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UNDER WHAT CIRCUMSTANCES IS THE SHIELD AGAINST SELF-INCRIMINATION LOWERED IN A CIVIL ACTION?

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I. OVERVIEW

And what happens to individual freedom and equality – and to our very conception of law itself – when the criminal code comes to cover so many facets of daily life that prosecutors can almost choose their targets with impunity?[1]

In the United States, most state and local prosecutors are elected officials[2] who have a vested interest in the outcome of a case. Secondly, a prosecutor's decisions are largely made in secret and reviewed by no one.[3] Thirdly, notwithstanding the Supreme Court's powerful statement

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[1] Hon. Neil M. Gorsuch, *Thirteenth Annual Barbara K. Olson Memorial Lecture: Law's Irony*, 37 HARV. J.L. & PUB. POL'Y 743, 748 (2014) (citing WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2-5 (2011)).

[2] Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY, 717, 734 (1996).

[3] KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 207-208 (1969).

that the United States Attorney's interest in a criminal prosecution is not that he "shall win a case, but that justice shall be done",[4] which is reflected in the American Bar Association's Model Code of Professional Responsibility,[5] "the vagueness of this standard and the prosecutor's unfettered discretion permit her to define justice as she sees fit, and many equate justice with convictions and incarceration, regardless of the circumstances of the case."[6]

Lafave has explained the nature of the American prosecutor's discretion.

> One of the most striking features of the American system of criminal justice is the broad range of largely uncontrolled discretion exercised by the prosecutor. Particularly noteworthy are these kinds of discretionary decisions: (1) the decision not to prosecute an individual notwithstanding sufficient evidence to meet the legal requirements for commencing a prosecution; and (2) the decision to tender concessions to a charged individual on the condition that he plead guilty rather than stand trial.[7]

Davis has commented to similar effect.

> Prosecutors are the most powerful officials in the American criminal justice system. They control the direction and outcome of all criminal cases, particularly through their charging and plea-bargaining decisions. These decisions have greater impact and more serious consequences than those of any other criminal justice official. The prosecutor's charging and plea-bargaining decisions are totally discretionary and

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[4] Berger v. United States, 295 U.S. 78, 88 (1935).

[5] ABA MODEL CODE OF PRO. RESP. EC 7-13 (AM. BARR ASS'N 1980) 'The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.'

[6] Angela J. Davis, *The Power and Discretion of the American Prosecutor*, 49 DROIT ET CULTURES 55, 60 ¶ 17 (2005).

[7] Wayne R. Lafave, *The Prosecutor's Discretion in The United States*, 18 THE AM. J. OF COMPAR. L., 532, 532 (1970).

> virtually unreviewable. Although most American prosecutors are elected officials, the democratic process does not effectively serve as a check on prosecutorial power because the charging and plea-bargaining decisions are made behind closed doors, shielded from public view.[8]

The outcome has been succinctly summarised by Pfaff: "Nearly everyone in prison ended up there by signing a piece of paper in a dingy conference room in a county office building."[9]

An alternative perspective to the unfettered power of the American prosecutor has been provided by Bellin, who considers the widespread view that American prosecutors rule the criminal justice system to be flawed, because it overlooks other powerful players in the system such as legislators, judges, and police.

> Prosecutors are one of the many important actors who populate the criminal justice ecosystem. Police, legislators, judges, governors, and parole boards are important too. The cacophonic rhetoric of prosecutorial dominance, however, ignores the agency of these other actors, fostering a rhetorically pleasing, but hopelessly flawed understanding of the criminal justice system. This blinkered approach overlooks the powerful forces that can and do constrain prosecutors and diverts attention from the most promising sources of lasting reform, like legislators, judges, and police, to the least.[10]

For present purposes, the most important source of lasting reform is the legislature. While coming from a different angle to Bellin, Davis has also argued that the prosecution function is in great need of reform.

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[8] Davis *supra* note 6, at 55.
[9] JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION, 132 (2017).
[10] Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV., 171, 212 (2019).

> By creating more transparency in the charging and plea-bargaining processes, informing their constituents of their practices and policies, and taking steps to eliminate race and class inequities, prosecutors would go a long way towards restoring fairness and the balance of power in the American criminal justice system.[11]

The Supreme Court of the United States has also weighed into the argument of the importance of plea-bargaining in the context of the Sixth Amendment right to effective assistance of counsel. In *Missouri v Frye*[12] the Supreme Court held that the Sixth Amendment right extended to the consideration of plea offers that lapse or are rejected. The majority opinion of the Court was given by Justice Kennedy who endorsed an analogy between plea bargaining and horse-trading, going on to cite academic authority for the proposition that the longer sentences in the statute books existed for bargaining purposes.

> "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system." Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992). See also Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but

[11] Davis, *supra* note 6, at 66.
[12] Missouri v. Frye, 566 U.S. 134 (2012).

> take a chance and go to trial" (footnote omitted)). In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.[13]

In the above passage, Kennedy is making three important points: (1) plea bargaining is not some adjunct to the criminal justice system but rather personifies the criminal justice system; (2) defendants face an unpalatable choice between pleading guilty or facing a longer sentence if found guilty at trial; and (3) the critical point for the defendant is the plea bargain rather than the trial.

However, Kennedy also acknowledged that there were positive benefits to plea bargaining.

> To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations.[14]

The recognition that criminal defendants require effective counsel in order for plea bargaining to operate in an even-handed manner is a point championed by Dripps, who has categorized the 1990s as "a steroid era in criminal justice … [i]n effect, the system splurged on crime control and scrimped on due process."[15] In marked contrast to Bellin's view that prosecutors are just one group of important players in the criminal justice system, Dripps claims the criminal justice system's "overriding evil is the concentration of power in executive hands."[16] For Dripps, the adoption by Congress of Sentencing Guidelines and mandatory minimum

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[13] *Id.* at 144.
[14] *Id.*
[15] Donald A. Dripps, *Guilt, Innocence and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV. 1343, 1350 (2016).
[16] *Id.* at 1356.

sentences had the effect of "dramatically *augmenting* prosecutorial power."[17] Dripps views the guilty plea system as undermining the principles of liberal democracy, with two significant negative impacts flowing from prosecutorial hegemony.

> First, the system prosecutors have dominated for the last thirty years has become the most punitive in the world and indeed, if we leave aside police states with camp systems, perhaps in history. Second, the arbitrary power to threaten catastrophic conviction consequences endangers the innocent - not only by confronting them with irrational risks if they stand trial but also by creating incentives to offer substantial assistance to prosecutors even if the grounds of cooperation need to be invented.[18]

In sum, Dripps concludes "plea incentives that would make an innocent person likely to plead guilty violate due process." [19] Dripps likens the plea process to a coerced confession in devising a standard as to whether the coerced plea is unconstitutional.

> Adapting the confessions test to the plea process yields the following standard: if the defense can show that in the totality of the circumstances the potential trial sentence threatens catastrophic consequences, such that the risk of conviction at trial might induce a reasonable, innocent person to plead guilty,

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[17] *Id.*

[18] *Id.* at 1357 (citing Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 85-86 (2005)) ("The federal system over the last three decades has featured increasingly severe sentences, and the adoption of federal sentencing guidelines in the late 1980s enhanced the power of prosecutors and judges to reward cooperation from defendants. In those districts where prosecutors took full advantage of the tools available to them under the sentencing laws, it became more expensive than ever for a federal defendant to insist on a trial; fewer paid the price each year.").

[19] *Id.* at 1347.

> the plea has been coerced in violation of due process.[20]

This begs the following question: does coercion by a prosecutor which forces a defendant to give a full disclosure undertaking in a civil action in exchange for criminal charges being dropped offend the Fourteenth Amendment due process clause? It would appear to be at least arguable that there is a *prima facie* conflict between lowering the shield of the constitutionally enshrined Fifth Amendment right against self-incrimination in a civil action by virtue of termination of criminal prosecution on the same facts, and *a priori* offending against the Fourteenth Amendment due process clause given the defendant has been coerced into giving a full disclosure undertaking on pain of the criminal charges being re-instated.

II. PENNSYLVANIA V. COSBY

Promises and pie-crust are made to be broken.[21]

In *Pennsylvania v Cosby,*[22] the Supreme Court of Pennsylvania considered Cosby's appeal on the issue of whether given (a) District Attorney Castor's agreement that Cosby would not be prosecuted in order to force Cosby's testimony at a deposition in Constand's civil action; (b) D. A. Castor's issuing a formal public statement reflecting that agreement; and (c) Cosby's reasonable reliance upon those oral and written statements by providing deposition testimony in the civil action, thus forfeiting his constitutional right against self-incrimination, did the Superior Court[23] err in affirming the trial court's decision to allow not only the prosecution of Cosby but the admission of Cosby's civil deposition testimony?[24]

In sum, the legal question is "whether, and under what circumstances, a prosecutor's exercise of his or her charging discretion binds future prosecutors' exercise of the

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[20] *Id.* at 1388.
[21] JONATHAN SWIFT, POLITE CONVERSATION (1738).
[22] Pennsylvania v. Cosby, 236 A.3d 1045 (Pa. 2020) (per curiam)..
[23] *Id.*
[24] Pennsylvania v. Cosby, 252 A.3d 1092, 1128 (Pa. 2021).

same discretion."[25] For reasons that will be discussed below, the majority[26] held that the answer to the above legal question is as follows:

> [W]hen a prosecutor makes an unconditional promise of non-prosecution, and when the defendant relies upon that guarantee to the detriment of his constitutional right not to testify, the principle of fundamental fairness that undergirds due process of law in our criminal justice system demands that the promise be enforced.[27]

In order to fully understand the reasons behind the finding of the Supreme Court of Pennsylvania, it is first necessary to set out the factual background.

