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PROSECUTORIAL MISCONDUCT: CONVICTION BY ANY MEANS NECESSARY

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I. INTRODUCTION

Prosecutors in criminal cases operate uniquely as servants of the law.² Their duty is as much “to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just [outcome].”³ Prosecutors have previously valued securing convictions over obtaining justice, forcing the United States Supreme Court to weigh in on the nature of their duty. The Court held in *Brady v. Maryland* that prosecutors must disclose material exculpatory evidence to the defense to avoid violating due process.⁴ Whether the prosecutor acts in good faith is irrelevant when determining a “Brady violation.”⁵ Such a violation of constitutional due process entitles the defendant to be released from custody.⁶

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² *Berger v. United States*, 295 U.S. 78, 88 (1935).

³ *Id.*

⁴ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁵ *Id.*

⁶ *Id.* at 86; *see also* *Mooney v. Holohan*, 294 U.S. 103, 112 (1934).

A constitutional violation under *Brady* would theoretically allow a defendant to bring a civil action under United States Code (“U.S.C.”) § 1983.⁷ “[E]very person who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages.”⁸ Section 1983 seems to suggest that prosecutors can be held civilly liable to defendants for withholding exculpatory evidence. However, the “courts have described the prosecutor’s immunity as a form of ‘quasi-judicial’ immunity.”⁹ This “quasi-judicial” immunity is rooted in the immunity of judges. The Court has supported this common-law immunity to protect the honest prosecutor,¹⁰ but the Court’s efforts to protect the “honest prosecutor” have also protected the “dishonest prosecutor.” The Court, not in words but in actions, has relied on professional responsibility rules to remove “dishonest attorneys” from serving as prosecutors.¹¹

Professional responsibility disciplinary measures are adequate when a prosecuting attorney knowingly violates their duty to refrain from using improper methods that violate a defendant’s due process rights. However, these disciplinary measures are not strictly enforced. Trial and appellate court judges have relied on prosecutor’s offices to “self-regulate” in violation of these judges’ own professional responsibility rules. The United States Supreme Court must carve out an exception to quasi-judicial immunity for prosecutors to allow for civil liability and possible criminal liability to protect the integrity of the legal profession based on the political ideals of the Rule of Law.¹²

II. ROLE OF THE PROSECUTOR

⁷ 42 U.S.C. § 1983 (1979).

⁸ *Id.*

⁹ *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976).

¹⁰ *Id.* at 425.

¹¹ SUSAN R. MARTYN ET AL., *THE LAW GOVERNING LAWYERS: MODEL RULES, RESTATEMENT, AND OTHER SOURCES OF LAW* 72-73 (2022-2023 ed. 2022).

¹² Jeremy Waldron, *The Concept and The Rule of Law*, 43 GA. L. REV. 1, 3 (2008).

Prosecutors hold “a peculiar and very definite . . . [position as] the servant[s] of the law.”¹³ A prosecutor serves as a representative “not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all: and whose interest, therefore, in a criminal prosecution is not that [they] shall win a case, but that justice shall be done.”¹⁴ This peculiar position indicates that the prosecutor serves as an advocate or representative of the entire community, not just the victim of any one crime. As an advocate for the government and the community, the prosecutor has two main goals in bringing defendants to trial to answer criminal allegations. The prosecutor’s goal is to ensure that the “guilt shall not escape or innocence suffer.”¹⁵ A finding of guilt cannot come at the cost of an innocence suffered.

Prosecutors are expected to try cases “with earnestness and vigor.”¹⁶ The prosecutor is also expected to “strike hard blows” as they pursue justice as an advocate for the community.¹⁷ Prosecutors have tools at their disposal to ensure that the guilty do not escape punishment and that the innocent do not suffer.¹⁸ The prosecutor may not use “improper suggestions, insinuations . . . [or] assertions of personal knowledge” as tools to achieve a guilty verdict.¹⁹ A prosecutor’s intentional withholding of exculpatory evidence is among these improper tools, which “carry much weight against the accused when they should properly carry none.”²⁰ During a trial, the lack of exculpatory evidence has the power to sway a jury as any “smoking gun.” A prosecutor’s use of these improper tools can amount to prosecutorial misconduct if they are “so pronounced and persistent that it permeates the entire atmosphere of the trial or so gross as probably to prejudice the

¹³ *Berger*, 295 U.S. at 79.

¹⁴ *Id.* at 88.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

defendant.”²¹ Four factors may be considered in evaluating whether the alleged prosecutorial misconduct is flagrant: “(1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the defendant.”²²

III. EXCULPATORY EVIDENCE

Arguably, the most egregious prosecutorial misconduct is withholding potentially exculpatory evidence. Exculpatory or *Brady* material is any evidence “known to the government that favors a criminal defendant.”²³ However, it is the prosecutor who determines what to disclose and what evidence has exculpatory value.²⁴ “A prosecution that [does not comport with the standards of justice by] withhold[ing] evidence on demand of an accused which, if made available, would tend to exculpate them or reduce the penalty helps shape a trial that bears heavily on the defendant.”²⁵ The dependence on the prosecutor to determine exculpatory evidence invites prosecutorial misconduct.

