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IT IS NOT WHETHER YOU WIN OR LOSE, IT IS HOW YOU PLAY THE GAME: IS THE WIN-LOSS SCOREKEEPING MENTALITY DOING JUSTICE FOR PROSECUTORS?

Catherine Ferguson-Gilbert^{*}

My job is to play a game. I have a rule book to guide me but its terms are vague. Scholars debate what the terms mean but are unable to come to a resolution. Thus, I define the terms myself in the same manner as other players who are in different positions on different teams. At the very least, the terms mean that I must win because no one would pay me to lose. I have played the game before and am undefeated, with an impressive record of 50-0. With such an impressive record, I can advance to more intense games—especially if my fans realize what a winner I am. I have enormous power behind me to help me win. I can choose or dismiss my opponents, buy the help of others, and use my virtually unchecked power against my opponents. 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 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.

As Clarence Darrow, a famous twentieth century lawyer, said:

[L]awyers are supposed to want justice, but in reality there is no such thing as justice, either in or out of court. In fact, the word cannot be defined. So, for lack of proof, let us assume that the word “justice” has a meaning, and that the common idea of the definition is correct, without even seeking to find out what is the common meaning. Then how do we reach justice through the courts? The lawyer’s idea of justice is a verdict for his client, and really this is the sole end for which he aims.¹

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¹ This is a hypothetical for illustrative purposes only and is not about the author.

1. CLARENCE DARROW, VERDICTS OUT OF COURT 316 (Arthur & Lila Weinberg eds., Elephant Paperbacks 1989) (1963).

Prosecutors' idea of justice is a guilty verdict for the people of the city, county, state, or territory the prosecutor represents. The prosecutor aims for the sole end of achieving convictions against each defendant. This article discusses how the win-loss record-keeping mentality of prosecutors does little justice. Part I begins by defining a prosecutor's role in our legal system. Part II documents the tally-keeping mentality of prosecutors. Part III examines the motivations prosecutors have for keeping and maintaining a good "score." Part IV reveals various instances of prosecutor misconduct that result from the win-loss scorekeeping mentality that pushes prosecutors to increase convictions. Part V demonstrates how there are little consequences for prosecutorial misconduct stemming from the win-loss scorekeeping mentality, perpetuating the pattern of misconduct. Lastly, Part VI examines an alternative means to measure the success of prosecutors in lieu of the win-loss tallying.

I. THE PROSECUTOR'S ROLE

The prosecutor's role in our legal system is defined by various ethical rules and precedent-setting cases. This role is distinct from the role of private attorneys or defense attorneys and possesses an enormous amount of power in our legal system. Unfortunately, the prosecutor's enormously powerful role is ill-defined in vague hortatory language, leading one to question exactly what the prosecutor's role really is.

A. Ethical Rules that Define the Prosecutor's Role

The prosecutor's role is described by the American Bar Association as "an administrator of justice, an advocate, and an officer of the court."² As a "minister of justice and not simply . . . an advocate,"³ the prosecutor must "seek justice, not merely to convict."⁴ The prosecutor has a dual role to be both an adversary and to also accomplish "impartial justice."⁵ This role has sometimes been described as a quasi-judicial one.⁶ Although the prosecutor functions as an adversary, the prosecutor is obliged "to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as

2. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-1.2 (3d ed. 1993) [hereinafter ABA STANDARDS].

3. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1994); ABA STANDARDS, *supra* note 2, 3-1.2, cmt.; ABA STANDARDS, *supra* note 2, 3-3.11 cmt.

4. ABA STANDARDS, *supra* note 2, 3-1.2. See also ABA Opinion 150 (1936), cited in MODEL RULES OF PROF'L RESPONSIBILITY Canon 7 n.24 (1969), "The prosecuting attorney is the attorney for the state, and it is his primary duty not to convict but to see that justice is done." MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1969); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1981).

5. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958), cited in MODEL RULES OF PROF'L RESPONSIBILITY Canon 7 n.24 (1969).

6. ABA STANDARDS, *supra* note 2, 3-1.2 cmt.

to enforce the rights of the public.”⁷ The prosecutor must “strive not for ‘courtroom victories’ . . . but for results that best serve the overall interests of justice.”⁸ The standards of private or defense attorneys cannot be the prosecutor’s guide if the duty to seek justice is to be properly fulfilled.⁹ The prosecutor has a duty to “seek to reform and improve the administration of criminal justice.”¹⁰ The prosecutor also has a duty to take action to correct substantive or procedural inadequacies or injustices.¹¹ The prosecutor’s duty to make sure the process is fair even extends into sentencing.¹² The prosecutor must disclose exculpatory evidence, unless the prosecutor seeks a protective order on the basis that such evidence could result in substantial harm to a particular individual or to the public.¹³

During the process from indictment to sentencing of a defendant, the prosecutor’s role obliges him or her—voluntarily and without request—to disclose exculpatory evidence to the defense counsel¹⁴ and even to continue seeking evidence that may be potentially damaging to the prosecutor’s case.¹⁵ Further, the prosecutor must not present the court with false testimony or exhibits.¹⁶ Upon discovering that a witness has committed perjury or an exhibit bears false testimony, the prosecutor has a duty to request the withdrawal of such evidence from the record.¹⁷ The prosecutor must also beware not to overstep the bounds of permissible argument in closing arguments given to the jury.¹⁸

Perhaps one of the most important ethical guidelines defining a prosecutor’s role is found in the discussion of conflicts of interest. “A prosecutor should not permit his or her own professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.”¹⁹ A prosecutor definitely has an interest in his or her own career success and advancement, which can sometimes be a conflict of interest.²⁰ The prosecutor must avoid measuring success “by the ‘conviction rate’ of the office”²¹ or by the prosecutor’s own conviction rate. Decisions by the prosecutor to bring, dismiss, or reduce charges should not be influenced by

7. *Id.*

8. *Id.* 3-1.3, cmt.

9. *Professional Responsibility: Report of the Joint Conference*, *supra* note 5; MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1981).

10. ABA STANDARDS, *supra* note 2, 3-1.2.

11. *Id.*

12. *Id.* 3-6.1, cmt.

13. *Id.* 3-6.2, cmt.

14. *Id.* 3-3.11, 3-3.11 cmt; MODEL RULES OF PROF’L CONDUCT R. 3.8 (1995).

15. ABA STANDARDS, *supra* note 2, 3-3.11.

16. *Id.* 3-5.6.

17. *Id.*

18. *Id.* 3-5.8, cmt.

19. *Id.* 3-1.3.

20. *See id.* 3-1.3, cmt.

21. *Id.* 3-3.9, cmt.

the prosecutor's desire to inflate the success rate of the office²² or his or her own success rate.

A prosecutor also has a general duty not to abuse the power of the office,²³ nor engage in conduct that would be prejudicial to the administration of justice.²⁴ Furthermore, the prosecutor must not engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation.²⁵ Ultimately, the prosecutor's role is defined in the ethical codes as an administrator of justice by ensuring a substantively and procedurally fair environment for the criminal defendant.

B. Precedent-Setting Cases Defining A Prosecutor's Role

Precedent-setting cases also define the role of a prosecutor. In *Berger v. United States*, the Supreme Court defined the prosecutor's role as a:

representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.²⁶

The Supreme Court has specifically declared that one of the prosecutor's duties is to provide the defense counsel with material evidence.²⁷ In *Brady v. Maryland*, the Supreme Court said, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process

22. *Id.* 3-3.9, cmt.

23. MODEL RULES OF PROF'L CONDUCT R. 8.4, cmt. 4 (1995).

24. *Id.* R. 8.4.

25. *Id.*

26. 295 U.S. 78, 88 (1935). The court reversed and ordered a new trial due to prosecutor misconduct. *Id.* at 89. The prosecutor

overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense. . . . He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner.

Id. at 84.

27. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."²⁸ The Supreme Court has defined the prosecutor's role as one of seeking justice, yet operating as an adversary.

C. The Prosecutor's Role is Distinct From the Role of Private or Defense Attorneys

In our "modified adversarial system,"²⁹ the prosecutor's role is to seek justice while the defense attorney's role is "to prevent, by all lawful and ethical means, the 'whole truth' from coming out. [The defense attorney] is not concerned about 'justice' for the general public or about the rights of victims. He is supposed to try to get his guilty client the best deal possible, preferably an acquittal."³⁰ Whereas prosecutors have a duty to disclose exculpatory evidence and evidence that would impeach the prosecutor's own witnesses, defense attorneys have no such obligation.³¹ Furthermore, while a defense attorney can cross-examine a prosecution witness to attack the witness' credibility for telling the truth when the defense attorney knows the witness is truthful, the prosecution cannot engage in the same type of conduct.³²

Although prosecutors are not supposed to take the defense attorney or private attorney's behavior as a guide,³³ prosecutors begin to rationalize that if their adversaries can do it, so can they.³⁴ Prosecutors further rationalize that certain evidence may not really be exculpatory or impeaching evidence.³⁵ They also rationalize that they would not "deliberately suborn perjury" if they knew for certain that the witness was lying.³⁶ The result of these rationalizations is that prosecutors take on the same role as attorneys in the private sector, while getting further away from their ethical obligation to be "administrators of justice."