In 2005, District Attorney Castor investigated Andrea Constand's claim that William Cosby had sexually assaulted her in 2004 at his home. D.A. Castor determined there would be difficulties in proceeding with a criminal prosecution for five reasons: (1) Constand's one year delay in filing a complaint and inconsistencies in her various statements to investigators which reflected on her credibility as a witness; (2) the recurring interactions between Constand and Cosby in the form of phone calls and meetings after the alleged incident were atypical of behavior between a complainant and alleged perpetrator; (3) Constand's contact with civil attorneys prior to filing the police complaint in pursuit of financial compensation in a civil action against Cosby, evidenced by Constand's illegal recording of telephone conversations with Cosby for the likely purpose of securing payment in exchange for not contacting the authorities; (4) the lack of corroborating forensic evidence; and (5) the inadmissibility of evidence from other potential claimants against Cosby. "The totality of these circumstances led D.A. Castor to conclude that 'there was insufficient credible and admissible evidence upon

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[25] *Id.* at 1130.

[26] Baer, C.J., Todd, Donohue, Dougherty, Wecht, Mundy, JJ. Saylor J dissented on the ground D.A. Castor's decision was not binding on his successors.

[27] *Cosby*, 252 A.3d at 1121.

which any charge against Mr. Cosby related to the Constand incident could be proven beyond a reasonable doubt.'"[28]

This left D.A. Castor in a dilemma because on the one hand he believed the case against Cosby would fail, while on the other hand he wanted some measure of justice for Constand. D.A. Castor's solution was to issue a press release, having first told Cosby's attorney Walter Phillips he was going to make a public statement that he was not going to charge Cosby, for the purpose of ensuring that "Mr. Cosby would not be allowed to take the Fifth Amendment in the subsequent civil suit that Andrea Constand's lawyers had told us they wanted to bring."[29] In the press release, D.A. Castor stated he had concluded "that a conviction under the circumstances of this case would be unattainable"[30] and consequently declined to authorize the filing of charges. However, for present purposes, it is the last paragraph of D.A. Castor's press release that warrants the closest attention because it contains an implied threat to Cosby, given D.A. Castor's discussion with Attorney Phillips regarding Cosby not being allowed to take the Fifth Amendment in any subsequent civil action.

> Because a civil action with a much lower standard for proof is possible, the District Attorney renders no opinion concerning the credibility of any party involved so as to not contribute to the publicity and taint prospective jurors. The District Attorney does not intend to expound publicly on the details of his decision for fear that his opinions and analysis might be given undue weight by jurors in any contemplated civil action. *District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise*. Much exists in this investigation that could be used (by others) to portray persons on both sides of the issue in a less than flattering light. The

[28] *Id.* at 1104 (citing Notes of Testimony Habeas Corpus Hearing, at 60 (Feb. 2, 2016).
[29] *Id.* at 1104.
[30] *Id.* at 1128 (citing Press Release, Feb. 17, 2005; N.T., Feb. 2, 2016, Exh. D-4).

> District Attorney encourages the parties to resolve their dispute from this point forward with a minimum of rhetoric.[31]

The author has emphasized the sentence containing the caution that the decision not to prosecute may be reconsidered if the need arose, because it is contended D.A. Castor intended to fire a warning shot across Cosby's bows that failure to testify and a decision to take the Fifth Amendment would trigger a review of the evidence potentially leading to a prosecution. The whole tone of the paragraph above was to encourage the parties to quietly resolve their dispute. In this, D.A. Castor clearly saw himself as a 'Minister of Justice.'

> "He decided that a civil lawsuit for money damages was her best option. To aid Constand in that pursuit, 'as the sovereign,' the district attorney 'decided that [his office] would not prosecute Mr Cosby,' believing that his decision ultimately "would then set off the chain of events that [he] thought as a Minister of Justice would gain some justice for Andrea Constand.'"[32]

Shortly after D.A. Castor issued his press release, Constand filed a lawsuit against Cosby.[33] During discovery, Cosby gave four dispositions and "not once during the four depositions did Cosby invoke the Fifth Amendment or even mention it … no one involved with either side of the civil suit indicated on the record a belief that Cosby could be prosecuted in the future."[34] The outcome of the civil case, as D.A. Castor had foreshadowed, was that "Constand settled her civil suit with Cosby for $3.38 million."[35]

However, the outcome of the civil case might have been considerably different if Cosby had called D.A. Castor's

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[31] *Id.* at 1138 (citing Press Release, Feb. 17, 2005; N.T., Feb. 2, 2016, Exh. D-4 (Author's emphasis)).
[32] *Id.* at 1104 (citing Notes of Testimony ("N.T."), Habeas Corpus Hearing, 2/2/2016, at 63-64)).
[33] Constand v. Cosby, 229 F.R.D. 472 (E.D. Pa. 2005),
[34] *Cosby*, 252 A.3d at 1106.
[35] *Id.* at 1107.

bluff to reconsider a criminal prosecution should Cosby have failed to co-operate in the civil case without further assurances, bearing in mind the weaknesses in the evidence against Cosby. At the very least, such intransigence from Cosby would have forced one of two results: either D.A. Castor would have been required to produce a written guarantee of immunity against prosecution binding on the Commonwealth of Pennsylvania, or a court would have been requested to issue an immunity order[36] to similar effect by holding D.A. Castor's press release bound the Commonwealth of Pennsylvania to honor the promise not to prosecute, which is further discussed in Part IV. In either event,[37] Cosby would have been able to rely on immunity under the written guarantee or binding promise not to prosecute, thereby minimizing (see discussion in Part IV as to why the risk is not completely removed) any risk to Cosby in testifying in Constand's civil action. But, at the time, there was every reason to believe, from Cosby's perspective, that the $3.38 million settlement was the end of the matter, especially as Constand had specifically agreed not to cooperate with any future efforts to prosecute Cosby as part of the civil settlement.[38]

There matters stood for nearly ten years when "following a media request, the federal judge who presided over the civil suit unsealed the records in 2015"[39] which included Cosby's depositions. Nothing may have turned on this development but for D.A. Castor having been succeeded by D.A. Ferman, his former first assistant, who decided to reopen the criminal investigation of Constand's allegations. Upon learning of D.A. Ferman's intentions, former D.A. Castor sent her an email attaching his press release.

The essence of the email to D.A. Ferman was to explain that former D.A. Castor's whole purpose back in 2005 was to force Cosby's hand in a civil action with the agreement of all parties.

> [W]ith the agreement of the defense lawyer and [Constand's] lawyers, I

[36] Pennsylvania's immunity statute is codified at 42 Pa.C.S. § 5947.
[37] On one view, only an immunity order would have sufficed to bind the Commonwealth of Pennsylvania.
[38] *Cosby*, 252 A.3d at 1110.
[39] *Id.* at 1107.

> intentionally and specifically bound the Commonwealth that there would be no state prosecution of Cosby in order to remove from him the ability to claim his Fifth Amendment protection against self-incrimination, thus forcing him to sit for a deposition under oath.[40]

The above passage from the email clearly sets out the plea-bargaining deal to which all parties agreed. In effect, D.A. Castor put a prosecutorial gun to Cosby's head by promising to bind the Commonwealth in exchange for his civil testimony. However, there are two other important points made by former D.A. Castor in his email. First, he pointed out that "I never made an important decision without discussing it with you during your tenure as First Assistant."[41] The implication is not only did D.A. Firman already know of the substance of the email but also that she had been fully consulted at the time.

Secondly, former D.A. Castor did not rule out any other possible prosecutions against Cosby, just those based on Cosby's depositions in his civil action with Constand, going as far as to state that 'unless you can make out a case without that deposition and without anything the deposition led you to, I think Cosby would have an action against the County and maybe even against you personally.'[42]

One may have thought such a warning might have given D.A. Firman pause for thought, but she had her own political agenda[43] and "asserted that, despite the public press release, this was the first she had learned about a binding understanding between the Commonwealth and Cosby"[44] and 'requested a copy of any written agreement not to prosecute Cosby.'[45] Former D.A. Castor replied by email which is set out in full below because it is central to all the subsequent legal history of the case.

