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**Absolute Immunity: A License To Rape Justice At Will**

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Kenneth has been the lead prosecutor in the trial section of the District Attorney’s Office for the past five years. He has been solicited by the 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. 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 140 cases he has tried in his ten years with the prosecutor’s office.

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. For example, he took the jury through each critical fact leading to

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2 Storyteller Kendall Haven claims that stories go back 100,000 years in human history, even predating language. Kendall Haven, Story Proof: The Science Behind the Startling Power of Story 3 (Libs. Unlimited 2007); see also Kenneth D. Chestek, Judging by the Numbers: An Empirical Study of the Power of Story, 7 J. ALWD 1, 3 (Fall 2010), (arguing the persuasive power of storytelling because “stories are inherently interesting. 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”).


4 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. Helena Whalen-Bridge, The Lost Narrative:
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. 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 for commercial businesses. Kenneth believed that the defendant was the only reasonable suspect that could have killed his thirty-year old girlfriend.

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 that 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 badly wanted the defendant to be prosecuted for this crime.

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

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1. The Connection Between Legal Narrative and Legal Ethics, 7 J. Ass’n Legal Writing Directors 229, 232 (Fall 2010).
3. 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. Carolyn Grose, Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom, 7 J. Ass’n Legal Writing Directors 37,47, (quoting Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Road Map (Clin. Leg. Educ. Assn. 2007))
4. Geoffrey S. Corn argued that imputed liability should be lodged against the prosecutor’s supervisor or commander, and 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. 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 (Fall 2009).
5. Since prosecutors often receive intense internal and external pressures to convict at all costs, 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. See Ethical Prosecutor, note 2, p. 2152.
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 position in the Hawaiian “hang loose” 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\(^{10}\) of the alleged victim, Defense Counsel sincerely believed that the result would either be a hung jury or an acquittal.\(^{11}\)

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 realized 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 sentenced the defendant to the mandatory LIFE\(^{12}\) sentence. Approximately one month after his client was convicted of Second Degree Murder, Derrick began combing through

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\(^9\) The way to connect with the jury and communicate the strength of your conviction in your client’s cause is by the effective use of your voice. Actually, your 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. Charles Becton, Using Your Voice in Closing Argument, 842 PRACTISING LAW INSTITUTE 383 (December, 2010), (quoting Sir Ernest Barker, Introduction to THE COMPLETE PLAYS OF WILLIAM SHAKESPEARE at xx (1984).

\(^{10}\) See generally West v. Foster, 2010WL3636164 (D. Nev. 2010).

\(^{11}\) 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. See Ramsammy v. State, 43 So. 3d 100 (Fla. App. Ct. 2010).

\(^{12}\) See LSA-R. S. 14:30.1
all of the jury questionnaires, hoping to find some evidence of impropriety on the State’s behalf. One by one, Derrick reviewed and dismissed all of the questionnaires, finding nothing\footnote{Prosecutorial misconduct of not easily discovered because it is inherently difficult for defense attorneys and defendants alike to find out the exculpatory material was withheld or that information giving rise to a viable defense even existed, see generally, Malia N. Brink, \textit{A Pendulum Swung Too Far: Why The Supreme Court Must Place Limits on Prosecutorial Immunity}, 4 CHARLESTON L. REV. 1 (Fall 2009).} to justify a claim of prosecutorial misdealing.

After doing a little more research, Derrick narrowed his review to the foreperson, who happened to be 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. 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 the State.\footnote{Rules 8.3(a) of the rules of Professional conduct dictate 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. See also \textit{In re Riehlmann}, 2004-0680 (La. 1/19/05), 891 So. 2d 1239.}

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.\footnote{Certain permissible inferences can be used to show the requisite mental state. Erica Summer, \textit{Post-Trial Jury Payoffs: A Jury Tampering Loophole}, 15 ST. JOHN’S J. LEGAL COMMENT. 353 (Spring 2001).} 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.\footnote{Id., p. 365, (stating that “juries are supposed to remain impartial in order to serve the interests of justice and to help insure a fair trial; 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”).} 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, but 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 Kenneth. 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. 17

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 defendant’s conviction and sentence. 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 21 But he would first have to show that Kenneth’s actions were not covered by the absolute immunity umbrella that seems to always make prosecutors invincible when it concerns a criminal prosecution. 22

The United States Supreme Court’s decision in Van De Kamp v. Goldstein, 23 indicated that prosecutors like Kenneth should not be penalized for using trial tactics like the one used above because of the enormous responsibilities that prosecutors have in the adversarial criminal justice system. To this Court, it was better “to leave unredressed the

17 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. Benjamin M. Lawsky, Limitations on Attorney Post-Verdic t Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant, 94 COLUMBIA L. REV. 1950 (Oct. 1994).
18 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 referred to as “Prosecutorial Subordination of Perjury”], (declaring that “most subordination of perjury claims against prosecutors are not discovered until long after the trial is over”).
20 “[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 (section 1983”). See 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 (2005); see also Richardson v. McKnight, 521 U. S. 399, 403 (1997), (stating 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)).
21 See Daniels v. Kieser, 586 F. 2d 64 (7th Cir.), 441 U. S. 931, 99 S. Ct. 2050, 60 L. Ed. 2d 659 (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). Further, the Liability Reform Act immunizes federal employees for liability for allegedly slanderous conduct committed within scope of employment. See 28 U. S. C. A. § 1346(b), 2671-2680.
22 See 42 U. S. C. § 1983; see also Chavers v. Stuhmer, 786 F. Supp 756 (E. D. Wis. 1992), (maintaining 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, 111 S. Ct. 1934, 1939, 114 L. Ed. 2d 547 (1991).
wrongs done by a dishonest officer(s) than to subject those who try to do their duty to [the] constant dread of retaliation.” In other words, the United States 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. 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 which appears to get stronger as prosecutors become more and more ruthless towards criminal defendants. The case of Pottawattamine County v. McGhee, 24 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 case because the parties ultimately settled.

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 court would not dare to pronounce his behavior as prosecutorial misconduct that would fall outside the his duties as a prosecutor.

