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UNSUPPORTABLE AND UNJUSTIFIED: A CRITIQUE OF ABSOLUTE PROSECUTORIAL IMMUNITY

*Margaret Z. Johns**

INTRODUCTION

Since John G. Roberts, Jr., became Chief Justice of the U.S. Supreme Court on September 29, 2005,[1] 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,[2] and three cases addressing issues of prosecutorial liability and immunity.[3] 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.[4] 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

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1. *Biographies of Current Justices of the Supreme Court*, U.S. SUPREME COURT, http://www.supremecourt.gov/about/biographies.aspx (last visited Oct. 20, 2011).

2. *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)).

3. *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).

4. *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).

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.

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.[5] 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.[6] 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]

Second, in Supreme Court decisions analyzing the civil rights liability of prosecutors, a primary reason for extending absolute immunity to prosecutors today is historical.[8] 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.[9] But in 1871, prosecutors did *not* enjoy absolute immunity.[10] In fact, the first case affording prosecutors absolute immunity was not decided until twenty-five years *after* the adoption of § 1983.[11] 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.[12] 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 slaves of their newly gained civil rights.[13] 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.[14] Rather than streamlining the process

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5. *See infra* Part I.
6. *See infra* Part I.
7. *See infra* Part I.
8. Burns v. Reed, 500 U.S. 478, 489–90 (1991); Imbler v. Pachtman, 424 U.S. 409, 421–24 (1976).
9. *Imbler*, 424 U.S. at 417–18.
10. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 107–22; *see infra* Part II.
11. *See generally* Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896).
12. *See infra* Part II.
13. *See infra* Part II.
14. *See infra* Part III.

to facilitate the early resolution of claims as was intended, the doctrine complicates and prolongs the process.[15] Specifically, the current doctrine affords prosecutors qualified immunity in some instances and absolute immunity in others.[16] But the difficulty of drawing lines between cases where qualified immunity applies and those where absolute immunity applies generates needless litigation.[17] Within eighteen months, the Roberts Court granted certiorari in two prosecutorial immunity cases.[18] Both cases illustrate the conflicts and complexities of the current prosecutorial immunity doctrine.[19] 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, 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 considers the lack of historical justification for the Supreme Court's recognition of the absolute prosecutorial immunity doctrine. Finally, Part III 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

In public debates about prosecutorial immunity, the frequency and significance of prosecutorial misconduct are disputed and sometimes trivialized.[20] But as recent studies establish, prosecutorial misconduct is a problem that contributes to a substantial number of wrongful convictions.[21] Moreover, despite layers of corrective procedures, our current criminal and civil justice process is ineffective in deterring or remedying prosecutorial misconduct.[22]

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15. *See infra* Part III.

16. *See infra* Part III.

17. *See infra* Part III.

18. 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).

19. *See infra* Part III.

20. Warren Diepraam, *Prosecutorial Misconduct: It Is Not the Prosecutor's Way*, 47 S. TEX. L. REV. 773, 773 (2006); Joshua Marquis, *Should It Be Easier to Sue Prosecutors for Misconduct?*, CQ RESEARCHER, Nov. 9, 2007, at 953 ("Cases of intentional misconduct by prosecutors are about as frequent as the number of cases of human rabies. For that very reason it's big news when a district attorney engages in actual misconduct."). *But see* D. Brooks Smith, *Policing Prosecutors: What Role Can Appellate Courts Play?*, 38 HOFSTRA L. REV. 835, 836 n.6 (2010) (Judge Smith, who serves on the Third Circuit, notes that "[e]xamples of prosecutorial misconduct are not uncommon" and that "[t]he list [of examples] is, unfortunately, lengthy.").

21. *See infra* Part I.A.

22. *See infra* Part I.B.

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."[23] From 1992–2011, using DNA evidence, the Innocence Project at Benjamin N. Cardozo School of Law has exonerated 273 people who were wrongfully convicted[24] and has reported that prosecutorial misconduct is a leading cause of these wrongful convictions.[25] One Innocence Project report concluded that 250 innocent people exonerated by DNA evidence had served 3,160 years in prison.[26] According to Northwestern University's Center on Wrongful Convictions, about 50 people each year are exonerated in both DNA and non-DNA cases.[27] The director of Cardozo Law School's Jacob Burns Ethics Center reported that of 180 DNA exonerations, 43 percent involved allegations of prosecutorial misconduct.[28]

These conclusions are borne out by two recent California reports. In 2007, the California Commission on the Fair Administration of Justice, established by the California State Senate to study ways to prevent wrongful convictions, issued its report.[29] The Commission found that in the preceding decade, California appellate courts found prosecutorial misconduct in 443 cases.[30] Of these cases, the courts found the misconduct had been harmless in 390 cases, but had reversed convictions in 53 cases.[31] Most recently, in 2010, the Northern California Innocence Project released its study of prosecutorial misconduct,[32] the most comprehensive review of state prosecutorial misconduct in the United States.[33] The Innocence Project reviewed more than 4,000 California state and federal appellate

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23. JOHN F. TERZANO ET AL., JUSTICE PROJECT, IMPROVING PROSECUTORIAL ACCOUNTABILITY: A POLICY REVIEW 2 (2009), *available at* http://amlawdaily.typepad.com/JusticeProjectReport.pdf.

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

25. *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, *supra* note 10, at 59–63 (summarizing studies of wrongful convictions and prosecutorial misconduct).

26. INNOCENCE PROJECT, 250 EXONERATED: TOO MANY WRONGFULLY CONVICTED 3 (2010), *available at* http://www.innocenceproject.org/docs/InnocenceProject_250.pdf.