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[40] *Id.* at 1108 (citing N.T., Feb. 2, 2016, Exh. D-5 being an email sent on September 23, 2015 from former D.A. Castor to D.A. Ferman and attaching his February 17, 2005 press release).
[41] *Id.*
[42] *Id.* at 1109.
[43] D.A. Firman is now Judge Firman, having subsequently been elected to a seat on the Court of Common Pleas of Montgomery County.
[44] *Cosby*, 252 A.3d at 1109.
[45] *Id.*

> The attached Press Release is the written determination that we would not prosecute Cosby. That was what the lawyers for [Constand] wanted and I agreed. The reason I agreed and the plaintiff's lawyers wanted it in writing is so that Cosby could not take the 5th Amendment to avoid being deposed or testifying. A sound strategy to employ. That meant to all involved, including Cosby's lawyer at the time, Mr. Phillips, that what Cosby said in the civil litigation could not be used against him in a criminal prosecution for the event we had him under investigation for in early 2005. I signed the press release for precisely this reason, at the request of [Constand's] counsel, and with the acquiescence of Cosby's counsel, with full and complete intent to bind the Commonwealth that anything Cosby said in the civil case could not be used against him, thereby forcing him to be deposed and perhaps testify in a civil trial without him having the ability to "take the 5th." I decided to create the best possible environment for [Constand] to prevail and be compensated. By signing my name as District Attorney and issuing the attached, I was "signing off" on the Commonwealth not being able to use anything Cosby said in the civil case against him in a criminal prosecution, because I was stating the Commonwealth will not bring a case against Cosby for this incident based upon then-available evidence in order to help [Constand] prevail in her civil action. Evidently, that strategy worked.
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> The attached, which was on letterhead and signed by me as District Attorney, the concept approved by [Constand's] lawyers was a "written declaration" from the Attorney for the Commonwealth there would be no prosecution based on anything Cosby said in the civil action. Naturally, if a prosecution could be made out without using what Cosby said, or anything derived from what Cosby

> said, I believed then and continue to believe that a prosecution is not precluded.[46]

Thus, the scene was set. Former D.A. Castor fully explained his intentions in the matter and the fact that all parties were agreed on the 'deal'. However, D.A. Firman did not consider she was bound by her predecessor's press release and along with her investigators 'pressed forward, reopening the criminal case against Cosby.'[47] In December 2015, the Commonwealth charged Cosby with three counts of aggravated indecent assault based on the January 2004 incident with Constand in Cosby's home.[48] In January 2016, Cosby filed a petition for a writ of *habeas corpus* seeking to have the charges dismissed on the basis of former D.A. Castor's purported promise not to prosecute Cosby. The trial court denied Cosby's petition because the only conclusion to be drawn from the record "was that no agreement or promise not to prosecute ever existed, only the exercise of prosecutorial discretion."[49]

The trial court identified a variety of reasons to justify its finding that no agreement ever existed:

> 1. Any agreement between then D.A. Castor and Cosby was an incomplete and unauthorized contemplation of transactional immunity.[50]
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> 2. Immunity can be conferred only upon strict compliance with Pennsylvania's immunity statute, which is codified at 42 Pa.C.S. § 5947, and because former D.A. Castor did not seek the court's permission under the immunity statute it followed that any purported

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[46] *Id.* (citing N.T., Feb. 2, 2016, Exh. D-7).
[47] *Id.* at 1110.
[48] By this time, First Assistant District Attorney Kevin R. Steele had replaced Judge Ferman as District Attorney.
[49] *Cosby*, 252 A.3d at 1110 (citing Tr. Ct. Op. ("T.C.O"), May 14, 2019, at 62).
[50] With respect, the trial court appears to have misunderstood Pennsylvania's immunity statute which is based on use and derivative use immunity rather than transactional immunity, as discussed in Part IV.

> immunity offer through the press release was defective, and thus invalid.
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> 3. Former D.A. Castor's testimony was equivocal at best, and Attorney Troiani who acted for Constand neither requested nor agreed to an offer of immunity.
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> 4. As Cosby maintained he had a consensual sexual encounter with Constand, it was unnecessary for former D.A. Castor to issue the press release in anticipation of civil litigation.
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> 5. The Commonwealth was not estopped from prosecuting Cosby because there was no written documentation to evidence that an offer not to prosecute had ever been extended.

Consequently, in May 2016 all of Cosby's charges were held for trial,[51] and "at the conclusion of a second jury trial, Cosby was convicted on all three counts of aggravated indecent assault."[52] The Superior Court[53] affirmed the trial court's decision to allow not only the prosecution of Cosby but the admission of Cosby's civil deposition testimony, which formed the central plank for Cosby's petition for allowance of appeal granted by the Supreme Court of Pennsylvania in 2020.[54]

In undertaking the review of the appeal, the Supreme Court of Pennsylvania commenced by ascertaining the legal relationship between D.A. Castor and Cosby, and found the record supported the conclusion that D.A. Castor's actions amounted only to a unilateral exercise of prosecutorial discretion. Consequently, the Supreme Court characterized what occurred between D.A. Castor and Cosby as being "not an agreement, a contract, or any kind of quid pro quo exchange."[55] As a result, the legal question became "whether, and under what circumstances, a prosecutor's exercise of his

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[51] *Cosby*, 252 A.3d at 1118.
[52] *Id.* at 1123,
[53] *Constand*, 236 A.3d at 1045.
[54] *Cosby*, 252 A.3d at 100.
[55] *Id.* at 1130.

or her charging discretion binds future prosecutors' exercise of the same discretion."[56]

In answering this question, the Supreme Court of Pennsylvania began its analysis of the relevant authorities by noting the various roles prosecutors inhabit in the criminal justice system.

> Prosecutors are more than mere participants in our criminal justice system. As we explained in *Commonwealth v. Clancy*, 192 A.3d 44 (Pa. 2018), prosecutors inhabit three distinct and equally critical roles: they are officers of the court, advocates for victims, and administrators of justice. Id. at 52. As the Commonwealth's representatives, prosecutors are duty-bound to pursue "equal and impartial justice," *Appeal of Nicely*, 18 A. 737, 738 (Pa. 1889), and "to serve the public interest." *Clancy*, 192 A.3d 52. Their obligation is "not merely to convict," but rather to "seek justice within the bounds of the law." *Commonwealth v. Starks*, 387 A.2d 829, 831 (Pa. 1978).[57]

Given the enormous discretion accorded to prosecutors, "our law has long recognized the special weight that must be accorded to their assurances."[58] In support of this proposition, the Supreme Court of Pennsylvania, in the context of guilty plea negotiations, cited *Santobello v. New York*[59] where the Supreme Court of the United States held that "when a plea rests in any significant degree on a promise or agreement by the prosecutor, so that it can be said to be part of the *inducement or consideration*, such promise must be fulfilled."[60] However, the Supreme Court of the United States clarified in a later decision, *Mabry v. Johnson*,[61] that

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[56] *Id.*
[57] *Id.* at 1131.
[58] *Id.*
[59] 404 U.S. 257 (1971).
[60] *Cosby*, 252 A.3d at 1132 (Pa. 2021) (citing Santobello v. New York, 404 U.S. 257, 262 (1971) (emphasis added)).
[61] 467 U.S. 504 (1984).

the defendant's guilty plea must be made in actual reliance on the promise in the plea agreement.[62]

While the Supreme Court of the United States did not explicitly ground its holding in *Santobello v. New York*[63] in due process guarantees, the Supreme Court of Pennsylvania considered it was "only sensible to read *Santobello*'s holding as resting upon due process principles because - as Justice Douglas noted in his concurring opinion - without a constitutional basis the Court would have lacked jurisdiction over what was otherwise a state law matter."[64]

Surprisingly, given the context of the Cosby case, the Supreme Court of Pennsylvania did not cite the opening paragraph of Justice Douglas's concurring opinion.

> I agree … that New York did not keep its 'plea bargain' with petitioner and that it is no excuse for the default merely because a member of the prosecutor's staff who was not a party to the 'plea bargain' was in charge of the case when it came before the New York court. The staff of the prosecution is a unit and each member must be presumed to know the commitments made by any other member. If responsibility could be evaded that way, the prosecution would have designed another deceptive 'contrivance,' akin to those we condemned in *Mooney v. Holohan*, 294 U.S. 103, 112, and *Napue v. Illinois*, 360 U.S. 264.[65]

Justice Douglas's reference in the above passage to *Mooney v. Holohan*[66] is authority for the principle that a criminal conviction procured by the state prosecuting

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[62] The issue in *Mabry v. Johnson* was whether if a criminal defendant accepted a prosecutor's proposed plea deal, is he or she constitutionally protected from having that offer subsequently withdrawn, which the Supreme Court of the United States answered in the negative. As the respondent's plea was not induced by the withdrawn offer, it did not affect the voluntariness of his plea and consequently there was no Fourteenth Amendment claim.

[63] 404 U.S. 257 (1971).

[64] *Cosby*, 252 A.3d at 1132 (Douglas, J. concurring) (citing Santobello, 404 U.S., at 266-67))).

[65] *Santobello*, 404 U.S. at 264 (Douglas J. concurring).

[66] 294 U.S. 103, 112 (1935).

authorities solely by the use of perjured testimony known by them to be perjured and knowingly used by them in order to procure the conviction is without due process of law, and in violation of the Fourteenth Amendment.

> Such a contrivance by a state to procure the conviction and imprisonment of a defendant is an inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the state, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a state, 'whether through its legislature, through its courts, or through its executive or administrative officers.'[67]

Similarly, in *Napue v. Illinois*[68] the Supreme Court of the United States reaffirmed the principle that the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied the petitioner due process of law in violation of the Fourteenth Amendment.

Given the observation by Justice Douglas cited above that 'the staff of the prosecution is a unit and each member must be presumed to know the commitments made by any other member', arguably the Commonwealth of Pennsylvania designed a deceptive contrivance to use Cosby's civil testimony in Constand's case in a later criminal trial when the head of the prosecution unit, D.A. Castor, had expressly indicated in a press release that there would be no prosecution of Cosby based on the facts in Constand's case.

There would be no issue had the prosecution solely used the testimony of women other than Constand whom Cosby had allegedly sexually abused, but that is not the approach the prosecution adopted. Instead, they led with admissions made by Cosby in his civil testimony and buttressed this evidence with other alleged 'bad acts' committed by Cosby which were not pursued due to the

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[67] *Id.* at 112-13 (citing Carter v. Texas, 177 U.S. 442, 447 (1900)).
[68] 360 U.S. 264, 265 (1959).