Some trial attorneys, including this Author would hesitate to describe Kenneth’s actions as a form of jury tampering, 25 but such an accusation would be difficult to prove because while the potential juror admitted to knowing Kenneth, neither he nor Kenneth

24 See Pottawattamie, 130 S. Ct. 1047.
25 See United States v. Locascio, 6 F. 3d 924 (2nd Cir. 1993); and Barnett v. United States, 870 F. Supp. 1197 (S. D. N. Y. 1994), (stating that a prosecutor’s act 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).
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 Kenneth’s relationship with the jury foreperson. 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 this person prior to the completion of voir dire. 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. Goldstein did not have a criminal history. He did not own a firearm, and there was no information to suggest that Goldstein even knew the victim. There was no physical evidence linking Goldstein to the victim. 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. Accordingly, Goldstein was arrested and the both the prosecutors and the police officers deferred getting any credible evidence against Goldstein until he was formerly arrested.  

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

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26 Likewise, the role of public opinion weighs heavily on recusal decisions among judges; 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. Bert. Brandenburg, *The Role of Public Opinion in the Debate Over Recusal Reform*, 58 Drake L. Rev. 737, 748 (Spring 2010).


28 See *Van De Kamp*, 129 S. Ct. at 859.

their jobs easier. 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.

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

In exchange for his assistance, the prosecutors agreed to offer Fink favorable dispositions in all of his pending cases in their office. Fink allegedly secured a statement from Goldstein that supposedly implicated him in the murder. The prosecutors used this statement and Goldstein was ultimately convicted. Ten years after his conviction, Goldstein learned that the District Attorney had on-going agreements with various jailhouse informants, including Eddie Fink. 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.30

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. 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.31 Thus, according to Goldstein, the prosecutors abused its authority by not disclosing this information to his attorney pursuant to Brady v. Maryland32 and Giglio v. United States.33 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.

30 See Van De Kamp, 129 S. Ct. at 856.
31 Id.
In *Brady*, both the defendant (Brady) and a co-defendant were convicted of first degree murder and given a death sentence after their convictions. 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. 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. The district court disagreed, but the Maryland appellate court opined that the prosecution’s failure to submit all statements to the defendant’s 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.\(^\text{34}\)

The United States Supreme Court granted writs, and ultimately agreed that the prosecution’s suppression\(^\text{35}\) of the extra-judicial statement was a violation of due process.\(^\text{36}\) However, it concluded that remanding the case to the district court for a re-trial 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. Thus, the high court concluded that the defendant’s due process rights were not “technically” violated.

In *Giglio v. United States*,\(^\text{37}\) 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 and the government failed to disclose this information to Giglio’s attorney. 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\(^\text{38}\) issue for the jury and the jury was entitled to know whether the co-conspirator was truthful.

\(^{34}\) See *Brady v. Maryland*, 373 U. S. at 85.

\(^{35}\) See *United States v. Femia*, 9 F.3d 990 (1st Cir. 1993), (reviewing the prosecutor’s immunity defense when the government suppresses exculpatory evidence).

\(^{36}\) The United States Supreme Court stated definitively that the prosecutions 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. See Brady, 373 U. S. 87; see also *Wilde v. Wyoming*, 362 U. S. 607, 80 S. Ct. 900, 4 L. Ed 2d 985 (1960).


\(^{38}\) See *Napue v. Illinois*, 360 U. S. 264, 79 S. Ct. 1173, 1178, 3 L. Ed. 2d 1217 (1959), finding that the State’s use of known false evidence that is material to the defendant’s guilt or punishment is incompatible
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. But first, Goldstein need to clearly clear the absolute immunity hurdle. 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 prosecutorial function. The Supreme Court disagreed, choosing to group every decision made by a prosecutor in a criminal case as ultimately being judicial in nature.

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 the 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.39

For instance, the judges on the United States Sixth Circuit strongly reprimanded federal prosecutors for their “win at any cost”40 demeanor in the John Demjanjuk case in 1993.41 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”, who murdered hundreds of thousands in the Nazi concentration camps in Sobibor, Poland.42

with “rudimentary demands of justice”; see also Pyle v. Kansas, 317 U. S. 213, 63 S. Ct. 177, 87 L. Ed. 2d 214 (1942).
40 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. See Ethical Prosecutor at p. 2147.
In another matter, a federal district court in Illinois ordered new trials for defendants convicted under the RICO statute for supplying drugs to local gangs when 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. 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. 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. 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.

In Santa Clara County, California, local citizens had to endure paying over $5 million dollars for cases in which prosecutors either authorized illegal searches or wrongfully convicted its citizens for various felony offenses before discovering their innocence. 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.

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 see are policemen taking the law into their own hands by shooting first and asking questions later. They witness judges abusing their authority for the purpose of satisfying their sexual and emotional

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45 See Burnside 824 F. Supp. at 1243.
48 See Brendan McCarthy, Glover Case Echoes Era of Algiers Seven: Lessons of 30 Years Ago Were Never Learned, Some Say. TIMES-PICAYUNE Sec. A (Nov. 7, 2010).
49 See Jones v. Luebbers, 359 F. 3d 1005 (8th Cir. 2004).
50 A federal district judge who was appointed to the bench by former U. S. President Ronald Reagan in 1987 plead guilty to possession of illegal drugs and for giving an Atlanta stripper, who was also a convicted
They read about doctors who amputate the wrong limbs from their patients because they have been working double shifts at the hospitals. 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, whom we have entrusted with the responsibility of prosecuting criminals, actually engaging in criminal behavior only to get convictions. Understandably, the weight that rests on a prosecutor’s shoulders is great, 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, the protection of the administration of justice, and the preservation of confidence in the legal profession.

On the other hand, how to prosecute the prosecutor has always been the “pink elephant in the room” from the judiciary’s viewpoint. Was the offending prosecutor...
simply an over-zealous advocate for justice or was his actions done to advance certain career objectives? \footnote{Lesley E. Williams, \textit{The Civil Regulation of Prosecutors}, 67 \textit{Fordham L. Rev.} 3441 (May, 1999), (arguing that since there are no specific rules addressing the conduct or the prohibited conduct of federal and state prosecutors, the American Bar Association, along with the judiciary, the Department of Justice and local prosecutor associations should engaged in a collaborative effort to define the parameters of acceptable and unacceptable behavior or prosecutors during every stage of the criminal process, including obtaining warrants, addressing the grand jury, presenting evidence during trial, questioning of witnesses, and the giving closing arguments to the jury).}

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. \footnote{See Lawton P. Cumminings, \textit{Can an Ethical Person Be An Ethical Prosecutor?: A Social Cognitive Approach to Systemic Reform}, 31 \textit{Cardozo L. Rev.} 2139, 2147, (describing the “win-at-all-cost” behavior of some prosecutors as “conviction psychology”).} 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. \footnote{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”), see \textit{Mendenhall v. Riser}, 213 F. 3d 226, 230 (5th Cir. 2000) (quoting \textit{Malley v. Briggs}, 475 U. S. 335, 343, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)).}

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 \textit{Van De Kamp} and \textit{Pottawattamie}.