27. Kevin Davis, *The Real World*, ABA J., Jan. 2011, at 51, 53.

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

29. 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.

30. *Id.*

31. *Id.*

32. *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.

33. *Id.* at 2.

decisions between 1997–2009 alleging prosecutorial misconduct.[34] 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.[35] Moreover, in another 282 cases, the courts did not resolve the question.[36] The finding of 707 cases of misconduct is significant—it equates to one case of prosecutorial misconduct each week in California alone.[37] 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.[38]

But these reports grossly underestimate the instances of prosecutorial misconduct for several reasons. First, only about 3 percent of felony cases actually go to trial, so there will be no judicial scrutiny of 97 percent of cases, almost all of which are resolved through guilty pleas.[39] 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.[40] Third, findings of misconduct at the trial court level (but not discussed in appellate decisions) are inaccessible.[41] Finally, the numbers fail to reflect the instances of prosecutorial misconduct that were never discovered or appealed.[42]

The failure to discover prosecutorial misconduct is especially likely in cases of *Brady* violations.[43] In 1963, the Supreme Court held that prosecutors have the duty to disclose exculpatory evidence to defendants.[44] But the failure to do so is a prevalent example of prosecutorial misconduct.[45] As the Innocence Project observed:

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34. *Id.*

35. *Id.*

36. *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.

37. *Id.* at 2.

38. 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.

39. RIDOLFI & POSSLEY, *supra* note 32, at 3.

40. *Id.* at 10–11.

41. *Id.* at 3.

42. *Id.*

43. *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.").

44. *Brady*, 373 U.S. at 86.

45. RIDOLFI & POSSLEY, *supra* note 32, at 36–38, 65. 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,

> When prosecutors make the decision as to whether evidence is *Brady* material, their belief that the defendant is guilty can create a distorting prism through which they tend to view the evidence inaccurately as a red herring or irrelevant. *Brady* violations are, by their nature, difficult to uncover; they become apparent only when the withheld material becomes known in other ways.[46]

For these reasons, *Brady* violations often go undetected.[47] For example, in one recent California case,[48] 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.[49] 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.[50]

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

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2092 (2010) (explaining the reasons an honest prosecutor may fail to disclose exculpatory evidence).

46. RIDOLFI & POSSLEY, *supra* note 32, at 36. Because *Brady* violations are so difficult to discover and police, scholars have suggested various preventative and corrective reforms. *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).

47. 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 . . . .

RIDOLFI & POSSLEY, *supra* note 32, at 25.

48. People v. Uribe, 76 Cal. Rptr. 3d 829 (Ct. App. 2008).

49. *Id.* at 846–47. *See* RIDOLFI & POSSLEY, *supra* note 32, at 20 (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 in now on appeal. *Id.*

50. *See* RIDOLFI & POSSLEY, *supra* note 32 (citing Tracey Kaplan, *Judge Orders New Trial in Second Case as Before, Tape of Exam Wasn't Given to Defense*, SAN JOSE MERCURY NEWS, Oct. 30, 2009, at 1B). Another example is the case of Alan Gell who was exonerated after "nine years in prison and half of that on death row" for murder. *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 263 (2008). Prosecutors withheld witness statements that the victim was seen alive after Gell was with him and that they were creating stories to disguise their own involvement. *Id.* at 264–65.

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.[51] 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.[52]

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.[53]

Where prosecutorial misconduct has caused the wrongful conviction of innocent people, the danger to public safety is obvious: the real criminals remain free to commit other crimes. Specifically, in cases of DNA exonerations, authorities have found that many of the true criminals committed other crimes while innocent people were incarcerated for their original crimes.[54] A horrifying example is the case of Kevin Green.[55] In 1980, Green was wrongfully convicted for assaulting his pregnant wife and murdering her unborn baby.[56] He served sixteen years in prison until he was exonerated.[57] 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] While Green was being wrongfully prosecuted and convicted, Parker continued to commit violent crimes, including raping a thirteen-year-old girl.[59]

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.[60] Second, the cost of incarcerating defendants through lengthy

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51. *Know the Cases: Browse Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/Browse-Profiles.php (last visited Oct. 20, 2011) (documenting all the cases of exoneration by DNA evidence).

52. *See* RIDOLFI & POSSLEY, *supra* note 32, at 66; 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.

53. RIDOLFI & POSSLEY, *supra* note 32, at 70.

54. *Id.* at 71.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *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

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.[61] In addition, the taxpayers may be liable for damages in civil lawsuits[62] and under wrongful imprisonment statutes.[63]

Finally, prosecutorial misconduct erodes the integrity of, and public confidence in, the criminal justice system as a whole.[64] The undermining of the public's confidence is exacerbated by the fact that minorities and the poor suffer the most from prosecutorial misconduct.[65] In our system, the prosecutor "is the representative . . . of a sovereignty whose . . . interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[66] 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.[67]

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.[68] Specifically, the Court pointed to "the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies";[69] the prospect of professional discipline;[70] and the potential criminal liability of prosecutors for violating the accused's rights.[71] But as

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evidence and introduced false evidence. *Id.* at 68. The cost of prosecution has exceeded $1 million. *Id.*

61. *Id.* at 68.

62. *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.

63. *Id.* at 70.

64. *Id.* at 71.

65. JIM DWYER ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 318 (2003) (explaining that prosecutorial misconduct happens more frequently in the conviction of black men); Arthur L. Rizer III, *The Race Effect on Wrongful Convictions*, 29 WM. MITCHELL L. REV. 845, 856–58 (2003); Ephraim Unell, Note, *A Right Not to Be Framed: Preserving Civil Liability of Prosecutors in the Face of Absolute Immunity*, 23 GEO. J. LEGAL ETHICS 955, 956–57 (2010).