D. The Prosecutor Has Enormous Power

The prosecutor possesses an enormous amount of power that further defines the prosecutor's role.³⁷ The prosecutor has the power to convene a

28. *Id.*

29. Alan M. Dershowitz, *Foreward to the First Edition of JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT* xiv (2d ed., Matthew Bender & Co. 1999) (1985).

30. *Id.* at xiv-xv. The defense attorney has no duty to seek justice. JOSEPH F. LAWLESS, JR., *PROSECUTORIAL MISCONDUCT* 23 (2d ed., Matthew Bender & Co. 1999) (1985).

31. Dershowitz, *supra* note 30, at xiv.

32. MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 214 (1990).

33. *Professional Responsibility: Report of the Joint Conference*, *supra* note 5.

34. Dershowitz, *supra* note 29, at xiii.

35. *Id.* at xiv.

36. *Id.* at xiii.

37. "The power and significance of the prosecutor is derived from the main roles that he

grand jury, issue warrants for arrest, grant immunity in exchange for favorable testimony, initiate criminal proceedings, and dismiss charges.³⁸ These are powers obviously unavailable to the defense.³⁹ The power of the prosecutor “to damage or destroy anyone he chooses to indict is virtually limitless.”⁴⁰ Justice Robert H. Jackson said this power was one of the most dangerous powers a prosecutor has because “he will pick the people he should get, rather than cases that need to be prosecuted.”⁴¹ Justice Jackson argued that this immense power demanded that prosecutors play fair and decent with a “dispassionate, reasonable and just” attitude.⁴² Again, the role of the prosecutor as an administrator of justice is apparent, but what does that mean?

E. Substantive Justice is Difficult to Define

Clarence Darrow said, “[j]ustice is something that man knows little about.”⁴³ Darrow said justice cannot be defined⁴⁴ and can never “be a lofty ideal. It has no emotions or passions. It has no wings. Its highest flight is to the Blind Goddess that stands on the courthouse roof. It savors syllogisms and fine distinctions which have no meaning or value in the important matters in life.”⁴⁵ Even Plato could not define the concept of “justice”:

If I thought it possible to deal adequately with the subject in a treatise or a lecture for the general public, what finer achievement would there have been in my life than to write a work of great benefit to mankind and to bring the nature of things to light for all men? I do not, however, think the attempt to tell mankind of these matters a good thing, except in the case of some few who are capable of discovering the truth for themselves with little guidance. In the case of the rest to do so would excite in some an un-

plays daily in the administration of justice.” JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* xv (1980).

38. Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *FORDHAM URB. L.J.* 607, 626-27 (1999).

39. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 *VAND. L. REV.* 45, 76 (1991).

40. FREEDMAN, *supra* note 32, at 216 (quoting Irving Younger, *Memoir of a Prosecutor*, Commentary, vol. 62, no. 4, p. 66 (Oct. 1976)).

41. Harvey A. Silvergate & Andrew Good, *Starr Teachers*, *THE CHAMPION*, Aug. 1999, at <http://209.70.38.3/public.nsf/championarticles/99aug03?opendocument> (quoting Justice Robert H. Jackson). As Mr. Freedman has indicated, none of the ethical codes even deal with this problem. FREEDMAN, *supra* note 32, at 217.

42. Green, *supra* note 38, at 628 (quoting Robert H. Jackson, *The Federal Prosecutor*, 31 *J. CRIM. L. & CRIMINOLOGY* 3, 4 (1940)).

43. CLARENCE DARROW, *ON THE DEATH PENALTY* 36 (Chicago Historical Bookworks 1991) (1924).

44. DARROW, *supra* note 1, at 316.

45. *Id.* at 312.

justified contempt in a thoroughly offensive fashion, in others lofty and vain hopes, as if they had acquired some awesome lore.⁴⁶

As Plato stated, the concept of justice cannot be defined—either one truly understands it or one does not. One cannot tell another how to act in a just manner. The “pretty”⁴⁷ standard of doing “justice” is vague, leaving prosecutors to be guided only by their morality.⁴⁸ “Some will decide that justice lies in conviction at all costs; others will bend over backwards to vindicate defendants’ rights. . . .”⁴⁹ 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.⁵⁰ The standard is so vague that it is unenforceable, thus giving prosecutors little incentive to comply.⁵¹ The prosecutor’s duties, to do “justice” and yet to be an adversary in our modified adversarial system, are “inherently contradictory—and perhaps hopeless.”⁵² Prosecutors begin to define their role of “seeking justice” in the same manner as do attorneys in the private sector—in terms of wins.

II. SCORE KEEPING MENTALITY

“The competitive and combative nature of modern adversary proceedings, often staged in the glare of intense media coverage, has changed many prosecutors from champions of justice to advocates of victory.”⁵³ Prosecutors as well as defense attorneys do their best to win.⁵⁴ As retired Illinois Supreme Court Justice Dom Rizzi has stated, some prosecutors overzealously seek convictions rather than seeking justice.⁵⁵ Prosecutors readily admit that

46. PLATO, *Letter VII*, in *THE COLLECTED DIALOGUES OF PLATO 1589*: 341d-c (Edith Hamilton and Huntington Cairns eds., L.A. Post trans., Princeton University Press 1971).

47. Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 *GEO. J. LEGAL ETHICS* 1301, 1305 (1996). Mr. Bresler describes the standard by which prosecutors are guided—to do justice—as a “pretty phrase.” *Id.* at 1301.

48. Zacharias, *supra* note 39, at 48.

49. *Id.*

50. *Id.* at 103.

51. *Id.* at 104.

52. *Id.*

53. LAWLESS, *supra* note 30.

54. Thomas A. Hagemann, *Confessions From a Scorekeeper: A Reply to Mr. Bresler*, 10 *GEO. J. LEGAL ETHICS* 151, 154 n.8 (1996). Winning is an important goal for the prosecutor in our adversarial system. Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 *IND. L. REV.* 495, 511 (1996) (quoting a former prosecutor with substantial experience prosecuting death penalty cases).

55. Ken Armstrong & Maurice Possley, *Trial and Error: Break Rules, Be Promoted, Series Five in a Five Part Series*, *CHI. TRIB.*, Jan. 14, 1999, at N1, [wysiwyg://29/http://chicagotribune.com/news/0,1308,21398-21721-21728,00.html](http://chicagotribune.com/news/0,1308,21398-21721-21728,00.html). Ken Armstrong & Maurice Possley, *Trial and Error: The Verdict: Dishonor, Series One in a Five Part Series*, *CHI. TRIB.*, Jan. 8, 1999, at C1, [wysiwyg://11/http://chicagotribune.com](http://chicagotribune.com)

winning is significant to them.⁵⁶ They try really hard to obtain convictions.⁵⁷ Prosecutors view the convictions they obtain against defendants as a measure of their success.⁵⁸ For instance, the U.S. Attorney's Office keeps track of its successful "batting average."⁵⁹ Some prosecutors' offices even measure wins and losses, next to each prosecutor's name on a board, with green stickers for victories and red stickers for losses.⁶⁰ Contests like the "two-ton" contest have developed as a game among prosecutors to see who could be the first to convict men and women weighing two tons.⁶¹ In one prosecutors' office, prosecutors must write and file a report with the district attorney if they lose a case.⁶² Sadly, though prosecutors keep track of their "wins," no one keeps track of their losses on appeal, which occur because prosecutors have exceeded the bounds of "justice" to seek a conviction.⁶³

Criminal defense attorney William Murphy said, "[t]here are a lot of good prosecutors out there who want to win and can take a loss. And there are prosecutors who so don't want to lose they would rather win dirty."⁶⁴ For those prosecutors, winning is everything and they will do it at any cost.⁶⁵ The cost is committing misconduct in order to win.⁶⁶ Most prosecutors do not de-

/ne. . /ws/item/0,1308,21398-21420-21467,00.html (quoting Harvard University Law Professor Alan Dershowitz, "Winning has become more important than doing justice. Nobody runs for Senate saying I did justice.").

56. Mr. Thomas A. Hagemann, a brash critic of Mr. Kenneth Bresler's article criticizing fellow prosecutors for keeping score rather than doing justice, made Mr. Bresler's point perhaps better than he himself did. Mr. Hagemann said,

winning matters. And, if winning matters, then we must motivate winning . . . and since we don't pay most prosecutors enough, what is the harm behind allowing them the motivation of not wanting to lose and keeping score? Or of allowing ex-prosecutors to talk about their record when their career is behind them?

Hagemann, *supra* note 54, at 154.

57. *Id.* at 153.