Finally, Part III will expound on the strong reluctance the legal community’s 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 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, 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. 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. 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. 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.

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. Rather, the controversy surrounds how should the immunity doctrine be applied to those prosecutors who seemed unmoved by the quest for justice. 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.

63 See 28 U. S. C. § 547; Brawer v. Horowitz, 535 F. 2d 830 (3rd Cir. 1976); and Nadler v. Mann, 951 F. 2d 301 (11th Cir. 1992).
64 See LSA-Const. Art. V, Sec. 26(B).
65 When 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, then the harm to society and to the legal community as a whole is inevitable. See Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 189 (1969).
66 See State v. Meredith, 796 So. 2d 109 (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).
68 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”).
69 The vague norm of doing “justice” becomes subject to the varying interpretations by different prosecutors with different morals and thus becomes less valuable as a source of guidance in the role of the prosecutor. See Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 VAND. L. REV. 45, 103 (1991).
The judiciary has echoes the public’s suspicions about prosecutors, but are less willingly\(^{70}\) to sustain a §1983 complaint against a prosecutor in light of the immunity doctrine. But the public’s thirst for justice and constitutional fairness is not always for the benefit of the defendant who is moments away from being incarcerated\(^{71}\) or brought to death row.

For example, in *Briede v. Orleans Parish Dist. Attorney’s Office*, 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 was in the custody of the police department. The men were subsequently released when the prosecutor failed to timely charged them. 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.

The prosecutor’s office filed a peremptory exception of no cause of action\(^{72}\) in this case, stating that it was not a proper defendant\(^{73}\) because it did not possess the capacity to be sued.\(^{74}\) It also argued that the state constitution as well as state jurisprudence gives prosecutors absolute immunity from civil liability.\(^{75}\) 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. In affirming the district court’s ruling, the appellate court recited

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\(^{70}\) In *Chavers*, 786 F. Supp. at 758-759, the district court permitted the indigent plaintiff, who is was a state prisoner, to present his 1983 claim against the detective, the state prosecutor and the police officer who had him charged and later convicted him for first degree murder. The district court reasoned that the allegations listed in his complaint was sufficient to show that these defendants may be entitled to qualified immunity, but not absolute immunity because their actions were investigatory in nature.

\(^{71}\) See Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*. 2006 Wis. L. Rev. 399 (2006), (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 have shown that public believes that the courts undo the work of the police to get the criminals off the street), (citing Laura B. Myers, *Bringing the Offender to Heel; Views f the Criminal Courts*, in Americans View Crimes and Justice, 46, 48 (Timothy J. Flanagan &Dennis R. Longmire eds., 1996).

\(^{72}\) See LSA-C. c. P. Art. 927 (4).

\(^{73}\) See *Briede*, 907 So. 2d at 791.

\(^{74}\) See LSA-Const. Art. 12 § 10.

\(^{75}\) The United States Supreme Court noted that the chilling effects from civil liability mandates that prosecutors be given immunity. *See Burns v. Reed*, 500 U. S. 478, 485, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991).
portions of the Louisiana Constitution and articles in the revised statutes\textsuperscript{76} and the
criminal code,\textsuperscript{77} which totally erases any 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\textsuperscript{78} 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 \textit{Miller v. Spiers},\textsuperscript{79} the plaintiff brought suit against the defendant, who was
employed as an Assistant District Attorney in New Mexico. The plaintiff alleged that the
defendant deliberately and maliciously had him indicted for murder because the
defendant did the following: (1) had the grand jury\textsuperscript{80} to 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 informed one of the staff writers
that his office had uncovered evidence that contained the plaintiff’s DNA, linking him to
the victim’s apartment. The defendant filed a motion for judgment on the pleadings in
response to the plaintiff’s complaint.

As it relates to allegations one and two, the district court found that absolute
immunity attached to the defendant’s investigation and the prosecution’s decisions they
related to his advocacy for the state before the grand jury. 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

\footnotesize{
\textsuperscript{76} See LSA-R. S. 16:1( C).
\textsuperscript{77} See LSA-C. Cr. P. Art. 381, (declaring the entity that is 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 a part of the criminal prosecution and cannot alleged that his/her
rights were affected thereby).
\textsuperscript{78} Nothing epitomizes the vast amount of discretion that a prosecutor possesses than when he is processing
a case involving white collar crime; because many white collar crime 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.
\textsuperscript{80} See LSA-C. Cr. P. Art. 437; see also \textit{United States v. Calandra}, 414 U. S. 338, 94 S. Ct. 613, 38 L. Ed.
}
giving them the result of his investigation—whether true or false. Further, the court ruled that absolute immunity was not created to cover instances where the prosecutor would encourage or conspire with police officers to have them give false\textsuperscript{81} statements in their affidavits to secure an arrest warrant against the plaintiff.

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. The court concluded that the defendant was not cloaked with the garment of absolute immunity when he performed these acts.

Both absolute and qualified immunity can be a double-edged sword that can have the potential of maiming even law enforcement officials who may have been wrongfully accused or imprisoned. In \textit{Brown v. Lyford},\textsuperscript{82} a former police sergeant filed a §1983 action against some of his fellow police officers and a prosecutor pro tempore who were engaged in a case involving children who were tortured, molestation and sodomized. During the prosecutor’s investigation, the plaintiff was investigating the disappearance of a seventeen year old girl. The plaintiff learned that one 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. 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.

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. 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

\textsuperscript{81} Defense attorneys for a man accused of murder filed a motion to dismiss 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. Jennifer Hewlett, \textit{Attorneys in Hit-an-Run that Killed Lexington Police Officer File Motion for Dismissal}, Lexington-Herald-Leader (11/6/2010). (2010 WestLaw 22206115).

