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## A Return to the Grand Jury to Promote a Zen Zeal in Prosecutors

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## Slip Opinions

### [A Return to the Grand Jury to Promote a Zen Zeal in Prosecutors](#)

**By Melanie D. Wilson \***

April 2, 2008

DNA evidence has freed at least 209 convicted people.[1] Sometimes DNA evidence exonerates a person. Other times, it does not. When it does not exonerate, a prosecutor must decide whether to persist in further prosecution of the defendant. I propose a fresh, but simple, solution for prosecutors who face such choices. To protect the interests of defendants and victims, and to assuage society's need for fair and accurate outcomes, prosecutors should represent these cases to a grand jury. The grand jury is an easily convened neutral party that can dispassionately evaluate the evidence, old and new, and determine whether a new trial is warranted.

#### Recent Example

After spending thirteen years in a New York penitentiary, Lynn DeJac, a forty-four-year-old woman convicted of strangling her thirteen-year-old daughter, was released from prison on November 28, 2007.[2] DeJac was not released on parole or freed after completing her sentence. She left prison after newly tested DNA evidence suggested that her former boyfriend, Dennis P. Donahue,[3] probably murdered the girl.[4] At trial, Donahue had testified against DeJac in exchange for immunity from prosecution.[5]

DeJac's story of release on new evidence is unusual, but not unique. As of December 2007, at least 209 people have been cleared by forensic evidence.[6] But DeJac's case is curious for another reason. Frank C. Clark, the district attorney for Erie County, Buffalo, New York, announced that he would retry DeJac.[7] At first, Clark planned to pursue DeJac for second-degree manslaughter, a lesser crime with a maximum punishment shorter than the length of sentence DeJac has already served.[8] Thus, even if convicted again, DeJac would not have returned to prison. Later, the district attorney changed his mind and said that his office was contemplating a harsher, second-degree murder charge.[9] According to Clark, "If the judge finds in our favor, second-degree murder is back on the table[.]"[10] He added, as if to gloat, "If she is convicted of that charge, she could wind up going back to prison for another 12 years." [11]

Should the district attorney continue to prosecute DeJac who has served a thirteen-year prison sentence for a crime it appears she did not commit? Clark argues, "The question of [DeJac's] guilt or innocence still has not been determined. That's why we have every trial." [12] One wonders whether Clark is qualified to decide whether or not to pursue further prosecution of DeJac. While prosecutors are accustomed to deciding whether, who, and what to charge, Clark's professional objectivity is dubious, considering the posture of DeJac's case. The new DNA evidence not only casts doubt on DeJac's guilt for murder, but it also suggests that Clark's office erred when it granted Donahue immunity from prosecution. What should Clark and others like him do? My solution—return to the grand jury. The grand jury serves as an easily convened neutral party to evaluate the evidence, both old and new.

#### The Prosecutor's Bias

Clark's decision to continue with the prosecution of DeJac is questionable. One detective from the Buffalo Police Department's Cold Case Squad is convinced that DeJac did not kill her daughter.[13] DNA consistent with Donahue's genetic material was found in DeJac's daughter's bed, on the wall behind the girl's body, and inside the girl's vagina.[14] In addition, detectives now question DeJac's physical ability to commit the crime and wonder whether she had sufficient time to accomplish the killing. According to one detective, "DeJac didn't have the time—or the strength—to subdue and kill her daughter . . ." [15] Detective Dennis Delano explained further: "Any person on the street could read the facts available to us and tell that Lynn DeJac could not possibly have killed her daughter[.] . . . In my mind, she's 100 percent innocent." [16]

District Attorney Clark has rebuked the law enforcement officers for talking about DeJac's innocence and has discarded the officers' rational interpretation of the evidence. After filing a brief opposing DeJac's motion for a new trial, District Attorney Clark rationalized his decision: "They can't refute one single, solitary fact that the jury relied on to convict her." [17] Clark exclaimed: "They have not demonstrated to my satisfaction that the newly discovered evidence would create a probability that the verdict would be more favorable to her." [18]

Although the district attorney's response to the new evidence seems unduly emotional, if not visceral,[19] rather than intellectual or logical, there is one legitimate reason to re-try DeJac. As defense attorney Barry Covert explained, "Clark has the obligation to proceed because of a grand jury indictment that still has counts against DeJac." [20] In other words, over a decade ago, a grand jury concluded that there was probable cause to charge DeJac with murder and manslaughter. Arguably, DeJac's guilt or innocence remains undecided for the lesser crime of manslaughter.