Statute of Limitations. In other words, the prosecution made a conscious decision that using Cosby's civil testimony in Constand's case was the most expedient method to secure a conviction. Is this stratagem not on all fours with *Mooney v. Holohan* and *Napue v. Illinois* in that the state prosecuting authorities used Cosby's civil testimony knowing the intimidatory and promissory circumstances under which it had been extracted?

Furthermore, as will be discussed in Part III, was Cosby not coerced into making the four depositions in Constand's civil case under threat of criminal proceedings being reopened? In other words, the prosecution knew that Cosby's depositions were not voluntary and had been exacted at a price.

In any event, the Supreme Court of Pennsylvania, building on the authority of *Santobello v. New York*,[69] went on to cite its own previous authority in *Commonwealth v. Zuber*,[70] a case involving the specific performance of a plea bargain.

> [T]here is an affirmative duty on the part of the prosecutor to honor any and all promises made in exchange for a defendant's plea. Our courts have demanded strict compliance with that duty in order to avoid any possible perversion of the plea bargaining system, evidencing the concern that a defendant might be coerced into a bargain or fraudulently induced to give up the very valued constitutional guarantees attendant the right to trial by jury.
>
> Therefore, in Pennsylvania, it is well settled that where a plea bargain has been entered into and is violated by the Commonwealth, the defendant is entitled, at the least, to the benefit of the bargain.[71]

Thus, the essential point being made by the Supreme Court of Pennsylvania was that "interactions between a prosecutor and a criminal defendant, including

[69] *Santobello,* 404 U.S. at 257.
[70] 353 A.2d 441 (Pa. 1976).
[71] *Id.* at 444.

circumstances where the latter seeks enforcement of some promise or assurance made by the former, are not immune from the dictates of due process and fundamental fairness."[72] However, the Supreme Court of Pennsylvania continued by calling in aid contract law to bolster its view that the obligations between a prosecutor and a criminal defendant "can involve precepts of contract law, which inform the due process inquiry," [73] citing in support *Puckett v. United States*.[74]

> Although the analogy may not hold in all respects, plea bargains are essentially contracts. See *Mabry v. Johnson*, 467 U.S. 504, 508 (1984). When the consideration for a contract fails that is, when one of the exchanged promises is not kept, we do not say that the voluntary bilateral consent to the contract never existed, so that it is automatically and utterly void; we say that the contract was broken …
>
> When a defendant agrees to a plea bargain, the Government takes on certain obligations. If those obligations are not met, the defendant is entitled to seek a remedy, which might in some cases be rescission of the agreement, allowing him to take back the consideration he has furnished, i.e., to withdraw his plea. But rescission is not the only possible remedy; in *Santobello* we allowed for a resentencing at which the Government would fully comply with the agreement - in effect, specific performance of the contract. 404 U.S., at 263. In any case, it is entirely clear that a breach does not cause the guilty plea, when entered, to have been unknowing or involuntary. It is precisely *because* the plea was knowing and voluntary (and hence valid) that the Government is obligated to uphold its side of the bargain.[75]

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[72] *Cosby*, 252 A.3d at 1133.
[73] *Id.*
[74] 556 U.S. 129, 137 (2009).
[75] *Id.* at 138.

Thus, on the authority of the Supreme Court of the United States, the litmus test in the context of plea bargains as contracts is whether the plea was 'knowing and voluntary' which binds the Government to perform 'its side of the bargain.' Following the principle established in *Puckett v. United States*,[76] the Supreme Court of Pennsylvania set down three requirements the aggrieved party must prove in order to succeed in a claim of promissory estoppel.

> (1) the promisor acted in a manner that he or she should have reasonably expected to induce the other party into taking (or not taking) certain action; (2) the aggrieved party actually took such action; and (3) an injustice would result if the assurance that induced the action was not enforced.[77]

The Supreme Court of Pennsylvania concluded that Cosby satisfied the above three criteria. One step in reaching this conclusion was the Court's holding in *Commonwealth v. Martinez*[78] that, once a bargained term is enveloped within a plea agreement, a defendant "is entitled to the benefit of his bargain through specific performance of terms of the plea agreement."[79]

The Supreme Court of Pennsylvania continued by pointing out that "the applicability of contract law principles to criminal negotiations is not limited to the plea bargaining process," citing *United States v. Carrillo*[80] as authority for the principle that "fundamental fairness requires a prosecutor to uphold his or her end of a non-prosecution agreement."[81] This led to the Supreme Court of Pennsylvania to hold that "prosecutors can be bound by their assurances or decisions under principles of contract law or by application of the fundamental fairness considerations … particularly when defendants rely to their detriment upon those guarantees."[82] The fundamental fairness considerations are

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[76] *Id.*
[77] *Cosby*, 252 A.3d 1092 at 1133.
[78] 147 A.3d 517, 520 (Pa. 2016).
[79] *Id.* at 533.
[80] *Cosby*, 252 A.3d at 1133.
[81] *See* United States v. Carrillo, 709 F.2d 35 (9th Cir. 1983).
[82] *Cosby*, 252 A.3d at 1134.

underpinned by the Fourteenth Amendment to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution which "mandate that all interactions between the government and the individual are conducted in accordance with the protections of due process."[83]

Thus, when a non-prosecution decision is "unconditional, is presented as absolute and final, or is announced in such a way that it induces the defendant to act in reliance thereupon … due process may warrant preclusion of the prosecution."[84] The Supreme Court of Pennsylvania found in Cosby's case that "a defendant's detrimental reliance upon the government's assurances during the plea bargaining phase both implicates his due process rights and entitles him to enforcement even of unconsummated agreements."[85] In coming to this conclusion, the critical fact for the Supreme Court of Pennsylvania was the "objectively indisputable evidence of record demonstrating D.A. Castor's patent intent to induce Cosby's reliance upon the non-prosecution decision."[86]

Contrary to the trial court's findings, the Supreme Court of Pennsylvania found that a reasonable observer would have concluded that D.A. Castor's decision not to prosecute was permanent,[87] but the due process entitlement only arose because Cosby detrimentally relied upon the Commonwealth's decision for which the evidence was Cosby's "counseled decision to testify in four depositions in Constand's civil case without ever invoking his Fifth Amendment rights."[88] Further evidence for Cosby's reliance on D.A. Castor's decision can be found in the fact that "when Cosby attempted to decline to answer certain questions about Constand, Constand's attorneys obtained a ruling from the civil trial judge forcing Cosby to answer."[89] Thus, the only remaining question was whether Cosby's reliance was reasonable.

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[83] *See id.; Commonwealth v. Sims*, 919 A.2d 931, 941 n.6 (Pa. 2007).
[84] *Cosby*, 252 A.3d at 1135.
[85] *Id.*
[86] *Id.* at 1137.
[87] *Id.*
[88] *Id.* at 1138.
[89] *Id.* at 1139.

On this question, the Supreme Court of Pennsylvania found "nothing unreasonable about Cosby's reliance upon his attorneys and upon D.A. Castor's public announcement of the Commonwealth's charging decision."[90] Consequently, "the subsequent decision by successor D.A.s to prosecute Cosby violated Cosby's due process rights."[91] In terms of a remedy, specific performance of D.A. Castor's decision compelled "the Montgomery County District Attorney's Office to stand by the decision of its former elected head."[92]

In a recent development, the current Montgomery County District Attorney, Kevin Steele, has petitioned the United States Supreme Court seeking to reinstate Cosby's sexual assault conviction on the ground that the Supreme Court of Pennsylvania had given D.A. Castor's press release the legal weight of an immunity agreement, calling the court's decision "an indefensible rule."[93] The outcome of the petition will not be known for several months, but as the United States Supreme Court only accepts fewer that 1% of the petitions it receives and four of the nine justices on the court have to agree to hear the case, the likelihood of the petition going to a full hearing is very slim.

III. FIFTH AMENDMENT RIGHTS

The Committee wants me to answer charges without facing my accusers … I am therefore, by advice of my counsel, forced to take the Fifth Amendment today until I can get a venue where I can face my accusers.[94]

The relevant portion of the Fifth Amendment reads as follows: "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." The importance of these two clauses has been underlined by the

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[90] *Id.* at 1142.
[91] *Id.* at 1143.
[92] *Id.* at 1144.
[93] Maryclaire Dale, *Cosby Prosecutors Urge Supreme Court to Restore Conviction*, HUFFPOST, https://www.huffpost.com/entry/bc-us-bill-cosby_n_61a60842e4b0ae9a42b34dfe (last visited Nov. 30, 2021).
[94] Carrie Johnson, HealthSouth's Ex-CEO Takes the Fifth, The Washington Post, https://www.washingtonpost.com/archive/business/2003/10/17/healthsouths-ex-ceo-takes-the-fifth/8c58dc15-fccd-4db1-8bc9-8b9de08c22c5/ (last visited Jan. 27, 2022).

Supreme Court of the United States. In *Malloy v. Hogan*,[95] the Court recognized "that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay."[96] By virtue of Section 1 of the Fourteenth Amendment, a person's rights under the Fifth Amendment are extended to the States:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State *deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

The italicized words in Section 1 of the Fourteenth Amendment above mirror the language of the Fifth Amendment. Effectively, the Fifth Amendment protects persons from actions of the federal government, while the Fourteenth Amendment enshrines the same protection to persons from actions by the States. As the Supreme Court of the United States has affirmed, the Fourteenth Amendment "secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement - the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."[97] Indeed, one Supreme Court Justice has put the widest possible construction on the reach of the Fifth Amendment:

> The guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against conviction and prosecution, but a safeguard of conscience and human dignity and freedom of expression, as well. My view is that the Framers put it beyond the power of Congress to compel anyone to confess his crimes. The

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[95] 378 U.S. 1 (1964).
[96] *Malloy*, 378 U.S. at 7 (citing Rogers v. Richmond, 365 U.S. 534, 541 (1961)).
[97] *Malloy*, 378 U.S. at 8.