\textsuperscript{82} See \textit{Brown v. Lyford}, 243 F. 3d 185 (5\textsuperscript{th} Cir. 2001).
officers. The district court dismissed the complaint based on qualified immunity, finding that there was probable cause to arrest the plaintiff. The plaintiff was unsuccessful in overcoming the qualified immunity defense posed by the defendants. The Fifth Circuit agreed because the prosecutor acted within his usual judicial functions.

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. The usual tactics 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. Prosecutorial misconduct, on the other hand, 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 this discussion.

Peter Henning stated it best when he said that prosecutors hold a special 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 from Professional Conduct provides no oversight or guidance with which to discern whether their conduct is acceptable zealous advocacy. For too often, unfortunately, the federal

83 See Kerr v. Lyford, 171 F. 3d 330 (5th Cir. 1999).
84 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 Gibson v. Rich, 44 F. 3d 274, 277 (5th Cir. 1995); see also Spann v. Rainey, 987 F. 2d 1110, 1114 (5th Cir. 1993).
85 In Berger v. United States, 295 U. S. 78 (1935), the Supreme Court stated that the prosecutor’s obligation in any criminal case is to seek justice 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; see also Imbler, 424 U. S. at 429.
87 See Darden v. Wainwright, 477 U. S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); see also United States v. Cornett, 232 F. 3d 570, 575-76 (7th Cir. 2000).
88 It was the prosecutor’s role as an advocate for justice that prompted the United States Supreme Court in Brady to insist that a prosecutors disclose exculpatory evidence in its possession that is both material and favorable to the accused regarding either guilt or punishment. See Brady v. United States, 373 U. S. 83, 87 (1963)
89 See Peter Henning. Prosecutorial Misconduct and Constitutional Remedies. 77 WASH. U. L. Q. 713 (Fall 1999).
constitution and the pertinent jurisprudence simply provide 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. 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 with advocating for a client’s interests does have constitutional and statutory limits.

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, hides favorable evidence from the defendant, uses illegal tactics to obtain admissible evidence or manipulates the jury’s impartiality by exploiting the jurors’ prejudices. 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.” Jackson also stated that it is the federal prosecutor who “has more control over life, liberty and reputation than any other person in America”.

So, should the legitimacy of the defendant’s conviction in our introduction hinge on Kenneth’s undisclosed relationship which he exploited to secure the murder conviction? 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 somehow have sufficient redress of his claim through other safeguards like professional discipline.

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90 See Henning, footnote n. 35.
92 See Washington v. Hofbauer, 228 F. 3d 689 (6th Cir. 2000).
93 See United States v. Sandoval-Gomex, 295 F. 3d 757 (7th Cir. 2002).
95 See Robert H. Jackson, 24 J. AM. JUDICATURE SOC’Y 18, 18 (1940), (speaking before a meeting of federal prosecutors).
96 See generally, Alafair S. Burke, Revisiting Prosecutorial Disclosure, 84 IND. L. J. 481 (Spr. 2009).
Kenneth’s actions not only damaged his title as a *minister of justice*, but he also, indirectly, manipulated the jury by pressuring it to convict the defendant for murder. There must be something more that defendants who have been imprisoned can do to deter these rogue prosecutors from randomly violating the general public. Hence, 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 titles communicate. Realistically, the problem with reigning in prosecutors for their unprofessional behavior is that no one generally wants to do it.

The bar associations do not want to micro-manage the prosecutor’s office, and legal scholars believe that the federal constitution and the statutes which have shielded prosecutors for centuries, are simply too massive to override. In other words, since the constitution has purposefully given broad authority to prosecutors, then there remains no incentive whatsoever for prosecutors to change their investigative and judicial policies.

Although state disciplinary authorities frequently make lofty pronouncements about self-policing and the requirement that their attorneys conform to high standards, the practicality of such an expectation is limited given the immunity that prosecutors enjoy.

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97 According to Rule 3.8 of the ABA’s Model Rules or Professional Conduct, 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 No. 1 CRIM LAW BULLETIN ART I (Winter 2007), [hereinafter referred to as Noble-Cause Corruption].

98 The prosecutorial abuse that is reference 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 for testifying in a criminal trial. See *Hart v. O’Brien*, 127 F. 3d 424 (5th Cir. 1997); see also *Ying Jing Gan v. City of New York*, 996 F. 2d 522, 534-35 (2d Cir. 1993) and *Barbera v. Smith*, 836 F. 2d 96, 101-02 (2d Cir. 1987).


standards of professionalism, the reality is that state authorities rarely—if at all—discipline prosecutors for misconduct.\(^{103}\)

More importantly, the United States Supreme Court’s decision in Goldstein v. Van De Kamp, have given prosecutors a titanium-like outer shell that is virtually impregnable. 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 lean heavily on their conviction rates as proof that their offices have been tough on crime during their political campaigns.\(^ {105}\)

**PART II**

**CONVICTIONS ARE FIRST AND FOREMOST**

Consider the factual circumstance in Pottawattamie County, Iowa v. McGhee,\(^{108}\) 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 with a 12-gauge shotgun wound to the chest less than a year earlier. The victim was a retired police officer and the murder took place during a heavy campaign

\(^{103}\) See Eugene Volokh, *Happy Birthday, Dear Murder Victim*, The Volokh Conspiracy (11/11/10), (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. 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. He also argued that the prosecutor elected to do this stunt because the trial was being televised on Court TV), [hereinafter referred to as *Happy Birthday Case*].


\(^{105}\) Media coverage of criminal trials is nothing new, but the coverage has expanded from the sensational cases involving celebrities to a wide range of 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. See Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1 (Fall 2009).

\(^{106}\) Michael Weiss wrote that from the interviews he has 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. *PUBLIC DEFENDERS ON JUDGES*, p. 41.


season for the county attorney’s office. 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 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 the neighborhoods like detectives looking for suspects. From these interviews, the men had more than twelve suspects who may have been responsible in the death of this retired officer. Further investigation revealed that the white brother-in-law of the captain of the fire department was developed as the 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.

