (1997) (noting that *Imbler* did not cite pre-1871 cases and relied primarily on "policy considerations").

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, 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.

Respectfully Submitted,



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