> evil to be guarded against was partly self-accusation under legal compulsion. But that was only a part of the evil. The conscience and dignity of man were also involved.[98]

While there is academic debate as to whether the Fifth and Fourteenth Amendments protect procedural or substantive due process, in large part due to different interpretations or understandings of the term "due process of law" between 1791 when the Fifth Amendment was ratified and 1868 when the Fourteenth Amendment was proclaimed,[99] the better view is that the two Amendments share a common original meaning as expressed by Justice Frankfurter.

> The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the Federal Government. It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth. The Fifth Amendment specifically prohibits prosecution of an 'infamous crime' except upon indictment; it forbids double jeopardy; it bars compelling a person to be a witness against himself in any criminal case: it precludes deprivation of 'life, liberty, or property without due process of law …' Are Madison and his contemporaries in the framing of the Bill of Rights to be charged with writing into it a meaningless clause? To consider 'due process of law' as merely a shorthand statement of other specific clauses in the same amendment is to attribute to the authors and proponents of this Amendment ignorance of, or indifference to, a historic conception which was one of the great instruments in the

[98] Ullmann v. United States, 350 U.S. 422, 445-46 (1956) (Douglas J., dissenting).
[99] *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L. J. 408, 417 (2010).

> arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen.[100]

Further support for the broad reach of the term "due process of law" can be found in Supreme Court dicta that due process acts as a buttress for the fundamental right of liberty against oppressive government, whether federal or state.

> Immunities that are valid as against the federal government by force of the specific pledges of particular amendments [here referring to the First and Sixth Amendments] have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.[101]

Similarly, in *United States v. Carolene Products Company*,[102] while the Supreme Court upheld the federal government's power to prohibit filled milk from being shipped in interstate commerce by adopting a deferential standard of review that treated economic regulations as 'presumptively constitutional' under a doctrine known as the 'rational basis test', the Court indicated it would adopt a stricter standard of review where a law appeared on its face to violate a provision of the United States Constitution.

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.[103]

Dubbed the most famous constitutional footnote in history, clearly the stricter standard of review applies to the

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[100] Adamson v. California, 332 U.S. 46, 66-67 (1947) (Frankfurter J., concurring).
[101] Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).
[102] 304 U.S. 144, 148 (1938).
[103] *Id.* at 152 n.4 (1938).

Fifth Amendment which mirrors rather than embraces the Fourteenth Amendment. This stricter standard was applied in *Garrity v. New Jersey*,[104] a case which is exactly on point with the facts in Cosby to the extent that both cases involve coercion.

In *Garrity*, the appellants were New Jersey police officers who were under investigation for traffic ticket 'fixing'. Each officer was given a choice: they could refuse to answer if disclosure would tend to incriminate him, but a refusal to answer would leave the officer subject to removal from office under the New Jersey forfeiture-of-office statute. The officers' answers were used in subsequent prosecutions, which resulted in their each being convicted. The question before the Supreme Court was whether the threat of removal from public office under the New Jersey forfeiture-of-office statute constituted coercion and rendered the resulting statements involuntary, and therefore inadmissible in the state criminal proceedings. Justice Douglas delivered the opinion of the Court.

> The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under *Chambers v. Florida*, 309 U.S. 227, and related cases can be "mental, as well as physical"; "the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U.S. 199, 206. Subtle pressures (*Leyra v. Denno*, 347 U.S. 556; *Haynes v. Washington*, 373 U.S. 503) may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his "free choice to admit, to deny, or to refuse to answer." *Lisenba v. California*, 314 U.S. 219, 241 …
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> We held in *Slochower v. Board of Education*, 350 U.S. 551, that a public-school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee:

[104] 385 U.S. 493, 497 (1967).

> "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of [385 U.S. 493, 500] guilt or a conclusive presumption of perjury … The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." Id., at 557-558.
>
> We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.
>
> There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price … We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.[105]

As seen in Part II, the Supreme Court of Pennsylvania relied on promissory estoppel to conclude specific performance of D.A. Castor's decision compelled "the Montgomery County District Attorney's Office to stand by the decision of its former elected head."[106] However, arguably the better view is that Cosby was coerced into making four depositions in Constand's civil case under threat of D.A. Castor reopening the prospect of criminal proceedings against Cosby. Is there any real difference between a police officer being coerced into making admissions for fear of forfeiting his job as in *Garrity*, and a suspect being offered the choice of making depositions in a civil case or facing

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[105] *Id.* at 496, 499-500 (1967).
[106] *Cosby*, 252 A.3d at 1150.

criminal proceedings? Did D.A. Castor not invoke the same mental coercion referred to by Justice Douglas in the above passage from *Garrity*, and condition Cosby's constitutional rights by the exaction of a price?

The United States Supreme Court has consistently expressed the view, in both the 19th and 20th centuries, that the Court is the guardian of the rights guaranteed to citizens under the Constitution, and that the Court must remain vigilant against any attempt to whittle down those rights. In *Boyd v. United States*, [107] the Court observed that "constitutional provisions for the security of person and property should be liberally construed … it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[108] As the Supreme Court noted some seventy-five years later "in this jealous regard for maintaining the integrity of individual rights, the [Supreme] Court gave life to Madison's prediction that 'independent tribunals of justice … will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.'"[109]

More specifically, the Supreme Court described the Fifth Amendment as being a provision that "must have a broad construction in favor of the right which it was intended to secure," [110] which was affirmed in *Quinn v. United States*.[111]

> Such liberal construction is particularly warranted in a prosecution of a witness for a refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly or begrudgingly - to treat it as an historical relic, at most merely

[107] 116 U.S. 616 (1886).
[108] *Id.* at 635.
[109] Mapp v. Ohio, 367 U.S. 643, 647 (1961) (citing I Annals of Cong. 439 (1789))).
[110] Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).
[111] 349 U.S. 155 (1955).

> to be tolerated - is to ignore its development and purpose.[112]

Similarly, at trial in *Grunewald v. United States*[113], one of three petitioners, Halperin, answered certain questions in a manner consistent with innocence and then, over his objection, was subjected to cross-examination which revealed that he had refused to answer the same questions, on grounds of possible self-incrimination, while he was appearing before a grand jury, under subpoena. Justice Black strongly criticized the trial judge's summing up as undermining privileges enshrined in the Constitution.

> At the conclusion of the trial the judge instructed the jury that Halperin's claim of his constitutional privilege not to be a witness against himself could be considered in determining what weight should be given to his testimony - in other words, whether Halperin was a truthful and trustworthy witness. I agree with the Court that use of this claim of constitutional privilege to reflect upon Halperin's credibility was error, but I do not, like the Court, rest my conclusion on the special circumstances of this case. I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the Constitution.[114]

Furthermore, in *Application of Gault*, [115] a case involving the question of whether juvenile proceedings were

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[112] *Id.* at 162.
[113] 353 U.S. 391 (1957).
[114] *Grunewald,* 353 U.S at 425-26 (Black J., concurring).
[115] In re Gault, 387 U.S. 1 (1967).

'criminal' or 'civil', the Supreme Court stressed that the availability of the Fifth Amendment did not turn on the nature of the proceedings, and under the Constitution dealing with a boy did not justify a kangaroo court.

> [I]t is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.[116]

Perhaps, for the present purpose of examining the implications of the *Cosby* ruling, the most powerful statement by the Supreme Court as to the purpose and strength of the Fifth Amendment can be found in *Hoffman v. United States*.[117]

> This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, 'was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed.'[118]

The reference in the above passage to the price of unhampered enforcement of the criminal law may be too high on occasions has a particular resonance in the Cosby case. One of the objects of a free society that was arguably sacrificed in the pursuit and trial of Cosby is the protection of the citizen from the untrammelled power of the state. In this case, the Montgomery County District Attorney's Office purported to act with unfettered power to renege on a non-

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[116] *Id.* at 49.
[117] 341 U.S. 479 (1951).
[118] Hoffman v. United States, 341 U.S. 479, 486 (1951) (citing Feldman v. United States, 322 U.S. 487, 489
(1944). *See* Arndstein v. McCarthy, 254 U.S. 71, 72-73 (1920); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

prosecution agreement coerced by its former head, D.A. Castor, whereby Cosby's Fifth Amendment rights were stripped away in Constand's civil action leading to incriminating depositions by Cosby, which were then cynically used by the D.A's Office to resurrect a criminal prosecution against Cosby who had already paid $3.38 million in compensation to Constand as D.A. Castor had originally intended. Such an underhand course of action flies in the face of both the objective of the Fifth Amendment and the way the Fifth Amendment has been interpreted by the Supreme Court of the United States.

IV. GUARANTEE OF IMMUNITY AGAINST PROSECUTION

It is better that ten guilty persons escape, than that one innocent suffer.[119]

In this Part, the options available to a person in Cosby's position are discussed. In Part II, reference was made to Cosby, in order to fully protect himself with the benefit of hindsight, refusing to give depositions in the Constand civil case until either D.A. Castor produced a written guarantee of immunity against prosecution binding on the Commonwealth of Pennsylvania, or a court had issued an immunity order[120] to similar effect by holding D.A. Castor's press release bound the Commonwealth of Pennsylvania to honor the promise not to prosecute. In *Cosby*, the trial court found that "immunity can be conferred only upon strict compliance with Pennsylvania's immunity statute, which is codified at 42 Pa.C.S. § 5947."[121] It is now appropriate to consider this immunity statute more fully.