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. While Hughes repeatedly denied having any knowledge of the retired officer’s murder, these ministers of justice continued to interrogate, 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, despite the fact that Hughes repeatedly lied about the identity of the murders, failed polygraph tests and admitting 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

110 See United States v. Scott, 223 F. 3d 208 (3rd Cir. 2000), (quoting United States v. McKenzie, 678 F. 2d 629, 631 (5th Cir. 1982).
111 See Buckley v. Fitzsimmons, 20 F. 3d 789 (7th Cir. 1994).
112 See Cox v. Hainey, 391 F. 3d 25 (1st Cir. 2004), (discussing prosecutorial immunity when advising law enforcement officials on the logistics of their actions); see also United States v. Strother, 60 M. J. 476 (U. S. Armed forces 2005).
113 See Burns v. Reed, 500 U. S. 478, 496, 111 S. Ct. 1934 (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).
information to Hughes regarding critical facts about how the officer was killed. The Eight
Circuit Court of Appeals found that the prosecutors’ behavior in this case was not
covered under the absolute immunity umbrella. Since the defendants’ substantive due
process rights were severely affected by the prosecutors’ act of obtaining, manufacturing,
coercing and fabricating evidence before filing criminal charges.

The prosecutors/appellees immediately filed a writ of certiorari with the Supreme
Court, hoping that the high court would unilaterally find that the prosecutors’ decision to
falsify, coerced and manipulate Hughes’ testimony before and during the trial fell within
their prosecutorial discretion thereby covering their deplorable acts with the cloak of
absolute immunity. Defense attorneys nationwide 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. These
officers acted as police officers, detectives, and prosecutors from the moment this retired
officer was found dead. 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.

Randall Grometstein 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 office consistently abuse the
constitutional rights of defendants. Criminal justice professionals, like Grometstein,
writes 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 guys” off the street justifies the occasional violations of due process that are necessary to accomplish that goal.

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

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114 See McGhee v. Pottawattamie County, Iowa, 547 F. 3d 922, 932-933 (8th Cir. 2008).
116 See footnote 88, supra.
117 See Noble-Cause Corruption, supra.
and law enforcement officials have an *us v. them* mentality depending on who is sitting at the defense table. 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 reasoning) with respect to members of our own group and teleologically with respect to outsiders, especially those perceived to be dangerous.

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 and 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 by the courts and the prosecutors alike. Prosecutors fear that if they were to show leniency to those individuals whom the government had little to no 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. This Author subscribes to the notion that exposing prosecutorial misconduct to the public will not only reinvigorate the public’s confidence

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119 *In re Conduct of Burrows*, 291 Or. 135,629 P. 2d 820 (1981) (per curiam), a prosecutor was publicly reprimand 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 to do undercover work for the police and the prosecutor’s office in the future).
121 Id. at p. 108.
123 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).
in the justice system, but exposing such misconduct will also deter other prosecutors from pursuing questionable trial practices in the future.\textsuperscript{124}

More accountability through active judicial oversight will cause senior prosecutors to become fervent in monitoring their junior\textsuperscript{125} prosecutors and they can mandate junior–level prosecutors to attend appropriate training seminars sponsored by the nation’s district attorney associations.\textsuperscript{126} 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.\textsuperscript{127}

What would be the objective of Congress enacted a §1983 remedy for any U. S. citizen whose civil rights have been grieved if that person cannot hold the offending government employee financially responsible due to other federal statutes that prevent such lawsuits. While the federal judiciary is concentrated on not jeopardizing the prosecutor’s decision-making authority regarding issues that are intimately associated\textsuperscript{128} to the judicial phase of the criminal process, defense attorneys, on the other hand, have to contend with disgruntled clients who have been convicted because the prosecutor intentionally ignored basic constitutional safeguards that ruined their clients’ reputations as well as their wills to live.\textsuperscript{129}

Many defense attorneys, during \textit{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?”\textsuperscript{130} Many of the jurors in the hundreds of appeals that I have reviewed would say, without hesitating that

\textsuperscript{124} See \textit{Drake v. Kemp}, 762 F. 2d 1449 (11\textsuperscript{th} Cir. 1985), writ denied, 478 U. S. 1020, 106 S. Ct. 3333 (1986).

\textsuperscript{125} The disadvantage with the bottom-up approach to prosecutorial misconduct is that 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. See Dunahoe, supra.

\textsuperscript{126} “[J]udging by a flurry of court rulings in recent years, unethical behavior by prosecutors is becoming a significant legal issue and a source of embarrassment

\textsuperscript{127} See Dunahoe, supra., p. 48.

\textsuperscript{128} See \textit{Van De Kamp}, 129 S. Ct. at 857.

\textsuperscript{129} See \textit{Prosecution Discipline}, p. 282, (finding that the instances of prosecutorial misconduct are not benign, but are acts of gross negligence or intentional acts done under the misguided impression that these prosecutors were pursuing justice).

\textsuperscript{130} Bruce A. Gree and Ellen Yaroshefsky, \textit{Prosecutorial Discretion of Post Conviction Evidence of Innocence}, 6 OHIO ST. J. CRIM L. 467, 497 (Spr. 2009), [hereinafter EVIDENCE OF INNOCENCE].
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\textsuperscript{131} evidence,\textsuperscript{132} to threatened witnesses against testifying for the defense, and to knowingly present false testimony\textsuperscript{133} or exhibits to secure a conviction.

Catherine Ferguson-Gilbert gave a hypothetical in her Article on prosecutors that depicted them in a light similar to unsportsmanlike athletes. Her description of government attorneys was very compelling. Here is an excerpt from her hypothetical:

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 my actions as “harmless.” There is no recourse for my misconduct in my attempt to win\textsuperscript{134} 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.\textsuperscript{135}

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.”\textsuperscript{136} 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.\textsuperscript{137}

Interestingly, the Van de Kamp court was of the opinion that to allow a defendant, not matter how justified, to bring a civil rights action against the prosecutor’s office,  

\textsuperscript{131}An attorney was publicly reprimanded for the not reporting a conversation he had with a person friend, who was also a former prosecutor. The former prosecutor disclosed to the attorney that he had suppressed exculpatory blood evidence against a defendant. Moments before his startling confession, the former prosecutor told the attorney that he was dying from colon cancer. See \textit{In re Riehlmann}, 2004-0680 (La. 1/19/05), 891 So. 2d 1239, 1241.

