Washington and Lee Journal of Civil Rights and Social Justice

Volume 17 | Issue 2 Article 3

4-1-2011

Absolute Immunity: A License to Rape Justice at Will

Prentice L. White

Follow this and additional works at: http://scholarlycommons.law.wlu.edu/crsj

Part of the Criminal Procedure Commons

Recommended Citation

Prentice L. White, *Absolute Immunity: A License to Rape Justice at Will*, 17 Wash. & Lee J. Civ. Rts. & Soc. Just. 333 (2011).
Available at: http://scholarlycommons.law.wlu.edu/crsj/vol17/iss2/3

This Article is brought to you for free and open access by Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Journal of Civil Rights and Social Justice by an authorized administrator of Washington & Lee University School of Law Scholarly Commons. For more information, please contact osbornecl@wlu.edu.

Absolute Immunity: A License to Rape Justice at Will

Prentice L. White*

Table of Contents

PART I 349
Prosecutorial Powers 349
PART II 359
Convictions are First and Foremost 359
PART III 376
Addressing the Misconduct 376
PART IV 379
The Proposal 379
CONCLUSION 382

Kenneth has been the lead prosecutor in the trial section of the District Attorney's Office for the past five years.[1] He has been solicited by the

---

* Prentice L. White is an Associate Professor of Law at Southern University Law Center (Baton Rouge, Louisiana), and is a former New Orleans prosecutor. He is a member of the Louisiana Appellate Project, which is a state agency that handles criminal appeals for indigent defendants in Louisiana, and he is part of the CJA Panel of contract attorneys for the Middle and Western Districts of Louisiana. The idea for this article resulted from several criminal appeals White has handled over the last ten years of his appellate practice and from conversations he has had with individuals who were wrongfully convicted for felony offenses.

1. The following account of Kenneth the prosecutor is fictional but representative of an all too common occurrence within our criminal justice system; *see* KENDALL HAVEN, STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY 3 (Libs. Unlimited 2007) (claiming that stories go back 100,000 years in human history, even predating language); *see also* Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ASS'N LEGAL WRITING DIRECTORS 1, 3 (2010) (demonstrating the persuasive power of storytelling because "stories are inherently interesting"). The author continues:

> We are entertained by stories. Politicians and public speakers often use stories to make points and to teach, and often to persuade. A good story affects the listener, or the reader, at a gut level. When the audience reacts in the way the storyteller intends, the reader will 'get' the message internally in a way that is profound.

Id.

United States Attorney's office on several occasions to head and train a new division in the federal prosecutor's office regarding high-profile white-collar crimes.[2] His trial tactics had won him a number of high-profile cases in his district. However, due to the great autonomy he has in the state-level prosecutor's office, Kenneth declined to transfer to the federal agency. After all, Kenneth only lost one felony trial out of the one hundred forty cases he has tried in his ten years with the prosecutor's office.[3]

During one of his most recent murder trials, Kenneth stood up before the twelve-member jury and gave a compelling closing argument that included all of the standard bells and whistles.[4] For example, he took the jury through each critical fact leading to how he believed the defendant killed the victim. He used every graphic and gory word he could think of to describe the murder, and he imitated how the defendant may have stabbed the victim during their domestic altercation. The only missing element in Kenneth's case was the victim's body.[5] There was blood on one of the defendant's kitchen knives, but that was all of the physical evidence the prosecution had against this defendant. The jury's demeanor during the trial seemed to indicate that it was willing to convict the defendant because he was a construction worker who dealt exclusively with burying pipelines

---

2. Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165 (2004).

3. *See* Lawton Cummings, *Can An Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2148 [hereinafter *Ethical Prosecutor*] (noting that a prosecutor's career is directly hampered or enhanced by his conviction rates). In most jurisdictions, the prosecutors who obtain "the highest conviction rates . . . stand to make the greatest chance for advancement internally." Id. (quoting Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–35 (2004), [hereinafter *Prosecutorial Resistance*]); *see also* Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379, 396 (2005).

4. *See* Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ASS'N LEGAL WRITING DIRECTORS 229, 232 (2010) (noting that a segment of legal scholars have decided to insert the use of narratives into their scholarship, either by incorporating the author's own true story or experience or that of another when interacting with a law, or by creating fictional accounts of people's experiences with a law).

5. *See* Alder v. Burt, 240 F. Supp. 2d 651, 665–71 (E.D. Mich. 2003) (finding that the prosecutor was reasonably inferring from the evidence when he stated that petitioner forced himself into the bedroom and burned the victim's body to destroy the evidence); *see also* Epperly v. Booker, 997 F.2d 1, 3 (4th Cir. 1993) (upholding a conviction for murder even though the victim's body was never found and all of the evidence was circumstantial).

for commercial businesses. Kenneth believed that the defendant was the only reasonable suspect that could have killed his thirty-year-old girlfriend.[6]

The victim had been living with the defendant for several years, and after a heated argument one night, the victim was never seen or heard from again. The defendant reported the victim missing three days later. The police immediately targeted him for the incident. After several weeks of searching the city, the District Attorney filed a murder charge against the defendant because of the trace amount of blood on the kitchen knife and due to the defendant's experience as a construction specialist. The District Attorney's Office, the Mayor's Office, and the Attorney General desperately[7] wanted the defendant to be prosecuted for this crime.[8]

Dressed in his usual dark pinstriped suit, Kenneth paced back and forth arguing how he believed this defendant committed the murder. He raised and lowered his voice at just the right moment to keep the jury's attention.[9] Everything Kenneth did during his closing argument was in his usual modus operandi until he gave his final salutation to the jury. When he thanked the jury for its time and attention, Kenneth placed his right hand on his left shoulder with his fingers positioned in the Hawaiian "hang loose"

---

6. *See* Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom*, 7 J. ASS'N LEGAL WRITING DIRECTORS 37, 47 (emphasizing that in order to produce competent professionals, many scholars and professors have brought together doctrine, skills, and values using a narrative theory and storytelling to focus their audience's attention on particular values like anti-racism, justice, cross-cultural competence, ethics, creativity, and compassion) (citing ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 105 (Clinic Legal Educ. Ass'n 2007)).

7. *See* Geoffrey S. Corn, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 412 (2009) (arguing that imputed liability should be lodged against the prosecutor's supervisor or commander, and explaining that this form of liability is based on the failure of the supervising prosecutor to take remedial measures when they are aware of the risk that misconduct will occur).

8. *See Ethical Prosecutor*, *supra* note 3, at 2152 (noting that prosecutors often receive intense internal and external pressures to convict at all costs). Therefore, the lack of sanctions for ethical violations actually generates the *win-at-all-costs* mentality that they need to relentlessly pursue a defendant for a felony crime. *Id*.

9. *See* Charles Becton, *Using Your Voice in Closing Argument*, 842 PRAC. L. INST. 383 (2010) (noting that the way to communicate the strength of your conviction in your client's cause to the jury is by the effective use of your voice (quoting Sir Ernest Barker, THE COMPLETE PLAYS OF WILLIAM SHAKESPEARE, at xx (1984)). The author continues by noting that an attorney's voice should have:

> [A] musical power, which . . . so choos[es] the "notes" or sounds of words, and set[s] them in such a sequence of harmony, that they [charm] the ear with music at the same time that they [delight] the mind with meaning.

Id.

sign and politely bowed before the jury. Derrick, defense counsel for the accused, found this gesture quite strange and so did the defendant. Because Kenneth could not overcome the fact that his case did not include the actual body or remains of the alleged victim, Defense Counsel sincerely believed that the result would either be a hung jury or an acquittal.[10]

For two hours, the jury deliberated and as each minute that went by, Derrick felt more and more confident that his client was going to be acquitted. Suddenly, the court announced that the jury had reached a verdict. Several minutes later, the jury entered the room. Derrick and his client both stood up and buttoned their jackets. The foreperson raised the small sheet of paper to his eyes and stated that the jury had found the defendant guilty as charged. The defendant dropped to his chair. Derrick rubbed his client's shoulder in disbelief. One thing that he knew without a doubt was that Kenneth had an inside track to this jury because the evidence was too weak to convict his client of second degree murder. He watched with disdain as the jury marched out of the courtroom, and he vowed to his client that he would not only appeal the conviction, but he also declared that he would do whatever he could to get his conviction reversed.

At sentencing, Derrick requested the court to grant his post verdict judgment of acquittal or at least a new trial. The district court politely denied all defense motions, and gave the defendant the mandatory life sentence.[11] Approximately one month after his client was convicted of second degree murder, Derrick began combing through all of the jury questionnaires, hoping to find some evidence of impropriety on the State's behalf. One by one, Derrick reviewed and dismissed each of the questionnaires, finding nothing to justify a claim of prosecutorial misdealing.[12]

After doing a little more research, Derrick narrowed his review to the foreperson, who happened to be a divorcee, and a football coach at a popular high school in the city. Since it was football season, he decided to attend the homecoming game for this particular high school.

---

10. *See* Ramsammy v. State, 43 So.3d 100, 100 (Fla. Dist. Ct. App. 2010) (emphasizing that despite the inability to find the victim's body, the State can still prove the fact that the victim in a murder case is dead by competent, substantial evidence).

11. *See* LA. CODE CRIM. PROC. ANN. art. 14:30.1 (2006) (setting forth the statutory elements of Second Degree Murder in Louisiana state law).

12. *See* Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 18 (2009) (noting that prosecutorial misconduct is not easily discovered because it is inherently difficult for defense attorneys and defendants alike to find out that exculpatory material was withheld or that information giving rise to a viable defense even existed).

Dressed in typical football-day attire, Derrick watched the football coach attentively as the coach barked orders to the players and to the referees. Nothing triggered any suspicion until he saw Kenneth approach the football coach with a big grin on his face. Derrick stood up and witnessed something that he had been searching for two months to see—a connection between the jury and Kenneth.[13]

Kenneth shook the coach's hand, and placed his right hand on his left shoulder—the same hand gesture he used in court on the day Kenneth gave his closing arguments.[14] Two days later, Derrick located the coach's ex-wife, and during their meeting, he learned that the hand signal the prosecutor used during trial was a fraternity symbol, which symbolized loyalty and brotherhood.[15] He also learned that Kenneth had helped the couple several years earlier when their son was accused of aggravated battery following a football game.

Derrick pulled the transcripts and the coach's questionnaire for a second review. He realized that while the coach did not deny knowing Kenneth during voir dire, he certainly did not give the court a full appreciation of the extent of his relationship to Kenneth—especially the fact that he was in a fraternity with him. More importantly, Kenneth purposefully did not disclose the extent of his relationship to this coach nor did he advise the court that he executed a plea agreement with the coach's son regarding an aggravated battery charge.[16]

Was Kenneth's behavior a form of prosecutorial misconduct? Kenneth's failure to disclose the depth of his relationship with the jury's foreperson may prove to be sufficient grounds to reverse the

---

13. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (1983) (dictating that a lawyer is not required to conduct an investigation and make a definitive decision that a violation has occurred before the duty to report a violation is triggered).

14. *See* Erica Summer, *Post-Trial Jury Payoffs: A Jury Tampering Loophole*, 15 ST. JOHN'S J. LEGAL COMMENT. 353, 354 (2001) (noting that certain permissible inferences can be used to show the requisite mental state).

15. *See id.* at 365 (noting a jury's responsibility to "remain impartial . . . [in] the interests of justice . . . to help insure a fair trial; [noting] further, there is a good chance that a juror will be tempted by an unspoken offer orchestrated by a litigant and swayed by the possibility of a post-verdict payoff").

16. *See* Benjamin M. Lawsky, *Limitations on Attorney Post-Verdict Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant*, 94 COLUM. L. REV. 1950, 1952 (1994) (noting the drafters of the ABA Code of Professional Responsibility did not find it to be unethical for a lawyer to talk to or question jurors, but did find it impermissible for the said lawyer to harass, entice, induce or exert influence on a juror to obtain his testimony).

defendant's conviction and sentence.[17] Ideally, this particular defendant may have a valid § 1983 civil rights action against the District Attorney's office if the appeal of his conviction and sentence was successful.[18] But he would first have to show that Kenneth's actions were not covered by the absolute immunity umbrella—a phenomenon that seems to always make prosecutors invincible when it concerns a criminal prosecution.[19]

The United States Supreme Court's decision in *Van De Kamp v. Goldstein*,[20] indicated that prosecutors like Kenneth should not be penalized for using trial tactics like the one used above because of the enormous responsibilities they have in the adversarial criminal justice system. To this Court, it was better "to leave unredressed the wrongs done by a dishonest officer(s) than to subject those who try to do their duty to [the] constant dread of retaliation."[21] In other words, the

---

17. *See* Carissa Hessick, *Prosecutorial Subordination of Perjury: Is the Fair Justice Agency the Solution We Have Been Looking for?*, 47 S.D. L. Rev. 255, 268, [hereinafter *Prosecutorial Subordination of Perjury*] (declaring that "most subordination of perjury claims against prosecutors are not discovered until long after the trial is over).

18. *See* Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (1996) [hereinafter § 1983] ("[E]very person who, under color of state law, deprives an individual of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law."); *see also* Alexandria White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 48 (2005) ("[W]here the Constitution guarantees a right, constitutional tort law can, in some instances, operate to provide a civil remedy and such a remedial scheme exists in the Federal Civil Rights Act of 1871 (§ 1983)."); Richardson v. McKnight, 521 U.S. 399, 403 (1997) (emphasizing that § 1983 seeks "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide related relief" (quoting Wyatt v. Cole, 504 U.S. 158, 161 (1992)); Daniels v. Kieser, 441 U.S. 931 (1978) (indicating that a prosecutor does not have absolute immunity for anything he does once trial has begun; rather, immunity is absolute only when he is performing quasi-judicial functions). When he is acting in an administrative or investigative capacity, the immunity may be qualified. *Id.*; The United States as a Defendant, 28 U.S.C.A. §§ 1346(b), 2671–2680 (West 2011) (stating that the Liability Reform Act immunizes federal employees for liability for allegedly slanderous conduct committed within scope of employment).

19. *See* § 1983, *supra* note 18 ("[I]n 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."); *see also* Chavers v. Stuhmer, 786 F. Supp. 756 (E.D. Wis. 1992) (stating that the concept of absolute immunity protects prosecutors from civil liability so long as the conduct giving rise to the complaint stems from actions that are "intimately associated" with the judicial phase of the criminal process (quoting Burns v. Reed, 500 U.S. 478 (1991)).

20. *See* Van de Kamp v. Goldstein, 129 S. Ct. 855, 858 (2009) (holding that prosecutors have absolute immunity for actions associated with the judicial phase of trial).

21. *Id.* at 860.

United States Supreme Court simply reversed the proverbial phrase to say that *one bad apple, should not and does not spoil the bunch*.

The Court's discussion of *Van De Kamp*—in essence—has given rogue prosecutors the necessary ammunition they need to implement whatever trial strategy they deem appropriate to secure a conviction.[22] More importantly, will the Court's decision in *Van De Kamp* encourage federal prosecutors—and prosecutors in general—to push the envelope even further since the Supreme Court was apparently reluctant to dismantle the absolute immunity shield? Some could argue that as the shield grows larger and covers more areas, prosecutors become more and more ruthless towards criminal defendants. The case of *Pottawattamine County v. McGhee*,[23] would have been an ideal case for our discussion regarding the role of absolute immunity in the prosecutor's arsenal; however, the Supreme Court was not given an opportunity to release a decision in this matter because the parties ultimately settled.[24]

Most defense attorneys would not dispute the fact that Kenneth's behavior had undermined the legitimacy of the defendant's conviction. Kenneth used his relationship with a fraternity brother to gain leverage against a defendant who was undergoing public scrutiny for murdering his girlfriend. It is obvious that Kenneth was silent about the depth of his relationship with this high school coach; however, it was the manner in which he reminded this coach about his fraternal duty of loyalty and brotherhood that should cause the legal community to be disillusioned. His behavior was unethical and unprofessional, but most courts would not dare to pronounce his behavior as prosecutorial misconduct.