The result is called a “*Brady* violation.” *Brady* evidence also includes impeachment evidence.²⁶ A *Brady* violation has three elements: (1) “The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice

²¹ *Bates v. Bell*, 402 F.3d 635, 641 (6th Cir. 2005) (quoting *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997)).

²² *Id.*

²³ *Brady Material*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (desk ed. 2012).

²⁴ Anna D. Vaynman & Mark R. Fondacaro, *Prosecutor Discretion, Justice, and Compassion: Re-Establishing Balance in Our Legal System*, 52 STETSON L. REV. 31, 36 (2022) (quoting Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940)).

²⁵ *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963).

²⁶ *Strickler v. Greene*, 527 U.S. 263, 282 (1999).

must have ensued.”²⁷ This discretion would be better served by a determination of materiality versus the exculpatory value of the evidence.

The one person or group of people with the most “control over life, liberty, and reputation” is the American prosecutor.²⁸ This vast amount of control is vested in a prosecutor’s discretion “to select cases to investigate and pursue, and to decide not to pursue other cases at all.”²⁹ The American prosecutor exercises their power over life, liberty, and reputation by having sole “access to the complete case file” and making “the decision as to what information to share with the defendant and his attorney based on the prosecutor’s own determination of relevance and exculpatory value” of the evidence.³⁰ For the honest prosecutor, the prosecutor’s “[d]iscretion makes room for compassion.”³¹ For the dishonest prosecutor, a prosecutor’s discretion allows an almost unchecked power to inflict substantial and injurious influence over a trial. A prosecutor’s discretion to decide the “exculpatory value” of evidence can heavily prejudice the defendant during criminal proceedings.

Even the Court has recognized that “the prosecution [has] broad discretion to withhold favorable evidence.”³² Furthermore, “prosecutorial misconduct is not *necessarily* an abuse of discretion.”³³ This failure to disclose comes from a dishonest prosecutor believing they may “act outside the bounds of the law.”³⁴ Prosecutorial misconduct is evident in a high number of exonerations.³⁵ Of these exonerations, the National Registry of Exonerations found that sixty-five percent were white-collar crimes and nine percent were drug crimes.³⁶ Unfortunately, prosecutorial misconduct is rarely disciplined, with only four percent of prosecutors disciplined for their

²⁷ *Id.* at 281-82.

²⁸ Vaynman, *supra* note 24, at 7.

²⁹ *Id.* at 4.

³⁰ *Id.*

³¹ *Id.* at 7.

³² *Id.* at 9.

³³ *Id.* at 8.

³⁴ *Id.* at 9.

³⁵ *Id.* at 8.

³⁶ *Id.*

misconduct in wrongful conviction cases.³⁷ The resulting theory is that prosecutorial discretion is “ripe of misuse, be it with or without malicious intent.”³⁸ Stricter enforcement of current professional responsibility rules is needed to control prosecutorial misconduct.

In *Bates v. Bell*, a habeas relief case, the Court used the harmless error standard to determine if the alleged prosecutorial misconduct occurred.³⁹ The harmless error standard states that “[a]n error is found to be harmless unless it ‘had substantial and injurious effect or influence in determining the jury’s verdict.’”⁴⁰ In a death penalty sentencing, this harmless error standard is not whether the verdict would change from guilty to not guilty, but rather whether there would be a change from death to life.⁴¹ A prosecutor’s intentional withholding of material exculpatory evidence represents a substantial and injurious influence on a jury’s verdict.

The Court set out a duty to disclose exculpatory evidence in *Brady v. Maryland*.⁴² In *Brady*, a key statement from the accomplice was intentionally withheld by the prosecution until after the court affirmed the defendant’s sentence.⁴³ The withholding of evidence in this manner violates due process.⁴⁴ The violation of due process rights is so significant that mere notice and hearing cannot remedy the harm done to a defendant.⁴⁵ The Court characterizes the withholding of exculpatory evidence as a “deliberate deception of court and jury.”⁴⁶ This deliberate deception is egregious enough to “entitle [the] petitioner to release from his present custody.”⁴⁷

³⁷ *Id.*

³⁸ *Id.* at 9.

³⁹ *Bates v. Bell*, 402 F.3d 635, 641 (6th Cir. 2005).

⁴⁰ *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)).

⁴¹ *Id.* at 641.

⁴² 373 U.S. 83.

⁴³ *Id.*

⁴⁴ *Id.* at 86; see also *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3rd Cir. 1952); *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3rd Cir. 1955).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942).

Even with the potential for an egregious deliberate deception, the Court requires only a reasonable prosecutor standard.⁴⁸ If the withholding of exculpatory or impeachment evidence is egregious enough to warrant release, then these actions should be egregious enough to warrant an exception to prosecutorial immunity.