> § 5947. Immunity of witnesses.
>
> (a) General rule. - Immunity orders shall be available under this section in all proceedings before:
>
> (1) Courts …

[119] William Blackstone. *Vol. 1V. Blackstone's Commentaries,* Chapter 27.
[120] 42 PA. CONS. STAT. § 5947 (1980).
[121] *Cosby*, 252 A.3d at 1117.

> (b) Request and issuance. - The Attorney General or a district attorney may request an immunity order from any judge of a designated court, and that judge shall issue such an order, when in the judgment of the Attorney General or district attorney:
>
> > (1) the testimony or other information from a witness may be necessary to the public interest; and
> >
> > (2) a witness has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.
>
> (c) Order to testify. - Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding specified in subsection (a), and the person presiding at such proceeding communicates to the witness an immunity order, that witness may not refuse to testify based on his privilege against self-incrimination.
>
> (d) Limitation on use. No testimony or other information compelled under an immunity order, or any information directly or indirectly derived from such testimony or other information, may be used against a witness in any criminal case, except that such information may be used:
>
> > (1) in a prosecution under 18 Pa.C.S. § 4902 (relating to perjury) or under 18 Pa.C.S. § 4903 (relating to false swearing);
> >
> > (2) in a contempt proceeding for failure to comply with an immunity order; or
> >
> > (3) as evidence, where otherwise admissible, in any proceeding where

> the witness is not a criminal defendant.[122]

Recall from Part II that the trial court in Cosby's case held that immunity could be conferred only upon strict compliance with Pennsylvania's immunity statute, and because former D.A. Castor did not seek the court's permission under the immunity statute it followed that any purported immunity offer through the press release was defective, and thus invalid. Additionally, from Part II that the Supreme Court of Pennsylvania found the record supported the conclusion that D.A. Castor's actions amounted only to a unilateral exercise of prosecutorial discretion. Thus, the Supreme Court of Pennsylvania did not pursue the question of how Cosby could have protected himself against the vagaries, even *volte-face*, of the Montgomery County District Attorney's Office, which is the focus of this article.

Instead, for the Supreme Court of Pennsylvania, the legal question became, of necessity, the circumstances under which a prosecutor's exercise of his or her charging discretion bound future prosecutors' exercise of the same discretion. In answering this legal question, the Supreme Court of Pennsylvania set down three requirements the aggrieved party must prove in order to succeed in a claim of promissory estoppel. However, as was put forward in Part III, arguably the better view is that Cosby was coerced into making four depositions in Constand's civil case under threat of D.A. Castor reopening the prospect of criminal proceedings against Cosby. In other words, the prosecution was estopped from pursuing Cosby because the prosecution knew that Cosby's depositions were not voluntary and had been exacted at a price. More fundamentally, the Montgomery County District Attorney's Office has laid itself open to the charge of *a priori* offending against the Fourteenth Amendment due process clause given the defendant Cosby had been coerced into giving a full disclosure undertaking on pain of the criminal charges being re-instated.

Be that as it may, a person in Cosby's position needs greater certainty than reliance on the doctrine of promissory estoppel or potential offending against the Fourteenth

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[122] 42 PA. CONS. STAT. § 5947 (1980).

Amendment due process clause. Reliance on the common law has always been fraught with difficulty as courts regularly confine precedents to their facts or distinguish the case in question on its facts from decided precedents. The raft of cases discussed in Part III dealing with Fifth Amendment rights only provide a guide to any given case outcome. Whilst the Supreme Court of Pennsylvania eventually righted the wrong inflicted on Cosby, he still served three years in jail before his conviction was quashed and he was set free. The holy grail is immunity. The question then becomes: how to secure such immunity before giving potentially incriminating depositions in a civil case?

As can be seen from § 5947(b) above, permission from a court is a prerequisite to any offer of immunity, although the statutory language used appears to imply that the court is obliged to issue such an order ('the judge shall issue such an order') when 'in the judgment of the Attorney General or district attorney' the conditions specified in § 5947(b)(1) and (2) are satisfied. These two conditions are (1) the testimony of the witness 'may be necessary to the public interest' and (2) the witness is otherwise claiming privilege against self-incrimination. Thus, consistent with the wide-ranging power and discretion of a District Attorney discussed in Part I, it is the judgment of the relevant District Attorney that is determinative of whether the two conditions specified in § 5947(b) have been met. 'Judgment' is a very subjective and personal word. Furthermore, of some significance is the general language employed in each condition such as the use of the word 'may' as regards being in the public interest, and 'likely' to refuse to testify. Both words present the relevant District Attorney with wide discretion in exercising his or her judgment in requesting an immunity order.

Consequently, had Cosby and his attorneys been less trusting of D.A. Castor's press release providing the necessary assurance that no future prosecution would be forthcoming based on Constand's complaint, there would appear to have been no obstacle to an immunity order being granted by the court. This conclusion follows if the public interest is defined as providing some measure of justice for Constand's civil case, which was D.A. Castor's expressed purpose in issuing the press release. Given that the litmus test for granting the immunity order is 'the judgment of the district attorney', it would appear that D.A. Castor's request

for an immunity order for Cosby would have been a *fait accompli*, as Cosby had already indicated he would exercise his privilege against self-incrimination meeting the second condition in § 5947(b).

Arguably, it would have been open to the Supreme Court of Pennsylvania to have decided the case on the basis that because Cosby had relied on the press release and an immunity order would have been forthcoming if Cosby had insisted, then equity required the original position taken by D.A. Castor of no prosecution against Cosby to be restored as though the immunity order had been granted by the court. As discussed in Part II, evidence for Cosby's reliance on D.A. Castor's decision can be found in the fact that "when Cosby attempted to decline to answer certain questions about Constand, Constand's attorneys obtained a ruling from the civil trial judge forcing Cosby to answer."[123] In light of this ruling, the Supreme Court of Pennsylvania could have held that Cosby was acting as though an immunity order had been granted.

Immunity orders have both a federal and state pedigree. In *Kastigar v. United States*,[124] the United States Supreme Court had cause to consider 18 U.S. Code § 6002 and § 6003.

> 18 U.S. Code § 6002 - Immunity generally
>
> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to –
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

[123] *Cosby*, 252 A.3d at 1139.
[124] 406 U.S. 441, 442 (1972).

> and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.[125]
>
> 18 U.S. Code § 6003 – Court and grand jury proceedings
>
> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.
>
> (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under

[125] 18 U.S.C.A. § 6002 (West 1970).

> subsection (a) of this section when in his judgment –
>
> > (1) the testimony or other information from such individual may be necessary to the public interest; and
> >
> > (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.[126]

The wide-ranging power and discretion of a District Attorney in 42 Pa.C.S. § 5947(b) is replicated for a United States Attorney in 18 U.S. Code § 6003(b). More specifically, the United States Department of Justice's website identifies six representative not all-inclusive factors relevant to the weighing exercise of whether an immunity order is necessary in the public interest for the purpose of § 6003(b)(1) above.

> 9-23.210 - DECISION TO REQUEST IMMUNITY—THE PUBLIC INTEREST
>
> Section 6003(b) of Title 18, United States Code, authorizes a United States Attorney to request immunity when, in his/her judgment, the testimony or other information that is expected to be obtained from the witness "may be necessary to the public interest." Some of the factors that should be weighed in making this judgment include:
>
> A. The importance of the investigation or prosecution to effective enforcement of the criminal laws;
>
> B. The value of the person's testimony or information to the investigation or prosecution;
>
> C. The likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;

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[126] 18 U.S.C.A. § 6003 (West 1970).

> D. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted, and his or her criminal history;
>
> E. The possibility of successfully prosecuting the person prior to compelling his or her testimony;
>
> F. The likelihood of adverse collateral consequences to the person if he or she testifies under a compulsion order.
>
> These factors are not intended to be all-inclusive or to require a particular decision in a particular case. They are, however, representative of the kinds of factors that should be considered when deciding whether to seek immunity.[127]

Before examining the decision in *Kastigar v. United States*, two points need to be raised. First, it should be noted that the statutory language as to the limitation on the use of the evidence which is the subject of the immunity order is virtually identical as between 42 Pa.C.S. § 5947(d) and 18 U.S. Code § 6002. Secondly, as Koontz and Stodel observe, there are three types of immunity statute. Both 42 Pa.C.S. § 5947(d) and 18 U.S. Code § 6002 are examples of use and derivative use immunity statutes.

> Immunity statutes may be separated into three categories. Use immunity statutes prohibit only the subsequent use of the compelled testimony in criminal prosecutions against the witness. Use and derivative use immunity statutes prohibit the subsequent use of compelled testimony and any evidence derived from such testimony in criminal prosecutions against the witness. Transactional immunity statutes prohibit the

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[127] *United States Department of Justice*, 9-23.100 WITNESS IMMUNITY, https://www.justice.gov/jm/jm-9-23000-witness-immunity (last visited Jan. 27, 2022).