66. Berger v. United States, 295 U.S. 78, 88 (1935).

67. RIDOLFI & POSSLEY, *supra* note 32, at 6.

68. *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))).

69. *Imbler*, 424 U.S. at 427.

70. *Id.* at 428–29.

71. *Id.*

the following discussion will explain, these deterrent and corrective mechanisms are entirely inadequate.

First, the courts' remedial powers are not available in the 97 percent of cases that never go to trial, so the protections of trial and appellate court scrutiny are only available in 3 percent of cases.[72] 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.[73]

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."[74] A finding of "harmless error" is not equivalent to a finding of trivial error.[75] Indeed, harmless error cases often reveal serious prosecutorial misconduct.[76] 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.[77] In the court's view, the prosecutor "instilled a poison which the defense could not drain from the case."[78] But the conviction was, nonetheless, affirmed. The Innocence Project study documents a number of cases where egregious misconduct was found to be harmless.[79] 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. 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] 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

72. RIDOLFI & POSSLEY, *supra* note 32, at 10.

73. *Id.* at 12–13.

74. Smith, *supra* note 20, at 836–40 ("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.").

75. 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.'" RIDOLFI & POSSLEY, *supra* note 32, at 19 (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.

76. *Id.* at 21–23, 26–28, 31, 36–37.

77. *See* People v. McKenzie, No. A112837, 2007 WL 2193548, at *9 (Cal. Ct. App. Aug. 1, 2007); RIDOLFI & POSSLEY, *supra* note 32, at 21.

78. *McKenzie*, 2007 WL 2193548, at *8.

79. RIDOLFI & POSSLEY, *supra* note 32, at 22–24.

80. *See* CAL. BUS. & PROF. CODE § 6086.7 (West 2003 & Supp. 2011); RIDOLFI & POSSLEY, *supra* note 32, at 22.

covered by the limited statutory reporting requirement.[81] 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.[82]

In a number of cases where prosecutorial misconduct was found to be harmless, the accused were in fact innocent.[83] 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.[84] In the thirty-one cases where the courts found prosecutorial misconduct, it was found to be harmless in nineteen cases.[85] Of these sixty-five cases of wrongful convictions, only twelve found harmful error.[86] Yet all sixty-five of these people were actually innocent.

The failure of the courts or disciplinary bodies to deter or remedy prosecutorial misconduct is equally apparent in cases where harmful error is found.[87] 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,[88] 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.[89] Moreover, from 1997–2009, appellate courts found 159 instances of harmful prosecutorial misconduct,[90] but only six prosecutors were disciplined for misconduct during criminal proceedings.[91]

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.[93] To put those numbers in perspective, appellate courts found prosecutorial

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81. RIDOLFI & POSSLEY, *supra* note 32, at 48.
82. *Id.* at 22, 48.
83. *Id.* at 64.
84. *Id.* at 65.
85. *Id.*
86. *Id.*
87. Barkow, *supra* note 45, at 2095 (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))).
88. CAL. BUS. & PROF. CODE § 6086.7 (West 2003 & Supp. 2011).
89. *See* RIDOLFI & POSSLEY, *supra* note 32, at 49 (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* Barkow, *supra* note 45, at 2096 (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).
90. RIDOLFI & POSSLEY, *supra* note 32, at 18.
91. *Id.* at 16.
92. *Id.*
93. *Id.*

misconduct in over 700 criminal cases, but only six prosecutors were disciplined.[94] In other words, less than 1 percent of the prosecutors formally found to have engaged in misconduct faced any professional sanction for it.[95]

Even where prosecutors were repeatedly found to have engaged in prosecutorial misconduct, they were still not reported or disciplined.[96] 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.[97] 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.[98] For example, one attorney was suspended for twenty months for bouncing a check in his personal account,[99] and a criminal defense attorney was suspended for two years for crossing the line between zealous advocacy and contempt of court.[100] 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.[101]

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[102]—"not a single prosecutor was disciplined for [mis]conduct in a criminal case."[103] And, "to date, no California prosecutor has been disbarred for prosecutorial misconduct."[104] 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."[105] In 2011, we know that this is simply not 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.[106]

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.[107] Specifically, despite repeated requests

94. *Id.*
95. *Id.* at 3.
96. *Id.* at 57–58.
97. *Id.* at 3, 57.
98. *Id.* at 59–60.
99. *Id.* at 59.
100. *Id.* at 59–60.
101. *Id.* at 60.
102. *Id.* at 54.
103. *Id.* at 56.
104. *Id.*
105. Imbler v. Pachtman, 424 U.S. 409, 429 (1976).
106. RIDOLFI & POSSLEY, *supra* note 32, at 3.
107. TERZANO ET AL., *supra* note 23, at 9.

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.[108] Withholding exonerating evidence is one of the most common types of prosecutorial misconduct.[109] What is unusual is that the state bar acted quickly and decisively to punish the prosecutor.[110]

In 2009, Attorney General Eric Holder dismissed an indictment against former Senator Ted Stevens because of prosecutorial misconduct.[111] Again, as in the Duke Lacrosse case, the prosecutors repeatedly failed to provide evidence to defense counsel despite court orders to do so.[112] 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.[113] 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."[114] Again, unfortunately, the response of Attorney General Holder and Judge Emmett Sullivan in addressing the misconduct is more remarkable than the misconduct itself.[115]

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.[116] 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.[117] But it failed to cite a single case where prosecutors had actually been held criminally liable.[118] In fact, in the 150 years since its adoption in 1866,[119] it appears that only one prosecutor has been convicted under this statute.[120]

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108. *Id.*
109. *Id.* at 2, 9.
110. *Id.* at 9.
111. *Id.* at 12.
112. *Id.*
113. *Id.*
114. *Id.* (alteration in original).
115. *Id.* at 2, 12.
116. *See* Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976).
117. *Id.* at 429.
118. *See id.*
119. 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).
120. 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); Smith, *supra* note 20, at 840 (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").