Some trial attorneys, including this Author would hesitate to describe Kenneth's actions as a form of jury tampering.[25] Such an

---

22. *See id.* at 858–59 (finding that a prosecutor enjoys absolute immunity despite failing to disclose impeachment material).

23. *See* Pottawattamie County v. McGhee, No. 08-1065 (U.S. argued Nov. 4, 2009) (questioning whether a prosecutor may be subjected to a civil trial and damages for a wrongful conviction for procuring false testimony during a criminal investigation, in violation of the defendant's substantive due process rights).

24. *See* Pottawattamie County v. McGhee, 130 S.Ct. 1047 (2010) dismissing the writ of certiorari pursuant to Rule 46 of the Rules of the Supreme Court).

25. *See* United States v. Locasscio, 6 F.3d 924, 947 (2d Cir. 1993) (describing a situation in which the prosecutor inflamed the jury by suggesting that the jury was sequestered to prevent jury tampering by the defendant's alleged crime family); *see also* Barnett v. United States, 870 F. Supp. 1197 (S.D.N.Y. 1994) (stating that a prosecutor's act

accusation would be difficult to prove because while the potential juror admitted to knowing Kenneth, neither he nor Kenneth gave opposing counsel or the district judge[26] an appreciation of the extent of their relationship,[27]and neither party questioned them on this issue during voir dire.

Legal scholars and many seasoned defense attorneys could argue that voir dire was the proper procedural vehicle for Derrick to use to question this potential juror regarding the depth and length of his relationship with Kenneth. Using a peremptory challenge against this foreperson could have insured that he would not have been impaneled. But should defense counsel's failure to use a peremptory challenge against this person relieve Kenneth of his continuing duty to fully disclose his relationship with persons qualifying for jury service. Further, should Kenneth be reprimanded by the court for his lack of candor and willful evasiveness?

Let's assume that after several years of unsuccessfully defending his appeal before the appellate courts, Derrick filed a federal habeas corpus pleading in the federal courts arguing that his client's conviction should be reversed. Looking at the Supreme Court's decision in *Van de Kamp*, should Derrick expect another defeat?

In *Van de Kamp*, the respondent, Thomas Goldstein, was an honorable soldier in the United States Marine Corps and an engineering student when he was arrested for murder in the late 1970s.[28] Goldstein did not have a criminal history.[29] He did not own a firearm, and there was no information to suggest that Goldstein even knew the victim.[30] There was no physical evidence linking Goldstein

---

of indiscreetly bringing in evidence without the defense's knowledge and then removing it was grounds for arguing jury tampering by the government on appeal).

26. *See* Bert Brandenburg, *The Role of Public Opinion in the Debate over Recusal Reform*, 58 DRAKE L. REV. 737, 748 (2010) (noting that the role of public opinion weighs heavily on recusal decisions among judges, and more importantly, judges must remember that their decisions must satisfy the concept of "reasonableness" so that the health and legitimacy of the judiciary is maintained).

27. *See* Erica Summer, *Post-Trial Jury Payoffs: A Jury Tampering Loophole*, 15 ST. JOHN'S J. LEGAL COMMENT. 353, 353 (2001) (noting that "[a]ny attempt to corrupt or influence a jury for the purpose of manipulating a determination by any means other than presenting evidence or argument in court does not fall within the meaning of jury tampering").

28. Goldstein v. Superior Court, 65 Cal.Rptr. 3d 90, 92 (Cal.Ct.App. 2007) (providing the factual background to Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009).

29. *Id.*

30. *Id.*

to the victim.[31] In fact, Goldstein, like most defendants in our criminal justice system, became a suspect because he matched the internal police stereotype of who the officers should classify as a potential suspect.[32] Accordingly, Goldstein was arrested and both the prosecutors and the police officers deferred getting any credible evidence against Goldstein until he was formerly arrested.[33]

Without any physical evidence or eyewitnesses to support Goldstein's conviction for murder, the police turned to getting a confession from Goldstein in order to make their jobs easier.[34] While the police were not going to risk talking to Goldstein themselves, they did intend to get Goldstein to make an admission to someone that he might feel comfortable talking to—a cellmate.[35]

Eddie Fink was a heroin addict and someone who was well acquainted with the prison system.[36] Not only was Fink a known criminal, but he had a talent for getting some of the inmates to trust him and to tell him things that they would not ordinarily tell family, friends, and definitely not the police.[37] Fink's talent was so well known among police and prosecutors that prosecutors began to use him for some of their most difficult cases.[38]

In exchange for his assistance, the prosecutors agreed to offer Fink favorable dispositions in all of his pending cases in their office.[39] Fink allegedly secured a statement from Goldstein that supposedly implicated him in the murder. The prosecutors used this statement and Goldstein was ultimately convicted.[40] Ten years after his conviction, Goldstein learned that the District Attorney had on-going agreements

---

31. *Id.*

32. *See id.* (stating that police detectives pursued Goldstein because a witness said the gunman could have been Goldstein and that detectives influenced that witness's testimony).

33. *See Van de Kamp*, 129 U.S. at 859. *See id*. (stating that there was no forensic evidence or suggestion by those acquainted with the victim that Goldstein had contact with the victim).

34. *Id.*

35. *See id*. (describing how Edward Fink was placed in the same cell as Goldstein).

36. *See id.* (stating that Edward Fink had several prior felony convictions).

37. *See* (Brief for Respondent at *3, Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009) (No. 07–854) ("Fink had an uncanny knack for extracting confessions from cellmates.").

38. *See Van de Kamp*, 129 U.S. at 859. *See id*. (stating that Fink testified to jailhouse confessions in return for favorable dispositions on many occasions).

39. *See id.* at *4 (stating that the District Attorney's office promised to cut Fink's sentence on a pending charge from sixteen months to less than two months).

40. *Id.*

with various jailhouse informants, including Eddie Fink.[41] Goldstein knew that Fink's testimony was false. He knew that the District Attorney's office was only using Fink's testimony because they did not have any credible evidence against him. Now, he had what he needed to prove his innocence.

Unfortunately, it was twenty-four years after his conviction and during a federal habeas corpus hearing that Goldstein was able to challenge the constitutionality of his conviction.[42] He argued in his brief that the prosecutor's use of Fink's testimony without revealing the standing agreement his office had with Fink prior to trial was reversible error.[43] Thus, according to Goldstein, the prosecutors abused its authority by not disclosing this information to his attorney pursuant to *Brady v. Maryland*[44] and *Giglio v. United States*.[45] The district court agreed, and vacated Goldstein's conviction because the information that was not disclosed severely jeopardized his defense and created undue leverage in the prosecution's favor.[46]

In *Brady*, both the defendant (Brady) and a co-defendant were convicted of first degree murder and given a death sentence after their convictions.[47] The defendant's trial counsel later learned that his client's co-defendant had previously admitted to actually killing the victim during the discovery phase of the case, but said information had been intentionally withheld by the prosecution.[48] The defendant immediately filed an application for post conviction relief, arguing that he was entitled to a new trial due to the prosecution's failure to deliver this vital information to his attorney prior to the trial.[49] The district court disagreed, but the Maryland appellate court opined that the prosecution's failure to submit all statements to the defendant's

---

41. *See id.* at *5 (describing how the jailhouse informant scandal broke a decade after Mr. Goldstein's trial).

42. *Id.*

43. Van de Kamp v. Goldstein, 129 S. Ct. 855, 859 (2009).

44. Brady v. Maryland, 373 U.S. 83, 84 (1963) (holding that withholding evidence material to either the guilt of the defendant or the punishment administered by the Court is a violation of due process).

45. Giglio v. United States, 405 U.S. 150, 153 (1972) (holding that nondisclosure of evidence affecting the credibility of a witness is suppression of material evidence and justifies a new trial, irrespective of the good faith of the prosecution).

46. *Van de Kamp*, 129 S. Ct. at 859.

47. *Brady*, 373 U.S. at 84.

48. *Id.*

49. *Id.*

attorney denied this defendant his right to due process and it remanded the case for a new trial, but only as it related to punishment, not guilt.[50]

The United States Supreme Court granted writs, and ultimately agreed that the prosecution's suppression of the extra-judicial statement was a violation of due process.[51] However, it concluded that remanding the case to the district court for a retrial as to punishment was not a violation of due process since the defense's potential use of this incriminating statement by the co-defendant would not have produced a conviction less than murder in the first degree.[52] Thus, the high court concluded that the defendant's due process rights were not "technically" violated.

In *Giglio v. United States*, the defendant (Giglio) appealed the district court's denial of his motion for a new trial after he uncovered information that the government promised not to prosecute a co-conspirator if he testified against the defendant.[53] The government failed to disclose this information to Giglio's attorney.[54] Because this co-conspirator was a key witness in the government's case, the Supreme Court held that a new trial was warranted because this witness' credibility was a critical issue for the jury and the jury was entitled to know whether the co-conspirator was truthful.[55]

In light of both *Brady* and *Giglio*, Goldstein surmised that he was entitled not only to a reversal of his conviction, but he also believed that he could override the prosecution's immunity claim and establish his entitlement to compensation from the District Attorney's office through a § 1983 civil rights action.[56] But first, Goldstein needed to

---

50. *Id.* at 85.

51. *Id.* at 87 (stating definitively that the prosecution's suppression of favorable evidence from the accused despite his request for such information violates due process where such evidence is material to either the guilt or punishment of the accused).

52. *See Brady*, 373 U.S. at 95 (vacating the judgment of the State Court of Appeals).

53. Giglio v. United States, 405 U.S. 150, 150–51 (1972).

54. *Id*. at 151.

55. *Id.* at 154 (noting that whether nondisclosure is a result of "negligence or design," it is the responsibility of the prosecutor, and also noting that the Government's case depended "almost entirely" on the witness's statement and the witness's credibility); *see also* Napue v. Illinois, 360 U.S. 264, 272 (1959) (finding similarly that the State's use of known false evidence that is material to the defendant's guilt or punishment is incompatible with "rudimentary demands of justice"); Pyle v. Kansas, 317 U.S. 213, 216 (1942) (holding that a perjured testimony knowingly used by state authorities constitutes a denial of the defendant's right to due process).

56. *See* § 1983, *supra* note 18 and accompanying text (stating that injunctive relief shall not be granted against a judicial officer unless a declaratory decree was violated or

clear the absolute immunity hurdle.[57] This hurdle proved to be much higher than what Goldstein had originally thought. He attempted to pierce the immunity veil by describing the prosecutor's failure to disclose the on-going relationship Fink had with the prosecutor's office as being an administrative, not a prosecutorial function.[58] The Supreme Court disagreed, choosing to group *every* decision made by a prosecutor in a criminal case as ultimately being judicial in nature.[59]

Prosecutorial misconduct is nothing new in the world of criminal defense. Defense attorneys as well as their individual clients can share hundreds, if not thousands, of stories in which prosecutors have falsified or hid crucial evidence from them or had manipulated the testimony of various witnesses for the purpose of securing a conviction. Yet, the courts have been quite hesitant to seriously discipline these prosecutors for their unethical behavior.[60]

For instance, the judges on the United States Court of Appeals for the Sixth Circuit strongly reprimanded federal prosecutors for their "win at any cost"[61] demeanor in the John Demjanjuk case in 1993.[62]

---

declaratory relief was unavailable).

57. *See* Van De Kamp v. Goldstein, 129 S. Ct. 855, 860–61 (2009) (noting that prosecutors possess absolute immunity under the law when acting in their role as an officer of the court).

58. *See id.* at 862 ("We agree with Goldstein that, in making these claims, he attacks the office's administrative procedures.").

59. *Id.* at 861–62 (finding that the prosecutor's actions warranted the same absolute immunity as other prosecutorial conduct because the direct relationship between a prosecutor's administrative obligations and conduct at trial made these obligations distinct from ordinary administrative duties).

60. *See* United States v. Martinez-Medina, 279 F.3d 105, 118 (1st Cir. 2002) (determining that despite the jeopardy to the defendant's fair trial, inducements given to government witnesses were acceptable as long procedural safeguards remained in place and that improper remarks made by the prosecutor at summation failed to create cause for a new trial).

61. *See Ethical Prosecutor*, *supra* note 3, at 2147 (commenting that legal scholars have classified this type of phenomenon as conviction psychology, which focuses on the pressures that induce some prosecutors to obtain convictions at the expense of their ethical standards).

62. *See* Demjanjuk v. Petrosky, 10 F.3d 338, 356 (6th Cir. 1993) (finding that prosecutors engaged in prosecutorial misconduct by failing to disclose exculpatory information implicating a different soldier for the Nazi wartime activities that led Demjanuk to be extradited to Israel to face a capital trial); *see also* Michael Gaugh, Note, *The Strange Case of John Demjanjuk: An Argument for a Higher Ethical Standard in Immigration Proceedings Based on Criminal Conduct,* 7 GEO. J. LEGAL ETHICS 783, 791 (1994) (describing the Sixth Circuit's conclusion that the failure to disclose represented a reckless indifference towards discovery obligations and duties to the court).

Not only did these prosecutors withhold crucial exculpatory evidence from opposing attorneys, but there was even evidence to show that Demjanjuk may have been misidentified as the sadistic guard at the Nazi death camp named "Ivan the Terrible,"[63] who murdered hundreds of thousands in the Nazi concentration camps in Sobibor, Poland.[64]

In another matter, a federal district court in Illinois ordered new trials for defendants convicted under the Racketeer Influenced and Corrupt Organizations (RICO)[65] statute for supplying drugs to local gangs. Defendants discovered that key government witnesses were permitted—with the government's blessings—to obtain and use illegal drugs during the time that they were inmates at a federal prison.[66] It was also discovered that these witnesses received several other substantial benefits from the government in exchange for their testimony—all of which was not disclosed to defense attorneys prior to trial.[67] In other words, the federal government abused its duty to investigate, report, and prosecute these offenses due to their overwhelming desire to secure a conviction at any cost.[68] The exact same allegation was lodged against the prosecutors in the *United States v. Boyd* case, which the federal judge upheld and also ordered a new trial.[69]

In Santa Clara County, California, local citizens had to endure paying over five million dollars for cases in which prosecutors either authorized illegal searches or wrongfully convicted its citizens for

---

63. *See Demjanjuk*, 10 F.3d at 340 ("Demjanjuk's claims of misconduct consisted of the government's failure to disclose information that pointed to another Ukrainian guard at Treblinka, Ivan Marchenko, as 'Ivan the Terrible.'").

64. *See* United Press International, *Demjanjuk's Statement to Judges*, PHILA. INQUIRER, Apr. 26, 1988, at A04 (reporting the atrocities linked to Ivan the Terrible).

65. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964 (2006).

66. *See* United States v. Burnside, 824 F. Supp. 1215, 1224–25 (N.D. Ill. 1993) ("[T]he court must also find that government personnel . . . were aware of the continuing drug use by these inmate government witnesses, but did not investigate it, did not stop it, and did not disclose it to defense counsel or the court before or during the *Burnside* trial.").