“[T]he prosecutor’s absolute duty to disclose under *Brady* is limited to evidence a reasonable prosecutor would perceive at the time as being material and favorable to the defense.”⁴⁹ The absolute duty does not only concern potentially exculpatory evidence in the possession of the prosecution but also impeachment evidence.⁵⁰ The duty extends to “any favorable evidence known to the others acting on the government’s behalf . . . including the police.”⁵¹ The absolute duty applies only to “favorable evidence rising to a material level of importance.”⁵² Evidence is materially important if “the suppressed evidence would have produced a different verdict.”⁵³ “Materially favorable evidence includes both exculpatory and impeachment evidence.”⁵⁴ Material evidence would be a better bright-line rule than analyzing exculpatory or impeachment value.

“When police or prosecutors conceal significant exculpatory or impeaching material in the State’s possession, it is ordinarily incumbent on the State to set the record straight.”⁵⁵ To satisfy the second element of a *Brady* violation, “a petitioner shows ‘cause’ when the reason for his failure to develop facts in state-court proceedings was the State’s suppression of the relevant evidence.”⁵⁶ A petitioner cannot show cause when ongoing suppression makes evidence unknown. Innocent defendants are prejudiced in court proceedings due to their inability to show cause. Because the prosecutor is “responsible

⁴⁸ *Villasana v. Wilhoit*, 368 F.3d 976, 979 (8th Cir. 2004).

⁴⁹ *Id.*

⁵⁰ *Kyle v. Whitley*, 514 U.S. 419, 437 (1995).

⁵¹ *Id.*

⁵² *Id.* at 438.

⁵³ *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

⁵⁴ *Villasana v. Wilhoit*, 368 F.3d 976, 978 (8th Cir. 2004).

⁵⁵ *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004).

⁵⁶ *Id.* at 691.

for ‘any favorable evidence known to others acting on the government’s behalf in the case,’ the petitioner will remain as disadvantaged as they were during the guilt phase of the trial.⁵⁷

The Court determined that defendants should not be forced to “scavenge for hints of undisclosed Brady material.”⁵⁸ The idea that “the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence” shifts the burden from the State.⁵⁹ “A rule thus declaring ‘prosecutor may hide, defendant must seek,’ [does not] . . . accord defendants due process.”⁶⁰ These rulings and the rule basing self-disclosure on a reasonable prosecutor standard conflict with each other and invite prosecutorial misconduct for failure to disclose material exculpatory evidence.

When a prosecutor willfully withholds material exculpatory or impeachment evidence, and the petitioner succeeds in a new trial, the petitioner has little legal recourse due to absolute or qualified immunity. The result leaves the exonerated defendant with damages from loss of time, money, and reputation within the community. Courts have sometimes “described the prosecutor’s immunity as a form of ‘quasi-judicial’ immunity and referred to it as a derivative of the immunity of judges recognized in *Pierson v. Ray*.”⁶¹ Prosecutorial misconduct leaves professional discipline as the only, but ineffective, recourse of the petitioner. Potential disbarment and other sanctions will not undo the harm done to the petitioner.

Various jurisdictions have considered the question of *Brady* requirements and their own professional conduct rules as they apply to prosecutors. In a formal ethics opinion, Tennessee noted that “[a] majority of states hold that the ethical duty of a prosecutor is broader and extends beyond Brady [sic].”⁶² Tennessee is not the only state to address the professional conduct of prosecutors and the *Brady* ruling. “[T]he Supreme

⁵⁷ See *id.* at 693 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

⁵⁸ *Id.* at 674.

⁵⁹ *Id.* at 696.

⁶⁰ *Id.*

⁶¹ *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976).

⁶² Bd. of Pro. Resp. of the Sup. Ct. of Tenn., Formal Ethics Op. 2017-F-163 (2018).

Court of North Dakota held that there is a distinction between compliance with an ethical rule and ensuring that an accused is not wrongfully convicted.”⁶³ The Supreme Court of North Dakota stated that “[t]he primary concern in disciplinary proceedings is to ensure that attorneys act in conformity with the ethical standards embodied in the Rules of Professional Conduct, regardless of the surrounding circumstances.”⁶⁴ The Sixth Circuit believes that the ethical obligations currently imposed on prosecutors are more stringent than the *Brady* requirements in Rule 3.8(d).⁶⁵ The Tennessee District Attorney General Conference adamantly opposed the ethics opinion of the Tennessee Board of Professional Responsibility and filed to vacate the opinion.⁶⁶

In Tennessee, this same group has been relied upon to “self-regulate” the attorneys working in their offices for ethical violations concerning prosecutorial misconduct, including the withholding of exculpatory or impeachment evidence.⁶⁷ The Tennessee Supreme Court ultimately vacated the formal opinion in its entirety and gave prosecutors a source of plausible deniability. The Tennessee Supreme Court accomplished this by allowing the ethical duty to require the prosecutor to know of the information before the duty attaches.⁶⁸

The Tennessee Supreme Court’s actions created a difficult standard for an innocent defendant to meet when seeking to prove an ethical violation by the prosecution. “Multiple circuits had also recognized . . . that ‘*Brady*-derived’ claims could be based on the conduct of law enforcement

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Tennessee Supreme Court Vacates Board of Professional Responsibility Formal Ethics Opinion 2017-F-163*, TENNESSEE STATE COURTS (Aug. 23, 2019), <https://www.tncourts.gov/press/2019/08/23/tennessee-supreme-court-vacates-board-professional-responsibility-formal-ethics>.