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,[121] 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.[122] Second, many instances of prosecutorial misconduct—including *Brady* violations—are extremely difficult to uncover and never come to light in court proceedings. Third, even where cases go to trial and prosecutorial misconduct is established on appeal, it is rarely found to constitute harmful—and therefore reversible—error. Fourth, even where prosecutorial misconduct is found on appeal to constitute harmful and reversible error, it is rarely reported to disciplinary bodies. Prosecutors are almost never subjected to professional discipline—even where the misconduct constitutes harmful error. And finally, criminal prosecutions for prosecutorial misconduct virtually never happen.

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.[123] When acting as advocates, prosecutors receive absolute immunity even when they have acted intentionally and maliciously.[124] 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.[125] 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.[126] But the Court has stressed that when "a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under § 1983."[127] Moreover, because the undisputed purpose of § 1983 was to *create* liability

121. *See Imbler*, 424 U.S. at 425–29.
122. RIDOLFI & POSSLEY, *supra* note 32, at 10.
123. *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).
124. *See Kalina*, 522 U.S. at 124; *Imbler*, 424 U.S. at 427.
125. *Buckley*, 509 U.S. at 268–70.
126. *See* Tenney v. Brandhove, 341 U.S. 367, 376–77 (1951) (upholding legislative immunity).
127. *Burns*, 500 U.S. at 498 (Scalia, J., concurring in part and dissenting in part).

for unlawful conduct of state officials, the Court has always emphasized that it would confer absolute immunity sparingly.[128]

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.[129] In fact, in 1871, although the office of the public prosecutor existed, the private prosecution of crimes was widespread,[130] and both public and private prosecutors were liable for malicious prosecution.[131] 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.[132]

Although the common law did *not* provide absolute immunity for persons responsible for a criminal prosecution, prosecutors were protected from excessive liability because the elements of the cause of action were difficult to prove. To establish a claim for malicious prosecution, the plaintiff had to prove that the prosecutor acted without probable cause and with malice.[133] 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.[134] 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."[135]

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

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128. *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.").

129. *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).

130. *See* Johns, *supra* note 10, at 108–14.

131. *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").

132. 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.").

133. 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).

134. Kalina v. Fletcher, 522 U.S. 118, 133 (1997) (Scalia, J., concurring).

135. Harper, *supra* note 133, at 170.

enforcement of civil rights. During Reconstruction, Congress sought to restructure the nation by eliminating slavery,[136] granting former slaves citizenship,[137] and providing effective redress for the deprivation of civil rights.[138] But this effort met fierce and violent resistance.[139] Former Confederates seized control in many parts of the South and launched aggressive campaigns against newly freed slaves, Republicans, Union supporters, and federal officials.[140] These anti-Reconstruction campaigns included state-sanctioned criminal prosecutions of Union officers and federal officials for attempting to enforce federal laws.[141]

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.[142] Southern prosecutors also targeted Union military commanders and officials of the Freedmen's Bureau who sought to enforce the 1866 Civil Rights Act.[143] 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.[144] 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."[145] General John M. Palmer, the Union military commander in Kentucky,

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

137. U.S. CONST. amend. XIV, § 1; AMAR, *supra* note 136, at 380–81.

138. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (2006)); AMAR, *supra* note 136, at 362, 381.

139. 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).

140. AMAR, *supra* note 136, at 377–78; Chin & Wagner, *supra* note 139, at 88–89; Forman, *supra* note 139, at 914–26; Glazer, *supra* note 139, at 1371–73; Harrington, *supra* note 139, at 1004–06.

141. *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).

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

143. *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).

144. *See* Achtenberg, *supra* note 141, at 329.

145. *Id.* at 298.

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.[146] As he explained, "there are twenty thousand crimes for which I am punishable and Congress will have to pass a law extending my life—lengthen it out a few thousand years that I may [serve] this punishment."[147] More than three thousand prosecutions were brought in Kentucky alone against former Union soldiers.[148]

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.[149] 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.[150] 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.[151] 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.[152]

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.[153] As Congress debated the Civil Rights Act of 1866, representatives expressed concern about the vexatious use of prosecutions against Union supporters and federal officials.[154] In recommending the passage of the Fourteenth Amendment, the Joint Committee on Reconstruction stated:

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146. *Id.* at 299.

147. *Id.*

148. *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).

149. *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).

150. *Id.*

151. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27.

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

153. *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).

154. *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 2065 (remarks of Sen. Doolittle) (describing the widespread nature of the problem of unfounded prosecutions against federal officials); *see also* Achtenberg, *supra* note 141, at 338–42 ("[F]or the 39th Congress, the

> 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.[155]

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.[156] But the violence continued unabated.[157] 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.[158] These remedial provisions were intended to be broadly construed. Thus, Representative Shellabarger declared:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. . . . [T]he largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.[159]

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.

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problem of baseless prosecutions . . . was a pressing current crisis that provoked vigorous debate and decisive legislative action.").

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

156. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

157. *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").

158. 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.

159. 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").

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*.[160] 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.[161] This split in authority persisted into the 1920s.[162] California rejected absolute prosecutorial immunity in 1908,[163] and Hawaii held that a public prosecutor could be liable for malicious prosecution and rejected the doctrine of absolute prosecutorial immunity in 1916.[164] Oregon waffled a bit and then accepted the doctrine in 1924.[165] In the federal system, absolute prosecutorial immunity was not recognized until 1927.[166] 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.[167] 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

160. 44 N.E. 1001 (Ind. 1896).