\textsuperscript{132}By far, the most popular form of prosecutorial misconduct has been those instances where the presiding prosecutor suppressed exculpatory evidence from the defense. Michael L. Radelet, Hugo Adam Bedau & Constance E. Putnam, \textit{In Spite of Innocence: Erroneous Convictions in Capital Cases} (1992).


\textsuperscript{134}Police officers look to the number of arrests made during any given month as evidence of their effectiveness; consequently district attorneys view their win-loss record as a symbol of their self-worth. See \textit{PROSECUTORIAL RESISTANCE}, p. 138.


\textsuperscript{137}Id.
would not only encourage other disgruntled defendants to follow along, but it would “pose substantial danger of liability even to the honest prosecutor.”

Does this sound strangely similar to the concerns defense attorneys have about innocent people going to jail while guilty people go free?

The overall purpose of the §1983 civil rights action was to create an avenue of recovery 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. Having a defendant lose their right to freedom because a government attorney violated one of the basic principles under our constitution just to guarantee a conviction seems to fall squarely within the province of the statute.

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 made possible only because the wrongdoer is clothed with authority of state law.” Generally speaking, all categories of government employees could possibly expose their employers to a §1983 suit except for prosecutors who enjoy the protection of an invincible shield called absolute immunity.

I recall 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.

139 See 42 U. S. C. § 1983 (2010), sometimes referred to as a Bivens claim, which is a suit “brought directly under the Constitution against federal officials,” (quoting Butz v. Economou, 438 U. S. 478, 504 (1978)).
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 in prison because his conviction resulted from a prosecutor’s desire to ignore basic federal criminal procedure. 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 an option for the appellate courts because in Smith v. Phillips, the Supreme Court “undermined the effectiveness of appellate reversal 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’”.  

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 is 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. Even the primetime news stations in the 1980s would not show people lying dead in the streets while broadcasting the many conflicts in the Middle East.  

Likewise, our society has become de-sensitized to the illegal events that commonly happened in our criminal justice system. Today, if a news station were to broadcasts that a person was released from prison after serving over 25 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, but no one would actually be surprised that an innocent person

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143 Two Hispanic men were released from prison after three former Illinois County prosecutors and four sheriffs had admitted to giving false testimony about important evidence that convicted these two men for the rape, abduction and murder of a 10-year old girl in 1985. Don Terry, Ex-Prosecutors and Deputies in Death Row Case Are Charged With Framing Defendant. (12/13/96), New York Times 18, [hereinafter EX-PROSECUTORS CHARGED].  
146 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. See Unethical Prosecutors, p. 976, (quoting Jackson v. State, 421 So. 15, 16 (Fla. Dist. Ct. App. 1982, stating that the desire to prevent acts of prejudicial misconduct by reversing conviction did little if anything to decrease prosecutorial impropriety).  
147 See Prosecutorial Subordination, p. 262.
actually went to prison. The inmate’s family and friends would certainly celebrate his release and applauded 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. Nothing would 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 this attorney should face disciplinary and perhaps criminal penalties for obstruction of justice. The same would not be true for prosecutors.

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. 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 lacked the financial resources to compete against the massive budgets of a state and/or federal governments. 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, but such fact should not depreciate the value of giving a defendant justice in a court of law.

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148 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 25% of those complaints. If 75% of the complaints for attorney misconduct was dismissed, imagine the statistical data for prosecutorial misconduct where there is federal judicial precedence authorizing prosecutors to use unconstitutional tactics as ministers of justice. 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 (Summer 2010).

149 See Prosecution Discipline, p. 282-83, (declaring that “if 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”).

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


152 Id.
Hiring medical experts to support a defendant’s unique and perhaps novel defense is genuinely not an option that public defenders have.153 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. Ridicules and a host of criticism are the dark clouds that hover over them and given their large caseloads, it not be unusual for any of them to overlook a *Brady*154 issue or not to pursue a specific argument that is buried in a police report or a drug analysis report.155 Nevertheless, this does not give prosecutors a license to take advantage156 of an unsuspecting defense attorney or public defender.157

Canvassing a typical criminal court, one will automatically notice on central theme—chaos. In fact, to say that the criminal court setting is chaotic is an understatement—even in those situations where the judge has taken the bench. The prosecutor 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 clients 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—preferably an acquittal.158

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153 Id., pp. 228-229.
154 Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L. J. 481, 515 (Spr. 2009), [hereinafter *REVISING DISCLOSURE*].
155 Id., p. 261.
156 Rules 8.3(a) and 8.4 (c) of the Rules of Professional conduct 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.
The immense power harnessed by prosecutors has caused many of them to blur the lines between seeking justice and opposing their adversary. One legal scholar eloquently stated:

Prosecutors’ unethical trial conduct is too common and to 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.

Some prosecutors begin to rationalize the relevance of the exculpatory evidence they uncover during their investigation. Some prosecutors who call witnesses that they know will give false testimony do not find such action as suborning perjury. In essence, 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.

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. 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 falls 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. Many jurists find it extremely difficult to

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159 A special prosecutor assigned to a case where prosecutors and sheriffs were charged for falsifying evidence stated 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.” See EX-PROSECUTORS CHARGED, supra.


161 See REVISING DISCLOSURE, supra., 499.

162 See H. Richard Uviller, The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit, 68 FORDHAM L. REV. 1695, 1697, (April, 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”).


164 In Riehlmann, 891 So. 2d at 1245,(stating the attorney was publicly reprimanded for not disclosing that a former prosecutor had suppressed exculpatory blood evidence until five years later when the defendant who affected by the former prosecutor’s action was scheduled to be executed).
the prosecutor because they are familiar with the prosecutor and are reluctant to speak ill of someone of whom they have shared personal, academic or professional experiences.166

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 reversal167 of their conviction.168 As our discussion turn to the harmless error rule, I feel that I have somehow betrayed169 their trust since the harmless error doctrine permits prosecutors to trample170 over the rules of criminal procedure with no criminal or civil repercussions. Academicians171 have repeatedly questioned the legitimacy of the harmless error rule because defense attorneys who commit the same serious constitutional violations receive an entirely different result.172

A defendant’s right to counsel, right to a trial by jury,173 right to compulsory process and right to cross-examination174 were originally intended to minimize the risk