⁶⁷ Bruce Green & Ellen Yaroshesky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 57 (2016).

⁶⁸ *Tennessee Supreme Court Vacates Board of Professional Responsibility Formal Ethics Opinion 2017-F-163*, *supra* note 66.

officers”⁶⁹ These courts have recognized that the prosecution includes law enforcement.⁷⁰ Ultimately, “[t]he duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney. . . .”⁷¹ Because the Tennessee Supreme Court vacated the formal opinion, there would not be an ethical violation. However, a *Brady* violation would not be excused for the withholding of any exculpatory or impeachment evidence by the state.

A. EXCULPATORY EVIDENCE AND PROFESSIONAL CONDUCT

Disciplining dishonest prosecutors is limited to professional discipline due to the principles of absolute and qualified immunity.⁷² These principles of immunity force courts to express a preference for professional discipline over civil liability or possible criminal liability.⁷³ However, the result is “that disciplinary authorities do not effectively regulate prosecutors,” resulting in prosecutors rarely being disciplined.⁷⁴ The limitations caused by the principles of immunity result in courts having to “let prosecutors off too lightly” at the detriment of innocent defendants.⁷⁵

The courts are limited by United States Supreme Court decisions and other case law and must “defer to prosecutors’ decisions about whether to initiate or dismiss criminal charges.”⁷⁶ The courts are prevented from implementing “meaningful regulation of prosecutors’ discretionary decisions through the disciplinary process.”⁷⁷ The absence of meaningful regulation encompasses federal and state courts. The courts are left open to political favoritism, personal self-interests, and

⁶⁹ Jackson v. City of Cleveland, 925 F.3d 793, 823 (6th Cir. 2019).

⁷⁰ *Id.* at 824.

⁷¹ *Id.*

⁷² Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 143 (2016).

⁷³ *Id.*

⁷⁴ *Id.* at 144.

⁷⁵ *Id.*

⁷⁶ *Id.* at 145.

⁷⁷ *Id.*

other abuses of prosecutorial misconduct, along with a lack of control over the prosecutors.⁷⁸ This is why state supreme courts adopt ethical codes to regulate all attorneys, including prosecutors, within their jurisdiction.⁷⁹ Ethics codes are the only way to professionally discipline a dishonest prosecutor.⁸⁰

The American Bar Association has compiled Model Rules of Professional Conduct.⁸¹ Every jurisdiction can adopt the model rules as written or adopt a version of the rules.⁸² Model Rule 3.8 focuses on the obligations of prosecutors.⁸³ Prosecutors cannot pursue charges that are not supported by probable cause.⁸⁴ Some jurisdictions have gone beyond the probable cause requirement. "In Washington, D.C., Rule 3.8 provides that a prosecutor shall not '[i]n exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person,' or 'prosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt.'"⁸⁵ The higher bar for bringing a defendant to trial allows the honest prosecutor to focus on their goal of pursuing justice, not just convictions. However, this encourages the dishonest prosecutor to withhold exculpatory evidence to ensure conviction while avoiding an ethics violation through the professional disciplinary process.

The "ethic rules may initially appear to leave much of prosecutors' work unregulated, or to regulate prosecutors too leniently"⁸⁶ However, the ethics rules that govern all attorneys also govern prosecutors. Prosecutors are just as responsible for "outright illegal conduct" such as discovery rule or court rule violations as private attorneys.⁸⁷ Prosecutors may also be disciplined for "conduct involving dishonesty, fraud,

⁷⁸ *Id.* at 146.

⁷⁹ *Id.* at 149.

⁸⁰ *Id.*

⁸¹ *See id.* at 149.

⁸² *Id.*

⁸³ MARTYN, *supra* note 11, at 72-73.

⁸⁴ Green & Levine, *supra* note 72, at 152 (referring to MODEL RULES OF PRO. CONDUCT r. 3.8(a)).

⁸⁵ *Id.*

⁸⁶ *Id.* at 153.

⁸⁷ *Id.*

deceit, or misrepresentation.”⁸⁸ “[T]here is an overwhelming consensus of opinion that ethics rules are under-enforced against prosecutors.”⁸⁹ Further, “disciplinary authorities have appeared to ignore even serious prosecutorial wrongdoing, as long as the conduct falls short of criminal law breaking.”⁹⁰ A dishonest prosecutor’s intentional fraud or misrepresentation of exculpatory evidence involves a bad act with a bad state of mind, which is the basis for any criminal act. The professional disciplinary processes for violations of ethics rules cannot address the criminal acts of a dishonest prosecutor.