Unfortunately, Clark's hyperbolic opposition to DeJac's request for a new trial, coupled with his admonishment of law enforcement officers for suggesting her innocence, gives the definite impression that the district attorney equates successful prosecution with victory, not with accurate, proportional and fair outcomes. This overzealous prosecutorial attitude is not new.[21] But it is unfortunate. Prosecutors, like Clark, serve as the chief law enforcement officers in their counties. In that capacity, they set the tone of justice for everyone impacted by the criminal justice system.[22]

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## Disincentives for Accurate Outcomes and a Lack of Legal Constraints to Guide Prosecutors

Why wouldn't a competent district attorney welcome an accurate outcome in a criminal prosecution, even if accuracy means an acquittal? Politics, of course. No district attorney is elected on her fair and accurate acquittal rate. Acquittals lose elections. Furthermore, defendants like DeJac are not popular people.<sup>[23]</sup> Thus, the political process that sustains prosecutors like Clark creates incentives for them to form a win-or-nothing attitude.

The lack of legal constraints on a prosecutor's discretion increases the likelihood that prosecutors will become obsessed with winning. Federal and state laws impose virtually no restrictions on prosecutors. New York State is no exception. The New York State Constitution requires that every public official take an oath of office, but that oath dictates little about how prosecutors should fulfill their duties.<sup>[24]</sup> It vaguely proclaims that officers must "support the constitution of the United States, and the constitution of the State of New York, and . . . faithfully discharge the duties of the office . . . according to the best of [their] ability[.]"<sup>[25]</sup> The other arguably relevant legal constraint on Clark is the New York Lawyer's Code of Professional Responsibility. But that Code simply prohibits a prosecutor from instituting criminal charges if it is obvious that such charges are unsupported by probable cause.<sup>[26]</sup>

## What Action Should a Conscientious Prosecutor Take?

To ensure that he fulfills his duty to zealously represent the interests of the thirteen-year-old murder victim, the residents of his county, and society, while also protecting the arguably competing rights of DeJac to procedural and substantive due process, Clark (and other prosecutors who are confronted with similar scientific evidence) should turn to the system already in place to protect these interests—the grand jury. In my view, allowing a grand jury to reconsider the case, in light of the change in circumstances and the discovery of new evidence, will promote a balanced, or "zen" zeal in prosecutors.<sup>[27]</sup>

Once a trial judge determines that new evidence casts sufficient doubt on the outcome of a defendant's conviction to warrant a new trial, the case is in a "do-over" posture. It should be treated as a new case. One primary purpose of the grand jury is to serve as a "buffer or referee between the Government and the people."<sup>[28]</sup> Although a district attorney is under no legal obligation to re-present an indictment,<sup>[29]</sup> doing so serves all of the interests of a laudable criminal justice system.<sup>[30]</sup> By allowing a grand jury to decide anew whether or not there is sufficient evidence to proceed against DeJac, Clark can ensure procedural and substantive fairness for DeJac and her daughter, while at the same time beginning to restore society's confidence in prosecutors. He also sidesteps any claim by political opponents that he is "soft" on crime or too "defendant friendly." Additionally, re-presenting DeJac's case to an impartial grand jury sends a message that prosecution is, once again, about truth and fairness, not solely about winning. While re-presenting the case under these circumstances may be unprecedented, prosecutors routinely supersede indictments to add charges. Why shouldn't they return to the grand jury to promote integrity in the system?

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[1] David Staba, *DNA Evidence Frees a Woman Convicted of Killing Her Daughter*, N.Y. TIMES, Nov. 29, 2007, at B1.