58. Elizabeth Glazer, *Crime Busting and Crime Prevention: A Dual Role for Prosecutors*, 15 CRIM. JUST. 11 (2001). Ms. Glazer was the head of her office's organized crime section a few years ago. One of her fellow prosecutors began each conversation by asking the other prosecutor whom they had put in jail that day. He was measuring success by arrests and convictions. *Id.*

59. LAWLESS, *supra* note 30, at 31.

60. Ken Armstrong & Maurice Possley, *Trial and Error: The Flip Side of a Fair Trial, Series Two in a Five Part Series*, CHI. TRIB., Jan. 11, 1999, at N1, [wysiwyg://20/http://chicagotribune.com/ne. . /ws/item/0,1308,21398-21543-21531,00.html](http://chicagotribune.com/ne. . /ws/item/0,1308,21398-21543-21531,00.html). This practice happened in the Illinois State Attorney's Office two decades ago. Since that time, misconduct inspired by this drive for convictions still continues today. *Id.*

61. *Id.*

62. Evan Moore, *Justice Under Fire: 'Win at all Costs' is Smith County's Rule, Critics Claim*, HOUSTON CHRONICLE, June 11, 2000, at A1, available at 2000 WL 4304479.

63. Armstrong & Possley, *supra* note 55, at C1.

64. Armstrong & Possley, *supra* note 60 at N1.

65. Press Release, Nat'l Ass'n of Crim. Def. Lawyers, *Winning at Any Cost: Prosecutorial Excess Distorting America's Justice System* (Feb. 9, 1999) (on file with author).

66. Armstrong & Possley, *supra* note 55 at C1. Legal scholars, judges, defense attorneys, and even prosecutors agree that the reason prosecutors cheat is to win. *Id.*

liberately hatch “diabolical plots to convict the innocent.”⁶⁷ Rather, most prosecutors are really good people who are just doing what they see as their job—to convict criminals and thereby reduce crime.⁶⁸ Most criminal cases involve guilty defendants, and thus prosecutors see their misconduct as leading to a “just” result—the conviction of a factually guilty defendant.⁶⁹ One prosecutor has equated convictions with justice because the defendants were factually guilty,⁷⁰ regardless of whether the process itself was just against any particular defendant.

After obtaining these “wins,” prosecutors keep score. Newspapers,⁷¹ law review articles,⁷² and books⁷³ document this scorekeeping mentality. Some cases are “sure winners” and thus prosecutors make ridiculous plea offers to defendants, knowing they will be rejected, and the prosecutor will have to take the case to trial.⁷⁴ Prosecutors experience a “temptation . . . to ‘win the big one’ and reap the rewards.”⁷⁵ Some prosecutors have even been accused of coaching witnesses to perjure themselves in order to win murder convictions.⁷⁶ As reporters Ken Armstrong and Maurice Possley have documented:

With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious cases. They have prosecuted black men, hiding evidence the real killers

67. Dershowitz, *supra* note 29, at x.

68. *Id.*

69. *Id.*

70. Hagemann, *supra* note 54, at 153. As a federal prosecutor, Mr. Hagemann believed “factually guilty defendants should lose” and that he was paid to seek convictions. His reason for seeking convictions was that the defendants he pursued “were, based on appearances, evidence, reasonable inferences, and [his and his] supervisor’s best judgement, factually guilty of the crimes charged.” Mr. Hagemann said that while some may answer that “justice” was done when a factually guilty defendant goes free, it is not something that our “justice” system could handle if it happened too often. *Id.*

71. Armstrong & Possley, *supra* note 60, at N1. An ex-prosecutor and now a defense lawyer, Michael Goggin’s record was 58 wins, 2 losses, and 2 hung juries. His partner Gregg Owen, also Goggin’s partner to several cases of prosecutor misconduct, had a record of 62 wins and 2 losses in his trial of 64 cases. Owen claimed that he and Goggin never lost together as a team—they won almost 40 cases in a row. They also accumulated a record for cases reversed due to prosecutor misconduct—4. *Id.* Jack Skeen, a district attorney for Smith County, Texas, also has a record for winning. He liked to win so much that he made his thirty assistant district attorneys write and file reports with him if they actually lost a case. Moore, *supra* note 63.

72. Hagemann, *supra* note 54, at 151. Mr. Hagemann admits, “I keep score.” In fact, his score as a former Assistant United States Attorney in Los Angeles, California, from 1985 to 1991, was “12-0.” Incidentally and quite appropriately for a *defense* attorney, he keeps score. As of the date his article was published in 1996, he was “1-0.” *Id.*

73. LAWLESS, *supra* note 30, at 31.

74. *Id.* at 23.

75. *Id.* at xvii.

76. J. Harry Jones, *Grand Jury Indicts Ex-prosecutor*, SAN DIEGO UNION TRIB., Feb. 16, 2001, at A1 (Mr. Peter J. Longanbach, a former District Attorney in San Diego, California, has been accused, by a criminal defense attorney who filed allegations against Longanbach, of suborning perjury of a witness in the 1996 murder trial of David Genzler).

were white. They have prosecuted a wife, hiding evidence her husband committed suicide. They have prosecuted parents, hiding evidence their daughter was killed by wild dogs. They do it to win. They do it because they won't get punished.⁷⁷

This conviction seeking, win-loss tallying mentality promotes prosecutor misconduct. Prosecutors continue racking up “notches”⁷⁸ in their records, with various motivations for doing so. Some prosecutors are motivated to keep score as a measure of their own success, while others use their record to advance their career or campaign for higher office.

III. MOTIVATIONS FOR KEEPING SCORE

Prosecutors have various motivations for keeping and publicizing their “score.” They reveal their tallies of wins in their resumes, to journalists, in political campaign advertisements, at cocktail parties, and in “other opportunities for self-promotion.”⁷⁹ Their motivations for doing so are professional, self-promotional, and political.⁸⁰ The prosecutor has a motivation to continue seeking convictions.⁸¹

A. Measure of Success

Many prosecutors measure their success by the number of wins they tally. If they did their job without caring whether they get the credit for a “win,” perhaps then justice would be served. As Ronald Regan’s plaque in the Oval Office was inscribed: “It’s remarkable how much can be accomplished if no one cares about who gets the credit.”⁸² Unfortunately, prosecutors get wrapped up in winning because they do care who gets the credit. They want to get credit for convicting factually guilty defendants. They seek the praise of fellow prosecutors who recognize their high conviction rates.⁸³ Convictions are a measure of the prosecutor’s success.⁸⁴ “Good trial lawyers, including prosecutors, have big egos. They are driven to succeed [because it is a] necessary tool of the trade. A little chest-pounding, some war stories and tales of wins, losses, and won-lost records come with the territory.”⁸⁵

77. Armstrong & Possley, *supra* note 55, at N1.

78. Guerra v. Collins, 916 F. Supp. 620, 637 (S.D. Tex. 1995) (the court concluded by saying that the prosecutors’ intentional “misconduct was designed and calculated to obtain a conviction and another ‘notch in their guns’ despite the overwhelming evidence” that another man was the real killer).

79. Kenneth Bresler, “I Never Lost a Trial”: When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537, 541 (1996).

80. *Id.* at 542.

81. *Id.*

82. *In Profile: M. David Barber*, 34 PROSECUTOR 18 (2000).

83. Armstrong & Possley, *supra* note 60, at N1.

84. Glazer, *supra* note 58.

85. Hagemann, *supra* note 54, at 152.

The drive to win is even greater in the context of high-profile and professionally high-stakes capital cases.⁸⁶ Charging a case as a capital offense “increases the chances of winning, [but] also increases the embarrassment and publicity of losing, making it all the more important for . . . prosecutors to search for additional ways to win.”⁸⁷ Losing a death penalty case “generates negative publicity [for the prosecutor] and is seen as ‘a knock to the prosecutor.’”⁸⁸ On the other hand, having an impressive record of convictions enhances the prosecutor’s job security.⁸⁹

Prosecutors become motivated by their own self-interests to win cases rather than their interests in serving the public.⁹⁰ The Supreme Court of Michigan said:

The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner’s guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community.⁹¹

The prosecutor has no right to sacrifice justice to his or her own professional success by seeking convictions, against even a factually guilty defendant, in a manner that is procedurally unjust.

B. Career Advancement or Promotions

The prosecutor faces additional motivations for seeking convictions and keeping score. Successful conviction rates serve to advance a prosecutor’s career by leading to promotions. Promotions for subordinate prosecutors depend on their “scores” for convictions.⁹² Winning gets rewarded while misconduct goes unpunished.⁹³ The underlying message to prosecutors is, as Alan M. Dershowitz has stated:

86. Wayne A. Logan, *Declaring Life at the Crossroads of Death: Victims’ Anti-Death Penalty Views and Prosecutors’ Charging Decisions*, 18 CRIM. JUST. ETHICS 41, Part III (1999) (citing Stacy Caplow, *What if There is No Client?: Prosecutors as “Counselors” of Crime Victims*, 5 CLINICAL L. REV. 1, 11 n.36 (1998)).

87. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2098 (2000).

88. Lefstein, *supra* note 54, at 512 (quoting a defense attorney with substantial experience as a prosecutor in capital cases).

89. Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 966 (1997).

90. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 834 (2000).

91. *Hurd v. People*, 1872 WL 3237, at *4 (Mich. 1872).