“Some [have] suggested that the tendency [for dishonest prosecutors] to commit misconduct may be intrinsic to the role of a lawyer ... in an adversarial system....”⁹¹ But the adversarial system is not the sole reason that a dishonest prosecutor engages in misconduct. “[O]thers [have] attributed this tendency to prosecution cultures that value winning cases or convicting criminals over [the dishonest prosecutor] playing by the rules [of criminal procedure].”⁹² Prosecutors may value winning cases as a means to help ensure they are politically secure in their positions. When narrowly conceived, wrongdoing “was assumed to be rare and the fault of a few rogue prosecutors.”⁹³ Even if rare as assumed, these instances of intentional prosecutorial misconduct represent a blemish on the integrity of the legal profession that erodes public confidence.

“[T]he Court [has] echoed the public’s confidence that prosecutors will faithfully observe their obligations to play fairly and seek justice.”⁹⁴ This reasoning has resulted in “judges assum[ing] that most prosecutors’ offices could be trusted to, and had the means to, regulate their prosecutors by . . . punishing individual misconduct” in direct violation of judicial ethics rules requiring the judges to act.⁹⁵ “Courts use

⁸⁸ *Id.* (quoting MODEL RULES OF PRO. CONDUCT r. 8.4(c)).

⁸⁹ *Id.* at 155.

⁹⁰ *Id.* at 157.

⁹¹ Green & Yaroshefsky, *supra* note 67, at 57.

⁹² *Id.*

⁹³ *Id.* at 53.

⁹⁴ *Id.* at 55.

⁹⁵ *See id.* at 54.

'prosecutorial misconduct' as a term of art to cover violations of law, particularly discovery law, whether or not the violation is intentional"⁹⁶ These violations of law "d[o] not turn on the prosecutor's state of mind," unlike criminal actions that require a culpable state of mind.⁹⁷ One issue with judges relying on prosecutors' offices to self-regulate is that it violates the judicial code. The ABA Model Code of Judicial Conduct binds judges to two rules that apply to known lawyer misconduct. Model Rule 2.15 details judges' responsibility to respond to judicial and lawyer misconduct.⁹⁸ Although the rule also covers judicial misconduct, the focus in this discussion will be on lawyer misconduct. "A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority."⁹⁹ These reporting obligations are limited to "those offenses that an independent judiciary must vigorously endeavor to prevent."¹⁰⁰ Violations of constitutional due process are one of the offenses that the independent judiciary is meant to prevent under these reporting requirements. Comment two of the rule details the reporting requirements:

[A]ctions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.¹⁰¹

A court's reliance on prosecutorial offices to self-regulate is a violation of the Code of Judicial Conduct. The

⁹⁶ *Id.* at 58.

⁹⁷ *Id.*

⁹⁸ MARTYN, *supra* note 11, at MODEL RULES OF PRO. CONDUCT r. 2.15.

⁹⁹ *Id.* at r. 2.15(B).

¹⁰⁰ *Id.* at r. 2.15 cmt. 1.

¹⁰¹ *Id.* at r. 2.15 cmt. 2.

comments to Rule 2.15 show that judges are not obligated to speak with the offending attorney or report to the offending attorney's supervisor before reporting the misconduct. The courts are required to vigorously endeavor to prevent due process violations.¹⁰² Prosecutorial misconduct violates due process, so courts are obligated to report it. Courts must make such reports directly to attorney disciplinary committees, and so must any other attorney who knows of the misconduct. A judge's reliance on prosecutors' offices to "self-regulate" and make such reports thus violates the rules of judicial conduct.

Courts have downplayed the seriousness of prosecutorial misconduct while relying on prosecutors' offices to remove dishonest prosecutors from office. Yet these trusted prosecutors' offices have also downplayed the harm of these violations of law, "urg[ing] courts to use the term 'error' in referring to . . . inadvertent or negligent violation[s] of discovery provisions or other laws."¹⁰³ These self-regulating prosecutors' offices have "dismissed many failings as involving [violations of the law]."¹⁰⁴ These failings erode the integrity of the legal profession.

The failure of prosecutors' offices to self-regulate, combined with the failure of disciplinary authorities to aggressively pursue ethics violations and the limitations placed on courts by qualified immunity, result in the protection of dishonest prosecutors and the continuation of valuing winning cases over achieving just outcomes. The dishonest prosecutor, while having the prerequisites of a criminal violation through their bad act and bad state of mind, evades the intended justice of a criminal proceeding. Professional discipline, including possible disbarment, is insufficient to bring justice to defendants whose fundamental rights were violated in an unfair criminal proceeding. Defendants who have had their fundamental rights violated suffer the loss of time, money, and reputation within their communities.

IV. ABSOLUTE AND QUALIFIED IMMUNITY

¹⁰² See *id.* at r. 2.15 cmt. 1.

¹⁰³ Green & Yaroshefsky, *supra* note 67, at 58.

¹⁰⁴ *Id.* at 59.