67. *See generally id.*

68. *See id.* at 1243 (describing the contents of a report conducted after post-trial hearings that provided details of the special privileges enjoyed by El Rukin government witnesses).

69. *See* United States v. Boyd, 833 F. Supp. 1277, 1365–66 (N.D. Ill. 1993) (ordering a new trial as a result of the prosecution's failure to disclose evidence of post-incarceration drug use and perjury on the part of government witnesses).

various felony offenses before discovering their innocence.[70] Except for one county prosecutor who received constant coverage for his prosecutorial misdeeds, none of the county prosecutors mentioned suffered any personal or professional consequences for their unprofessional and unethical behavior.[71]

The instances of misconduct in our society are overwhelming—especially in situations where children have come to idolize attorneys and law enforcement officials because of their influence in the community. For example, how often have we heard children say that when they grow up they want to be police officers, firemen, judges, doctors, or lawyers? Realistically, what children are seeing are policemen taking the law into their own hands by shooting first and asking questions later.[72] They witness judges abusing[73] their authority for the purpose of satisfying their sexual[74] and emotional desires.[75] They read about doctors who amputate the wrong limbs[76] from their patients because they have been working double shifts at the hospitals.

---

70. *See* Kathleen "Cookie" Ridolfi & Maurice Possley, *Prosecutor Misconduct Has a High Public Cost*, SAN JOSE MERCURY NEWS, Nov. 12, 2009, at 8A (discussing different incidents that served as the basis for some of the prosecutorial misconduct charges that contributed to an increased cost for taxpayers).

71. *Id.* and accompanying text.

72. *See* Brendan McCarthy, *Glover Case Echoes Era of Algiers Seven: Lessons of 30 Years Ago Were Never Learned, Some Say*, TIMES-PICAYUNE, Nov. 7, 2010, at A (analyzing the parallels between an incident in the 1970s where police shot four men in retaliation for an officer's death and an incident of police brutality against one man after Hurricane Katrina).

73. *See* Jones v. Luebbers, 359 F.3d 1005, 1009 (8th Cir. 2004) (evaluating a judge's action for bias based on the claim that he dealt with the defense attorney angrily as a result of an ill will against the attorney that developed in previous cases).

74. Greg Bluestein, *Federal Judge Pleads Guilty to 2 Drug Charges*, THE WASH. TIMES, Nov. 19, 2010, at 1–2 (reporting that a federal district judge plead guilty to possession of illegal drugs and for giving a stripper possession of his government issued laptop). The sixty-seven-year-old jurist admitted to knowing about the stripper's felony conviction and conceded to having at least two handguns in his possession. *Id.*

75. *See Double Standard: Special Court Should Reconsider Dismissal of Complaints Against Judge Keller*. HOUS. CHRON., Nov. 5, 2010, at B8 (stating that a Texas judge prevented the clerk's office from accepting the last-minute stay of execution by refusing to extend its hours, even though a pending Supreme Court consideration alerted the judge to the forthcoming stay). The commission reviewing the judge's actions issued only a relatively mild public warning. *Id.*

76. *See* Mireya Navarro, *Confidence Shaken, Hospital Tries to Bounce Back After Series of Errors*, N.Y. TIMES, Apr. 14, 1995, at § 10 (describing a series of errors in treatment at University Community Hospital in Tampa, including the amputation of the wrong leg on one patient).

They also see lawyers who have either deceived or stolen from their clients to become instant millionaires.

To add insult to injury, we are now witnessing a season of unaccountability where federal employees,[77] whom we have entrusted[78] with the responsibility of prosecuting criminals, actually engage in criminal behavior to get convictions. Understandably, the weight that rests on a prosecutor's shoulders is great,[79] but the harm caused to the justice system and the general public is even greater.

> Indeed, the most frequently articulated goals of professional discipline systems coincide neatly with the goals of deterrence remedies of prosecutorial misconduct: the protection of the public,[80] the protection of the administration of justice,[81] and the preservation of confidence in the legal profession.[82]

---

77. *See* Butz v. Economou, 438 U.S. 478, 515 (1978) (expanding absolute immunity from civil liability to cover state and federal agencies that customarily perform certain functions that are analogous to those of a prosecutor).

78. *See In Re* Jordan, 913 So. 2d 775, 781 (La. 2005) (stating that "a prosecutor stands as the representative of the people of the State, and he is entrusted with upholding the integrity of the criminal justice system by ensuring that justice is served for both the victims of crimes and the accused").

79. *See* Imbler v. Pachtman, 424 U S. 409, 427 n.25 (1976) (describing the different prosecutorial obligations, such as turning over evidence to the defense that calls the conviction into question, that might suffer if the prosecutor is faced with the prospect of liability) (citing MODELCODE OF PROF'L RESPONSIBILITY EC 7-13 (1969)).

80. *See*, *e.g.*, *In re* Abrams, 689 A.2d 6, 12 (D. C. 1997) (pointing to the protection of the public an important rationale for disciplinary proceedings); *In re* Olson, 577 N.W.2d 218, 220 (Minn. 1998) ("The primary purpose of attorney discipline is protection of the public."); *In re* Imbriani, 694 A. 2d 1030, 1035 (N.J. 1997) ("The primary purpose of a disciplinary proceeding is to protect the public, not to punish attorneys."); *In re* Curran, 801 P.2d 962, 974 (Wash. 1990) (emphasizing the need to uphold rules of conduct to preserve confidence in the bar).

81. *See*, *e.g.*, *In re* Chandler, 641 N.E.2d 473, 479 (Ill. 1994) (noting that the most effective way to protect the public and the legal profession is to impose fairly balanced disciplinary sanctions); Statewide Greviance Comm'n v. Botwick, 627 A.2d 901, 906 (Conn. 1993) (stating that disciplinary proceedings protect the administration of justice); *In re* Bourcier, 939 P.2d 604, 608 (Or. 1997) ("The purpose of a lawyer disciplinary proceeding is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge properly their professional duties to clients, the public, the legal system, and the legal profession.").

82. *See*, *e.g.*, Emil v. The Mississippi State Bar, 690 So. 2d 301, 327 (Miss. 1997) ("Public policy demands that we adequately discipline unethical attorneys to preserve the dignity and reputation of the legal profession."); *In re* Berk, 602 A.2d 946, 950 (Vt. 1991) (noting that the attorney's lack of professional responsibility would reduce public confidence in the legal profession).

On the other hand, how to prosecute the prosecutor has always been the "*pink elephant in the room*"[83] from the judiciary's viewpoint.[84] Was the offending prosecutor simply an overzealous advocate for justice or was his actions done to advance certain career objectives?[85] Further, was the violation constitutional in nature such that the only viable remedy is the defendant's release with an apology from the state?

Part I of this article will evaluate the source of the prosecutor's authority and then track the development of absolute and qualified immunity.[86] Part I will also include a discussion of why a prosecutor's unethical and often criminal behavior will not automatically result in the dilution of the immunity defense from absolute to qualified.[87]

Part II of this Article will explain how twenty-first century jurists, including the United States Supreme Court, have made characteristics like honor, professionalism, and integrity secondary in light of *Van De Kamp* and *Pottawattamie*.

Finally, Part III will expound on the strong reluctance the legal community has with imposing § 1983 sanctions against those agencies that have either employed, trained, and promoted prosecutors or other law enforcement officials who have committed heinous constitutional offenses. Part III will also address why judges and disciplinary associations are inept to deal with the overwhelming claims of misconduct lodged by wrongfully

---

83. *See* Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?* 7 GEO. J. LEGAL ETHICS 1083, 1086 (1994) (explaining that there is such a strong public and political outcry for a tougher stance against crime, prosecutors are boldly crossing ethical boundaries with very few, if any repercussions, because there are so few remedial solutions available that can counter the misconduct).

84. *See* Lesley E. Williams, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3447 (1999) (arguing that the absence of specific rules addressing the prohibited conduct of prosecutors obliged the ABA, along with the judiciary, the Department of Justice and local prosecutor associations to collaborate and define the parameters of acceptable and unacceptable behavior for prosecutors during every stage of the criminal process).

85. *See Ethical Prosecutor*, *supra* note 3, at 2147 (describing the "win-at-all-cost" behavior of some prosecutors as "conviction psychology").

86. *See* Hunt v. Jaglowski, 926 F.2d 689, 692 (7th Cir. 1991) (realizing that because there should be a form of checks and balances for prosecutors who conduct themselves beyond the judicial process, the federal courts have granted only qualified immunity to said prosecutors when their actions are either administrative or investigatory in nature).

87. *See* Mendenhall v. Riser, 213 F.3d 226, 230 (5th Cir. 2000) (emphasizing that qualified immunity is a mode of protection reserved for specific government officials that grants them "'ample room for mistaken judgments,' by protecting 'all but the plainly incompetent or those who knowingly violate the law'") (quoting Malley v. Briggs, 475 U.S. 335, 343 (1986)).

convicted defendants. Finally, this Author will present his proposal that may ignite a meaningful dialogue towards reaching a resolution to this growing epidemic.

PART I

Prosecutorial Powers

Like the powers bestowed on the United States Attorney by the federal statutes,[88] the Louisiana Constitution vests great authority in its District Attorneys, and their assistants, to preside over every criminal prosecution within their respective jurisdiction, to represent the State of Louisiana before the grand jury and to advise the grand jury after it has been impaneled.[89] While the powers mentioned in the state's constitution are intentionally vague and overbroad, these powers are attached to an enormous price tag that the general public must pay if these powers are ever abused.[90] The District Attorney can impanel a grand jury to assist their office in investigating a criminal case, but they are not bound to adhere to the grand jury's decisions.[91] If there are two competing statutes whereby a criminal defendant can be prosecuted, it is the District Attorney who chooses between them and their decision cannot be persuaded by judicial scrutiny.[92]

---

88. *See* 28 U.S.C. § 547 (2006) (listing the powers provided for U.S. attorneys); *see also* Brawer v. Horowitz, 535 F.2d 830, 841 (3d Cir. 1976) (summarizing some of the legal powers of the prosecutor and policy reasons behind them)*;* Nadler v. Mann, 951 F.2d 301, 305 (11th Cir. 1992) (tracing the delegation of power from the President to the district attorney).

89. *See* LA. CONST. art. V, § 26(B) ("[A] district attorney, or his designated assistant, shall have charge of every criminal prosecution by the state in his district, be the representative of the state before the grand jury in his district, and be the legal advisor to the grand jury."). He shall perform other duties provided by law. *Id*.

90. *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 189 (La. State Univ. Press 1969) (finding that the prosecutor has the blessings of the court when he/she violates a citizen's rights through the arbitrary and/or malevolent exercise of authority, inevitably resulting in harm to society and to the legal community).

91. *See* State v. Meredith, 796 So. 2d 109, 114 (La. Ct. App. 2001) (stating that the district attorney can, in non-capital cases, "choose to prosecute even after the grand jury returns a no true bill," and conversely, "can refuse to prosecute when the grand jury returns a true bill").

92. *See* State v. Flores, 669 So. 2d 646, 651 (La. Ct. App. 1996) ("This statute, and the wide discretion given to district attorneys in prosecuting crimes, under La. Const. art. V, § 26 and LaC.Cr.P. art. 61, means that, absent some unusual prejudice or special circumstance, an offender may be punished under any statute which proscribes his

Again, no one disputes the enormity of the prosecutor's responsibilities or the vast number of decisions that are made while deciding how to charge a defendant for a particular crime.[93] Rather, the controversy surrounds how the immunity doctrine should be applied to those prosecutors who seemed unmoved by a defendant's right to a fair trial and to justice.[94] The prosecutors' unfettered, unbridled, and virtually unrestrained discretion has so enraged the public's sense of fair play that our courts can no longer maintain an apathetic approach to this issue.

The judiciary has echoed the public's suspicions about prosecutors, but are less willing[95] to sustain a § 1983 complaint against a prosecutor in light of the immunity doctrine. But the public's thirst for justice and for constitutional fairness is not always for the benefit of the defendant who is moments away from being incarcerated[96] or from being brought to death row.

For example, in *Briede v. Orleans Parish Dist. Attorney's Office*,[97] the plaintiff filed a wrongful death and survival action against the district attorney's office in New Orleans after she and her husband had been robbed by two men who had been arrested and were in the custody of the police department.[98] The men were subsequently released when the prosecutor

---

conduct.").

93. *See* United States v. Henderson, 241 F.3d 638, 652 (9th Cir. 2000) (arguing that "prosecutors have considerable leeway to strike 'hard blows' based on the evidence and all reasonable inferences from the evidence").

94. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 103 (1991) (indicating that the vague norm of doing "justice" is subject to the varying interpretations by different prosecutors with different morals and thus is less valuable as a source of guidance in the role of the prosecutor).

95. *See Chavers v. Stuhmer*, 786 F. Supp. 756,758–59 (E.D. Wis. 1992) (permitting the plaintiff to present his § 1983 claim against the detective, state prosecutor and police officer responsible for charging and convicting him for first degree murder). The court reasoned these defendants may be entitled to qualified immunity, but not absolute immunity because their actions were investigatory in nature. *Id.*

96. *See* Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 405–06 (2006) (quoting Laura B. Myers, *Bringing the Offender to Heel: Views of the Criminal Courts*, *in* AMERICANS VIEW CRIMES AND JUSTICE 46, 48 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996) (stating that "despite the ideal that the criminal justice system should protect the innocent and convict only the guilty, public support for the rights of the accused is not clear"). Some studies show that the public believes 'the courts undo the work of the police to get criminals off the street.'". *Id.*

97. Briede v. Orleans Parish Dist. Attorney's Office, 907 So. 2d 790 (La. Ct. App. 2006).

98. *See id*. at 791 (describing the background for the claim).

failed to timely charge them.[99] Under the cause-in-fact analysis, the plaintiff argued that but for the prosecutor's failure to formally file the necessary charges against these men following their arrest, she would not have been robbed or kidnapped and her husband would not have been shot in the back.[100]

The prosecutor's office filed a peremptory exception of no cause of action[101] in this case, stating that it was not a proper defendant[102] because it did not possess the capacity to be sued.[103] It also argued that the state constitution as well as state jurisprudence gives prosecutors absolute immunity from civil liability.[104] Since the decision to file or not file formally charges against a person suspected of committing a crime was a prosecutorial function, the district court granted the exception and dismissed the plaintiff's case.[105] In affirming the district court's ruling, the appellate court recited portions of the Louisiana Constitution and articles in the revised statutes[106] and the criminal code,[107] which totally erase[108] any

---

99. *Id.*

100. *Id.*

101. *See* LA. CODE CIV. PROC. ANN. art. 927(b)(4) (2010) (listing no cause of action as a preemptory exception).

102. *See Briede*, 907 So.2d at 791 ("The Orleans Parish District Attorney's Office filed the peremptory exception of no cause of action, arguing the following: 1) that the Orleans Parish District Attorney's Office is not a proper defendant, as it does not have the capacity to be sued.").

103. *See* LA. CONST. art. 12, § 10 (listing the circumstances under which a state, state agency, or a political subdivision can have immunity from suit and liability).

104. *See* Burns v. Reed, 500 U.S. 478, 485 (1991) (noting that the chilling effects from civil liability mandates that prosecutors be given immunity).

105. *See* Briede v. Orleans Parish Dist. Attorney's Office, 907 So. 2d 790, 792 (La. Ct. App. 2006) (noting that the district court dismissed the suit after determining that the prosecutor had absolute immunity).