92. Zacharias, *supra* note 39, at 58 n.63.

93. Ken Armstrong & Maurice Possley, *Trial and Error: Reversal of Fortune, Series Four in a Five Part Series*, CHI. TRIB., Jan. 13, 1999 at N1, [wysiwyg://26/http://chicago trib-](http://chicago.trib-)

three-fold: (1) if misconduct is necessary to convict a guilty defendant, by all means do it; (2) try not to get caught, because that may complicate matters; (3) but if you do get caught, you can count on the court to bail you out either by ignoring the misconduct or by invoking the 'harmless error' rule.⁹⁴

Even if a good prosecutor does not want to seek a conviction, against a defendant that the prosecutor believes is innocent, the system is not set up for the prosecutor to do so.⁹⁵ Prosecutors who do not want to get caught up in the scorekeeping, conviction-seeking mentality often do anyway because being the whistle blower is against the prosecutor's own self-interest in promotions or career advancement.⁹⁶

Prosecutors who have committed misconduct, in the pursuit for additional "notches" of conviction on their record, have been promoted or have seen their careers advance. Some have become supervisors for the state's attorney office,⁹⁷ circuit court judges,⁹⁸ appellate court judges,⁹⁹ inspector generals,¹⁰⁰ congressmen,¹⁰¹ and even chief disciplinary counsel¹⁰² presiding over

une.com/ne. . /ws/item/0,1308,21398-21645-21660,00.html (quoting Mr. Scott Arthur, a former prosecutor in the Ford Heights 4 case. Prosecutors continually get "promoted rather than reprimanded.").

94. Dershowitz, *supra* note 29, at xii.

95. Telephone interview with Kenneth Bresler, Trial Attorney in the Fraud Section, Criminal Division, U.S. Justice Department (Feb. 9, 2001).

96. *Id.* Mr. Bressler was the prosecutor on a case in which he believed the defendant was innocent. When he suggested the possibility—that the defendant might be innocent—to his superiors, he was reprimanded and thrown off the case. In another case in which he believed one of the defendants was innocent, his boss told him, "If you don't believe in the case, don't take it to trial," and pulled him off of the case. Mr. Bressler said that was his impetus to writing the article. *Id.*

97. Armstrong & Possley, *supra* note 60, at N1 (former prosecutor Michael Goggin had six cases reversed because of misconduct—more than any other Cook County prosecutor—yet he became a supervisor for the Illinois State Attorney's Office).

98. *Id.* (prosecutor Nick Ford was named Cook County, Illinois judge merely two months after his 1995 murder conviction of Christopher Heynerd was reversed because he improperly argued to the jury that he would be fired if his witnesses lied and therefore the jury should believe his witnesses). Armstrong & Possley, *supra* note 55, at N1. Former prosecutor Carol Pearce McCarthy's misconduct in two of her cases that were overturned by the appellate court was described as "inexcusable." Yet, she was promoted to deputy chief of the narcotics prosecutions bureau and later became a judge in juvenile court. *Id.*

99. Armstrong & Possley, *supra* note 55. Ironically, after being scolded by the Illinois Appellate Court for prosecutor misconduct, former prosecutor Patrick Quinn became a judge on the Illinois Appellate Court. Obviously he is now in a position to review cases of prosecutor misconduct.

100. *Id.* Ex-prosecutor Alexander Vroustouris' murder conviction was thrown out because he defied the judge's order to refrain from making a certain improper argument in closing. He landed a job as Chicago's inspector general. *Id.*

101. Armstrong & Possley, *supra* note 55, at C1 (former prosecutor George "Buddy" Darden withheld evidence in a case against seven men who were later exonerated, but were nonetheless convicted and received sentences of death. Mr. Darden went on to be a Georgia congressman).

102. *Id.* In New Mexico, former prosecutor Virginia Ferrara became chief disciplinary counsel and now polices other lawyers for misconduct after herself failing to disclose evi-

other lawyers for misconduct. These career advancements happen in ordinary criminal cases and even more so in high-profile cases.¹⁰³ The position of prosecutor is often sought for the “boost it can give subsequent careers.”¹⁰⁴ Because career advancement and promotions are based upon conviction rates, prosecutors seek convictions to boost their “score” rather than seeking justice.¹⁰⁵

C. Campaigns for Re-election or Higher Office

When prosecutors get wrapped up in the scorekeeping, conviction-seeking mentality, they use these records to further promote careers in the political arena. As Clarence Darrow once said:

A prosecutor hopes and expects to be judge, and after that he will aspire to be governor, then senator, and President, in their regular turn. To accomplish this noble ambition he must in each position give the people what they want, and more; and there are no rungs in the ladder of fame upon which lawyers can plant their feet like the dead bodies of their victims.¹⁰⁶

A prosecutor must give the people what they want—someone who is “tough on crime.”¹⁰⁷ Seeking the death penalty helps prove the prosecutor running for election is not ‘soft on crime’ like his opponents.¹⁰⁸ Prosecutors seek convictions to campaign on them by reminding voters of their notorious cases.¹⁰⁹ Prosecutors use their “wins,” especially those in the death penalty context, in campaign advertisements.¹¹⁰ Campaigning on their trial success—

dence of another suspect in a murder case. *Id.*

103. Gerald F. Uelmen, *Leaks, Gags and Shields: Taking Responsibility*, 37 SANTA CLARA L. REV. 943, 950 (1997).

104. Berenson, *supra* note 90, at 808 (quoting JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 174 (1978)).

105. *Id.* at 808-09 (citing Albert Ahschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 106 (1968-1969)).

106. CLARENCE DARROW, *THE STORY OF MY LIFE* 352 (1934).

107. Former Pennsylvania State Attorney General Ernie Preate told lawmakers that the tough-on-crime mentality along with motivations of “revenge had weakened constitutional safeguards against executing the innocent.” Patricia Manson, *For Defense, Reform Tide is a Buoyant Force*, CHI. DAILY L. BULL., Apr. 22, 2000, at 1. “Politicians of all stripes bow before the altar of ‘tough on crime’ rhetoric as a surefire means to boost their electability.” James McCloskey, *The Death Penalty: A Personal View*, 1996 CRIM. JUST. ETHICS P2, available at 1996 WL 13108692.

108. Logan, *supra* note 86 (citing Wise, *Prosecutors Want Death Penalty: Qualms Voiced About Costs, Time, Training of Lawyers*, NYLJ Mar. 3, 1995, at 1) (quoting a publicly elected prosecutor).

109. Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidate's Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 946-947 (1994).

110. For example, California Attorney General John K. Van de Kamp ran a television advertisement with a gas chamber in the background. Meanwhile the announcer declared that while Van de Kamp was a two-term District Attorney for Los Angeles County and two-term Attorney General of California, he “put or kept 277 murders on Death Row.” John Balzar,

their convictions—has been deemed by some as essential to be elected as a prosecutor.¹¹¹ Indeed, examples can be readily seen in newspapers at election time.¹¹² There are prosecutors, however, who do not feel the need to resort to campaigning on their conviction records.¹¹³ For those who do campaign on their conviction records, however, it is essential that they maximize their convictions.¹¹⁴

Prosecutors keep score of their convictions as a measure of their own success among their colleagues, to promote their own careers, and to campaign on them later for re-election to prosecutor or higher offices. Arguably, this scorekeeping mentality leads to seeking and obtaining convictions at all costs to the defendants—whether factually guilty or entirely innocent. The result is prosecutorial misconduct and *injustice*.

IV. WINNING AT ALL COSTS

As Martin Luther King, Jr. notoriously said in his Letter from Birmingham Jail, “[i]njustice anywhere is a threat to justice everywhere.”¹¹⁵ Prosecutorial misconduct is a threat to justice because it infects the entire criminal justice system where every defendant has a constitutional right to a fair trial, whether the defendant is factually guilty or entirely innocent.¹¹⁶ When a prosecutor engages in scorekeeping, the prosecutor has “an incentive to cut constitutional and ethical corners to secure a guilty verdict. . . .”¹¹⁷ Some prosecutors get swept up in their cases and do not pause to question the validity or strength of their evidence.¹¹⁸ Instead of pursuing justice, they give in

Van de Kamp Ads Focus on Death Row, Will Air Today, L.A. TIMES, Mar. 21, 1990, 1990 WL 2421833. An advertisement for re-election of prosecutor Chuck Credo declared that there were “four very good reasons” to re-elect him: “Johnny Taylor, executed. Benjamin Berry, executed. . . .” *Nightline: Crime and Punishment: A Matter of Life and Death* (ABC television broadcast Sept. 13, 2000) [hereinafter *Nightline*] (transcript on file with the author).

111. Zacharias, *supra* note 39, at 58 n.63 (“For elected prosecutors, publicity about trial successes is essential to campaigns.”).

112. See *Special Section: District Attorney*, DENVER POST, Oct. 22, 2000, at 47, available at 2000 WL 25832478. District Attorney Dave Thomas, in answer to the question why he thought he was the best candidate, said he was “a tough prosecutor [and] personally tried seven cases during [his] tenure . . . all with successful results.” District Attorney Sara F. Law ran for re-election on the high conviction rate of her office and cited those rates—“DUI offense (91 percent), felony assaults (91 percent), and murder (100 percent).” *Id.*

113. Joe D’Alessandro, a Florida State Attorney who has been re-elected eight times, has never campaigned on his conviction record for death penalty cases. *Nightline*, *supra* note 110.