[2] *Id.*

[3] Donahue was recently charged in the murder of another female who was found strangled and naked on her bed in 1993. Donn Esmonde, Commentary, *DNA Closes the Case for DeJac Retrial*, THE BUFFALO NEWS, Nov. 21, 2007, at B1. Donahue is also a "person of interest" in two other strangulation slayings. See Tom Precious, *For Imprisoned Mother, a Scream – and Then Hope With Ex-Boyfriend in Custody, DeJac Believes She'll Be Vindicated in '93 Murder of Daughter*, THE BUFFALO NEWS, Sept. 20, 2007, at A1.

[4] Gene Warner, *DeJac Case Becomes Battleground for Justice*, THE BUFFALO NEWS, Nov. 17, 2007, at A1.

[5] Staba, *supra* note 1.

[6] *Id.*; see also Kirk Johnson, *Man Imprisoned for 9 Years for Murder Is Released in Wake of DNA Evidence*, N.Y. TIMES, Jan. 23, 2008, at A14; Jeff Carlton, *DNA Tests Help Free Man Who Spent 26 Years in Prison*, USA TODAY, Jan. 4, 2008, at 2A.

[7] Staba, *supra* note 1.

[8] *Id.*

[9] Matt Gryta & Dan Herbeck, *DeJac's New Trial Rife with Hazards*, THE BUFFALO NEWS, Jan. 17, 2008, at B1.

[10] *Id.*

[11] *Id.*

[12] Staba, *supra* note 1.

[13] Warner, *supra* note 4. Detective Dennis Delano stated, "In our opinion, after investigating this case and looking at all the available evidence, Lynn DeJac could not have killed her daughter." *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590 (2006) (arguing that prosecutors sometimes fail to make decisions that rationally further justice because prosecutors are irrational human beings).

[20] Julie Fine, *Lynn DeJac Is Ready for a New Trial*, WKBW TV Buffalo, N.Y., Nov. 29, 2007 (on file with author).

[21] See Burke, *supra* note 20 (citing several instances of prosecutorial overzealousness); see also Duff Wilson, *Prosecutor Loses Effort to Dismiss Main Ethics Charge*, N.Y. TIMES, Apr. 14, 2007, at A1 (recounting the Durham County, North Carolina, District Attorney's pursuit of sexual assault charges against three Duke students whom the prosecutor later agreed were wrongly accused).

[22] See Tresa Baldas, *Prosecutors Feeling Impact of 'Duke' Effect*, NAT'L L.J., May 18, 2007, available at <http://www.law.com/jsp/article.jsp?id=1179392697425> (noting that prosecutors across the country are seeing fallout from the Duke prosecutor's overzealous pursuit of a case, as defense attorneys use the prosecutor's actions to discredit other criminal prosecutors).

[23] See Buffalo Pundit, *Lynn DeJac*, available at <http://buffalopundit.wnymedia.net/blogs/archives/5985> (Nov. 29, 2007) (containing responses to DeJac's release).

[24] See N.Y. CONST. art. XIII (amended 1938).

[25] *Id.*

[26] See N.Y. LAWYER'S CODE PROF'L RESPONSIBILITY DR 7-103 (2002).

[27] Zen is a school of Buddhism that emphasizes enlightenment through meditation and insight. OXFORD AMERICAN COLLEGE DICTIONARY 1662 (2002).

[28] United States v. Williams, 504 U.S. 36, 47 (1992); *id.* at 51 (noting that the grand jury "sits . . . to assess whether there is adequate basis for bringing a criminal charge").

[29] *Id.* at 51 (rejecting the notion that a prosecutor is obligated to present exculpatory evidence as well as inculpatory evidence to a grand jury).

[30] New York's Rules of Criminal Procedure appear to allow for such dispassionate decision making. See N.Y. R. CRIM. P. 190.05 (describing the role of the grand jury in New York as "to hear and examine evidence concerning offenses"); N.Y. R. CRIM. P. 190.55(2)(c) (explaining that "[a] district attorney may submit to a grand jury any available evidence concerning an offense prosecutable in the courts of the county").



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