106. *See* LA. REV. STAT. ANN § 16:1(C) (2010). The statute provides that:

The district attorney for the parish of Orleans or his designated assistant shall have charge of every criminal prosecution by the state in the Criminal District Court for the Parish of Orleans, and represent the state in all matters in the Orleans Parish Juvenile Court. The district attorney or his designated assistant shall be the representative of the state before the grand juries in the parish of Orleans and shall be the legal advisor to the grand juries. He shall perform other duties provided by law.

107. *See* LA. CODE CRIM. PROC. ANN art. 381 (2010) (declaring that the entity authorized to bring a criminal prosecution shall do so in the name of the state for the purpose of punishment, and that any person injured by the commission of an offense shall not be part of the prosecution and cannot allege his/her rights were affected).

108. *See Briede*, 907 So. 2d at 792–93 (upholding the district court's decision after finding that the applicable statutes and constitutional provisions supported the district attoney's actions).

hope for a citizen to sue the district attorney's office for its prosecutorial decisions.

Although the legal community recognizes that prosecutors have wide discretion[109] in making decisions relative to how they charge, investigate, and handle a criminal proceeding, the general public, however, is becoming less tolerable of the prosecutor's immunity as well as the court's rationale for granting such immunity.

In *Miller v. Spiers*,[110] the plaintiff brought suit against the defendant, who was employed as an Assistant District Attorney in New Mexico.[111] The plaintiff alleged that the defendant deliberately and maliciously indicted him for murder because the defendant: (1) had the grand jury[112] specifically target him as a suspect in a murder that took place in the defendant's jurisdiction; (2) presented false and misleading evidence to the second impaneled grand jury after the first grand jury refused to indict him; (3) obtained an arrest warrant for the plaintiff, knowing that the contents of the warrant were false and contained material omissions that were intended to create probable cause; and (4) contacted the local newspaper to inform one of the staff writers that his office had uncovered evidence that contained the plaintiff's DNA, linking him to the victim's apartment.[113] The defendant filed a motion for judgment on the pleadings in response to the plaintiff's complaint.[114]

As it relates to allegations one and two, the district court found that absolute immunity attached to the defendant's investigation and to his prosecutorial decisions because they related to his advocacy for the state

---

109. *See* J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME 8–9 (2d ed. 2006) (commenting that nothing epitomizes the vast discretion a prosecutor possesses than when he is processing a case involving white collar crime because many statutes are broad and vague, and the task of defining the particular crime falls in the first instance to prosecutors, and ultimately to the courts).

110. Miller v. Spiers, 434 F. Supp. 2d 1064 (D. N.M. 2006).

111. *See id.* at 1066 ("Defendant Paul Spiers was employed as an Assistant District Attorney for the Bernalillo County District Attorney's office at the time in issue.").

112. *See* LA. CODE CRIM. PROC. ANN art. 437 (2010) (stating that the grand jury will inquire into offenses at the request of the district attorney); *see also* United States v. Calandra, 414 U.S. 338, 344 (1974) ("Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors.").

113. *See Miller*, 434 F. Supp. 2d at 1067–68 (describing the allegations against the prosecutor regarding his conduct in relation to the grand jury indictment process, obtaining a warrant, and the press).

114. *See id.* at 1066 ("Spiers moves to dismiss the allegations against him on the ground that his actions are protected by absolute, or alternatively, qualified immunity.").

before the grand jury.[115] However, the court found that allegations three and four were not protected by absolute immunity because the traditional notions of advocacy did not encompass contacting the local newspaper and giving them the result of his investigation—whether true or false.[116] Further, the court ruled that absolute immunity was not created to cover instances where the prosecutor would encourage or conspire with police officers to give false[117] statements in their affidavits to secure an arrest warrant against the plaintiff.[118]

The district court granted in part the motion to dismiss on the first two allegations in the complaint, but denied in part the dismissal on the allegations pertaining to the defendant's use of the print media and false statements from police officers to secure his indictment.[119] The court concluded that the defendant was not cloaked with the garment of absolute immunity when he performed these acts.[120]

Both absolute and qualified immunity can be double-edged swords that can have the potential of maiming even wrongfully accused or imprisoned law enforcement officers. In *Brown v. Lyford*,[121] a former police sergeant filed a § 1983 action against some of his fellow police officers and a prosecutor pro tempore—all of whom were engaged in a case involving children who were tortured, molested, and sodomized.[122] During the prosecutor's investigation, the plaintiff was investigating the disappearance of a seventeen year old girl.[123] The plaintiff learned that one

---

115. *See id.* at 1067–68 (determining that the prosecutor should receive absolute immunity for his actions concerning the grand jury as a result of its relationship to his role as prosecutor).

116. *See id.* at 1068 ("[C]ontacts with the press are definitely not within the traditional advocacy function of a prosecutor and therefore not protected by absolute immunity.").

117. *See* Jennifer Hewlett, *Attorneys in Hit-and-Run that Killed Lexington Police Officer File Motion for Dismissal*, LEXINGTON-HERALD-LEADER, Nov. 6, 2010 (describing the motion filed by defense attorneys for a man accused of murder requesting dismissal of the indictment against their client because the prosecutor intentionally presented the testimony of the lead detective to the grand jury, knowing that his testimony was false).

118. *See* Miller v. Spiers, 434 F. Supp. 2d 1064, 1068 (D. N. M. 2006) (finding that use of a false arrest warrant and complaint failed to fall under the absolute immunity shield).

119. *See id.* at 1068–69 (finding that the prosecutor should receive absolute immunity for his dealings with the grand jury, but not for his actions towards the press and his use of a warrant without probable cause).

120. *Id.* at 1069.

121. Brown v. Lyford, 243 F.3d 185 (5th Cir. 2001).

122. *See id.* at 187 (describing the incidents of abuse in the § 1983 complaint and the parties involved).

123. *See id.* at 188 (noting that Brown was involved in investigating a missing

of the children in the child abuse case stated that the missing seventeen-year-old was also a victim in the instant child abuse investigation.[124] The plaintiff disagreed with the child's statement because he had been involved in the child abuse case and discovered that one of the key suspects in the child abuse case was not in the state at the time the seventeen-year-old victim was reported missing.[125]

Not long after making this statement, the child implicated the plaintiff and other suspects not only in the disappearance of the seventeen-year-old child, but also in the child abuse case that the defendants were presently investigating.[126] The entire investigation was aborted and the plaintiff and the other original suspects in the child abuse case brought a separate § 1983 action against the prosecutor and the investigating officers.[127] The district court dismissed the complaint based on qualified immunity,[128] finding that there was probable cause to arrest the plaintiff.[129] The plaintiff was unsuccessful[130] in overcoming the qualified immunity defense posed by the defendants.[131] The United States Court of Appeals for the Fifth Circuit agreed because the prosecutor acted within his usual judicial functions.[132]

---

seventeen year old girl).

124. *See id.* ("In 1993, one of the Kerr children, identified as 'R.S.,' claimed that [the seventeen year old girl] had been abducted, raped, and murdered by the Kerrs.").

125. *See id.* ("Brown said he had separately investigated the Kerr and Hicks children's allegations, and observed that Wendell Kerr, a key suspect, was not in Texas when Kelly Wilson disappeared.").

126. *See id.* ("R.S. implicated Brown in the charges of child abuse and the disappearance of Kelly Wilson.").

127. *See id.* at 187 (describing the § 1983 lawsuit that arose after the investigation ceased).

128. *See* Kerr v. Lyford, 171 F.3d 330, 338 (5th Cir. 1999) (determining that the district attorney's investigatory activities merited qualified rather than absolute immunity).

129. *See* Brown v. Lyford, 243 F.3d 185, 189–91 (5th Cir. 2001) (reasoning that probable cause is a prerequisite for the type of qualified immunity granted by the district court).

130. *See* Gibson v. Rich, 44 F.3d 274, 277 (5th Cir. 1995) (observing that the qualified immunity doctrine not only provides protection from damages for the targeted government official, but is a means of avoiding judicial scrutiny from the lawsuit itself); *see also* Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993) ("Qualified immunity protects against being subjected to litigation and against liability.").

131. *See Brown*, 243 F.3d at 191 (finding that in regard to their investigative functions, Brown "was entitled to the same qualified immunity that protects Goar, Minshew, Flieg, and Baggs").

132. *See id.* (stating that the prosecutor was entitled to qualified immunity for his investigative arts).

The resounding theme behind all of the above mentioned jurisprudence, along with thousands of other cases dealing with prosecutorial misconduct, has been that prosecutors need the freedom to perform their duties without the threat of a civil lawsuit lingering over their heads. [133] The complaints have been instances where prosecutors have *coincidentally* lost or have forgotten to inform defense attorneys that there is evidence that favors the defendant's claim of innocence.[134] On the other hand, prosecutorial misconduct does not include instances where the prosecutor zealously argues to the jury or before the media that the defendant is overwhelmingly guilty. Prosecutors who are discourteous to the defendant's family or who play mental *chess games* with defense attorneys to persuade the defendant to enter a guilty plea are not part of the immunity discussion.[135]

Peter Henning stated it best when he said that prosecutors hold a special[136] place in the criminal justice process because whereas the prosecutor has a continuing duty to refrain from acting in an independent and unethical manner, the Model Rules of Professional Conduct provide no oversight or guidance with which to discern whether their conduct is acceptable zealous advocacy.[137] Far too often the federal Constitution and

---

133. *See* Berger v. United States, 295 U.S. 78, 88–89 (1935) (stating that the prosecutor's obligation in any criminal case is to seek justice and not just another conviction). However, the court went on to say that when the government crosses the line between proper and improper methods, prosecutorial misconduct occurs. *Id.*; *see also* Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976) ("We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs.").

134. *See* Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (describing the failure of police to preserve evidence by refrigerating and performing tests on clothing containing semen stains); *see also* United States v. Navarro, 608 F.3d 529, 532 (9th Cir. 2010) (evaluating a claim that the prosecutor misled the jury by misstating the law of duress).

135. *See* Darden v. Wainwright, 477 U.S. 168, 181 (1986) (stating that the standard of review turned on whether the level of unfairness in the trial affected due process rather than undesirable remarks on the part of the prosecutor); *see also* United States v. Cornett, 232 F.3d 570, 575–76 (7th Cir. 2000) (determining that the prosecutor's improper vouching for witnesses was harmless and did not prejudice the defendant).

136. *See* Brady v. United States, 373 U.S. 83, 87 (1963) (demonstrating that it was the prosecutor's role as an advocate for justice that prompted the United States Supreme Court in *Brady* to insist that a prosecutor disclose exculpatory evidence in its possession that is both material and favorable to the accused regarding either guilt or punishment).

137. *See* Peter Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 727 (1999) (commenting that despite the fact that ethical rules impose a greater obligation than mere zealous representation onto prosecutors, "the codes do not furnish any guidance about what that means or even whose perspective determines whether a particular result was just").

the pertinent jurisprudence provide only *suggestions* for the government's attorney to consider while prosecuting defendants.

In almost the same context as stating that a prosecutor's objective is to ensure that justice is given, the *Berger* court held that the government's attorney may strike as many *hard blows* as constitutionally permissible while avoiding *foul ones*; so long as the prosecutor is using every legitimate means to secure a conviction.[138] Confusing? Absolutely. This is the type of double talk that the general public finds frustrating in the legal profession. Vigorous representation of one's client is a thread that is deeply woven into the fabric of every course in a law school's curriculum. But being vigilant, thorough, and unyielding while advocating for a client's interests does have constitutional limits.[139]

Given the limitless authority of prosecutors, the judiciary does not promote the pursuit for justice when it allows or even ignores prosecutors who, for the sole purpose of getting a conviction, hide favorable evidence from the defendant, use illegal tactics to obtain admissible evidence[140] or manipulate the jury's impartiality by exploiting the jurors' prejudices.[141] During his tenure as Attorney General in 1940, Robert Jackson stated that "[w]hile the prosecutor at his best is one of the most [beneficial] forces in our society, when he acts from malice or other base motives, he is one of the worst."[142] Jackson also stated that it is the federal prosecutor who "has more control over life, liberty, and reputation than any other person in America."[143]

So, should the validity of the defendant's conviction—in our introduction—hinge on Kenneth's undisclosed relationship which he

---

138. *See id.* at 729 ("[T]he Court noted the prosecutor's duty to strike 'hard blows,' while avoiding 'foul ones,' and stated that the government's attorney may 'use every legitimate means' to secure a conviction.").

139. *See* Imbler v. Pachtman, 424 U.S. 409, 429 (1976) (discussing that though immunity protected prosecutors from civil liability, they could still be held accountable for constitutional and criminal law violations).

140. *See* Washington v. Hofbauer, 228 F.3d 689, 699–700 (6th Cir. 2000) (finding that while the prosecutor engaged in severe misconduct by implying to jurors they could consider character evidence, it was not prejudicial to the defendant).

141. *See* United States v. Sandoval-Gomex, 295 F.3d 757, 762–63 (7th Cir. 2002) (determining that although the prosecutor made improper remarks by implying that the defendant did not understand the concept of deportation, it failed to prejudice the defendant enough to constitute a plain error).

142. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940).

143. *See id.* (speaking before a meeting of federal prosecutors).

exploited to secure the murder conviction?[144] The United States Supreme Court apparently believes that a defendant who has been wrongfully imprisoned as a result of a prosecutor's blatant refusal to comply with notions of professionalism and ethical representation can still have sufficient redress of his claim through other safeguards like professional discipline.

Kenneth's actions not only damaged his title as a *minister of justice*,[145] but he also, indirectly, manipulated the jury by pressuring it to convict the defendant for murder. There must be something more that defendants can do to deter these rogue prosecutors from randomly violating the general public.[146] But the first order of business for the legal community should be to have prosecutors reverence their position as *ministers of justice* because the public is not going to expect anything less than what their title communicates. Realistically, the problem with reigning in prosecutors for their unprofessional behavior is that no one generally wants to do it.[147] The bar associations do not want to micro-manage the prosecutor's office, and legal scholars believe that the federal Constitution and the statutes[148] which have shielded prosecutors for centuries, are simply too massive to

---

144. *See generally*, Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481 (2009) (proposing a prophylactic open file rule in order to expand defendants' federal constitutional rights to discovery).

145. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 (suggesting that prosecutors enjoy the classification of being ministers of justice and not simply that of advocates); *see generally*, Randall Grometstein, *Prosecutorial Misconduct and Noble-Cause Corruption*, 43 CRIM. L. BULL., No. 1, ART I (2007), [hereinafter *Noble-Cause Corruption*].

146. The prosecutorial abuse that is referenced in this Article does not involve a prosecutor's actions in giving false or incorrect information about the defendant during his/her investigation or for actions that involve the prosecutor not alerting witnesses about the consequences of testifying in a criminal trial; *see* Hart v. O'Brien, 127 F.3d 424, 432–33 (5th Cir. 1997) (examining allegations that a district attorney used false information to obtain a search and arrest warrant); *see also* Ying Jing Gan v. City of New York, 996 F.2d 522, 534–35 (2d Cir. 1993) (evaluating a complaint against a prosecutor for providing insufficient protection to a witness and failing to inform the witness of the dangers of face-to-face identification); Barbera v. Smith, 836 F.2d 96, 101–02 (2d Cir. 1987) (dealing with a claim against a prosecutor for failing to provide adequate protection to a witness an revealing the witness' identity to a suspect).