114. Richman, *supra* note 89.

115. Martin Luther King, Jr., *Letter From Birmingham Jail*, in THE NORTON READER 887 (Arthur M. Eastman ed., 8th ed. 1992).

116. LAWLESS, *supra* note 30, at 2.

117. Bresler, *supra* note 79, at 543.

118. *Nightline*, *supra* note 110 (Ms. Laurie White was a former prosecutor in New Orleans and is now a defense attorney. She said prosecutors do not knowingly pursue convictions against innocent defendants but rather get swept up in the cases to the point that they do not question their evidence.).

to the urge to “pound an opponent into submission.”¹¹⁹ In the effort to pound their opponents, prosecutors engage in misconduct. The misconduct is “often concealed and difficult to expose.”¹²⁰ More effort is often expended by prosecutors to cover up their wrongdoing than to correct it.¹²¹ Prosecutors engage in hiding evidence or not disclosing evidence, procuring perjury from witnesses, and other forms of misconduct as they get wrapped up in their scorekeeping mentality of seeking convictions.

A. Hiding Evidence or Failing to Disclose Evidence

Cases where prosecutors withheld or failed to disclose evidence, in the pursuit of convictions, abound. For example, in *Alcorta v. State of Texas*, the prosecutor was aware that its star witness was sexually involved with the defendant’s wife—whom the defendant was prosecuted for killing after he came upon her and the star witness in a parked car, kissing.¹²² The prosecutor also coached the witness not to volunteer that he was sexually intimate with the victim and actually suborned perjury from the witness by asking him a series of questions on direct examination, to which the witness lied in his responses and concealed this relationship.¹²³ Luckily, the court, in a per curiam opinion, reversed and remanded the case to accord the defendant due process.¹²⁴

Prosecutors have also failed to disclose documentary evidence such as statements from witnesses. One prosecutor was actually suspended from the bar for two years stayed and placed on probation for an equal amount of time after she committed misconduct in a murder trial against three defendants when she did not disclose a key statement.¹²⁵ Another prosecutor kept secret a statement from an eyewitness, the victim’s brother, who told the police his killers were white when the prosecution was pursuing a black man as the defendant.¹²⁶ Prosecutors have even gone so far, in their pursuit for convictions, as to hide physical evidence like the knife, gun, or pipe with which the vic-

119. *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 48 (D.C. Cir. 1992).

120. TEXAS DEFENDER SERVICE, REPORT: A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, CHAPTER TWO: OFFICIAL MISCONDUCT: A DELIBERATE ATTACK ON THE TRUTH, Part I, at <http://www.texasdefender.org/study/chapter2.html>.

121. Manson, *supra* note 107 (quoting Former Illinois Supreme Court Justice John L. Nickels).

122. *Alcorta v. Texas*, 355 U.S. 28, 28 (1957).

123. *Id.* at 31.

124. *Id.* at 32.

125. CALIFORNIA BAR JOURNAL (November 2000), available at <http://www.calbar.org/2cbj/00nov/attdisc.htm> (the prosecutor was Vita Marie Mandalla, #105200 of Woodland, California).

126. Armstrong & Possley, *supra* note 55, at C1 (the case took place in New York where prosecutors won against two black men, Sammy Thomas and Willie Gene. The prosecutor that committed misconduct was Peter Corning. Incidentally, he later went on to become a judge).

tim allegedly first attacked or threatened the defendant.¹²⁷ In one prosecution, a jacket, seized from another suspect (not the defendant), which matched an eyewitness description of the killer, remained in the trunk of the police officer during the defendant's trial.¹²⁸ Prosecutors have withheld evidence that a blood-spatter expert supported the defendant's claim that she did not shoot her husband, but that he shot himself.¹²⁹ Prosecutors have withheld evidence suggesting a police informant framed the defendant¹³⁰ and even that the real killer was their star witness.¹³¹ Prosecutors have also failed to reveal immunity arrangements made with their star witnesses in exchange for their favorable testimony, as well as evidence that would damage or destroy their witnesses' credibility.¹³² Prosecutors have even concealed evidence that the defendant was not the real killer but someone else was and argued alternative theories of who was the killer, to convict two people, in two separate cases, rather than only one.¹³³ One prosecutor went to such lengths to with-

127. *Id.* (incidents like this have happened in Indiana, South Carolina, Arizona, Colorado, and Illinois. These are not just isolated incidents in one "bad" jurisdiction).

128. ACLU, THREE FREED FROM NORTH CAROLINA'S DEATH ROW, Aug. 17, 2000, at <http://www.aclu.org/news/2000/w081700a.html> (visited Feb. 13, 2001). The case involved U.S. Army Sgt. Tim Hennis whose conviction for rape and murder of a woman and her two children was reversed and whose case was remanded to the trial court where a jury found him not guilty. The eyewitness identified a man who wore a jacket with specific writing on it. Another man was in the neighborhood at the time of the murders and had in fact been questioned by the police who seized the jacket from him. The evidence was not revealed during Mr Hennis' first trial. *Id.*

129. Armstrong & Possley, *supra* note 55, at C1.

130. *Id.*

131. *Id.*

132. Rhode Island v. DiPrete, 1997 WL 105107 (R.I. Super. Ct. 1997) This case documents several instances of withholding evidence. The court reversed and stated, "the state cannot be allowed to benefit from having acted in a manner that is less than constitutional and ethical in the pursuit of convictions. . . ." *Id.* (emphasis added). Mr. Hansen refers to separate rulings in June 1993 from U.S. District Court Judges James Holderman and Suzanne Conlon in which federal prosecutors withheld evidence that their star witnesses received special favors in exchange for their cooperative testimony and used drugs while in custody. Mark Hansen, *New El Rukn Trials: Prosecutor Misconduct Cited*, 79 A.B.A. 42 (1993). Senior Justice Department Prosecutor William Lynch had one of his cases dismissed by U.S. District Judge James Ideman for prosecutor misconduct in withholding evidence from the defendants because the evidence attacked the credibility of his star witness. NAT'L ASS'N OF CRIM. DEF. LAWYERS, RELUCTANT DISCIPLINE, at <http://209.70.38.3/PUBLIC/ABUSE/CR000006.htm>.

133. Jacobs v. Scott, 31 F.3d 1319, 1322 (S.D. Tex. 1994), *cert denied*, 513 U.S. 1067 (1995). In the trial against Jesse Dewayne Jacobs, the prosecutor used the defendant's confession to the police to convict him as the killer of his sister's lover's wife. In a subsequent criminal case by the same prosecutor against Jacob's sister, the prosecutor argued that she was the real killer—not Jacobs. The prosecution called police officers that testified that certain portions of Jacob's confession were not true. The prosecution also called Jacobs himself to testify that his sister was the one who killed the victim. The Supreme Court denied cert. when the appellate court found that the alternative arguments of the prosecutor did not constitute "new evidence" entitling him to federal habeas corpus relief. Two justices dissented—Stevens and Ginsburg. *Id.* Sadly, Jacobs received his sentence of death, for a crime he did not commit, on January 4, 1995. TEXAS DEPARTMENT OF CRIMINAL JUSTICE, STATISTICS, at <http://www.tdcj.state.tx.us/statistics/deathrow/executed/jacobos.jpg>. In his last statement, Ja-

hold or conceal evidence that he ordered helpful evidence to be deleted from reports, made illegible photocopies of documentary evidence, buried 300 pages of evidence harmful to his case in 18,000 pages of other evidence, and withheld the names of witnesses.¹³⁴ As these examples demonstrate, not only do prosecutors hide physical and documentary evidence in order to win, but they also suborn perjury from their star witnesses.

B. Subornation of Perjury

Prosecutors who fall into the trap of seeking convictions and not justice suborn perjury from police officers called to testify against defendants¹³⁵ and from other witnesses as well.¹³⁶ When the defendant can prove that the prosecutor permitted witnesses to lie and did nothing to correct the perjury, reversals are supposed to be “virtually automatic.”¹³⁷ Prosecutors have been admonished against suborning perjury or producing any other type of false evidence in order to obtain a conviction.¹³⁸ In *Napue v. Illinois*, the Court said that a prosecutor “may not knowingly use false evidence, including false testimony, to obtain a tainted conviction.”¹³⁹ Despite being admonished against these types of unethical and unconstitutional conduct, prosecutors continue to suborn perjury in order to obtain convictions.

C. General Prosecutor Misconduct

Prosecutors have been accused of a host of other forms of misconduct ranging from inappropriately badgering truthful witnesses to shape their testimony into lies, threatening witnesses by handcuffing them until they agree to provide cooperative testimony, and cooperating with police in repeated searches of witnesses’ homes in order to get them to provide favorable tes-

cobs said, “I have committed lots of sins in my life, but I am not guilty of this crime.” *Id.*

134. J. Harry Jones, *Judge Voids 5 Convictions in Sports-Agent Fraud Case, State Investigating Retired Prosecutor For Misconduct*, SAN DIEGO UNION TRIB., Jan. 20, 2001, <http://pqasb.pqarchiver.com/sandiego/main...html?QIID=000000067255677&FMT=FT&FMTS=FT> (San Diego County Superior Court Judge Judith Hayes held that ex-prosecutor Peter J. Longanbach committed prosecutor misconduct to win convictions).