165 See Adam M. Gershowitz, Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct, 42 U. C. DAVIS L. REV. 1059 (April, 2009), (citing United States v. Kojayan, No. 91-50875, 1993 U. S. App. LEXIS 19873, at 16 (9th Cir. Aug. 4, 1993, indicating that a prosecutor accused of misconduct has his named redacted from the appellate opinion when this prosecutor personally appeared to argue the case before the court).
166 See Deborah Sontag, The Power of the Fourth, N. Y. Times Mag., Mar. 9, 2003, at 640, (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).
167 See EVIDENCE OF INNOCENCE, supra, p. 507.
168 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 (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).
169 Prosecutorial corruption apparently is not limited to U. S. borders. See Clarifying the Betrayal of Trust, Japan Times, Tokyo (Oct. 5, 2010), (discussing the corruption present in the Japanese public prosecutor’s office).
170 Contrast this view with a situation where the prosecutor learns of new evidence casts doubt on a convicted defendant’s guilt as oppose 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 Bruce A. Green and Ellen Yaroshefsky, Prosecutorial Discretion and Post-Conviction Evidence of Innocence, 6 OHIO STATE J. OF CRIM. L. 467, 474 (2009), [hereinafter referred to as Prosecutorial Discretion].
172 See Jim Dwyer, Peter Neufeld & Barry Scheck, Actual Innocence 181 (2000), (declaring that the harmless error standard has been a “lie that the criminal justice system tells itself;” in fact, it is used to “absolve police officers and prosecutors of misconduct”).
173 See LSA-U. S. Const. Amend VI; see also Todd E. Pettys, Counsel and Confrontation, 94 MINN L. REV. 201 (Dec. 2009).
that an innocent person would be punished. 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. Presenting false evidence, intimidating defense witnesses and striking potential jurors because of their racial and ethnic backgrounds are all within the prosecutor’s arsenal of trial tactics. 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 deplorable 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. These jurists are hesitant to hold these rogue prosecutors accountable. In fact, finding a judge who would be willing to jeopardize his tenure for the sake of having a prosecutor publicly reprimanded would be as hard as finding a solution to the national debt crisis.

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175 See Prosecutorial Discretion at p. 482, (quoting 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).
176 On December 9, 2010, the United States Senate convicted U. S District Judge G. Thomas Porteous for maintaining a corruption relationship with a local bail bondsman, accepting gifts from lawyers and friends to pay gambling debts, committed 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 Votes to Remove Federal Judge: Louisiana Jurist Convicted of Corruption and Perjury. (Chicago Tribune 12/9/10).
177 See Walter W. Steele, Jr., Unethical Prosecutors and Inadequate Discipline, 38 Sw. L. J. 964 (Nov. 1984), (asserting that “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 certain disciplinary rules), [hereinafter UNETHICAL PROSECUTORS].
178 Judges are less likely to sanction or even confront prosecutors for their misconduct our 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).
179 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. Michael Scott Weiss, Public Defenders on Judges: A Qualitative Study of Perception and Motivation. 40 No. 1 CRIM. LAW BULLETIN ART 2 (Winter 2004), [hereinafter PUBLIC DEFENDERS ON JUDGES].
180 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.
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 judicial review of the misconduct.\(^{181}\) There are no substantive regulations to guide or correct the behavior of the nation’s ministers of justice.\(^{182}\) 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\(^ {183}\) claims of prosecutorial misconduct and have called it *work product*.\(^ {184}\) On those rare occasions 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.\(^ {185}\) 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.\(^ {186}\)

With so many safeguards in place to shield prosecutors from public scrutiny, it is not surprising that there are not more cases of defendants who have been wrongfully convicted. As the prosecutor’s trial tactics become more harsh and ruthless, the judiciary and the disciplinary boards become more helpless, hoping that the other would put on the armor of justice and confront this modern-day Goliath about their reprehensible behavior.\(^ {187}\) Unfortunately, neither party is willing to take any meaningful action towards

\(^{181}\) Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 Hofstra L. Rev. 275 (Winter 2007), [hereinafter referred to as *Unethical Prosecutors*].  
\(^{182}\) 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 (1935).  
\(^{183}\) See Joe Palazzolo and Mike Scarcella, *Losing Integrity: How Justice Fumbled Its Case Against Ted Stevens*, (Apr. 6, 2009), Legal Times, Sec. 1.  
\(^{185}\) See Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U. D.C. L. Rev. 275 (Fall 2004), (quoting from Deborah Rhode, In the Interest of Justice, 160-61 (2000), stating that the discipline for prosecutors is rare and that there are few, if any, consequences for prosecutorial misconduct), [hereinafter referred to as *Prosecution Discipline*].  
\(^{186}\) See Herrera v. Collins, 506 U. S. 390, 416-17 (1993); see, e.g., Moeller v. Weber, 689 N. W. 2d 1.7 (S. d. 204), (indicating that “newly discovered evidence is not a sufficient ground for habeas relief where no deprivation of a constitutionally protected right is involved”).  
\(^{187}\) Appellate courts point to the district courts for prompt and decisive action against prosecutors who have defaced justice and encourages the district court to use its admonishment and contempt powers to salvage
stopping prosecutors from raping justice at will.\textsuperscript{188} In the past, the courts have voiced its disapproval of a prosecutor’s unethical tactics by issuing contempt citations, imposing fees and costs and criticizing\textsuperscript{189} prosecutors in its opinions, but these methods of judicial discipline were the equivalent of throwing rocks at a battle tank.\textsuperscript{190}

The idea of assessing financial penalties against this political\textsuperscript{191} titan causes district court to create justifications for not doing so (i.e. the noble-cause ideology). Hence, the creation of absolute immunity and harmless error. 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\textsuperscript{192} filing their fingernails, realizing that qualified immunity is immunity nonetheless.\textsuperscript{193}

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 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 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 report in the shredder,\textsuperscript{194} put on his jacket and threw the file on the desk of his


\textsuperscript{190} Rory K. Little, \textit{Who Should Regulate the Ethics of Federal Prosecutors}, 65 FORDHAM L. REV. 355, 360 (1996), (asserting that the United States Supreme Court has curtailed the court’s supervisory powers against offending prosecutors).