147. *See* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1062–63 (2009) (discussing the reluctance of appellate court judges to publicly censure district attorneys for prosecutorial misconduct).

148. *See* Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (2010) (limiting the tort liability of federal employees and preserving the right for federal employees to make defenses based on judicial or legislative immunity).

override.[149] In other words, since the Constitution has purposefully given broad authority to prosecutors, then there remains no incentive whatsoever for prosecutors to change their policies.[150]

Although state disciplinary authorities frequently make lofty pronouncements about self-policing and the requirement that their attorneys conform to high standards of professionalism, the reality is that state authorities rarely[151]—if at all—discipline prosecutors for misconduct.[152]

More importantly, the United States Supreme Court's decision in *Van de Kamp v. Goldstein* has given prosecutors a titanium-like outer shell that is virtually impregnable.[153] The courts' fear of penalizing prosecutors for their questionable/criminal behavior is that it does not want to restrain the prosecutor's authority in a time when both Congress and the Office of the United States President are declaring war on crime and have assured the general public that criminals will be prosecuted to the fullest extent of the law. For this reason, the nation's district attorneys

---

149. *See generally*, Martin A. Schwartz, *Wrongful Conviction Claim Barred by Prosecutorial Immunity*, N.Y. L.J., June 16, 2009, at col. 1 (stating that prosecutorial immunity can shield even blatantly unconstitutional conduct).

150. *See* Zacharias, *supra* note 94, at 103–04 (commenting that because the vague requirement to do justice is not often enforced, prosecutors have few reasons to conform their conduct to this standard).

151. *See* Eugene Volokh, *Happy Birthday, Dear Murder Victim*, VOLOKH CONSPIRACY (Nov. 11, 2010, 2:45 PM), http://volokh.com/2010/11/11/happy-birthday-dear-murder-victim/ [hereinafter *Happy Birthday Case*] (discussing a prosecutor's decision to conclude her closing arguments to the jury by singing "Happy Birthday" to the deceased child-victim who was allegedly murdered by his defendant parents). Although the majority of justices on the Georgia Supreme Court found the prosecutor's behavior to be totally improper, it did not rule that the defendants' convictions should be reversed because defense counsel did not object to the prosecutor's theatrical performance. *Id*. On appeal, defense counsel argued that the stunt was so preposterous and he did not want to call any more attention to the performance by objecting. *Id*. He also argued that the prosecutor elected to do this stunt because the trial was being televised on Court TV. *Id*.

152. *See* 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, 1138 (1996) (suggesting that prosecutors should not have absolute immunity). "Although prosecutors need some protection from suit, absolute immunity is too much. . . . Discarding absolute prosecutorial immunity will only leave incompetent or malevolent prosecutors subject to civil liability for their misdeeds." *Id.*

153. *See* Van de Kamp v. Goldstein, 129 S. Ct. 855, 864–65 (2009) (finding that the supervisory prosecutors were "entitled to absolute immunity in respect to Goldstein's claims that their supervision, training, or information-system management was constitutionally inadequate").

lean heavily on their conviction rates as proof that their offices have been tough on crime[154] during their political[155] campaigns.[156]

PART II

Convictions are First and Foremost

Consider the factual circumstance in *Pottawattamie County, Iowa v. McGhee*[157] in which two African-American teenagers were arrested and later convicted of first-degree murder in 1978 after the body of a retired police officer was discovered near a car dealership. The officer's body had a twelve-gauge shotgun wound to the chest, and the defendants were arrested a year later.[158] The victim's murder investigation took place during a heavy campaign season for the county attorney's office.[159] The county attorney, along with an assistant county attorney, made it the focal point of their political campaign to make an arrest with all deliberate speed. Their objective was to show the community that their office was serious about

---

154. *See* Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 8–16 (2009) (describing the media and political pressures on prosecutors to win convictions). Media coverage of criminal trials is nothing new, but the coverage has expanded from the sensational cases involving celebrities to a wide range of criminal cases that the public follows with great attention, thereby placing enormous pressure on prosecutors to quickly make an arrest and prosecute as soon as humanly possible. *Id.*

155. *See* Michael Scott Weiss, *Public Defenders on Judges: A Qualitative Study of Perception and Motivation*, 40 CRIM. L. BULL. 36, 41 (2004) [hereinafter *Public Defenders on Judges*] (describing the interviews the author had with current and former public defenders). Many of the criminal court judges credit their posts as judges to their connections and not to their talents; in fact, these judges who hope to ascend to the appellate level will not be able to do so if the media as well as the general public gets the impression that they are soft on crime by indulging criminals or giving them a fair shake. *Id.*

156. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2472 (2004) (noting that "prosecutors are particularly concerned about their reputations because they are a politically ambitious bunch" and "many [prosecutors] have parlayed their prosecutorial successes into political careers").

157. *See* McGhee v. Pottawattamie County, 547 F.3d 922, 933 (8th Cir. 2008), *dismissed*, 130 S. Ct. 1047 (2010) (finding that "immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not 'a distinctly prosecutorial function'").

158. *See id.* at 926 (describing the factual circumstances).

159. *Id.*

protecting its citizens and that crime committed against first responders would be handled swiftly and with no mercy.

Nothing in this murder investigation seem particularly disturbing until the facts reveal that both the county attorney and his assistant started interviewing witnesses and canvassing[160] the neighborhoods for suspects like detectives.[161] From these interviews, the men had more than twelve suspects who may have been responsible in the death of this retired officer.[162] Further investigation revealed that the white brother-in-law of the captain of the local fire department was developed as a likely suspect to the murder. Polygraph tests later revealed that the suspect's answers were untruthful and that he was also a suspect in a 1963 murder in another state.[163]

Interestingly, the detectives/prosecutors continued their search for suspects and located an African-American teenager named Hughes, who had been arrested for stealing several cars from a dealership in Nebraska.[164] While Hughes repeatedly denied having any knowledge of the retired officer's murder, these ministers of justice[165] continued to interrogate,[166] induce, and threaten Hughes until he surrendered. To say that Hughes was a habitual liar would be like referring to a person with an intelligence quotient of 185 as being "smart."

Nevertheless, Hughes repeatedly lied about the identity of the murderers, failed polygraph tests, and admitted to lying to the police about his involvement in the retired officer's murder. These county prosecutors used Hughes as their star witness against two other African-American teenagers. The prosecutors continuously fed information to Hughes regarding critical facts about how the officer was killed. The United States

---

160. *See* United States v. Scott, 223 F.3d 208, 209 (3d Cir. 2000) (stating that police officers canvassed a neighborhood and located a defendant who had evidence inadvertently hidden inside his clothing).

161. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 270 (1993) (regarding the prosecutor's pre-indictment conspiracy with sheriff deputies to create false evidence against the plaintiff).

162. *See McGhee*, 547 F.3d at 926 ("In the investigation's early stages, more than a dozen individuals were under suspicion, but McGhee and Harrington were not yet suspects.").

163. *Id.*

164. *Id.*

165. *See* Cox v. Hainey, 391 F.3d 25, 30–35 (1st Cir. 2004) (discussing prosecutorial immunity when advising law enforcement officials on the logistics of their actions).

166. *See* Burns v. Reed, 500 U.S. 478, 496 (1991) (finding that a prosecutor's legal advice to police may not be subjected to immunity because such actions may not fall under the judicial process category).

Court of Appeals for the Eighth Circuit found that the prosecutors' behavior in this case was not covered under the absolute immunity umbrella because the defendants' substantive due process rights were severely affected by the prosecutors' act of obtaining, manufacturing, coercing, and fabricating evidence before filing criminal charges.[167]

The prosecutors/appellees immediately filed a writ of certiorari with the Supreme Court, hoping that the high court would unilaterally find that their decision to coerce and manipulate Hughes' testimony before and during the trial fell within their prosecutorial discretion and thereby cover their deplorable acts with the cloak of absolute immunity.[168] Defense attorneys from all over the country sat on the edge of their seats, waiting patiently to see how the Supreme Court would perform its legal gymnastics around qualified immunity and drench these prosecutors with absolute immunity.[169] These officers acted as police officers, detectives, and prosecutors from the moment this retired officer's body was found. Unfortunately, the case settled before the Supreme Court could render a decision in the matter, causing prosecutors in all fifty states to let out a sigh of relief.[170]

Randall Grometstein[171] captured the full extent of this conundrum when he focused on the teleological reasoning (ends-oriented thinking) offered by many prosecutors when they are called to answer why their offices consistently abuse the constitutional rights of defendants. Criminal justice professionals, like Grometstein, write that this mode of thinking is generally triggered either by sensational or notorious crimes or from moral panic.

> Many prosecutors and police officers subscribe to the crime-control model of the criminal justice system and thereby take a teleological view of the system. Consequently, the noble cause of getting the "bad

---

167. *See* McGhee v. Pottawattamie County, Iowa, 547 F.3d 922, 933 (8th Cir. 2008), *dismissed*, 130 S. Ct. 1047 (2010) (stating that immunity does not extend to the prosecutor's actions that violated a person's substantive due process rights before filing formal charges).

168. *See* Pottawattamie County v. McGhee, 129 S. Ct. 2002, 2002 (2009) (granting writ of certiorari).

169. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 57 (2005) (noting that the "reconsideration of absolute prosecutorial immunity is especially urgent").

170. *See* Pottawattamie County v. McGhee, 130 S. Ct. 1047, 1047 (2010) ("The writ of certiorari in the above-entitled case was dismissed today pursuant to Rule 46 of the Rule of this Court.").

171. *See Noble-Cause Corruption*, *supra* note 145, at 66–67 (describing a teleologist).

> guys" off the street justifies the *occasional* violations of due process that are necessary to accomplish that goal.[172]

In other words, prosecutors articulate to the masses that sometimes they have to break the law and do unethical and unconstitutional things to convict those people who broke the law. Grometstein goes on to discuss Jocelyn M. Pollock's view that prosecutors and law enforcement officials have an *us v. them* mentality depending on who is sitting at the defense table.[173] Other notable scholars share in Pollock's interpretation of today's ever-evolving justice system.

> Anthropologists would not be surprised by the hypothesis that we reason deontologically (means-oriented)[174] with respect to members of our own group and teleogically with respect to outsiders, especially those perceived to be dangerous.[175]

Nevertheless, the Supreme Court remains vigilant in its contention that placing a constitutional magnifying glass over the nation's prosecutors and halting the criminal justice process every time a prosecutor steps offside, engages in unnecessary roughness, or commits some form of unethical behavior drastically affects the prosecutor's effectiveness.[176] It also undermines their authority to bring criminals to justice. In other words, if the innocent are inadvertently grouped into a net filled with guilty criminals then those innocent people are simply classified as collateral damage[177] by the courts and prosecutors alike. Prosecutors fear that if they were to show leniency to those individuals whom the government had little to no

---

172. *Id.* at 68.

173. *See generally* JOCELYN M. POLLOCK, ETHICS IN CRIME AND JUSTICE: DILEMMAS AND DECISIONS 148–149(Thompson Wadsworth 2004) (emphasizing the fierce loyalty within the group).

174. *See In re* Conduct of Burrows, 291 Or. 135, 143 (1981) (per curiam) (describing a prosecutor who was publicly reprimanded for talking to a represented defendant who expressed interest in entering a guilty plea on the pending charges in exchange for leniency on the sentence and a chance to do undercover work for the police and the prosecutor's office in the future).

175. Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664, 669 (1957).

176. *See* Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?,* 38 CAL. W. L. REV. 283, 304 (2001) (stating that courts often "grant anonymity to prosecutors engaged in misconduct").

177. *See Prosecutorial Resistance*, *supra* note 3, at 138 (noting the "psychological and personal barriers for prosecutors confronting post-conviction innocence claims").

incriminating evidence against, then the public would paint them as being *soft on crime*, and this would mark them as *politically deceased*.

Legal scholars believe that sanctioning prosecutorial misconduct would place a chilling effect on a prosecutor's trial decisions and could cause a public revolt against government attorneys.[178] This Author subscribes to the notion that exposing prosecutorial misconduct to the public will not only reinvigorate the public's confidence in the justice system, but exposing such misconduct will also deter other prosecutors from pursuing questionable trial practices in the future.[179]

More accountability through active judicial oversight will cause senior prosecutors to become fervent in monitoring their junior[180] colleagues. They could also mandate that junior-level prosecutors attend appropriate training seminars sponsored by the nation's district attorney associations.[181] Unlike the situation with Kenneth, our lead prosecutor in the first part of this Article, junior-level prosecutors account for a majority of the prosecutorial misconduct cases, mainly because they are attempting to maximize professional gains by impressing the private-sector attorneys who are watching them in the audience.[182]

What would be the objective for Congress to enact a § 1983 remedy for its citizens whose civil rights have been grieved if that person cannot hold the offending government employee financially responsible because other federal statutes prevent such lawsuits? While the federal judiciary is concentrated on not jeopardizing the prosecutor's decision-making authority on issues that are *intimately associated* to the judicial phase of the criminal process,[183] defense attorneys, on the other hand, have to contend

---

178. *See generally* Lisa C. Harris, Note, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755, 1785 (1996) (discussing the loss of trust in the justice system after police misconduct was exposed in the Simpson trial).

179. *See* Drake v. Kemp, 762 F.2d 1449, 1461 (11th Cir. 1985) (finding that an improper prosecutorial argument rendered a sentencing proceeding fundamentally unfair).

180. *See* Dunahoe, *supra* note 18, at 64–67 (stating that the disadvantage with the bottom-up approach to prosecutorial misconduct is that the supervising attorney will not be deterred by such an approach and there will be no incentive to change the office's internal structure to prevent future prosecutorial conduct).

181. *Id*.

182. *See* Dunahoe, *supra* note 18, at 49 (arguing that "individual low-level prosecutors are responsible for a significant percentage of prosecutorial misconduct and, further, that these prosecutors seek primarily to maximize professional gains").

183. *See* Van de Kamp v. Goldstein, 129 S. Ct. 855, 857 (2009) ("Prosecutors are absolutely immune from liability in § 1983 suits brought against prosecutorial actions that are 'intimately associated with the judicial phase of the criminal process'. . . ." (quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976))).

with disgruntled clients who have been convicted because the prosecutor ignored basic constitutional safeguards that ruined their clients' reputations as well as their will to live.[184]

Hundreds of defense attorneys, during voir dire, have asked potential jurors this question: "In your opinion, which one of these situations would be the greatest harm to society, for an innocent man to go to jail or for a guilty man to go free?"[185] Many of the jurors in the hundreds of appeals that I have reviewed would say, without hesitating, that the greatest harm was for an innocent man to go to jail. If this is the public's notion of a grave injustice, then it stands to wonder why the judiciary seems to have an opposite view. The fact that a prosecutor is engaged in representing the government in a criminal matter does necessarily give them a license to hide exculpatory[186] evidence,[187] to threatened witnesses against testifying for the defense, or to knowingly present false testimony[188] or exhibits to secure a conviction.

Catherine Ferguson-Gilbert gave a hypothetical in her Article on prosecutors that depicted this type of prosecutorial action as being unsportsmanlike athletes.[189] Her description of government attorneys was very compelling. Here is an excerpt from her analogy:

> Even if I do not play the game well, and I lie, cheat, and dishonor the game itself—I will face no consequences. When I play the game unfairly, and even hurt innocent people in the process, others will label

---

184. *See* Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC L. REV. 275, 282 (2004) [hereinafter *Prosecution Discipline*] (finding that the instances of prosecutorial misconduct are not benign mistakes, but are acts of "gross negligence or intentional acts" done under the misguided impression that these prosecutors were pursuing justice).