135. FREEDMAN, *supra* note 32, at 225.

136. ACLU, *THREE FREED FROM NORTH CAROLINAS DEATH ROW*, *supra* note 128. Charles Munsey was convicted of murdering a woman. During his trial, prosecutors suborned perjury from their star witness who claimed Munsey confessed the murder to him while they were in Central Prison together. The witness had never even been in Central Prison and prosecutors knew it. Another man later confessed to the killing, and Munsey’s death sentence conviction was overturned. Sadly, while awaiting a new trial, Munsey died from lung cancer. *Id.*

137. *United States v. Wallach*, 935 F.2d 445, 456 (1991) (citations omitted).

138. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

139. *Id.*

timony, to knowingly using false testimony and withholding material exculpatory evidence.¹⁴⁰

Despite the prosecutors' numerous forms of misconduct, there are little consequences for their unconstitutional and unethical behavior that results from the win-loss tally-keeping mentality.¹⁴¹

V. LITTLE CONSEQUENCES FOR PROSECUTOR MISCONDUCT

Prosecutors commit misconduct in the drive to win—and because they will not get punished.¹⁴² The only check on prosecutor misconduct is the morality of the individual prosecutor.¹⁴³ That check is clearly not enough. As Ken Armstrong and Maurice Possley from the Chicago Tribune found after extensive research:

In an environment where prosecutors recite conviction rates like boxers touting win-loss records, the risks are negligible for those who break the rules of a fair trial. Winning a conviction can accelerate a prosecutor's career, but getting rebuked on appeal will rarely stall it, contributing to a culture that fosters misconduct. And the deterrents that confront prosecutors are fearsome only in theory.¹⁴⁴

Prosecutors face almost no discipline for their outrageous misconduct.¹⁴⁵ In addition, they have immunity from civil suits by defendants seeking some type of retribution.¹⁴⁶ They are not likely to be criminally prosecuted for their misconduct either.¹⁴⁷ When the appellate courts reverse their convictions due to prosecutor misconduct, they receive "professional courtesy." The Supreme Court reviews prosecutor misconduct cases with a pathetic standard

140. *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995). This case is a particularly egregious example of prosecutor misconduct in which the defendant's writ of habeas corpus was granted. Mr. Ricardo Aldape Guerra was ultimately released from prison on April 16, 1997, after serving 15 years on death row. Unfortunately, his freedom was short-lived; he died in an automobile accident on August 22, 1997. *Man Who Avoided Execution is Killed in Auto Accident*, AUSTIN AM. STATESMAN, Aug. 22, 1997, at B8.

141. See *infra* Part V.

142. Armstrong & Possley, *supra* note 55, at C1. Prosecutors who commit misconduct in the drive to win should be punished under several ethical rules, including ABA Model Rules of Professional Conduct, Rule 8.4(c). Ironically, prosecutors like Jefferson County, Colorado, Chief Deputy District Attorney Mark C. Pautler get punished under the same rule for coaxing a triple murderer and rapist into surrendering by posing as a public defender to get the killer to let hostages go unharmed. Stephen Tarnoff, *Hard Line on a White Lie: Colorado panel disciplines prosecutor who helped coax triple murderer into surrendering*, 87 ABA JOURNAL 32 (2001).

143. Armstrong & Possley, *supra* note 55, at C1 (quoting Bennett Gershman, Professor of Law at Pace University in White Plains).

144. Armstrong & Possley, *supra* note 55, at N1.

145. See *infra* Part V.A-C.

146. *Id.*

147. *Id.*

called “harmless error.”¹⁴⁸ In essence, prosecutors have no deterrents to their unethical and unconstitutional behavior.

A. Little Discipline

Prosecutors receive little discipline from their state bar agencies when they commit misconduct. “In circumstances where life and liberty are at stake . . . most state bar associations are ill-equipped to review the ethical behavior of prosecutors, and they almost never do.”¹⁴⁹ Perhaps the state bar associations do not have the extensive time and money it would take to prosecute all of the cases of prosecutor misconduct.¹⁵⁰ It is more likely, however, that the reason prosecutors are not disciplined for their misconduct very often is because the trial records do not usually reveal their misconduct,¹⁵¹ unless it is particularly egregious. For example, evidence the prosecutor conceals from the jury and the defense counsel is obviously not documented in the trial transcript, nor is the fact that the prosecutor suborned perjury from certain witnesses. Often, the only person who will know about the misconduct is the prosecutor engaged in such behavior.¹⁵²

Sometimes the misconduct is brought to the attention of the appellate courts that reverse convictions based on prosecutors’ misconduct. Out of 381 convictions that were reversed on appeal, due to prosecutors’ misconduct in failing to disclose evidence and submitting false evidence, since 1963, not one single prosecutor received a *public* sanction from the state disciplinary agency.¹⁵³ *Private* sanctions by state disciplinary agencies, in the form of admonitions or reprimands, are obviously unpublished.¹⁵⁴ Investigations of prosecutors are kept confidential if they do not result in disciplinary action.¹⁵⁵

148. See *infra* Part V.E.

149. JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE* 181 (2000). The State of Colorado’s lawyer-discipline panel did, however, review the unethical behavior of one of its prosecutors who lied when he misrepresented himself as a public defender in order to keep a dangerous criminal in a hostage situation from further hurting anyone. Tarnoff, *supra* note 142. The disciplinary panel found, in a 2-1 decision, that Jefferson County Chief Deputy District Attorney Mark C. Pautler violated both ABA Rule 8.4(c)— which prohibits conduct involving dishonesty, deceit, fraud, or misrepresentation—and Colorado Rules of Professional Conduct, Rule 4.3, which prohibits “deceptive conduct by a lawyer when dealing on behalf of a client or with a person not represented by counsel.” *Id.* The disciplinary panel said, “[t]he ends do not justify the means.” *Id.* If disciplinary boards can use ABA Rule 8.4(c) to discipline a lawyer who makes an exception to the rule in order to save people’s lives, then the disciplinary boards should also enforce this rule against prosecutors who make exceptions to the rule in order to promote their own lives.

150. More resources would be consumed in the investigation of prosecutorial misconduct than is spent by state bars to investigate ethical violations by private counsel. Zacharias, *supra* note 39, at 105.

151. *Id.* at 106.

152. *Id.*

153. Armstrong & Possley, *supra* note 55, at C1.

154. *Id.*

155. *Id.*

It is therefore difficult to determine whether prosecutors generally receive absolutely no disciplinary sanctions or merely receive low-level sanctions like private reprimands for prosecutor misconduct. A search of the local state disciplinary agency's records for disciplinary action since August 1998 produced only one record of a prosecutor who received public sanctions for misconduct.¹⁵⁶ The prosecutor was ordered to take the MPRE again within the next year, received a two year sentence which was stayed, and received a two year probation for her misconduct in a murder conviction in which she failed to disclose evidence to the defense.¹⁵⁷ In Illinois, only one public sanction was issued against a prosecutor in twenty-six years.¹⁵⁸ Sometimes, courts do give appropriate sanctions. For example, San Diego Prosecutor L. Forrest Price was suspended from the practice of law for two years after he forged evidence in a 1976 double murder trial.¹⁵⁹

Even though prosecutors violate their ethical obligations to seek justice, not convictions, disciplinary agencies are reluctant to do anything to cure the problem of prosecutor misconduct. Prosecutors who commit misconduct while engulfed in the scorekeeping, conviction-seeking mentality have little deterrent to this type of behavior.¹⁶⁰ "The future prospects of vigorous enforcement of the prosecutorial duty [to seek justice, not convictions] are dim."¹⁶¹ Given that prosecutors are not deterred by threats of being publicly

156. CALIFORNIA BAR JOURNAL (Nov 2000), available at <http://www.calbar.org/2cbj/00nov/attdisc.htm>.

157. *Id.* The case involved prosecutor Vita Marie Mandalla, #105200, of Woodland, California. My search also revealed another case of public sanctioning of former Madera County prosecutor George M. Dechant, Jr. #156651, who was summarily disbarred after being convicted of setting a fire that caused \$1 million in damage to his prosecutors' office. CALIFORNIA BAR JOURNAL, DISCIPLINE: FORMER PROSECUTOR DISBARRED AFTER SETTING D.A.'S OFFICE ON FIRE (Jan. 1999), available at <http://www.calbar.org/2cbj/99jan/page25-1.htm>.