Certain government officials have the privilege of immunity for actions taken during their official duties. For example, judges that act within their judicial jurisdiction enjoy a common-law absolute immunity.¹⁰⁵ Police officers also enjoy this common law absolute immunity through a defense under 42 U.S.C. § 1983 – “good faith and probable cause” – that is usually used to defend against false arrest actions.¹⁰⁶ However, this common-law absolute immunity is contrary to the language of 42 U.S.C. § 1983: “[E]very person who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages.”¹⁰⁷ The common-law absolute immunity provision “was [determined] to be preserved in § 1983.”¹⁰⁸

In addition to the common law absolute immunity, qualified immunity extends to “Governor[s] and other executive officials.”¹⁰⁹ The Court has even extended this qualified immunity to school officials.¹¹⁰ Qualified immunity exists within “the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action”¹¹¹ Many courts have held that prosecutors enjoy a “quasi-judicial” immunity.¹¹² This quasi-judicial immunity is based upon the immunity of judges.¹¹³ Qualified immunity applies to prosecutors’ actions taken in the scope of discretion and responsibilities of their office.¹¹⁴ The scope of discretion given to prosecutors is broad so that they may meet the responsibilities of their office.

While there are few limitations on a prosecutor’s immunity, they do exist. “Before the establishment of probable cause to arrest, a prosecutor will generally not be entitled to

¹⁰⁵ *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976).

¹⁰⁶ *Id.* at 418-19 (quoting 42 U.S.C. § 1983); *see also* *Pierson v. Ray*, 36 U.S. 547, 554-55 (1967).

¹⁰⁷ *Imbler*, 424 U.S. at 417 (quoting 42 U.S.C. § 1983).

¹⁰⁸ *Id.* at 418.

¹⁰⁹ *Id.* at 419.

¹¹⁰ *Id.* (referencing *Wood v. Strickland*, 420 U.S. 303, 322 (1975)).

¹¹¹ *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232 (1974)).

¹¹² *Id.* at 420.

¹¹³ *Id.*

¹¹⁴ *Green & Yaroshefsky*, *supra* note 67.

absolute immunity.”¹¹⁵ The prosecutor cannot consider themselves as an advocate before probable cause is established.¹¹⁶ This is contrary to the idea that “prosecutors are entitled to absolute immunity for actions as advocates before a grand jury . . . even if they present unreliable or wholly fictitious [evidence].”¹¹⁷ It is the grand jury that determines probable cause by issuing a true bill for the indictment of a defendant. Ultimately, a prosecutor may not have absolute immunity without established probable cause unless it is before a grand jury seeking to establish probable cause; however, they may still have qualified immunity as an investigator.¹¹⁸

Prosecutors often must defend themselves against the common-law tort action of malicious prosecution.¹¹⁹ Prosecutorial immunity became the majority rule in *Griffith v. Slinkard*.¹²⁰ The courts have theorized that this prosecutorial immunity is necessary to allow the prosecutor to perform their duties of office without being impeded.¹²¹ Although the court has described this immunity as absolute and grounded on principles of public policy, this viewpoint also indicates that it is public policy to excuse prosecutorial misconduct as a violation of a citizen’s due process rights under the United States Constitution and other sovereign constitutions. This viewpoint contradicts the professional responsibility rules that require ethics violations to be reported.

The Court justifies this absolute immunity on public policy grounds because it fears that not doing so would undermine the performance of prosecutors’ duties.¹²² The Court relies on the prosecutor’s obligation to exercise their best judgment in performing their duties.¹²³ However, the Court fails to acknowledge that this duty may be breached.

¹¹⁵ *McGhee v. Pottawattamie County*, 547 F.3d 922, 929 (8th Cir. 2008); see also *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993).

¹¹⁶ *Id.*

¹¹⁷ *Michaels v. New Jersey*, 222 F.3d 118, 121-22 (3rd Cir. 2000) (quoting *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994)).

¹¹⁸ See *Green & Yaroshesky*, *supra* note 67.

¹¹⁹ *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976).

¹²⁰ *Id.* at 422.

¹²¹ *Id.* at 424 (referencing *Pearson v. Reed*, 44 P.2d 592, 597 (1935)).

¹²² *Id.* at 424.

¹²³ *Id.*

Recognizing potential breaches of the duty to exercise good judgment is best done through an exception to prosecutorial immunity. This is evident through the Court's primary concern that the "honest prosecutor would face greater difficulty in meeting the standards of qualified immunity."¹²⁴ The Court must both acknowledge and hold accountable the "dishonest prosecutor" while protecting the "honest prosecutor" through the creation of an exception to the principles of absolute/qualified immunity concerning the breach of duty by a prosecutor.

The Court acknowledged that extending the principles of absolute and qualified immunity to prosecutors "leaves the genuinely wronged criminal defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. . . ." ¹²⁵ The Court believed that "the vigorous and fearless performance of the prosecutor's duty . . . is essential to the proper functioning of the criminal justice system."¹²⁶ The Court was "in agreement with Judge Learned Hand."¹²⁷ Judge Hand "thought in the end [it is] better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."¹²⁸ The Court stated that, although prosecutors are shielded from liability in civil lawsuits, the public is not powerless to deter and punish prosecutorial misconduct because criminal proceedings are still possible.¹²⁹ The Court "has never suggested that the policy considerations which compel civil immunity for certain government officials also place them beyond the reach of the criminal law."¹³⁰

There have been strides to recognize the existence of "dishonest prosecutors" at the appellate level. The state of Iowa has attempted to recognize the need for holding dishonest prosecutors liable for their actions.¹³¹ Iowa enacted the Iowa

¹²⁴ *Id.* at 425.