185. *See* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 497 (2009) [hereinafter *Evidence of Innocence*] (stating that "the fundamental question is whether an innocent person was wrongly convicted, not whether the defendant can be successfully retried").

186. *See In re* Riehlmann, 891 So. 2d 1239, 1241 (describing the situation in which a former prosecutor told a current prosecutor about exculpatory evidence he had suppressed in a former case). The current prosecutor (attorney) was publicly reprimanded for not reporting the conversation. *Id.* The former prosecutor disclosed to the attorney that he had suppressed exculpatory blood evidence against a defendant. *Id.* Moments before his startling confession, the former prosecutor told the attorney that he was dying from colon cancer. *Id.*

187. *See* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 290–91 (Northeastern University Press 1992)(describing instances where the presiding prosecutor suppressed exculpatory evidence from the defense).

188. *See generally* Fritz v. City of Ada, Oklahoma, Civ. No: 00-194 (E.D. Okla. 2000).

189. *See* Ferguson-Gilbert, *supra* note 176, at 283 (describing the author's hypothetical of playing a "game").

> my actions as "harmless." There is no recourse for my misconduct in my attempt to win[190] the game. I thus continue my pursuit of wins, but I am supposed to be "just." I have a blindfold on, but if I take it off I can see the procedure I need to follow to be "just." Who am I? I am. . . a prosecutor.[191]

Gilbert's hypothetical is most appropriate for our discussion because even the prosecutors themselves rate their success using a "score keeping mentality" or a "batting average."[192] Law enforcement agencies measure their prosecutors' win-loss ratio by placing the names of each prosecutor on a board, with green stickers for wins and red stickers for losses.[193]

Interestingly, the *Van de Kamp* court was of the opinion that to allow a defendant, no matter how justified, to bring a civil rights action against the prosecutor's office, would not only encourage other disgruntled defendants to follow along, but it would "pose substantial danger of liability even to the honest prosecutor."[194] Does this sound strangely similar to the concerns most potential jurors have about innocent people going to jail?

The overall purpose of the § 1983 civil rights action was to create an avenue of recovery[195] for a citizen who had their civil rights violated. The only prerequisite to bringing such an action was to have the complainant demonstrate how he was deprived of a constitutional right by a person acting under color of law.[196] Having a defendant lose their right to freedom because a government attorney violated one of the basic principles under our constitution seems to fall squarely within the province of the statute.

---

190. *See Prosecutorial Resistance*, *supra* note 3, at 135–38 (stating that police officers look to the number of arrests made during any given month as evidence of their effectiveness, and consequently, district attorneys view their win-loss record as a symbol of their self-worth).

191. Ferguson-Gilbert, *supra* note 176, at 283.

192. *See generally* Elizabeth Glazer, *Crime Busting and Crime Prevention: A Dual Role for Prosecutors*, CRIM. JUST. MAG., Winter 2001 ("Like most prosecutors, he viewed the individual case as the unit of measurement and the number of arrests or convictions as the measure of success.").

193. *See* Ferguson-Gilbert, *supra* note 176, at 290 ("Some prosecutors' offices even measure wins and losses, next to each prosecutor's name on a board, with green stickers for victories and red stickers for losses.").

194. Van de Kamp v. Goldstein, 129 S. Ct. 855, 858 (quoting Imbler v. Pachtman, 424 U.S. 409, 425 (1976)).

195. *See* 42 U.S.C. § 1983 (2010) (providing for a civil action for deprivation of rights). This provision is sometimes referred to as a *Bivens* claim, which is a suit "brought directly under the Constitution against federal officials." Butz v. Economou, 438 U.S. 478, 504 (1978).

196. *See* Collins v. Womancare, 878 F.2d 1145, 1147 (9th Cir. 1989) (arguing on appeal that Womancare did not act under color of state law).

The United States Supreme Court further interpreted this statute by stating that a person acts under color of law for purposes of 42 U.S.C. § 1983 if he "exercise[s] power possessed by virtue of state law and the harm was possible only because the wrongdoer was clothed with authority of state law."[197] Generally speaking, all categories of government employees could expose their employers to a § 1983 suit—except for prosecutors who enjoy the protection of an invincible shield called absolute immunity.

I am reminded of a conversation I had with a defense attorney regarding the possibility of piercing the absolute immunity shield. She agreed that the immunity shield has protected prosecutors from being personally responsible for mistakes in judgment and their failures to comply with basic discovery requests. However, she regretfully admitted that this form of immunity has created prosecutorial juggernauts who view the criminal courts as their personal playground where they own all the toys and get to make the decision on how the games should be played. She also mentioned that if the federal courts were to allow defendants to maintain a § 1983 action against federal and state prosecutors it should be for *egregious* conduct only.[198]

Initially, I agreed with her statement, but began to wonder, "how should egregious conduct be defined in criminal prosecutions?" In fact, I begin to theorize what could be more egregious than for a person to spend months or even years[199] in prison because his conviction resulted from a prosecutor's desire to ignore basic federal criminal rules.[200] Apparently, the United States Supreme Court does not share my contempt for prosecutorial excuses. After all, simply reversing a defendant's conviction is no longer

---

197. West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

198. *See* Jackie Lu, *How Terror Changed Justice: A Call to Reform Safeguards that Protect Against Prosecutorial Misconduct*, 14 J.L. & POL'Y 377, 385–86 (2006) ("Findings of egregious prosecutorial misconduct could warrant overturning a conviction.").

199. *See* Don Terry, *Ex-Prosecutors and Deputies in Death Row Case are Charged with Framing Defendant*, N.Y. TIMES, A18 Dec. 13, 1996 [hereinafter *Ex-Prosecutors Charged*] (reporting that three former prosecutors and four sheriff's deputies were charged with conspiracy, perjury, and obstruction of justice, resulting in two Hispanic men being released from prison after years on death row). Three former Illinois County prosecutors and four sheriffs admitted to giving false testimony about important evidence that convicted the two men for the rape, abduction and murder of a ten-year-old girl in 1985. *Id.*

200. *See* Marshall J. Hartman & Stephen L. Richards, *The Illinois Death Penalty: What Went Wrong*?, 34 J. MARSHALL L. REV. 409, 422–23 (2001) (noting that "the responsibility of insuring that a criminal defendant receives a fair trial lies, in heavy measure, upon the prosecutor").

an option for the appellate courts because in *Smith v. Phillips*,[201] the Supreme Court "undermined the effectiveness of appellate reversal[202] as a sanction against offending prosecutors when it decided that the 'touchstone of due process analysis is the fairness of the trial, not the culpability of the prosecutor.'"[203]

During the 1980s, it was virtually impossible to see a man or woman on primetime television wearing provocative clothing or using profanity. Now, provocative clothing and profanity are the norm. Our culture has even developed animated television shows with men and women wearing provocative clothing, engaging in risqué bedroom scenes and using vulgar language. Primetime news stations in the 1980s would not show people lying dead in the streets while broadcasting the many conflicts in the Middle East. However, this is a new generation with a new set of rules.

Our society has become desensitized to the jaw-dropping events that commonly happen in our criminal justice system. Today, if a news station were to broadcast that a person was released from prison after serving over twenty-five years of incarceration because evidence was destroyed or misplaced by the prosecutor's office, society would be outraged and it would protest against the prosecutor's office for no more than a weekend. Yet, no one would actually be surprised that such a thing happened. The inmate's family and friends would certainly celebrate his release and applaud the fact that justice was finally received for their loved one.

No more than three days after this breaking story, it would be business as usual in the criminal courts. The prosecutor would shrug his shoulders for making the mistake, and the defense attorney would shake his head in disbelief, but the atmosphere in the courts would not change. Surely, nothing could be more egregious than to have an innocent man or woman, spend years living in a cell no larger than a public restroom stall. If a defense attorney were to manipulate or hide vital evidence from the State, there would not be any disagreement that he would face disciplinary and

---

201. *See* Smith v. Phillips, 455 U.S. 209, 219 (1982) ("Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.").

202. *See* Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L.J. 965, 976 (1984) (stating that reversing convictions as a sanction to prosecutors who used unconstitutional tactics will not act as a deterrent to prosecutors even though they may be somewhat beneficial to defendants).

203. *Prosecutorial Subordination*, *supra* note 17, at 262 (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)).

perhaps criminal penalties for obstruction of justice.[204] The same would not be true for prosecutors.[205]

An argument can be made that prosecutors should not be held accountable for a defendant's conviction when it was the defendant's own trial counsel who overlooked the exculpatory evidence.[206] These sorts of claims have generously been lodged against public defenders at both the state and federal levels. Public defenders have routinely been applauded for their efforts in upholding their duties and responsibilities while representing indigent defendants in the criminal courts. The legal community is well aware that public defenders lack the financial resources to compete against the massive resources available to state and/or federal governments.[207] Naturally, the financial resources of the government dwarfs the budget of any public defender's office—even in a recession period like the one this country is presently experiencing. Nevertheless, this fact should not depreciate the value of giving a defendant his right to a fair and impartial trial.[208]

Hiring medical experts to support a defendant's unique and perhaps novel defense is genuinely not an option that public defenders have.[209]

---

204. *See generally* Laurel Fedder, *Obstacles to Maintaining the Integrity of the Profession: Rule 8.3's Ambiguity and Disciplinary Board Complacency*, 23 GEO. J. LEGAL ETHICS 571, 571 (2010) (stating that "those licensed to practice law pledge to abide by certain rules and regulations promulgated to ensure that the legal system functions properly"). One legal scholar reviewed statistical data from the disciplinary board in the State of Texas, and learned that in 2008, the agency received over 7,000 complaints of attorney misconduct, but investigated less than twenty-five percent of those complaints. *Id.* at 580. If seventy-five percent of the complaints for attorney misconduct were dismissed, imagine the statistical data for prosecutorial misconduct where there is federal judicial precedence authorizing prosecutors to use unconstitutional tactics as ministers of justice. *Id.*

205. *See Prosecution Discipline*, *supra* note 184, at 282–83 (declaring that "[i]f disciplinary authorities severely punish lawyers who steal money from clients, it behooves our justice system to at least consider discipline of lawyers, who, intentionally or through gross negligence, steal years of a person's life and distort our justice system").

206. *See* Kelly v. Curtis, 21 F.3d 1544, 1556 (11th Cir. 1994) (declaring that the police, not the prosecutor should be held civilly liable for hiding or not revealing exculpatory evidence).

207. *See* Rebecca Marcus, Note, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219, 223 (1994) (noting the "combination of increasingly meager resources and soaring caseloads").

208. *See id.* at 228 ("The financial support given to public defenders' offices is simply insufficient to provide the truly effective assistance of counsel as mandated by the Constitution.").

209. *See id.* at 228–29 (stating that the total expenditures for the criminal justice system display an inequity in the distribution of resources, particularly for public defense).

These defenders have at least three hundred cases assigned to them and many of them can hardly recall the names of their clients correctly let alone the specific facts and circumstances of their cases.[210] Ridicules and a host of criticism are the dark clouds that hover over public defenders and given their large caseloads, it is not unusual for any of them to overlook a *Brady*[211] issue or not to pursue a specific argument that is buried in a police report or a drug analysis report.[212] Again, this does not give prosecutors a license to take advantage[213] of an unsuspecting defense attorney or public defender.[214]

Canvassing a typical criminal court, one will automatically notice one central theme—chaos. In fact, to say that the criminal court setting is chaotic is an understatement. The prosecutors are calling out the cases on the docket, while several private defense attorneys are talking to their incarcerated clients who are seated in the jury box or behind a protective glass located in the courtroom. The judge's minute clerk is calling out the available dates for status conferences and trials, and the public defender is quickly trying to get a gist of his client's case before the judge asks, "how does your client wish to plea?"

The function of a prosecutor and that of a defense attorney is uniquely different. Unlike the prosecutor, the defense attorney's obligation is to guarantee that his client receives a fair and speedy trial. Sometimes this obligation incorporates keeping certain evidence from being introduced or certain witnesses from testifying so that he can secure the best possible outcome for his client, which is generally an acquittal.[215]

---

210. *See id.* at 230 ("Some [public defenders] even say they feel they are violating their clients' constitutional rights because they are unable to spend the time or resources that they believe their client's cases merit.").

211. *See* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 481 (2009) [hereinafter *Revisiting Disclosure*] (noting the "increased attention to the prosecutorial suppression of material exculpatory evidence").

212. *See* Marcus, *supra* note 207, at 230 (stating that prosecutors have "free" access to lab work while defense programs must pay for it from their own budget).

213. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3(a), 8.4(c) (2007) (imposing on all attorneys the obligation to not only report unprofessional conduct, but to also refrain from engaging in conduct involving deceit, dishonesty, fraud and misrepresentation).

214. *See* Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 309 (2009) (discussing the significant disparities in resources allocated to the prosecution and the defense, resulting in excessive workloads in defender offices).

215. *See* JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT 23 (Matthew Bender & Co., 2d ed. 1999) (1985) (describing the function of the prosecutor and how it may have changed from being "champions of justice to advocates of victory").

The immense power harnessed by prosecutors has caused many of them to blur the lines between seeking justice and opposing their adversary.[216] One legal scholar eloquently stated:

> Prosecutors' unethical trial conduct is too common and too destructive to ignore. Any amount of misconduct by a prosecutor is intolerable because of the unique and powerful position he plays in the criminal justice system. Frequent misconduct is subversive to the perception that the American legal profession is capable of self-policing professional standards.[217]

Some prosecutors begin to rationalize the relevance of the exculpatory evidence they uncover during their investigation. They call witnesses that they know will give false testimony, but they do not find such action to be suborning perjury.[218] The American judicial system has been transformed from a quest for justice to an everyday wrestling match with the ultimate goal being to get a conviction.[219]

Because of the usually busy atmosphere of the criminal court system it is especially egregious for a prosecutor to take advantage of their authority and power by manipulating, hiding, or manufacturing evidence against the defendant.[220] Being a minister of justice denotes a sense of nobility and honor. The interests of the general public as well as the victims' interests and that of their families fall within the prosecutor's discretion and control. Therefore, any misconduct committed by a prosecutor while engaged in their prosecutorial function creates a negative perception before the public that can hardly be erased.[221] Jurists find it extremely difficult to sanction

---

216. *See Ex-Prosecutors Charged*, *supra* note 199, at A18 (quoting a special prosecutor that "there must always be a line between vigorous prosecution and official misconduct, between advocacy and unfairness, and between justice and injustice . . . [t]his indictment charges that [the] line was crossed by seven people").

217. Steele, Jr., *supra* note 202, at 979.

218. *See Revisiting Disclosure*, *supra* note 211, at 499 ("Prosecutors seeking to do justice may also feel obligated to use every legally permissible maneuver to convict a defendant they believe is guilty, and therefore will not necessarily dissolve exculpatory evidence to the defense if they believe the evidence is immaterial.").

219. *See* H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1697 (2000) (arguing that the legal community and society as a whole has "imposed fundamentally inconsistent obligations on . . . prosecutors, bending them into psychological pretzels by requiring them to be the neutral investigators and the 'quasi-judicial' adjudicator while at the same time imagining themselves as the zealous courtroom advocate").

220. *See generally* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 732 (2001) (providing a table of the stages of prosecutorial misconduct).