158. Armstrong & Possley, *supra* note 93, at N1. Prosecutor Ray Garza was censured by the Illinois Attorney Registration and Disciplinary Commission for his misconduct in the trial of Enice Lyles, Jr. for murder. Garza verbally attacked the defense attorney, judges, and witnesses. Garza also cursed at the defendant's lawyer while his co-counsel Prosecutor Scott Arthur threatened the defense counsel to the point where the defense counsel fled the room because he thought Arthur was going to punch him. The court said Garza and Arthur "destroyed the aura of dignity" in the courtroom. Though Garza was disciplined, Arthur was investigated but not disciplined. *Id.*

159. Ken Armstrong & Maurice Possley, *Trial and Error: Prosecution on Trial in DuPage, Series Three in a Five Part Series*, CHI. TRIB., Jan. 12, 1999 at N1, available at [wysiwyg://23/http://chicagotribune.com/news/..ws/item/0,1308,21398-21579-21577,00.html](http://www.wysiwyg://23/http://chicagotribune.com/news/..ws/item/0,1308,21398-21579-21577,00.html).

160. Press Release, American Civil Liberties Union, ACLU of Rhode Island Files Disciplinary Complaint Against State Attorney General's Office: Statement of Steven Brown, Executive Director ACLU of Rhode Island (August 5, 1998) (on file with author), <http://www.aclu.org/news/n080598d.html>. Pace University Law Professor and former Manhattan Assistant District Attorney Bennett Greshman, who wrote the book PROSECUTORIAL MISCONDUCT, said "[p]rosecutors have a conviction mind-set . . . [and the criminal justice system is] a mess because prosecutors act unethically and there is no deterrence because there are no sanctions imposed." Robyn Blumner, *Perspective: Prosecutors Should Rethink Their Goals*, ST. PETERSBURG TIMES, May 6, 2001, at 1D, available at 2001 WL 6976480.

161. Zacharias, *supra* note 39, 106-07.

sanctioned, suspended from the practice of law, or barred entirely—they have little incentive to avoid getting wrapped up in big egos, seeking convictions, and increasing their win-loss records for their own self-interests.

B. Prosecutor Immunity

The Supreme Court in 1976 granted prosecutors immunity from civil suits, even if they commit misconduct, based on the Supreme Court's belief that there were already sufficient means to deal with misconduct—sanctions by local disciplinary boards and criminal prosecution.¹⁶² Unfortunately, sanctions by local disciplinary boards for prosecutor misconduct are a very rare occurrence. Furthermore, prosecutors rarely prosecute their own colleagues for misconduct.¹⁶³ Prosecutors know they have full immunity and wave that flag whenever they can—in the face of claims of prosecutor misconduct.¹⁶⁴ Although prosecutors have a right to some protection from civil suits in order to fulfill the functions of their job without dealing with endless litigation on the side, the prosecutors' interests need to be balanced against the interests of victims of prosecutor misconduct.¹⁶⁵ When there is no balance of the defendant's rights to a fair trial and prosecutors know they have full immunity, there is no deterrent to their conviction seeking, scorekeeping mentality.

C. Lack of Criminal Convictions Against Prosecutors Engaged in Misconduct

Prosecutors rarely seek convictions against their colleagues. Out of 381 homicide convictions reversed due to prosecutor misconduct, by failing to disclose evidence or presenting false evidence to the court, not one prosecutor faced trial for the misconduct.¹⁶⁶ Rather, only two of the cases resulted in charges being filed that were dismissed before trial.¹⁶⁷ In other cases of prosecutor misconduct, the Chicago Tribune found only two cases where prosecutors were actually convicted for their misconduct.¹⁶⁸

Prosecutors who do attempt to seek convictions against their fellow prosecutors face a tremendous uphill battle with jurors who tend not to believe that the accused prosecutor would do anything wrong.¹⁶⁹ Prosecutors

162. Armstrong & Possley, *supra* note 55, at C1. Prosecutors have also been granted immunity from suits under § 1983. See generally LAWLESS, *supra* note 30, at 863.

163. See *infra*. Part V.C.

164. J. Harry Jones, *4 Ex-Gang Members File \$10 Million Claims Over Cop-Killing Case*, SAN DIEGO UNION TRIB., Feb. 16, 2001, at B2. San Diego District Attorney Paul Pfingst claimed, "We have full prosecutorial immunity." *Id.*

165. DWYER, *supra* note 149, 180.

166. Armstrong & Possley, *supra* note 159.

167. *Id.*

168. Armstrong & Possley, *supra* note 55, at C1.

169. Armstrong & Possley, *supra* note 159. Quoting Miami lawyer Gerald Houlihan who

who face no disciplinary action, no civil consequences, and no criminal consequences for their unethical and unconstitutional practices in the pursuit of convictions for their tally sheet will continue their misconduct.

D. Sanctioning by Appellate Courts is a "Professional Courtesy"

Appellate courts that overturn convictions because a defendant's rights were violated due to prosecutorial misconduct, rarely identify the prosecutor by name and even when they do identify the prosecutor by name, they rule in unpublished opinions.¹⁷⁰ "The granting of anonymity isn't mandated anywhere, but instead stems from tradition and professional courtesy."¹⁷¹

E. Courts Grant Anonymity to Prosecutors Engaged in Misconduct

Although the Supreme Court in a 1983 opinion suggested that appellate courts identify prosecutors who have engaged in misconduct as a way to "chastise" them, what the Court envisioned rarely happens.¹⁷² For instance, Carol Pearce McCarthy prosecuted Willie Ray, Jr. in 1982 for murder, but the conviction was overturned in 1984 by the Illinois Appellate Court.¹⁷³ The Court listed several ways in which McCarthy committed misconduct and said that her actions in the case "read like a veritable hornbook of 'do nots.'"¹⁷⁴ Yet, the court granted her the professional courtesy of referring to her in their published opinion as "the prosecutor,"¹⁷⁵ rather than by name.

F. When Courts Identify the Prosecutor By Name, They Issue Unpublished Opinions

When courts do identify the prosecutor by name, they still grant the "professional courtesy" of making the opinion unpublished. In one case, the court named Carol Pearce McCarthy by name for her prosecutorial misconduct but issued an unpublished opinion.¹⁷⁶ Case reporters and legal databases do not contain unpublished opinions.¹⁷⁷ In another case, Cook County Prosecutor Patrick Quinn had three cases reversed on appeal by the Illinois Appel-

took two prosecutors to trial in 1980 in Rochester, New York, for conspiring with sheriff's officials to hide evidence and suborn perjury from witnesses who would testify against leaders of organized crime. Prosecutor Raymond Cornelius, who was a judge by then, was acquitted whereas Prosecutor Patrick Brophy was convicted of a misdemeanor and fined \$500. *Id.*

170. *See infra* Part V.D.1-2.

171. Armstrong & Possley, *supra* note 55, at N1.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

late Court for misconduct, but the rulings were all unpublished.¹⁷⁸ Retired Illinois Appellate Court Judge Dom Rizzi “bristles at . . . ways in which he believes reviewing courts fail to deter misconduct by prosecutors.”¹⁷⁹ Judge Rizzi said that courts document prosecutorial misconduct in unpublished opinions and treat prosecutorial misconduct as a “harmless error.”¹⁸⁰

G. The Supreme Court Sanctions Prosecutor Misconduct as “Harmless Error”

In *Brecht v. Abrahamson*, the Supreme Court set forth the “harmless error” standard in which a defendant is entitled to habeas corpus relief for convictions obtained as a result of prosecutorial misconduct, but only if the defendant can establish that “actual prejudice” resulted.¹⁸¹ The prosecutor in that case made unconstitutional reference to the defendant’s post-Miranda silence as well as constitutional references to the defendant’s pre-Miranda silence.¹⁸² The Court said, considering the record as a whole, the prosecutor’s unconstitutional references to the defendant’s post-Miranda silence were in-ferent, cumulative of his pre-Miranda silence, and evidence of the defendant’s guilt was overwhelming.¹⁸³ Thus, the court found that there was no “actual prejudice.”¹⁸⁴

The Court’s legal analysis of prosecutorial misconduct cases, under the “harmless error” standard, begins by asking whether the prosecutor’s misconduct violated one or more of the defendant’s constitutional rights.¹⁸⁵ If it did, the Court may only uphold the conviction against the defendant “if it finds beyond a reasonable doubt that the error did not contribute to or result in the defendant’s conviction.”¹⁸⁶ The Court then looks at the strength of the evidence against the defendant, and if it is overwhelming, then it is likely that the “error” of prosecutorial misconduct will be deemed “harmless.”¹⁸⁷ The Court also considers the impact of the prosecutorial misconduct on the jury,¹⁸⁸ whether the misconduct infected the entire trial or just portions thereof,¹⁸⁹ and whether the prosecutor deliberately committed misconduct.¹⁹⁰

178. *Id.*

179. *Id.*

180. *Id.*

181. *Brecht v. Abrahamson*, 507 U.S. 619, 621 (1993).

182. *Id.*

183. *Id.*

184. *Id.*

185. LAWLESS, *supra* note 30, at 946.

186. *Id.* See *Chapman v. California*, 386 U.S. 18, 23-24 (1967).

187. LAWLESS, *supra* note 30, at 945-46. See *United States v. Blanton*, 730 F.2d 1425, 1434 (11th Cir. 1984); *United States v. Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983); *Moore v. Wyrick*, 589 F. Supp. 608, 611 (W.D. Mo. 1984).