161. Arnold v. Hubble, 38 S.W. 1041, 1041 (Ky. Ct. App. 1897).

162. Douglas J. McNamara, Buckley*,* Imbler *and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 ALB. L. REV. 1135, 1169 (1996). *See generally* Annotation, *Immunity of Prosecuting Officer from Action for Malicious Prosecution*, 34 A.L.R. 1504 (1925) (recognizing the split in authority and collecting cases); Note, *The Civil Liability of a District Attorney for Quasi-judicial Acts*, 73 U. PA. L. REV. 300 (1925).

163. Carpenter v. Sibley, 94 P. 879, 879 (Cal. 1908).

164. Leong Yau v. Carden, 23 Haw. 362, 369 (1916).

165. 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 re-argument, 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).

166. *See generally* Yaselli v. Goff, 275 U.S. 503 (1927).

167. *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”).

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

As members of the Supreme Court have recognized, the current doctrine of prosecutorial immunity is difficult to apply.[168] Depending on the function they are performing at the time of the alleged misconduct, prosecutors are sometimes entitled to absolute immunity and sometimes entitled to qualified immunity.[169] Absolute immunity protects prosecutors acting as advocates even when they engaged in intentional and malicious misconduct;[170] qualified immunity protects prosecutors engaged in non-advocacy functions unless they violated clearly established law of which a reasonable officer would have known.[171] Under the current doctrine, drawing the line between conduct entitled to absolute immunity and conduct entitled to qualified immunity is a complicated question that has generated multiple conflicting decisions.[172] The two most recent cases where the Supreme Court has granted certiorari on this issue are excellent examples of the problem: *Pottawattamie County v. McGhee*[173] and *Ashcroft v. al-Kidd*.[174]

A. Pottawattamie County v. McGhee

The *Pottawattamie County* case presented two interrelated issues: (1) is fabrication of evidence by a prosecutor before probable cause is established a due process violation; and (2) if so, which type of immunity—absolute or qualified—attaches where the prosecutor subsequently uses that evidence at trial? To understand these issues, some doctrinal background is helpful.

The Supreme Court has held that the potent doctrine of absolute prosecutorial immunity is reserved for advocacy functions intimately connected with the judicial phase of the criminal proceedings.[175] Since qualified immunity is presumed to be sufficient to protect honest officials from litigation and liability for honest mistakes in the conduct of their

168. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 286–91 (1993) (Kennedy, J., concurring in part and dissenting in part) (arguing in dissent that the distinction between advocatory and investigatory functions requires "difficult and subtle distinctions" and that "the rule the Court adopts" in the majority opinion "created more problems than it has solved"); Imbler v. Pachtman, 424 U.S. 409, 431 n.33 (1976) ("Drawing a proper line between these functions may present difficult questions . . . .").

169. *Buckley*, 509 U.S. at 268–70; *Imbler*, 424 U.S. at 430–31.

170. *Kalina*, 522 U.S. at 124; *Imbler*, 424 U.S. at 427.

171. *Buckley*, 509 U.S. at 268.

172. Johns, *supra* note 10, at 89–106.

173. 130 S. Ct. 1047 (2010) (cert. granted; case settled and dismissed after oral argument).

174. 131 S. Ct. 2074 (2011).

175. *Buckley*, 509 U.S. at 273; *Imbler*, 424 U.S. at 430.

office,[176] prosecutors receive only qualified immunity for misconduct in performing investigative and administrative functions.[177] Determining whether a prosecutor's misconduct is an act of investigation or advocacy is one of the most vexing questions arising under the prosecutorial immunity doctrine.[178]

One clear distinction was established in *Buckley v. Fitzsimmons*.[179] In *Buckley*, the prosecutor had conspired with police to fabricate evidence during the preliminary investigation of a rape and murder case. The Court concluded that before a prosecutor has probable cause to arrest a defendant, "[a] prosecutor neither is, nor should consider himself to be, an advocate."[180] Thus, before probable cause is established, only qualified immunity applies. But the Court declined to rule on whether the plaintiff's due process rights had been violated by the prosecutor's coercion of and payment for witness testimony because the claim was unclear and had not been addressed by the lower court.[181] In Justice Scalia's view, claims about the fabrication of evidence were unlikely to support civil rights actions since, as he stated, he was aware of "no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution."[182]

Since *Buckley*, the lower courts have split on this issue. The Third and Seventh Circuits have held that coercion violates only the witness's rights, not the criminal defendant's rights.[183] The Second Circuit has held that prosecutorial misconduct in gathering evidence violates the defendant's rights.[184] In Justice Thomas's view, the failure to find a constitutional violation when prosecutors fabricate evidence "leaves victims of egregious prosecutorial misconduct without a remedy."[185] The lower courts have also split on the issue of which immunity applies if the prosecutor subsequently uses the tainted evidence in the criminal proceeding. The Third Circuit has held that absolute immunity applies,[186] but the Second and Ninth Circuits apply qualified immunity.[187]

176. *See Buckley*, 509 U.S. at 281 (Scalia, J., concurring); Burns v. Reed, 500 U.S. 478, 486–87 (1991); Harlow v. Fitzgerald, 457 U.S. 800, 811 (1982).

177. *Buckley*, 509 U.S. at 273 (majority opinion).

178. *Imbler*, 424 U.S. at 431 n.33.

179. 509 U.S. 259 (1993).

180. *Id.* at 274.