221. *See In re* Riehlmann, 891 So. 2d 1239, 1245 (La. 2005) (stating that the attorney

prosecutors because they are familiar with the prosecutor and are reluctant to speak ill[222] of someone of whom they have shared personal, academic, or professional experiences. [223]

As an appellate attorney in both state and federal courts in the State of Louisiana, I know the awkwardness of my conversations with my clients when I attempt to explain to them why a prosecutor's constitutional misjudgments does not automatically result in a new trial or a reversal[224] of their conviction.[225] As I discuss the *harmless error* rule, I feel that I have somehow betrayed[226] their trust since the harmless error doctrine permits prosecutors to trample[227] over the rules of criminal procedure with no criminal or civil repercussions. Academicians[228] have repeatedly

---

was publicly reprimanded for not disclosing that a former prosecutor had suppressed exculpatory blood evidence until five years later when the affected defendant was scheduled to be executed).

222. *See* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1067 (2009) (noting that courts often go out of their way to avoid publicizing the names of prosecutors, as in *United States v. Kojayan,* 8 F.3d 1315 (9th Cir. 1993)).

223. *See* Deborah Sontag, *The Power of the Fourth*, N. Y. TIMES, Mar. 9, 2003 38 (Magazine), *available at* http://query.nytimes.com/gst/fullpage.html?res=9F00EFDA1731F93AA35750C0A9659C8B63 (last visited Jan. 22, 2011) (stating that it is common practice for the judges of the Fourth Circuit to descend from the bench to shake the hands of the advocates following each argument) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

224. *See Evidence of Innocence*, *supra* note 185, at 507 (discussing how convinced a prosecutor must be of a defendant's innocence to rectify an apparent injustice through available judicial or executive processes).

225. *See* James Edwards Wicht, III, *There is No Such Thing as a Harmless Constitutional Error: Returning To A Rule of Automatic Reversal*, 12 BYU J. PUB. L. 73, 73 (1997) (discussing the subjective nature of the harmless error rule, which was created to prevent the setting aside of convictions for small errors that did not affect the parties' substantial rights).

226. Prosecutorial corruption apparently is not limited to U. S. borders. *See* Editorial, *Clarifying the Betrayal of Trust*, JAPAN TIMES, Oct. 5, 2010, *available at* http://search.japantimes.co.jp/cgi-bin/ed20101005a1.html (last visited Jan. 20, 2011) (discussing the corruption present in the Japanese public prosecutor's office) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

227. Contrast this view with a situation where the prosecutor learns of new evidence that casts doubt on a convicted defendant's guilt as opposed to actually withholding the exculpatory evidence from defense counsel or surrendering information that trial jurors may have considered extra-record evidence during its deliberations. *See* EVIDENCE OF INNOCENCE, *supra* note 128, at 474 (discussing the manner in which prosecutors should respond when new evidence casts doubt on the guilt of a defendant).

228. *See generally*, Alan Hirsch, *Confession and Harmless Error: A New Argument for the Old Approach*, 12 BERKELEY J. CRIM. L. 1, 2 (2007) (favoring a return to automatic reversal).

questioned the legitimacy of the harmless error rule because defense attorneys who commit the same serious constitutional violations receive an entirely different result.[229]

A defendant's right to counsel, right to a trial by jury,[230] right to compulsory process, and right to cross-examination[231] were originally intended to minimize the risk that an innocent person would be punished.[232] But the purpose of the Sixth Amendment is somehow lost in the translation when the public realizes that federal prosecutors who enjoy the authority to charge individuals with crimes can also distort the outcome of the criminal process—all with the court's blessings.

The courts and legal scholars concur that a prosecutor who would resort to using such tactics defaces the criminal justice process. While there may be no dispute that the prosecutor's actions are despicable, it is highly unlikely that the prosecutor would ever face any criminal, civil, or disciplinary sanctions for his behavior.

Unfortunately, the resounding problems with imposing civil penalties against prosecutors resides with those elected officials (i.e. judges), who are entrusted with the obligation of insuring that justice is served.[233] These jurists are hesitant[234] to hold these rogue prosecutors

---

229. *See* JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 175 (2000) (declaring that harmless error is a sham, resulting in a scenario in which most prosecutors are not disciplined for their misconduct).

230. *See* L.A. CONST. art. I, § 17; *see also* Todd E. Pettys, *Counsel and Confrontation*, 94 MINN. L. REV. 201, 201 (2009) (discussing the Sixth Amendment's Confrontation Clause and a defendant's right to cross-examination of a hearsay declarant).

231. John R. Kroger, *The Confrontation Waiver Rule*, 78 B.U. L. Rev. 835 (1996).

232. *See Evidence of Innocence*, *supra* note 185, at 482, (citing Rose v. Clark, 478 U.S. 570, 577–78 (1986) (declaring that these rights are essential for the trier of fact to reach a determination of guilt or innocence).

233. On December 9, 2010, the United States Senate convicted U.S. District Judge G. Thomas Porteous for maintaining a corrupt relationship with a local bail bondsman, accepting gifts from lawyers and friends to pay gambling debts, and committing perjury during the appointment process. Former Judge Porteous was the eighth federal district judge to be removed through the impeachment process. *See* Michael A. Memoli, *Senate Convicts Federal Judge; G. Thomas Porteous of Louisiana is Found Guilty of Corruption and Perjury*, LOS ANGELES TIMES, Dec. 9, 2010, at A12, *available at* http://articles.latimes.com/2010/dec/09/nation/la-na-porteous-impeach-20101209 (last visited Feb. 1, 2011) (reporting on the conviction of Judge Porteous for corruption and perjury charges) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

234. *See* Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 964, 972 (1984) [hereinafter *Unethical Prosecutors*] ("Frequently, the assignment of a prosecutor to one particular judge can lead to a team-member kind of rapport between a judge and 'his' prosecutor, a fact that facilitates violations of DR 7-110.").

accountable.[235] In fact, finding a judge who would be willing to jeopardize[236] his tenure for the sake of having a prosecutor publicly reprimanded would be as hard as finding a solution to the national debt crisis.[237]

Assuming arguendo that there is a judge who is willing to delve into the prosecutor's decision-making policies in a particular criminal case, the Supreme Court would make it virtually impossible for the affected parties to conduct the necessary discovery to support a request for judicial review of the misconduct.[238] There are no substantive regulations to guide or correct the prosecutor's behavior.[239] The defendants are too intimidated to pursue an action against the prosecutor's office for fear that they may be life-long criminal targets in future investigations. The courts have built a fortress around the evidence that supports[240] claims of prosecutorial misconduct and have called it *work product*.[241] On those rare occasions

---

235. Judges are less likely to sanction or even confront prosecutors for their misconduct out of fear that they would suffer politically or could themselves become targets of the all powerful prosecutor's office. *See, e.g.*, Edward M. Genson & Mark W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?* 19 LOY. U. CHI. L.J. 39, 47 (1987) ("Disciplinary sanctions are rarely imposed against prosecutors.").

236. A study that interviewed several public defenders about their positions have described the criminal judges that they have been exposed to in their practice as ex-prosecutors with an exclusive prosecutorial background who also viewed themselves as members of the law enforcement community. *See* Michael Scott Weiss, *Public Defenders on Judges: A Qualitative Study of Perception and Motivation*. 40 CRIM. L. BULL., No. 1, ART 2 (2004), [hereinafter *Public Defenders on Judges*].

237. However, there was a dissenting opinion issued in the case where the prosecutor brought a birthday cake into the courtroom, placed it in front of the jury, lit the candles and sung Happy Birthday to the murdered victim. The dissent called for the convictions to be reversed. *See Happy Birthday Case*, *supra* note 151.

238. *See* Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 281 (2007) [hereinafter *Unethical Prosecutors*] (noting that the Supreme Court has set nearly impossible standards for obtaining the necessary discovery to seek judicial review of certain types of prosecutorial misconduct).

239. The title *ministers of justice* "carries with it the specific obligation 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. " *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2007); *see also* Berger v. United States, 295 U.S. 78, 89 (1935) (reversing the defendant's prior conviction due to prosecutorial misconduct).

240. *See* Joe Palazzolo & Mike Scarcella, *Losing Integrity: How Justice Fumbled Its Case Against Ted Stevens*, LEGAL TIMES, Apr. 6, 2009, at 1 (laying out a timeline of events for the Stevens prosecution).

241. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 123–41 (2007) (examining the breadth of prosecutorial misconduct and the

where judicial review is permitted, the courts often issue decisions affirming the prosecutor's behavior by using the doctrines of *harmless error* and absolute immunity.[242] In fact, the Supreme Court noted that in the absence of procedural error, the defendant's only remedy for being wrongfully convicted was to submit a petition for executive clemency.[243]

With so many safeguards in place to shield prosecutors from public scrutiny, it is surprising that there are not more cases of defendants who have been wrongfully convicted. As the prosecutor's trial tactics become harsher and ruthless, the judiciary and the disciplinary boards become more helpless. Each one hoping that the other would be courageous enough to put on the armor of justice and confront this modern-day Goliath about their reprehensible behavior.[244] Unfortunately, neither party is willing to take any meaningful action towards stopping prosecutors from raping justice at will.[245]

In the past, the courts have voiced disapproval of a prosecutor's unethical tactics by issuing contempt citations, imposing fees, and costs, or criticizing[246] prosecutors in its opinions, but these methods of judicial discipline were the equivalent of throwing rocks at a battle tank.[247]

---

reasons why prosecutors often escape punishment).

242. *See* Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U.D.C. L. REV. 275, 276–77 (2004) [hereinafter *Prosecution Discipline*] (stating that the discipline for prosecutors is rare and that there are few, if any, consequences for prosecutorial misconduct) (quoting DEBORAH RHODE, IN THE INTEREST OF JUSTICE 160–61 (2000)).

243. *See* Herrera v. Collins, 506 U.S. 390, 416–17 (1993) (discussing executive clemency as a remedy for claims of innocence based upon the discovery of new evidence); *see, e.g.*, Moeller v. Weber, 689 N.W.2d 1, 7 (S.D. 2004) ("However, newly discovered evidence is not a sufficient ground for habeas relief where no deprivation of a constitutionally protected right is involved.").

244. Appellate courts point to the district courts for prompt and decisive action against prosecutors who have defaced justice and encourage the district court to use its admonishment and contempt powers to salvage the integrity of the judicial system. *See* United States v. Modica, 663 F.2d 1173, 1186 (2d Cir. 1981) (affirming defendant's conviction because the prosecutor's improper summation did not deprive him of a fair trial since the evidence of guilt was overwhelming).

245. *See* Aviva Abramovsky, *Traitors In Our Midst: Attorneys Who Inform on Their Clients*, 2 U. PA. J. CONST. L. 676, 676 (2000) (describing prosecutors' use of defense attorneys as informants against their own clients).

246. *See generally* Judith A. Morrow, Jackie A. Gardina & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from Reported Decisions*, 32 HOFSTRA L. REV. 1425 (2004) (analyzing judges' attitudes and approaches towards their role in regulating attorney conduct) [hereinafter *Judicial Attitudes*].

247. *See* Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors*, 65

The idea of assessing financial penalties against this political[248] titan causes district courts to create justifications for not doing so (i.e. the noble-cause ideology). Hence, absolute immunity and harmless error were created. The courts later developed qualified immunity to address those prosecutors who pushed the envelope but did so while acting in an administrative function. The courts herald qualified immunity as its response to the public's outrage and call for justice. Meanwhile, prosecutors stand on the sidelines calmly[249] filing their fingernails, realizing that qualified immunity is immunity nonetheless.[250]

Let's assume that a prosecutor was assigned to a murder case involving the death of a recently-elected city councilman. A police report was generated and the lead detective located a suspect who may have been responsible. Before the suspect was arrested, the prosecutor received information from the first deputy, indicating that he was going to be promoted to another division in the office. While celebrating his promotion, the prosecutor, just minutes later, received a supplemental police report, stating that the potential suspect had an alibi that made it highly unlikely that he was the murderer. The prosecutor gently placed the new report in the shredder,[251] put on his jacket and threw the file on the desk of his successor as he left the building to celebrate his promotion. The suspect is later arrested and convicted for murder. He spends ten years in prison before learning of the supplemental report that was destroyed.

If the defendant pursues a § 1983 action against the prosecutor who shredded the report, should the prosecutor's actions be protected by

---

FORDHAM L. REV. 355, 360 (1996) (asserting that the United States Supreme Court has curtailed the court's supervisory powers against offending prosecutors).

248. *See* Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 953, 1008 (2010) [hereinafter *Prosecuting Political Defendants*] (offering a proposal to slightly narrow the scope of the U.S. Attorney's Manual's model to limit prosecutorial discretion).

249. A prosecutor was sanctioned with a three-month deferred sentence for failing to turn over exculpatory evidence to the defense regarding a witness' inability to see the person who committed the crime because she did not have her eyeglasses on. *See* LA. CODE. CRIM. PROC. ANN. arts. 718, 719(A), 722 (1977) (amended 1997) (granting a defendant access to any exculpatory evidence within the possession of the prosecutor, even if the prosecutor does not intend to use the evidence at trial); *see also In Re* Jordan, 913 So. 2d 775, 781 (2005) (dismissing charges against a prosecutor for failing to disclose pertinent information from a witness to the defense).

250. *See* Burns v. Reed, 500 U.S. 478, 496 (1991) (finding qualified immunity to be more protective than absolute immunity).

251. *See Revisiting Disclosure*, *supra* note 211, at 488 (noting that a conscientious prosecutor would dismiss charges against a defendant in the face of exculpatory evidence).

absolute or qualified immunity? The Supreme Court's decision in *Van De Kamp* seems to reflect that the decision to shred the documents was done in the context of a prosecutor, not as a supervisor. However, a serious argument could be presented to show that the prosecutor's promotion prior to learning of the supplemental report placed him in an administrative role; thereby putting him within the parameters of qualified immunity.[252]

Realistically, the prosecutor's act of shredding valuable evidence in favor of the defendant would probably never be discovered. The defendant would spend the rest of his life in prison, and his entire existence on this earth would be reduced to an inmate number found on the left side of his orange jumper.[253] Regardless of whether the courts implement absolute or qualified immunity against the offending prosecutor, the result would be the same because the courts' primary objective is to protect the office, not the individual prosecutor. With this in mind, the prosecutor in our example would still be able to deflect a civil suit no matter what standard the court instituted.

PART III

Addressing the Misconduct

As already mentioned, qualified immunity is impenetrable and the Supreme Court has already guaranteed that no form of judicial or governmental oversight can be implemented to deter what prosecutors do best—obtain convictions. The Supreme Court noted in *Imbler*[254] that prosecutors are immunized from civil liability for acts *intimately*[255] *associated with the judicial phase of the criminal process*. By making this statement, the Supreme Court knew that it had just handed the nation's prosecutors the keys to the kingdom.[256]

---

252. The Supreme Court declared that qualified immunity would bar suit against government officials whenever "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

253. *See Judicial Attitudes*, *supra* note 246, at 1462 (noting that courts are primarily concerned with providing a fair, efficient and impartial forum for disputes).

254. *See* Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976) (noting the inadequacy of qualified immunity for protecting prosecutors form suits).

255. *See generally* Hayes v. Parish of Orleans, 737 So. 2d 959 (La. Ct. App. 1999) (affirming the lower court's decision that defendant prosecutor was immune from tort claims based upon the prosecutor's prior prosecution of the plaintiff).