¹²⁵ *Id.* at 410.

¹²⁶ *Id.* at 427-28.

¹²⁷ *Id.* at 428.

¹²⁸ *Id.* (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (CA2 1949)).

¹²⁹ *Id.* at 429.

¹³⁰ *Id.*

¹³¹ See IOWA CODE ANN. § 669.1.

Tort Claims Act (ITCA).¹³² The ITCA allows for a “waiver of sovereign immunity” for certain claims that “fit within the ITCA’s specified reach.”¹³³ The Eighth Circuit Court of Appeals acknowledged that there was a consensus that “[i]mmunity is absolute only when the prosecutor performs distinctively prosecutorial functions.”¹³⁴

The consensus emanates from the “deprivation of liberty . . . can be shown to be the result of [the prosecutor’s] fabrication of evidence.”¹³⁵ The *McGhee* court agreed with the Second Circuit. The court found “immunity does not extend to the actions of a County Attorney who violates a person’s substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not ‘a distinctively prosecutorial function.’”¹³⁶ This finding does not account for evidence that is fabricated after formal charges are brought against a person.

V. REMEDIES

These changes can be based on the “Rule of Law.” The Rule of Law compromises some or all of the following:

1. a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences or ideology;
2. a requirement that there be general rules laid down clearly in advance, rules whose public presence enables people to figure out what is required of them, what the legal consequences of their actions will be, and what they can rely on so far as official action is concerned;

¹³² *Id.*

¹³³ *McGhee v. Pottawattamie County*, 547 F.3d 922, 930 (8th Cir. 2008).

¹³⁴ *Id.* at 933 (quoting *Buckley v. Fitzsimmons*, 919 F.2d 1230 (7th Cir. 1990)).

¹³⁵ *Id.* at 932 (quoting *Zahrey v. Coffey*, 221 F. 3d 342, 344, 349 (2nd Cir. 2000)).

¹³⁶ *Id.* at 933.

3. a requirement that there be courts, which operate according to recognized standards of procedural due process or natural justice, offering an impartial forum in which disputes can be resolved, and allowing people an opportunity to present evidence and make arguments before impartial and independent adjudicators to challenge the legality of official action, particularly when it impacts on vital interests in life, liberty, or economic well-being;
4. a principle of legal equality, which ensures that the law is the same for everyone, that everyone has access to the courts, and that no one is above the law.¹³⁷

The Rule of Law is a “cluster of ideals constitutive of modern political morality; the others are human rights, democracy, and perhaps also the principles of [a] free market economy.”¹³⁸ There can be a “violat[ion] when the norms that are applied by officials do not correspond to the norms that have been made public to the citizens or when officials act on the basis of their own discretion rather than norms laid down in advance.”¹³⁹ Prosecutorial misconduct can be seen as a violation of the Rule of Law when a prosecutor knowingly or intentionally violates a defendant’s due process rights. These public norms are valueless if they are not properly administered, and fair procedures are useless if the applicable rules are changed or ignored.¹⁴⁰ The rules concerning prosecutorial misconduct tend to be ignored or improperly administered by courts, prosecutors’ offices, defense attorneys, and disciplinary committees.

Efforts to remove protections for dishonest prosecutors must come from multiple sources. The United States Supreme Court must create an exception to absolute, qualified, and sovereign immunities to remove protections from civil and potential criminal liability for intentionally withholding

¹³⁷ Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT’L. 315, 316-17 (2011).

¹³⁸ Waldron, *supra* note 12, at 1.

¹³⁹ *Id.* at 4.

¹⁴⁰ *Id.* at 7.

exculpatory or impeachment evidence. Trial courts must take a more active role in recognizing dishonest prosecutors and not rely on prosecutors' offices to self-regulate under their judicial ethics reporting requirements.

Most jurisdictions have recognized that the current Model Rules of Professional Conduct are stricter in regard to exculpatory or impeachment evidence.¹⁴¹ In jurisdictions such as Tennessee, prosecutors' organizations have lobbied heavily against any effort to connect the disclosure of materially relevant exculpatory or impeachment evidence with professional ethics requirements.¹⁴² These organizations' responses to the possibility of an ethics requirement mandating the disclosure of evidence indicate that prosecutors desire an advantage over accused defendants. Prosecutors' organizations and offices must recognize the necessity of strictly enforced professional ethics requirements to begin to eliminate prosecutorial misconduct. Eliminating prosecutorial misconduct will require prosecutors' offices to take a zero-tolerance approach to supervising prosecutors who intentionally or inadvertently violate any defendant's constitutional rights.

Defense attorneys must take a tougher stance on reporting prosecutorial misconduct that violates their clients' constitutional rights. Although defense attorneys fear being unable to negotiate fair plea deals for their clients, they rarely have good working relationships with dishonest prosecutors in the first place. Defense attorneys need protection from any possible retaliation for fulfilling their own ethical requirements. These defense attorneys are required to advocate for their clients and report known ethical violations. Any fear of retaliation would serve as a hindrance to fulfilling those duties.

