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Connick v. Thompson and the (Changing?) Scope of Prosecutorial Immunity

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Connick v. Thompson and the (changing?) scope of prosecutorial immunity

One of the petitions for certiorari the Supreme Court considered at last Friday's conference was [Connick v. Thompson, No. 09-571](#). Prosecutors in the Orleans Parish (La.) DA's office violated a defendant's *Brady* rights. Years later the office was held liable under the *Monell* doctrine, which allows municipal liability when government policy causes a constitutional wrong. Individual prosecutors, as you may know, enjoy absolute immunity from personal liability for wrongs committed while discharging the prosecutorial function. So there was no individual liability here, but there was municipal liability.

As far as I can discern, the Court took no action on the case Friday; it isn't on the order list. That is an ambiguous signal, of course. Cert. might later be granted or denied after one or more Justices has a chance to study the case further or to lobby colleagues. Maybe someone is working on a dissent from the denial of cert. It is conceivable there could be a summary reversal, though that would surprise me in this case.

The question whether the office should have been held liable on this particular record is a matter over which, I suppose, reasonable minds might differ (some non-conclusive evidence of that comes from the fact that the en banc Fifth Circuit divided evenly). The petitioners certainly claim that this was a very aggressive and problematic application of *Monell* liability. I'm not sure about that. But what I find interesting about this case is the second point in the office's cert. petition. There they claim that the reasoning that supports absolute immunity for individual prosecutors also supports absolute immunity for *prosecutors' offices* as entities, at least for certain categories of *Monell* liability. An amicus brief amplifies that argument. (The briefs in the case are available at SCOTUSblog [here](#).) Basically the idea is that entity liability will chill vigorous prosecution and so forth - the same things that support individual immunity.

The thing about the law is that arguments that seem crazy at time 1 could become plausible at time 2 and could become obviously correct at time 3. (Some of them will remain crazy at all times, but right now we don't know which ones.) Maybe I'm just behind the times on this one, but aren't we still at time 1 when it comes to this argument for entity immunity? Or have I missed a shift to time 2?

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