181. *Id.* at 279.

182. *Id.* at 281 (Scalia, J., concurring).

183. Michaels v. New Jersey, 222 F.3d 118, 121 (3d Cir. 2000); Buckley v. Fitzsimmons, 20 F.3d 789, 794 (7th Cir. 1994).

184. Zahrey v. Coffey, 221 F.3d 342, 349 (2d Cir. 2000).

185. Michaels v. McGrath, 531 U.S. 1118, 1119 (2001) (Thomas, J., dissenting from denial of certiorari).

186. Michaels v. McGrath, 222 F.3d 118, 123 (3d Cir. 2000).

187. Milstein v. Cooley, 257 F.3d 1004, 1011 (9th Cir. 2001); *Zahrey*, 221 F.3d at 347.

These are precisely the questions presented by *Pottawattamie County v. McGhee*.[188] If a prosecutor fabricates evidence or coerces testimony in the early stages of a criminal investigation, is that a violation of the criminal defendant's due process rights? And if so, is the prosecutor entitled to only qualified immunity because the misconduct occurred in the investigative stage? Or if the prosecutor subsequently uses that evidence in the criminal proceeding, is the prosecutor entitled to absolute immunity because introducing evidence is advocacy that is intimately connected with the judicial phase of the criminal trial?

The facts of the *McGhee* case are tragic. In 1978, Curtis W. McGhee and Terry Harrington were convicted of murdering a retired police officer who was working as a security guard.[189] The prosecutor obtained these convictions by offering perjured testimony, fabricating evidence, and failing to disclose compelling exculpatory evidence.[190] McGhee and Harrington were found guilty and sentenced to life imprisonment.[191] Their post-conviction actions for relief were denied.[192] In 2002, their convictions were finally overturned for prosecutorial misconduct by the Iowa Supreme Court—after they had served twenty-four years of their life sentences.[193]

McGhee and Harrington then brought civil rights actions against the county, as well as the prosecutors and investigators involved in the case.[194] They contended that the defendants violated their constitutional rights by withholding exculpatory evidence and using perjured testimony and fabricated evidence.[195] Defendants moved for summary judgment, claiming qualified and absolute immunity.[196] The prosecutors argued that there was no constitutional violation in procuring or fabricating evidence before the filing of the "True Information."[197] In their view, it was only using the evidence at trial that was unconstitutional and that they were entitled to absolute immunity for this misconduct because it was prosecutorial advocacy intimately connected to the judicial proceedings.[198] The district court granted in part and denied in part these motions.[199]

On appeal, the Eighth Circuit affirmed in part and reversed in part the trial court's ruling.[200] The court pointed out that it had previously held that that "a person's due process rights are violated when police officers use

188. 130 S. Ct. 1047 (2010) (cert. granted; case settled and dismissed after oral argument).
189. McGhee v. Pottawattamie County, 547 F.3d 922, 925 (8th Cir. 2008).
190. *Id.* at 926–28.
191. *Id.* at 927.
192. *Id.*
193. *Id.* at 925.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at 930–31.
198. *Id.*
199. *Id.* at 931.
200. *Id.* at 926.

falsified evidence to procure a conviction."[201] The court affirmed that procuring or fabricating false evidence is a constitutional violation regardless of whether it was done by police officers or by prosecutors. As the court observed, "'[I]t would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty.'"[202] And the court held that where the prosecutor's misconduct consisted of both fabricating the evidence and then using the evidence at trial, immunity does not shield the misconduct. Fabricating the evidence before the filing of formal charges was not "a distinctly prosecutorial function" entitled to either absolute or qualified immunity.[203]

Undoubtedly, the Supreme Court granted certiorari to resolve the conflict in the lower courts on these questions. Specifically, in *Pottawattamie County*, the Eighth Circuit acknowledged that its decision was consistent with the view of the Second Circuit,[204] but in tension with that of the Seventh Circuit.[205] This case was dismissed after full briefing and oral argument,[206] so this conflict remains unresolved.

B. Ashcroft v. al-Kidd

Most recently, the Supreme Court granted certiorari and decided *Ashcroft v. al-Kidd*.[207] The question presented was whether the U.S. Attorney General was entitled to absolute or qualified immunity when he used a material witness warrant with the intent to detain a person suspected of terrorist activity for investigation.[208] While the *al-Kidd* case arose in the context of a material witness warrant, it raised the broader question of the relevance of the prosecutor's subjective state of mind in applying the prosecutorial immunity doctrine.

Since the case was an interlocutory appeal following the denial of a motion to dismiss, the facts are taken from the plaintiff's complaint.[209] Plaintiff Abdullah al-Kidd was born in Kansas in 1972; his parents,

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201. *Id.* at 932. The Supreme Court has previously recognized that where prosecutors and police engage in the same act of misconduct, the law would protect the prosecutor, but not the police officer. As the Court stated in *Buckley*, "[I]t is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973)).

202. *McGhee*, 547 F.3d at 932 (quoting McGhee v. Pottawattamie County, 475 F. Supp. 2d 862, 907 (S.D. Iowa 2007)).

203. *Id.* at 933.

204. *Id.* at 932–33; *see* Zahrey v. Coffey, 221 F.3d 342, 344, 349 (2d Cir. 2000).

205. Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir. 1994).

206. Pottawattamie County v. McGhee, 130 S. Ct. 1047 (2010); *see Boundaries of Prosecutorial Immunity*, *supra* note 3 (reporting that the case was settled for $12 million for two wrongfully convicted men).

207. 131 S. Ct. 2074 (2011).

208. *Id.* at 2079.