States must enact criminal penalties for prosecutors who withhold exculpatory or impeaching evidence in order to preserve the integrity of the criminal justice system in the United States. State Bar disciplinary committees must also take a tougher stance on disciplining prosecuting attorneys who violate current ethics rules. Disciplinary committees can only take this tougher stance if reporting requirements are met.

¹⁴¹ See Bd. of Pro. Resp. of the Sup. Ct. of Tenn., *supra* note 62.

¹⁴² See *Tennessee Supreme Court Vacates Board of Professional Responsibility Formal Ethics Opinion 2017-F-163*, *supra* note 66.

These criminal statutes should be enacted to reinforce the long-held belief that no one is above the law.

The United States Supreme Court must form its decisions within societal norms. As the only court expressly created under the United States Constitution, the Supreme Court is primarily relied on by the American people to create order among the differing jurisdictions.¹⁴³ A simplified breakdown of the basic function of the United States Supreme Court can be based on the “principle of legal equality.”¹⁴⁴ The principle of legal equality is the fourth principle under the Rule of Law.¹⁴⁵ This guiding principle “ensures that the law is the same for everyone, that everyone has access to the courts, and that no one is above the law.”¹⁴⁶

The Supreme Court’s decisions have valued protection for honest prosecutors over the due process rights of defendants who fall victim to prosecutorial misconduct. This violates the idea that “no one is above the law.”¹⁴⁷ The inequality results from the lack of an exception to protect defendants from dishonest prosecutors. The Court is correct that honest prosecutors must be able to perform their duties without potentially baseless accusations and possible civil liability looming over them as they perform their duties.¹⁴⁸ However, the Court must include an exception that removes absolute and qualified immunity for dishonest prosecutors to allow for both civil liability and criminal sanctions for intentional prosecutorial misconduct.

An exception to the principles of absolute immunity and qualified immunity cannot end prosecutorial misconduct alone. The lower and appellate courts must take a more active role in stopping unethical behavior in their courtrooms.¹⁴⁹ These courts must stop relying on prosecutors’ offices to self-regulate. Judges are ethically bound by the Code of Judicial Conduct to report prosecutorial misconduct that violates defendants’

¹⁴³ See U.S. CONST., art. III, § 1.

¹⁴⁴ Waldron, *supra* note 137, at 317.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Imbler*, 424 U.S. at 425.

¹⁴⁹ MARTYN, *supra* note 11, at 59.

constitutional due process rights.¹⁵⁰ These courts' reliance on self-regulation by prosecutors' offices is arguably a violation of the ABA Model Rules of Judicial Conduct.¹⁵¹ The courts must remain impartial by taking a strict view of unethical conduct by all parties involved.

The courts have largely relied on prosecutors' offices to self-regulate their prosecutor's unethical misconduct.¹⁵² The courts are wrong to rely on this self-regulation, especially as the Model Rules of Professional Conduct require all attorneys to regulate and report unethical conduct by other attorneys when they know of said unethical conduct.¹⁵³ The obligation to report professional misconduct should not fall to prosecutors' offices alone. Rule 8.3(a) requires "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, [to] inform the appropriate professional authority."¹⁵⁴ "Reporting a violation is especially important where the victim is unlikely to discover the offense."¹⁵⁵

Ultimately, the issue is not weak ethics rules. The issue is a lack of reporting and enforcing the current Model Rules. Prosecutors' offices may be reluctant to report ethical violations under the guise of team loyalty, but reporting requirements nonetheless remain in effect. Defense attorneys may be reluctant to report ethics violations out of fear of losing bargaining capabilities with prosecutors. These ideologies can lead to a lack of reporting and enforcing the current ethics rules. The result renders the current professional responsibility rules ineffective.

VI. CONCLUSION

Prosecutorial misconduct is largely ignored within the criminal justice system. The United States Supreme Court has wrongly applied absolute and qualified immunity to protect

¹⁵⁰ *Id.* at r. 2.15 cmt. 1.

¹⁵¹ *See id.*

¹⁵² Green & Yaroshefsky, *supra* note 67, at 54.

¹⁵³ MARTYN, *supra* note 11, at 101.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at r. 8.3 cmt. 1.

honest prosecutors while turning a blind eye to dishonest prosecutors. The idea that prosecutors must be protected at the cost of innocent defendants being wrongfully convicted without legal recourse, along with courts' reliance on prosecutors' offices to regulate themselves, means that these dishonest prosecutors are now in a position above and beyond the law.

There is evidence for a need for stricter adherence to the reporting requirements of attorneys and judges, as well as for an exception to remove absolute and qualified immunity for dishonest prosecutors so wrongfully convicted defendants can use civil remedies to return to their status quo. Criminal statutes are necessary to protect the integrity of the legal profession and ensure the principles of legal equality. The criminal justice system must make these changes to limit prosecutorial misconduct in American courts.