256. *See generally* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*,

In *Aversa v. United States*,[257] the petitioner sued the Assistant District Attorney for willfully and purposefully telling a local and national news media that the petitioner was involved in drug dealing and money laundering when the prosecutor knew that the money discovered in the petitioner's bank accounts was obtained from a legitimate real estate venture. The petitioner's career as an accountant was ruined by the prosecutor's public statements. While the district and appellate courts characterized the prosecutor's actions as false, misleading, self-serving, unjust, and unprofessional, it still refused to pierce the prosecutor's protective coating because the prosecutor could not be held personally accountable due to qualified immunity.

In *Imbler*, Justice White stated in his concurrence that the immunity which the majority sponsored for prosecutors was to guarantee that these ministers of justice remain zealous in their law enforcement responsibilities. He went on to say that those who may be offended by the prosecutor's behavior can have recourse against them in the criminal courts and in the Office of Professional Responsibility (OPR).[258]

Classifying qualified immunity as a lesser grade of immunity for a prosecutor is quite frankly a hoax. Originally, qualified immunity was created as a mechanism to provide a quick resolution to claims of misconduct committed by government officials. The crucial element necessary for any government official to possess this type of immunity was to be in good faith and without any malice—both of which are questions of fact. If these issues can only be determined following a trial, then qualified immunity really is not immunity at all.

The United States Supreme Court's discussion in *Imbler* is a circular style of logic that is synonymous with the classical musical chairs games or the urban card shuffle games of the 1970s. Several federal circuit courts have shown their willingness to end this cycle

---

2005 BYU L. REV. 53 (2005) (arguing that absolute immunity for prosecutors should be abolished).

257. *See* Aversa v. United States, 99 F.3d 1200 (1st Cir. 1996) (affirming the dismissal of the plaintiff's slander action against a U.S. Attorney since he was acting within the scope of his employment as a prosecutor).

258. *See* Imbler v. Pachtman, 424 U.S. 409, 429 (1976) ("This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law.").

of abuse by finding that any prosecutorial decisions made with the specific intent to distort, fabricate, manipulate, or mislead (choose the adjective that best suits your tastes), should be held personally accountable.

Generally speaking, prosecutors will not prosecute their own.[259] Actually, there is a slim chance that these rogue prosecutors will ever be indicted. For a prosecutor to be indicted for the manner in which he or she tried a felony case will affect office morale and cause huge turnovers in the department.[260] Remember, the action that is being sued upon with prosecutors is that attorney's failure to abide by the Constitution—an action that should never happen among those who portray themselves as ministers of justice.[261]

Judges, who are generally former prosecutors,[262] view the act of disciplining other prosecutors as repulsive as mothers *eating their own young*.[263] In addition, the OPR, which is in the best position to supervise and discipline federal prosecutors, usually administers its decisions in secret and enjoys the added bonus of no public oversight.[264]

Ephraim Unell advocated that absolute immunity should either be totally abolished or significantly limited so that these aggrieved defendants who have been incarcerated well over a quarter of their lives can receive some sort of financial recourse against prosecutors

---

259. *See* Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 654 (2002) (noting that prosecutors rarely face professional discipline for discretionary decisions).

260. *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decision-Making*, 57 UCLA L. REV. 1023, 1035 (2010) (describing the negative effects that the threat of civil rights damage actions can have on public offices).

261. *See id.* (discussing constitutional criminal procedure).

262. A former prosecutor was charged in a forty-seven-count indictment for falsifying evidence that resulted in two men being wrongfully convicted. This former prosecutor was a presiding county judge at the time of his arrest. *See* EX-PROSECUTORS CHARGED, *supra* note 141, at 18.

263. One legal scholar described criminal judges as former prosecutors who often forget that they no longer should have an interest in getting the defendants convicted, and their behavior has been viewed as less tolerable than the actual prosecutors in the case. *See* SEYMOUR WISHMAN, CONFESSIONS OF A CRIMINAL LAWYER 1–10 (1981) (reflecting on the various complications of his work as a criminal defense attorney).

264. *See* Bradley T. Tennis, *Uniform Ethical Regulation of Federal Prosecutors*, 120 YALE L. J. 144, 180 (2010) ("Proceedings are conducted largely in secret, and the results are often unpublished, even within the Department of Justice itself.").

who only view convictions[265] as a form of career advancement.[266] This Author whole heartedly agrees with Unell that absolute immunity must be diluted in the wake of such an enormous amount of prosecutorial misconduct cases in our country. Nevertheless, a more structured conversation regarding the government's response to this growing epidemic must take place—immediately.

PART IV

The Proposal

Every seasoned personal injury trial attorney that I have had the pleasure to meet and witness in a trial proceeding has the same motto: whenever a claimant intends to bring a lawsuit against an agency, department, or entity, they must establish a paper trail,[267] which chronicles a pattern of negligent actions. In doing so, the claimant establishes a history for the trier of fact which can advance his cause of action and sustain his lawsuit in court.

The same ideology can be applied to prosecutorial misconduct cases, but the courts as well as disciplinary associations seem to be deathly afraid to approach this issue with any degree of candor.[268] United States President Barak Obama, our nation's 44th president, has made the concept of *transparency*[269] the hallmark of his administration; thus, this Author

---

265. *See generally* Ephraim Unell, *A Right Not To Be Framed: Preserving Civil Liability of Prosecutors in the Face of Absolute Immunity*, 23 GEO. J. LEGAL ETHICS 955 (2010) (arguing for the abolition of absolute immunity for activities undertaken within the scope of a prosecutor's duties).

266. *See* George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 112 (1975) (noting that young prosecutors may imitate their superiors' emphasis on obtaining convictions in an effort to maintain career stability).

267. *See* Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 588 (2002) (examining how courts convey the negligence standard to the jury and how juries understand and apply those instructions to the facts of the case); *see also* Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference*, 77 OR. L. REV. 497, 497 (1998) (examining the interrelationship of statutes and tort actions).

268. *See* Kenneth Rosenthal, *Prosecutor Misconduct, Convictions and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998) (noting a significant absence of disciplinary sanctions against prosecutors, even in egregious cases of misconduct).

269. *See* Peter Nicholas & Christi Parsons, *The 44th President: New Administration Gets to Work*, LOS ANGELES TIMES, Jan. 22, 2009, at A1 (reporting on President Obama's

believes that transparency should also be the resounding theme when dealing with prosecutorial misconduct.[270] The increased number of prosecutorial misconduct cases should spark the same intense form of public upheaval as the members of the Tea Party did regarding the issue of out-of-control government spending during the 2010 Congressional Mid-Term elections.[271]

Accordingly, this Author proposes that Congress, through the leadership and direction of the United States President, create a five-member committee, whose sole purpose would be to deal with the overwhelming amount[272] of prosecutorial misconduct complaints that have been lodged in both our federal and state court systems. The creation of this committee would be comprised of at least one Supreme Court Justice, the presiding United State Attorney General, the chairperson of the Senate Judiciary Committee, the United States Attorney who presides over the district where the misconduct occurred, and the chairperson of the American Bar Association. Just as it is done with the Equal Employment Opportunity Commission (EEOC),[273] the United States President can

---

efforts to make his administration more transparent); *see also* Sheryl Gay Stolberg, *On First Day, Obama Quickly Sets a New Tone,* N.Y. TIMES, Jan. 22, 2009, at A1, *available at* http://www.nytimes.com/2009/01/22/us/politics/22obama.html (last visited Feb. 1, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice) (reporting that President Obama planned to move swiftly to impose new rules on government transparency and ethics).

270. *See generally* Russell G. Pearce, *Professional Responsibility for the Age of Obama*, 22 GEO. J. LEGAL ETHICS 1595 (2009) (advocating the potential greatness that morally responsible lawyers can realize in their everyday work).

271. *See* Liz Robbins, et. al., *Protesters Air Views on Government Spending at Tax Day Tea Parties Across United States*, N.Y. TIMES, Apr. 16, 2009, at A16, *available at* http://www.nytimes.com/2009/04/16/us/politics/16taxday.html (last visited Feb. 1, 2011) (reporting on Tea Party protests against large government spending) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); *see also* Janie Lobber & Eric Lipton, *G. O. P. Insider Fuels Tea Party and Suspicion*, N.Y. TIMES, Sept. 19, 2010, at A1, *available at* http://www.nytimes.com/2010/09/19/us/politics/19russo.html (last visited Feb. 1, 2011) (reporting on Sal Russo's efforts to advance Tea Party ideals) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

272. In the late 1980s, the EEOC amended its administrative procedures by developing and training private attorneys in Title VII actions to address its immense backlog of pending charges and to assist overburdened claimants with their litigation efforts. *See* Allen Greenberg, *NAACP Sees Rising Job Discrimination Against Minorities*, UPI, Jan. 12, 1988 (quoting NAACP attorney James Foster that EEOC investigators are overwhelmed by a backlog of complaints).

273. The Equal Employment Opportunity Commission (EEOC) was created as a mechanism to attack employment discrimination through conciliation and persuasion inside the guise of Title IV Civil Rights Act of 1964. *See* Laurie M. Stegman, *An Administrative Battle of the Forms: The EEOC's Intake Questionnaire and Charge of Discrimination*, 91

appoint a general counsel to this committee, and anoint them with the authority to provide direction, coordination, and supervision to each member of the panel.

Although these complaints can encompass state prosecutors, this Author argues that all complaints be filed with this committee. This committee would have original authority over all prosecutorial misconduct complaints, and it would designate the specific format for all written complaints as well as issue a written opinion to the aggrieved defendant—all of which is similar to the "right to sue" letters issued by the EEOC[274] in employment discrimination suits.[275] Committee opinions would be posted on either its own website or on the website for the American Bar Association. In those instances where a defendant was convicted through the prosecutor's deceptive, unethical, and unconstitutional trial tactics during either the investigative or guilt phase of a criminal proceeding, the aggrieved defendant can file a claim before this committee, outlining his/her entitlement to file a § 1983 action against the individual prosecutor responsible for their wrongful conviction.[276]

The complainants who are successful in receiving a "right to sue" letter from this committee can file their lawsuit in federal court and litigate their causes of action before a trier of fact. The complainants would have their complaints summarily dismissed, but can find solace in the fact that a

---

MICH. L. REV. 124, 124 (1992) [hereinafter *Administrative Battle*] (chronicling the creation of the EEOC as a mechanism to seek compliance with the Civil Rights Act of 1964).

274. As it relates to the EEOC, "if the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b) (2010).

275. Actually, the EEOC has a two-step filing process embodied in a pair of forms: the Intake Questionnaire, which solicits preliminary information (i.e. name, address, brief description of the discriminatory act complained of and the employer), and the Charge of Discrimination, which formally engages the EEOC's administrative machinery. *See* EEOC Form 283; *see also Administrative Battle*, *supra* note 215, at 126 (describing the EEOC's two-step filing procedure).

276. A New York State Supreme Court justice ordered the release of a man who spent eighteen (18) years in prison for a crime he did not commit. The release of Fernando Bermudez was ordered because the court had sufficient evidence to establish that Bermundez was "actually innocent" of the crime he was sent to prison. The *actual innocence* analysis permitted the courts to avoid procedural roadblocks in the criminal process when there was compelling evidence of innocence. John Eligon, *Hope for the Wrongfully Convicted*, N.Y. TIMES, Nov. 23, 2009, at A23, *available at* http://www.nytimes.com/2009/11/23/nyregion/23innocence.html (last visited Feb. 1, 2011) (quoting Glenn A. Garber, founder of the Exoneration Initiative, an organization that focuses on innocence claims that lack DNA evidence) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

national register would be generated due to their petition being filed and that their complaints would be on that attorney's record, indicating to the public that this prosecutor had engaged in suspected unconstitutional behavior while in the prosecutor's office.

Just as the EEOC is a federally-funded agency that was created to enforce federal laws prohibiting employment discrimination in the workplace, the oversight committee would also be federally funded and endowed with the responsibility of insuring that justice and constitutional fairness is served by every government attorney in every criminal proceeding in this country.

Undeniably, my argument for such a committee will be met with an unyielding amount of criticism and judicial scrutiny.[277] Yet, it would be a true injustice for us to continue to broadcast to the public that the United States Attorney's office and the numerous district attorney offices across this country are serious about obtaining justice for the victims of crimes while maintaining a *business as usual* demeanor in court. Promoting an agenda that says prosecutorial misconduct will not be tolerated should also come with zero tolerance for prosecutorial excuses, indiscretions, grave misjudgments, and unethical behavior.[278]

CONCLUSION

There is no dispute that criminals deserve to be convicted and punished for the crimes they have committed whether it be misdemeanor offenses or crimes of a heinous and violent nature. This Author asserts that the courts should always be blind to a defendant's racial and socio-economic backgrounds while ruling on a case on its docket. Unfortunately, the persons whom we have entrusted to guard justice and to protect her purity have been raping and molesting her innocence at will and with the blessings of the federal government.

These ministers of justice have repeatedly been caught in the act of subverting justice; yet, they go unpunished. They proclaim to the viewing public that their actions could not possibly constitute rape because they had the audacity to wear jurisprudential condoms called absolute immunity. Legal scholars have warned the judiciary that giving these prosecutors the keys to the proverbial *hen*

---

277. *See Prosecuting Political Defendants*, *supra* note 248, at 979 (noting that the decision to drop the Stevens prosecution gave rise to a large amount of criticism).

278. *See* Steve Weinberg, *Cross-Examination: Local Prosecutors Are the Last Sacred Cow in Journalism.*, QUILL, Jan. 1, 2004, at 12 (examining journalists' efforts to investigate and report on prosecutorial misconduct).

house would only end in chaos, but their warnings were overpowered by the courts' need to protect the institution.

The harm these rogue prosecutors have caused to the image of justice indisputably outweighs any argument the federal judiciary can offer to protect its favorite son. When these prosecutors are finally reprimanded for their actions, the only form of punishment they suffer is a lowering of their precious *win-loss* ratios and perhaps a minor setback to their promotions.[279]

The rationale behind assessing financial sanctions against prosecutors for their misconduct is gaining stronger public support. But before the courts order prosecutors to take out their checkbooks, the federal government ought to establish an oversight committee to handle the large number of prosecutorial misconduct cases that have flooded the justice system. The committee should also maintain a record of these offending prosecutors as well as the districts where these complaints have surfaced.

Both the offending prosecutor and his respective supervisor will be required to submit a response to each and every claim listed in the petitioner's complaint. To differentiate itself from the typical disciplinary boards across the country, the committee will place each complaint on its website as well as the committee's decisions. Anyone interested in reviewing a particular prosecutor's disciplinary record will be able to research this information by using the prosecutor's name, state where they are licensed, and their respective attorney number. The committee's investigative and decision–making authority will parallel that of the EEOC.

As it relates to the EEOC, the members of the commission will be appointed by the United States President and all of the panel meetings will be transcribed and available to the public.[280] Likewise, the oversight committee that I am proposing should also be vested with the same authority as the EEOC, except in the realm of prosecutorial misconduct complaints. This committee (or commission) will have original authority over all prosecutorial complaints and the complaints must present sufficient information for the committee to approve the complainant's right to pursue their cause of action in a court of law. By establishing this committee, we can then begin the process of protecting the interests and innocence of our most prized citizen—justice.

---

279. *See Prosecutorial Subordination of Perjury*, *supra* note 17, at 260 (examining the pros and cons of sanctioning prosecutors who suborn perjury).

280. *See* Joe Palazzolo & Mike Scarcella, *Losing Integrity: How Justice Fumbled Its Case Against Ted Stevens*, LEGAL TIMES, Apr. 6, 2009, at 1 (noting a desire to regain public confidence in the wake of the Stevens prosecution).