209. al-Kidd v. Ashcroft, 580 F.3d 949, 952 n.1 (9th Cir. 2009).

siblings, and two children are also native-born U.S. citizens.[210] While attending college at the University of Idaho in the mid-1990s, the plaintiff converted to Islam and changed his name from Lavoni T. Kidd to Abdullah al-Kidd.[211] Following the tragic events of September 11, 2001, the federal government began conducting surveillance of the plaintiff.[212] The surveillance logs found no illegal activity by the plaintiff and he has never been charged with a crime.[213] In March 2003, the plaintiff planned to travel to Saudi Arabia on a scholarship with an established university to further his language and religious studies.[214] When he was at Dulles Airport in Virginia, the FBI arrested al-Kidd pursuant to a material witness warrant issued in Idaho in the case of Sami Al-Hassayen, who had been indicted for visa fraud and making false statements to the government.[215] Al-Hassayen was never convicted of those or other charges.[216]

The affidavit submitted by FBI agents to obtain the plaintiff's warrant incorrectly stated that the plaintiff was taking a one-way, first-class flight to Saudi Arabia for $5,000, when in fact he had a round-trip ticket costing about $1,700.[217] Moreover, the FBI affidavits failed to disclose that the plaintiff: had voluntarily talked to the FBI on previous occasions; had native-born U.S. children; had not been contacted by the FBI for six months before his arrest; had never been told by the FBI that he might be needed as a witness, that he should not travel, or that he should inform the FBI if he intended to travel; and had never been asked to surrender his passport or postpone his trip.[218]

After his arrest, al-Kidd was interrogated without counsel.[219] Following the magistrate judge's suggestion (without advice of counsel), the plaintiff agreed to have his hearing in Idaho.[220] He spent the next fifteen nights in jails in Virginia, Oklahoma, and Idaho, in high-security wings with convicted criminals.[221] He was repeatedly strip-searched and routinely shackled.[222] When he was finally released from detention, he was required to live with his in-laws, report regularly to the government, and remain in a limited geographic area.[223] The government never called al-Kidd as a witness in the criminal trial against Al-Hassayen,[224] which did not

210. *Id.* at 951–52; Brief for Respondent at 1, Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011) (No. 10-98), 2011 WL 219561, at *1.
211. *al-Kidd*, 580 F.3d at 952; Brief for Respondent, *supra* note 210, at 1.
212. Brief for Respondent, *supra* note 210, at 1.
213. *Id.*
214. *al-Kidd*, 580 F.3d at 952; Brief for Respondent, *supra* note 210, at 2.
215. *al-Kidd*, 580 F.3d at 953; Brief for Respondent, *supra* note 210, at 2.
216. Brief for Respondent, *supra* note 210, at 2.
217. *al-Kidd*, 580 F.3d at 952–53; Brief for Respondent, *supra* note 210, at 2.
218. Brief for Respondent, *supra* note 210, at 3.
219. *Id.* at 4
220. *Id.* at 4–5.
221. *al-Kidd*, 580 F.3d at 953; Brief for Respondent, *supra* note 210, at 5.
222. Brief for Respondent, *supra* note 210, at 5.
223. *al-Kidd*, 580 F.3d at 953; Brief for Respondent, *supra* note 210, at 5.
224. *al-Kidd*, 580 F.3d at 954; Brief for Respondent, *supra* note 210, at 5.

commence for more than a year after his arrest.[225] Even after the Al-Hassayen trial, the government maintained close supervision of the plaintiff until he moved for relief.[226] Based on public statements by high ranking federal officials—including FBI Director Robert Mueller and the head of the Department of Justice's Criminal Division, Michael Chertoff—al-Kidd alleged that he was improperly arrested and detained without probable cause for the purpose of investigating his possible criminal activities, not for the purpose of securing testimony in the criminal trial of Al-Hassayen.[227]

Ashcroft moved to dismiss al-Kidd's complaint on the grounds of absolute and qualified immunity.[228] In his view, the decision to submit a material witness warrant is always a prosecutorial function.[229] The district court rejected the motion, finding that the use of the material witness warrant to "detain individuals while investigating possible criminal activity qualifies as a police type investigative activity, not prosecutorial advocacy."[230]

The Ninth Circuit upheld the district court's ruling.[231] While recognizing that absolute immunity may often attach to the government's decision to seek a material witness warrant,[232] it distinguished cases where the decision to seek a material witness warrant was to further an investigative—not prosecutorial—function. In such cases, only qualified immunity applies.[233] In reaching this conclusion, the court candidly considered the goal and intent of the prosecution in seeking the warrant.[234] The court stressed that its conclusion did not rest on naked allegations of motive but on plausible facts from the public record and other objective indicia.[235] Former Attorney General Ashcroft petitioned for certiorari as to whether the court of appeals erred by denying him absolute immunity on the grounds that he was using the material witness warrant as a pretext to investigate and preventively detain terrorism suspects.[236]

On May 31, 2011, the Court issued its decision in *al-Kidd*.[237] The Court held that Ashcroft was entitled to qualified immunity because the material witness warrant was valid under the Fourth Amendment's objective reasonableness standard.[238] Since Ashcroft did not violate clearly

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225. Brief for Respondent, *supra* note 210, at 5.
226. *Id.*
227. *al-Kidd*, 580 F.3d at 954–55; Brief for Respondent, *supra* note 210, at 5–10.
228. *al-Kidd*, 580 F.3d at 957.
229. *Id.* at 959.
230. *Id.* at 956.
231. *Id.* at 981.
232. *Id.* at 959–60.
233. *Id.* at 960.
234. *Id.* at 960–62.
235. *Id.* at 962–63.
236. Petition for a Writ of Certiorari at I, Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011) (No. 10-98), 2010 WL 2830439, at *I.
237. 131 S. Ct. 2074.
238. *Id.* at 2080.