\textsuperscript{191} Anthony S. Barkow and Beth George, \textit{Prosecuting Political Defendants}, 44 GA. L. REV. 953 (Spr. 2010), [hereinafter PROSECUTING POLITICAL DEFENDANTS].

\textsuperscript{192} 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 LSA-C. Cr. P. Arts. 718, 719(A) and 722; see also \textit{In Re Jordan}, 913 So. 2d at 781.

\textsuperscript{193} See \textit{Burns v. Reed}, 500 U. S. at 496 (1991), (finding qualified immunity to be a more protective that absolute immunity).

\textsuperscript{194} See \textit{REVISITING DISCLOSURE}, supra., p. 488.
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 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 placing him within the parameters of qualified immunity.\(^\text{195}\)

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 inmate number found on the left side of his orange jumper.\(^\text{196}\) 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 an 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 at any cost. The Supreme Court noted in *Imbler*\(^\text{197}\) that prosecutors are immunized from civil liability for acts *intimately*\(^\text{198}\) associated with the judicial phase of the criminal process. By making

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\(^\text{195}\) 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”. See *Harlow v. Fitzgerald*, 457 U. S. 800, 818 (1982).

\(^\text{196}\) See *Judicial Attitudes*, supra.


this statement, the Supreme Court knew that it had just handed the nation’s prosecutors the keys to the kingdom.\footnote{199 See generally, Margaret Z. Johns, Reconsidering Absolute Prosecutorial Immunity, 2005 BYU L. REV. 53, (stating that absolute and qualified immunity for prosecutors and arguing that absolute immunity should be abolished).}

In \textit{Aversa v. United States},\footnote{200 See \textit{Aversa v. United States}, 99 F. 3d 1200 (1st Cir. 1996).} 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 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 \textit{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.\footnote{201 See \textit{Imbler}, 424 U. S. at 429.}

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 for trier of fact to decide. If these issues can only be determined following a trial, then qualified immunity really is not immunity at all.

The United States Supreme Court performed a style of circular logic with this issue that would be synonymous with the classical musical chairs games or the urban card shuffle games of the 1970s. Several federal circuit have shown their willingness to end this cycle 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, prosecutors will not prosecute their own. 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 trial will affect office morale and cause huge turnovers in the department. Remember, the action that is being sued upon with prosecutors is that attorney’s failure to abide by the constitution—something that should not happen among those who portray themselves as ministers of justice and government representatives.

Judges, who are generally former prosecutors, view the act of disciplining other prosecutors as repulsive as mothers eating their own young. In addition, the Office of Professional Responsibility (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.

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 who only view convictions as a form of career advancement. This Author wholeheartedly 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 be had—immediately.

202 Peter Krug, Prosecutorial Discretion and Its Limits, 50 AM. J. COMP. L. 643 (Fall 2002).
204 Id.
205 A former prosecutor was charged in a 47-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.
206 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. (1981).
207 Bradley T. Tennis, Uniform Ethical Regulation of Federal Prosecutors, 120 YALE L. J. 144 (October 2010).
208 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 (Summer 2010).
IV. THE PROPOSAL

Every seasoned personal injury trial attorney that I have had the pleasure to meet and witness in a trial proceeding have subscribe to the notion that whenever a claimant intends to bring a lawsuit against an agency, department or entity, they must establish a paper trail,210 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 apply to prosecutorial misconduct cases, but the courts as well as disciplinary associations seems to be deathly afraid to approach this issue with any degree of candor.211 United States President Barak Obama, our nation’s 44th president, has made the concept of transparency212 the hallmark of his administration; thus, this Author asserts that transparency should also be the resounding theme when dealing with prosecutorial misconduct.213 The increase 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.214

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 amount215 of prosecutorial misconduct

212 Peter Nicholas and Christi Parsons, The 44th President: New Administration Gets to Work, (Jan. 22, 2009), Los Angeles Times, Sec. 1; and Sheryl Gay Stolberg, On First Day, Obama Quickly Sets a New Tone, (Jan. 22, 2009), New York Times, Sec. A.
213 See generally, Russell G. Pearce, Professional Responsibility for the Age of Obama, 22 GEO. J. LEGAL ETHICS 1595 (Fall 2009).
215 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. 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).
complaints that have been lodged in both our federal and state court system. 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. Like the Equal Employment Opportunity Commission (EEOC), the United States President can appoint a general counsel to this committee, and anoint them with the authority 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 in employment discrimination suits. 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 behavior during 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 or governmental agency responsible for their wrongful conviction.

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216 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 Mich. L. Rev. 124 (Oct. 1992), [hereinafter Administrative Battle].

217 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).

218 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; and Administrative Battle, supra., p. 126.

219 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 Bermudez 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
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 unsuccessful complainants would have their complaints summarily dismissed, but can find solace in the fact that a national register would be generated by their petition and would follow the specific prosecutor who had to submit to the committee’s evaluation of his conduct.

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 endowed with the responsibility of insuring that justice and constitutional fairness was 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. Yet, true injustice would be 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.

CONCLUSION

There is no dispute that criminals deserve to be convicted and punished for the crimes they commit whether it be misdemeanors 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 standing before the bar. Unfortunately, the persons whom we have entrusted to guard justice and protects its purity have been raping and molesting her innocence at will and with the blessings of the federal government.

Convicted. 11/23/09 N. Y. Times A23, (quoting Glenn A. Garber, founder of the Exoneration Initiative, an organization that focuses on innocence claims that lack DNA evidence).

220 Prosecuting Political Defendants, supra., p. 979.

221 Steve Weinberg, Cross-Examination: Local Prosecutors Are the Last Sacred Cow in Journalism. But Some Journalists Have Found The Value of a More Thorough. (Jan. 1, 2004), Quill, Sec. 12.
These ministers of justice have repeatedly been caught in the act of subverting justice; yet, they go unpunished. Then 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 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. 222

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

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 or attorney number. The committee’s investigative and decision–making authority will parallel that of the Equal Employment Opportunity Commission (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

222 See Prosecutorial Subordination of Perjury, supra.
to the public. Likewise, the oversight committee that I am proposing should also be
vested with the same authority 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 to
receive approval to file 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.

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223 See Joe Palazzolo and Mike Scarcella, Losing Integrity: How Justice Fumbled Its Case Against Ted Stevens, (Apr. 6, 2009), Legal Times, Sec. 1.