> prosecution of the witness in regard to any matter relating to which he testified.[128]

Thus, transactional immunity is effectively blanket or total immunity, whereas use and derivative use immunity only prevents the prosecution from using the witness's own testimony or any evidence derived from that testimony. Any objective reading of D.A. Castor's press release leads to the conclusion that had D.A. Castor sought an immunity order it would have been use and derivative use immunity, which is also consistent with 42 Pa.C.S. § 5947(d). Furthermore, had D.A. Castor obtained evidence independent of Cosby's testimony which substantiated Constand's complaint against Cosby, then Cosby could have been prosecuted under a use and derivative use immunity order.

Mr. Justice Powell, who delivered the opinion of the court in *Kastigar v. United States*,[129] set out the question before the Supreme Court as follows.

> This case presents the question whether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment privilege against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from the testimony.[130]

The plain language of 18 U.S. Code § 6002 above clearly suggests an affirmative answer to the question above presented by Mr. Justice Powell, given that refusal to comply with the immunity order on the basis of a person's privilege against self-incrimination is barred, but the quid pro quo is that neither direct nor derivative testimony or other information may be used against the witness in any criminal case. In answering its own question, the Supreme Court held

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[128] Hal M. Koontz and Jeffrey C. Stodel, *The Scope of Testimonial Immunity under the Fifth Amendment: Kastigar v. United States*, 6 LOY. L.A. L. REV. 350, 352 (1973).
[129] 406 U.S. 441 (1972).
[130] Kastigar v. United States, 406 U.S. 441, 442 (1972).

that the immunity is coextensive with the privilege and suffices to supplant it.

> The statute's explicit proscription of the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" (*Ullmann v. United States*, 350 U. S., at 438-439, quoting *Boyd v. United States*, 116 U. S., at 634.) Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.[131]

[131] *Id.* at 453.

Thus, the majority in *Kastigar* held that the United States need only grant use and derivative use immunity. In *Zicarelli v. New Jersey Investigation Comm'n*,[132] which the Supreme Court decided on the same day, the Court held that the *Kastigar* decision was also applicable to state immunity statutes. The Supreme Court found that the New Jersey statutory immunity from use and derivative use (N. J. Rev. Stat. 52:9M-17 (b) (1970)), which is written in similar terms to 42 Pa.C.S. § 5947(d) and 18 U.S. Code § 6002, was coextensive with the scope of the privilege against self-incrimination and was sufficient to compel testimony.

> This is a comprehensive prohibition on the use and derivative use of testimony compelled under a grant of immunity. Appellant contends that only full transactional immunity affords protection commensurate with that afforded by the privilege and suffices to compel testimony over a claim of the privilege. We rejected this argument today in *Kastigar*, where we held that immunity from use and derivative use is coextensive with the scope of the privilege, and is therefore sufficient to compel testimony. We perceive no difference between the degree of protection afforded by the New Jersey statute and that afforded by the federal statute sustained in *Kastigar*.[133]

As mentioned in Part II, the trial court in Cosby in referring to transactional immunity appears to have misunderstood Pennsylvania's immunity statute which is based on use and derivative use immunity rather than transactional immunity. This misunderstanding may have followed from D.A. Castor's own confusion, as the Supreme Court of Pennsylvania observed.

> The [trial] court deemed the former district attorney's characterization of his

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[132] 406 U.S. 472 (1972).

[133] Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472, 475 (1972).

> decision-making and intent to be inconsistent, inasmuch as he testified at times that he intended transactional immunity, while asserting at other times that he intended use and derivative-use immunity.[134]

It is of course conceivable, given the district attorney's wide discretion under 42 Pa.C.S. § 5947(b), that D.A. Castor could have crafted a request for an immunity order that amounted to transactional immunity, notwithstanding 42 Pa.C.S. § 5947(d), but that is mere speculation as D.A. Castor chose to rely on his press release and appears to have never seriously intended to pursue an immunity order for Cosby. Whether such a hypothetical transactional immunity order would have withstood court scrutiny is another matter, although it is open to argument that prosecutors at the state level may offer a witness either transactional immunity or use and derivative use immunity. However, in light of *Kastigar*, it would appear that the better view at state level is that transactional immunity needs to be specified in the statute, as in Article 50 of New York's Criminal Procedure Law.

> S 50.10 Compulsion of evidence by offer of immunity; definitions of terms.
>
> The following definitions are applicable to this article:
>
> 1. "Immunity." A person who has been a witness in a legal proceeding, and who cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein, possesses "immunity" from any such conviction, penalty or forfeiture. A person who possesses such immunity may nevertheless be convicted of perjury as a result of having given false testimony in such

[134] *Cosby*, 252 A.3d at 1117.

> legal proceeding, and may be convicted of or adjudged in contempt as a result of having contumaciously refused to give evidence therein.
>
> 2. "Legal proceeding" means a proceeding in or before any court or grand jury, or before any body, agency or person authorized by law to conduct the same and to administer the oath or to cause it to be administered.
>
> 3. "Give evidence" means to testify or produce physical evidence.

For present purposes, there is a telling observation in *Kastigar* as to an immunity order not being dependent on the integrity of the prosecuting authorities, who also have the burden of showing their evidence is independent and untainted.

> A person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in *Murphy*:
>
> > "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964).
>
> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate

> source wholly independent of the compelled testimony.[135]

The United States Department of Justice's website specifically refers to *Kastigar* in its policy statement dealing with authorization to prosecute after compulsion.

> 9-23.400 - AUTHORIZATION TO PROSECUTE AFTER COMPULSION
>
> The request to prosecute should indicate the circumstances justifying prosecution and the method by which the government will be able to establish that the evidence it will use against the witness will meet the government's burden under *Kastigar v. United States*, 406 U.S. 441 (1972).[136]

This same point as regards the burden of proof of adducing evidence independent of the compelled testimony was made in Part II, when it was said that in Cosby's case there would have been no issue had the prosecution solely used the testimony of women other than Constand whom Cosby had allegedly sexually abused, but that was not the approach the prosecution adopted.

However, as has been observed, it is questionable whether the prosecution really bears the burden of proof referred to above in *Kastigar v. United States*.[137]

> There is without question a possibility of secret misuse of compelled testimony, since there is no great difficulty in finding sources "wholly independent" for a conclusion already reached from the leads of compelled testimony.[138] Once an independent source is found, the burden will shift to the defendant who then must prove that illicit use was made

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[135] Kastigar, 406 U.S. at 460 (1972).
[136] United States Department of Justice, *supra* note 127.
[137] 406 U.S. 441, 460 (1972).
[138] *See* Piccirillo v. New York, 400 U.S. 548, 568 (1971) (Brennan, J., dissenting); United States ex rel. Catena v. Elias, 449 F.2d 40, 45 (3d Cir. 1971) (Seitz, C.J., concurring).

> of the testimony, and that the prosecution against him was the result of such illicit use.[139]

This was the essence of Mr. Justice Marshall's dissent in *Kastigar v. United States*.[140]

> I do not see how it can suffice merely to put the burden of proof on the government. First, contrary to the Court's assertion, the Court's rule does leave the witness "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Ante* at 406 U.S. 460. For the information relevant to the question of taint is uniquely within the knowledge of the prosecuting authorities … The good faith of the prosecuting authorities is thus the sole safeguard of the witness' rights. Second, even their good faith is not a sufficient safeguard. For the paths of information through the investigative bureaucracy may well be long and winding, and even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony. *Cf. Giglio v. United States,* 405 U.S. 150 (1972); *Santobello v. New York,* 404 U.S. 257 (1971). The Court today sets out a loose net to trap tainted evidence and prevent its use against the witness, but it accepts an intolerably great risk that tainted evidence will, in fact, slip through that net.[141]

This presents the drafter of an immunity statute with a dilemma. On the one hand transactional immunity may be

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[139] Richard D. Bennett, *Self-incrimination: Choosing a Constitutional Immunity Standard - Kastigar v. United States*, 32 MD. L. REV. 289, 300 (1972)

[140] 406 U.S. 441 (1972).

[141] *Id.* at 469 (1972) (Marshall, J., dissenting).

too generous and offer the witness an 'immunity bath', while on the other hand use and derivative use immunity may still undermine the protection of the witness. Nevertheless, in Cosby's case, at least it can be said that under use and derivative use immunity in 42 Pa.C.S. § 5947(d), the prosecution would have been prevented from using Cosby's four depositions given in Constand's civil case. This would have required the prosecution to broaden the net of evidence, even if, in Justice Marshall's words some tainted evidence had slipped through the net.

This begs the question: does use and derivative use immunity in exchange for compelled testimony represent a fair bargain for the witness, whose protection from becoming the accused, depending on the good faith of the prosecuting authorities and the labyrinthine bureaucracy, may be as strong as the single hair from a horse's tail in the Greek anecdote of the Sword of Damocles?

One academic commentator has answered this question in the negative, albeit in the federal context of 18 U.S. Code § 6002 which was designed to achieve effective law enforcement against organized crime, identifying two difficulties with the Supreme Court's decision in *Kastigar*.

> Initially, it is apparent that uncertainties persist in the subsequent prosecution of a witness immunized under a grant of use/derivative use immunity. Second, it is apparent that recognition of the constitutional sufficiency of use/derivative use immunity has emasculated the scope of protection previously thought to be constitutionally mandated by the fifth amendment. A witness is still subject to criminal prosecution, and his ability to avoid compulsory testimony is drastically limited to arguable and narrow situations.[142]

This leads Harding to conclude that '[a] witness may find no incentive to talk where he can still be prosecuted and may prefer the consequences of a contempt finding …

[142] E. R. Harding, *The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of Kastigar*, 19 VILL. L. REV. 470, 495 (1974).