established law, he was immune from liability under § 1983.[239] Justice Scalia concluded, "[W]e need not address the more difficult question of whether he enjoys absolute immunity."[240]

While the Court was able to dodge the absolute immunity question in *al-Kidd*, that difficult question remains unresolved. Prior decisions have held that distinguishing between an investigative and an advocacy function often turns on the prosecutor's purpose—that is, the prosecutor's subjective state of mind.[241] For this reason, the Fifth and Ninth Circuits have held that when a prosecutor interviews a witness after probable cause has been met, the question of whether the prosecutor is acting as an investigator or an advocate depends on the prosecutor's purpose in conducting the interview.[242] Under this approach, the court must examine the events surrounding the conduct to determine the prosecutor's intent.[243]

The need for extensive discovery to determine the prosecutor's state of mind is illustrated by a Ninth Circuit case, *KRL v. Moore*.[244] In *KRL*, the plaintiff contended that after probable cause had been established, the prosecutor secured a search warrant which went beyond the need for preparation for the pending criminal case and sought to gather evidence of additional criminal activity.[245] The court held that a genuine question of fact was presented as to whether the prosecutor obtained the warrant to collect evidence to prosecute the existing charges or for a collateral investigation.[246] To determine the prosecutor's motive, it was necessary to reconstruct events through notes and testimony, which required significant factual discovery.[247]

But injecting a substantive state-of-mind analysis into the immunity defense raises several problems. First, the *Buckley* Court warned against allowing prosecutors to escape liability by simply claiming that investigative functions were for advocacy purposes.[248] Second, in its qualified immunity decisions, the Supreme Court has ruled that subjective inquiries lead to wide-ranging discovery which can disrupt effective government and prolong litigation, thus defeating the very purpose of the immunity defenses, which is to eliminate not just liability, but also

239. *Id.* at 2085.
240. *Id.*
241. Genzler v. Longanbach, 410 F.3d 630, 638 (9th Cir. 2005); KRL v. Moore, 384 F.3d 1105, 1111 (9th Cir. 2004); Cousin v. Small, 325 F.3d 627, 633–35 (5th Cir. 2003); Broam v. Bogan, 320 F.3d 1023, 1030–31 (9th Cir. 2003).
242. *Genzler*, 410 F.3d at 638; *KRL*, 384 F.3d at 1111; *Cousin*, 325 F.3d at 633–35; *Broam*, 320 F.3d at 1030–31.
243. *Cousin*, 325 F.3d at 629–35; *Broam*, 320 F.3d at 1033–34.
244. 384 F.3d 1105 (9th Cir. 2004).
245. *Id.* at 1112.
246. *Id.*
247. *Id.*
248. Buckley v. Fitzsimmons, 509 U.S. 259, 276 (1993).

litigation.[249] For this reason, the Court emphatically replaced the subjective standard with an objective standard in *Harlow v. Fitzgerald*.[250]

It is unlikely that the Court will resurrect a subjective standard in absolute immunity cases. Allowing wide-ranging discovery into the prosecutor's subjective state of mind seems as undesirable in absolute immunity cases as it was in qualified immunity cases before the Court adopted the objective standard in *Harlow*.[251] But this is exactly what seems to be required to determine whether a prosecutor was acting in an investigative or advocacy capacity after probable cause is established.

The simplest solution is to apply qualified immunity in all cases: regardless of whether the prosecutor was acting as an investigator or advocate, did the prosecutor violate clearly established law of which a reasonable prosecutor would have known? If not, qualified immunity protects the prosecutor from liability. If so, the prosecutor should be held liable for violating the accused's well-established constitutional rights. The current qualified immunity doctrine has evolved into a standard that "is sufficient to 'protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'"[252] Indeed, qualified immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'"[253]

As the *Pottawattamie County* and *al-Kidd* cases illustrate, numerous conflicts in the application of the current prosecutorial immunity doctrine are generated by the difficulty of determining whether absolute or qualified immunity applies in a given case. But in both of these cases, the Court never reached decisions on the absolute immunity questions, so the uncertainties remain. Scrapping the doctrine of absolute immunity in favor of the uniform application of qualified immunity would eliminate much of the complexity and confusion. As I have previously argued, absolute immunity undermines the integrity of the criminal justice process,[254] denies victims a remedy for constitutional wrongs,[255] and fails to deter prosecutorial misconduct.[256] Absolute immunity is unnecessary to protect honest prosecutors, who are protected by stiff requirements for pleading and proving a constitutional violation and by the doctrine of qualified immunity.[257] Rather, the uniform application of the doctrine of qualified

249. Harlow v. Fitzgerald, 457 U.S. 800, 815–18 (1982).

250. *Id.* at 815–19. Under the *Harlow* test, an officer is entitled to qualified immunity unless the alleged misconduct violated clearly established law of which a reasonable officer would have known. *Id.* at 818–19.

251. *Id.* at 815–19.

252. *Buckley*, 509 U.S. at 268 (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)); *see* Johns, *supra* note 10, at 136–39 (explaining that qualified immunity has evolved to a more efficient and protective standard since absolute prosecutorial immunity was adopted in 1976).

253. Burns v. Reed, 500 U.S. 478, 495 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

254. Johns, *supra* note 10, at 123–25.

255. *Id.* at 125–26.

256. *Id.* at 127–28.

257. *Id.* at 131–39.

immunity would simplify an unnecessarily complex area of the law, serve the criminal justice process, and protect the honest prosecutor while providing a remedy for intentional and malicious prosecutorial misconduct.

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.