188. See *United States v. Nickerson*, 669 F. 2d 1016, 1019-20 (5th Cir. 1982) and *United States v. Chatham*, 568 F.2d 445, 451 (5th Cir. 1978).

189. See *United States v. Chatham*, 568 F.2d 445, 451 (5th Cir. 1978).

The “harmless error” standard has been called a “lie that the criminal justice system tells itself.”¹⁹¹ The “lie” is used to “absolve police officers and prosecutors of misconduct.”¹⁹² This lie is a dangerous one—especially to innocent defendants who have been convicted in cases involving prosecutor misconduct.¹⁹³ “Lies, cheating, distortions at the lower levels of the [court] system are excused at high ones.”¹⁹⁴ In sixty-three percent of the convictions the Cardozo Innocence project studied that were reversed through the use of DNA evidence to exonerate innocent defendants, prosecutor misconduct “played an important role in the convictions.”¹⁹⁵ Young prosecutors pursuing convictions at all costs soon learn that the court will bail them out by either ignoring their misconduct altogether or simply calling it a “harmless error.”¹⁹⁶

The appellate courts appear to condone prosecutor misconduct under this standard. Thus, “the prosecutor may take liberties, perceiving that the courts will impose few ethical limitations or not enforce sanctions on his conduct. Those accused, whether guilty or innocent, suffer the consequences.”¹⁹⁷ If courts do not reverse convictions where there has been misconduct by prosecutors, “there is virtually no way [one] can be assured that the conduct will not repeat itself in other cases.”¹⁹⁸

Prosecutors engrossed in the win-loss record-keeping, conviction seeking mentality forget about their ethical obligations to pursue justice. When they do, they commit ethical violations and violate defendant’s constitutional rights. For these gross injustices, prosecutors pay little—if anything at all. Prosecutors receive little discipline from their state bar disciplinary agencies. They are granted immunity from civil suits, no matter how egregious their misconduct. Colleagues rarely seek criminal convictions against prosecutors who have engaged in misconduct. Lastly, the appellate courts and the Supreme Court sanction the misconduct. Thus, prosecutors who face no conse-

190. See *United States v. Singletery*, 646 F.2d 1014, 1019 (5th Cir. 1981).

191. DWYER, *supra* note 149, at 175.

192. *Id.* at 172.

193. *Id.*

194. *Id.* at 175. Ken Armstrong & Maurice Possley, *Trial and Error: About this Series*, CHI. TRIB., Jan. 8, 1999, available at wysiwyg://32/http://chicagotribune.com/nc_nworld/ws/indx/0,1306,21398-21422.html. The Chicago Tribune studied homicide cases in which convictions were reversed because prosecutors committed misconduct by failing to disclose evidence or presenting the court with false evidence. They found a body of cases in which the courts said the conduct by prosecutors may have been reprehensible, but it probably did not change the outcome of the trial. This is known as the “harmless error” standard. Armstrong, *supra* note 55, at N1. The Chicago Tribune also studied 167 published opinions, involving prosecutorial misconduct, between 1993 and 1997 in which the Illinois Appellate Court or Illinois Supreme Court affirmed convictions based on the “harmless error” standard. *Id.*

195. DWYER, *supra* note 149, at 175.

196. Dershowitz, *supra* note 29, at xii.

197. LAWLESS, *supra* note 30, at 24-25.

198. Armstrong & Possley, *supra* note 55, at N1.

quences for their unethical and unconstitutional behavior continue seeking convictions—by any means.

“[B]y tolerating the erosion of civil liberties of anyone, no matter how unpopular, we invite prosecutors to violate our civil liberties and the civil liberties of a family member who may be unlucky enough to fall within the cross-hairs of a prosecutor’s sights.”¹⁹⁹ There are alternatives to allowing the erosion of defendants’ civil liberties by prosecutors’ misconduct engaged in as a result of seeking convictions in a win-loss record keeping culture.

VI. AN ALTERNATIVE TO CONVICTION SEEKING, TALLY-KEEPING AS A MEASURE OF SUCCESS

Clarence Darrow once said, “every kind of human conduct comes from causes, and in order to change conduct the causes that bring it about must be altered or removed.”²⁰⁰ Prosecutor misconduct comes from a cause—win-loss record-keeping, and conviction seeking mentalities of every prosecutors’ office across the nation. The cause must be removed entirely. Prosecutors have an ethical obligation to refrain from seeking convictions and measuring their success in that manner. Prosecutors also have an affirmative ethical obligation to seek justice.

Former Illinois Supreme Court Judge John L. Nickels said that prosecutors need to be “reoriented” to their duty of justice.²⁰¹ Prosecutors need to see that winning is not everything and critically question what it even means to win.²⁰² Winning should not be equated with convictions or sentences against defendants. Winning is more about the process of playing the game. Is the process fair? Did the prosecutor do what was just and required of him or her during the process of according the defendant a fair trial? Did the prosecutor voluntarily disclose evidence and promote the truth from witnesses rather than perjury? Those are measures of a “winner.”

There are a few real “winner” prosecutors in the legal system and few “loser” prosecutors as well. For example, Brooklyn District Attorney Charles Hynes agreed that Jeffrey Blake, an innocent man who served eight years in prison for a murder he did not commit, should be released.²⁰³ Mr. Hynes discovered evidence that the only witness to the double murder had perjured himself, thus resulting in the conviction of an innocent man.²⁰⁴ Mr.

199. Press Release, American Civil Liberties Union, John Roberts, Executive Director ACLU of Mass., ACLU Condemns Prosecutorial Abuses on Local and National Level (Feb. 18, 1999) (on file with author), available at <http://www.aclu.org/news/1999/n021899c.html>.

200. DARROW, *supra* note 106, at 336.

201. Manson, *supra* note 107.

202. Bresler, *supra* note 109, at 958.

203. Bob Herbert, *Justice Delayed*, N.Y. TIMES, July 30, 1998, at A21; Bob Herbert, *A Case of Lies*, N.Y. TIMES, Aug. 2, 1998, sec. 4, at 15; Bob Herbert, *Justice, at Long Last*, N.Y. TIMES, Oct. 29, 1998, at A31; Bob Herbert, *Justice Confounded*, N.Y. TIMES, Dec. 31, 1998, at A19.

204. See *supra* note 203.

Hynes supported the release of an innocent man. Mr. Hynes sought justice, not convictions.²⁰⁵ An example of a “loser” prosecutor, who is actually a real winner, is Glenn M. Kaas. He was the first prosecutor in Hartford, Connecticut’s Community Court.²⁰⁶ He said that he “found that the more involved [he] became with the community restoration business, the farther [he] stray[ed] from the traditional adversarial system wherein one tallies up one’s wins and losses.”²⁰⁷ Mr. Kaas often introduces himself to community groups by saying that he is possibly one of the worst prosecutors in Connecticut because almost ninety-five percent of his cases are eventually dismissed by the judge.²⁰⁸ When asked whether he is pleased with the statistic, he says, “[y]ou bet.”²⁰⁹ Mr. Hynes and Mr. Kaas are both examples of good prosecutors who seek justice not convictions.

Bruce Green defines “seeking justice” as:

standing up to the police (when their investigations are inadequate), disregarding the public (when its expectations are unreasonable), and overcoming one’s own self-interest or ennui. In the face of contrary pressures and expectations, both external and internal, it may take a certain amount of inner strength (or strength of character) for an individual prosecutor to decide not to bring criminal charges, to comply with procedural norms that make it more difficult to secure convictions, to confess error, or to seek to overturn a conviction that was unfairly procured.²¹⁰

Prosecutors must abandon their win-loss record-keeping, conviction seeking, mentality and instead seek justice. Instead of asking a prosecutor what his or her record is to measure the prosecutor’s success, one should ask prosecutors how many times they have concealed evidence to obtain a conviction; how many times they have rationalized that evidence did not need to be turned over to the defense because it was not “material”; how many times they have suborned perjury to obtain a conviction; how many times they have presented with false evidence to the court to obtain a conviction; how many times they knew the defendant was not accorded procedural due process and yet did nothing; and lastly and perhaps most importantly—how many times they have convicted an innocent person or one whom they believed could be innocent. An answer to these questions of “0 and 0” is a better measure—of prosecutor success and the concept of justice—not convictions.

Although substantive justice is difficult to define, as Clarence Darrow and others have noted, procedural justice is not. The rules clearly define procedures for prosecutors to follow to insure a fair process for every defen-

205. Herbert, *supra* note 203, at A21.

206. Glenn M. Kaas, *Restorative Justice: A New Paradigm for the Prosecutor (a View From Hartford Community Court)*, 34 PROSECUTOR 31 (2000).

207. *Id.*

208. *Id.*

209. *Id.*

210. Green, *supra* note 39, at 642-43.

dant—whether entirely innocent or factually guilty. Like the Blindfolded Goddess on the steps of the courthouse, prosecutors may be blind to substantive justice but need only to remove the blindfold to see the clear path to procedural justice before them. When the blindfold is removed, prosecutors will see that nowhere along the path are the words “to win” inscribed.