[w]ithout the added incentive inherent in the removal of all criminal sanctions, silence may indeed be golden.'[143] In effect, Harding's argument is that unless transactional immunity is available, use and derivative use immunity does not represent a sufficiently fair bargain to give testimony and a contempt finding may be the more preferable outcome. So, by analogy, would a person in Cosby's situation faced only with use and derivative use immunity be better advised to risk a contempt finding in civil proceedings?

The problem with such a strategy is that the penalty for civil contempt, unlike criminal contempt,[144] is potentially open-ended, encapsulated in the oft quoted phrase 'the contemnor has the key to the cell in his own pocket.'[145] Judges have justified such draconian punishment for civil contempt on the basis that without the power to compel compliance courts would be unable to function.[146]

A sobering reminder of the severity of penalties for civil contempt can be found in the Pennsylvania case of Beatty Chadwick, who was finally released in 2009 after serving 14 years in jail which is the longest term ever imposed thus far for civil contempt. Chadwick was jailed for failing to deposit approximately $2.5 million into a court-controlled account which was designated for alimony payments to his ex-wife. In *Chadwick v Janecka*, the United States Court of Appeals, Third Circuit, found "that there is no federal constitutional bar to Mr. Chadwick's indefinite confinement for civil contempt so long as he retains the ability to comply with the order requiring him to pay over the money at issue."[147]

Thus, had Cosby refused to comply with a court order to make depositions in Constand's civil case, then he would have risked being jailed for contempt. The upshot would have been threefold: (1) Cosby may have served an indeterminate amount of time in jail until he purged himself of the contempt; (2) he may have incurred the ire of the court and thereby possibly increased the quantum of damages he ultimately would have had to pay; and (3) he may still have faced criminal charges even if he had previously secured a

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[143] *Id.*
[144] *See*, 42 U.S. Code § 1995 (1957).
[145] Green v. United States, 356 U.S. 165, 197 (1958) (Black, J., dissenting).
[146] Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 450 (1911).
[147] Chadwick v Janecka, 302 F.3d 107, 120 (3rd Cir. Ct. App. 2002) .

use and derivative use immunity order. In the words of Fagin 'I think I'd better think it out again!'[148]

V. A DEFENDANT'S BEST COURSE OF ACTION

It is always wise with a course of action to consider the likely consequences before going ahead with it.[149]

In summing up the best course of action for a defendant in the position that Cosby found himself, it would appear a reasonable conclusion that given the wide-ranging discretion of district attorneys and their successors, it would be unwise to rely on either press releases or promises short of immunity guarantees disclaiming any intention to prosecute in the future on the same facts and eschewing use of dispositions in civil proceedings. As mentioned in Part IV, a person in Cosby's position needs greater certainty than reliance on the doctrine of promissory estoppel or potential offending against the Fourteenth Amendment due process clause, which was the Supreme Court of Pennsylvania's remedy to Cosby's reasonable reliance on D.A. Castor's promise. Reliance on the common law has always been fraught with difficulty as courts regularly confine precedents to their facts or distinguish the case in question on its facts from decided precedents. In the absence of an immunity order, a better strategy is to test the value of the promise from the district attorney's office by claiming the Fifth Amendment right in the civil action until the court rules that the District Attorney's assurance of no prosecution is absolute and binding on his or her successors. This would stymie, or at least make more difficult, any attempt in the future by the district attorney's office to reopen the possibility of a criminal prosecution.

The danger or the risk of reliance on the promise of no prosecution is the one Cosby experienced with the findings of the trial court, particularly (1) any agreement between then D.A. Castor and Cosby was an incomplete and unauthorized contemplation of transactional immunity; (2) the Commonwealth was not estopped from prosecuting

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[148] RON MOODY, *Reviewing the Situation, on* OLIVER! THE ORIGINAL SOUNDTRACK (Colgems 1968).
[149] George Jackson.

Cosby because there was no written documentation to evidence that an offer not to prosecute had ever been extended; and (3) immunity can be conferred only upon strict compliance with Pennsylvania's immunity statute. As regards the latter, this is the position taken by the current Montgomery County District Attorney, Kevin Steele, who as mentioned in Part II, has petitioned the United States Supreme Court seeking to reinstate Cosby's sexual assault conviction on the ground that the Supreme Court of Pennsylvania had given D.A. Castor's press release the legal weight of an immunity agreement.

Effectively, the trial court held (and the Supreme Court of Pennsylvania did not address the validity of the trial court's finding) no statement or promise that D.A. Castor could have made, no matter how definitive or in what format, would substitute for an immunity order. In other words, when D.A. Castor and Cosby's attorneys were engaged in negotiations as to the deal or bargain that was being struck (no prosecution in exchange for depositions in Constand's civil case), nothing short of an immunity order would suffice. Thus, on the authority of Cosby's case, attorneys acting for a person in Cosby's position can now completely discount and put aside any assurances from the relevant district attorney's office in the case in hand that are not backed by an immunity order. The onus has shifted away from the defendant's acceptance or otherwise of the offer on the table to the precondition of an immunity order before civil testimony is forthcoming. This leaves the question of the type of immunity order to be sought.

Before turning to the nature of any immunity order being sought by a district attorney, it is worth reflecting on the ramifications of the trial court's finding in Cosby's case. In Part I, it was stated that plea bargaining is not some adjunct to the criminal justice system but rather personifies the criminal justice system. Cosby made a deal with D.A. Castor which was reneged on by his successors. Cosby was only released after spending three years in jail because the Supreme Court of Pennsylvania found that D.A. Castor made an unconditional promise of non-prosecution that Cosby relied upon and which the principle of fundamental fairness demanded be enforced.

Such an uncertain outcome is cold comfort to a person contemplating the type of bargain Cosby was offered by D.A.

Castor. No rational person would accept such a bargain, given most state and local prosecutors are elected officials who have a vested interest in the outcome of a case with the additional uncertainty of a regular turnover of office holder, which in turn undermines the reliability of the normal plea-bargaining process. The Cosby case may well result in district attorneys facing greater resistance to plea-bargains unless they are backed by an immunity order. This will certainly be the case if D.A. Steele's petition currently before the Supreme Court of the United States is ultimately successful and results in Cosby being sent back to jail to complete his original sentence.

As to the type of immunity order, in Part IV it was argued that given the district attorney's wide discretion under 42 Pa.C.S. § 5947(b), D.A. Castor could have crafted a request for an immunity order that amounted to transactional immunity, notwithstanding 42 Pa.C.S. § 5947(d). Whether such a hypothetical transactional immunity order would have withstood court scrutiny is another matter, although it would appear that the better view at state level is that transactional immunity needs to be specified in the statute, as in Article 50 of New York's Criminal Procedure Law.

In the absence of transactional immunity being specified in the statute, the pragmatic defendant should assume (1) that use and derivative use immunity will apply, and (2) even with such immunity the protection of the witness may still be undermined depending on the good faith of the prosecuting authorities and the subterranean tentacles of the supporting investigative apparatus. Nevertheless, at least it can be said that under use and derivative use immunity, the prosecution is prevented from using depositions given in a civil case. This requires the prosecution to broaden the net of evidence even if some tainted derivative evidence slips through the net.

Only one other option remains: to call the district attorney's bluff to reconsider a criminal prosecution should the defendant have failed to co-operate in the civil case without further assurances, bearing in mind the weaknesses in the evidence against the defendant which led to the deal being offered in the first place. Of course, the defendant does not possess the luxury of hindsight in second guessing the mind of the prosecutor, but there is much to be said for

putting the district attorney's office to the test as there may be less obdurate defendants to pursue against whom there is better evidence available. Why provide any further evidence in a civil trial to the evidence already available to the prosecutor when that additional evidence may strengthen the prosecutor's hand and stoke the fires of a future prosecution. In the words of Shakespeare: "There is a tide in the affairs of men which, taken at the flood, leads on to fortune; omitted, all the voyage of their life is bound in shallows and in miseries."[150]

The conclusion to be drawn from the forgoing analysis is that a person in Cosby's position, faced with a deal from prosecuting authorities that no prosecution will be forthcoming in exchange for depositions in a parallel civil case on the same facts, should as a matter of rational decision-making reject the deal if it is based on 'paper' assurances in the form of a press release or written assurances. This follows because it is unclear whether a district attorney can bind his or her successors in law.

The rational decision or least risky strategy is to call the district attorney's bluff and force the issue by rejecting the deal unless it is backed by a transactional immunity order or a use and derivative use immunity order, based on the law as stated by the trial court in Cosby's case. If the district attorney refuses to seek an immunity order, then it is the prosecuting authorities who are put to the test. The weaker the evidence available to the district attorney's office, which is presumably why a deal was offered in the first place, then the less likely the prosecution will elect to go to trial, especially against a well-resourced defendant.

If the district attorney instead elects to seek an immunity order, the rational defendant should first seek a transactional immunity order and in the alternative a use and derivative use immunity order, which will depend on (a) the language of the statute itself, and (b) the interpretation given to the statute by the courts of the respective jurisdiction. True it is that a use and derivative use immunity order does not offer complete protection to a witness for the reasons discussed in Part IV, but such an immunity order is far better than relying on promises that

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[150] THE TRAGEDY OF JULIUS CAESAR, WILLIAM SHAKESPEARE, Act-IV, Scene-III.

do not bind a district attorney's successors. Ultimately, this is the most rational strategy for a person in Cosby's position aiming to minimize the risk of providing evidence to the district attorney's office that might prompt a future prosecution.