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***Prosecutorial
Misconduct
Second Edition***

BENNETT L. GERSHMAN



Prosecutorial Misconduct

Second Edition

by Bennett L. Gershman

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In memory of my father, Joseph S. Gershman

Introduction to First Edition

This book is about the use and abuse of power by one of the most influential figures in the American governmental system. Although not a member of the legislative or judicial branches, this official exercises broad lawmaking and adjudicative powers. Although technically a member of the executive branch, this official operates autonomously and independently and is usually accountable only to the public. Whether rural or urban, local or federal, elected or appointed, this official is glamorized by the media and diabolized by his foes. This figure is the public prosecutor, and he has the power to make decisions that control and even destroy people's careers, reputations, and lives. Any comprehensive and systematic understanding of the criminal justice system must take account of the central role of the prosecutor.

A study of the prosecutorial process is fascinating and frustrating. As a longtime prosecutor, defense attorney, and law professor, I have always believed that the prosecutor's task is more exacting than that of any other public officer. More than any other official, the prosecutor is required to serve two masters - society and justice. This practical and ethical obligation was articulated by the Supreme Court almost fifty years ago in what has become the classic statement of the role of the prosecutor:

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

Needless to say, for prosecutors to differentiate between hard blows and foul blows is not a simple task. Attempting to defend society's interests aggressively, against an equally zealous opponent, while at the same time trying to play the role of "minister of justice," can be equally difficult. Can prosecutors effectively reconcile the interests of societal protection and individual justice, in effect walking a tightrope?

Many prosecutors I have known have walked that tightrope with skill and grace. They have exercised their prodigious powers responsibly, prudently, and fairly. Others, however, have

conducted themselves arrogantly, arbitrarily, and abusively. Unfortunately, no clear legal and ethical standards exist to govern prosecutor's behavior. Although judicial opinions, bar association standards, and prosecutor's office manuals provide general guidance, the rules of proper conduct are often not well understood or applied. Prosecutors, like police officials, often act intuitively based on their sense of fairness and duty. Unlike police, however, the prosecutor is an attorney who has the luxury of foresight.

To date there has been no consistent, systematic, or comprehensive attempt to deal with the problem of prosecutorial misconduct. Judicial opinions, law review articles, and news reports frequently identify instances of reprehensible prosecutorial conduct. Issues of prosecutorial misconduct are often raised in criminal appeals. The digests are filled with opinions analyzing those issues. But the law of prosecutorial misconduct has developed in an ad hoc and random fashion. This book attempts to bring order to that chaos; to organize, explain, and analyze aberrant prosecutorial behavior throughout every stage of the criminal justice process.

Two major themes emerge from this book. First, it becomes inescapably clear that the prosecutor, for good or ill, is the most powerful figure in the criminal justice system. To be sure, the judge exercises considerable power, but only after the prosecutor has made the crucial decisions about whom to charge, whom to punish, and how severely. And this power to charge, plea bargain, grant immunity, and coerce evidence is largely uncontrolled. Second, acts of misconduct by prosecutors are recurrent, pervasive, and very serious. Case reports do not adequately describe the extent of such misconduct because so much of the prosecutor's work is conducted secretly and without supervision. One example is the prosecutor's suppression of evidence. Only when information subsequently is revealed can the prosecutor be charged with misconduct. But how does exculpatory information secreted in the prosecutor's files ever become known if the prosecutor chooses to conceal it? Although I have not precisely defined the term "misconduct," I use it to describe behavior that deliberately seeks an unfair advantage over the accused or a third person, or otherwise seeks to prejudice these persons' rights.

The second theme is probably the most significant in terms of long range reform. Restraints on prosecutorial misconduct are either meaningless or nonexistent. Relatively few judicial or constitutional sanctions exist to penalize or deter misconduct; the available sanctions are sparingly used and even when used have not proved effective. Misconduct is commonly met with judicial passivity and bar association hypocrisy. This judicial and professional default is not easily explained. Perhaps the prosecutor's standing, prestige, political power, and close affiliation with the bar may account for the lethargic responses. Another explanation may be the confusion between disciplining prosecutors and freeing guilty defendants. Some courts believe that reversal of a

conviction because of prosecutorial misconduct may punish the prosecutor but exact too great a toll on society. Whatever the reasons, the absence of significant external controls requires prosecutors to be self-regulating. With so much at stake, however, and the potential for abuse so great, self-regulation is not an acceptable safeguard. I hope this book can serve as a catalyst to discussions and suggestions about meaningful and systematic methods of prosecutorial discipline.

I am grateful to many persons for the inspiration and preparation of this book. The idea came from a discussion with Larry Goldman, a former colleague in "Hogan's office" who, together with David Fuller, another former colleague, provided many insightful suggestions and generously read and commented on several chapters. Travis Lewin, a professor of trial advocacy at Syracuse College of Law, offered assistance and encouragement. I am also grateful for the consistently thoughtful and attentive help and cooperation from the library staff at Cornell Law School. Many law students assisted in the research for this book, and I am deeply grateful not only for their help but also for their enthusiasm and encouragement: Jamie Maxwell, Becky Spiegel, Mark Jackson, Meredyth Smith, Brian Smith, and Wenlee Jensen. Trudi Calvert edited the manuscript with skill. I served under two prosecutors: Frank S. Hogan and Maurice H. Nadjari. For better or worse, I bear their heritage. I learned much from my bureau chiefs in Hogan's office - Alfred Scotti, Michael Juviler, Joseph Stone, and Peter Andreoli. But the person who contributed the most to my understanding of the prosecutor's role was Melvin Glass, my first bureau chief, to whom I express my admiration and thanks.

Bennett L. Gershman
Ithaca, New York
1984

Preface to Second Edition

The prosecutor's dominance in American criminal law, well established when this book was first published in 1985, has become even more entrenched. The last fifteen years are most notable for a vast accretion of power by prosecutors, increased deference by courts to prosecutorial prerogatives, and a general failure of courts and disciplinary bodies to impose meaningful sanctions on prosecutors for misconduct.

Each chapter in the book has been updated to reflect these trends. Virtually every aspect of the prosecutor's function — investigation, charging, plea bargaining, immunity granting, disclosure and discovery, and courtroom advocacy — reflects excess and abuse. Serious prosecutorial misconduct that undermines a fair trial is increasingly insulated from judicial review by the aggressive application of the harmless error rule. By the same token, the need to prove substantial prejudice has rendered grand jury and other investigative abuses virtually unassailable. A prosecutor's violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by courts, and almost never by disciplinary bodies. Radical changes in habeas corpus review, judicially and legislatively, have confined the once Great Writ to only marginal utility, even for often outrageous constitutional violations. Due process of law, at one time a significant protection against egregious prosecutorial misconduct, has also been given an increasingly limited application, and in some instances deemed entirely irrelevant. On the other hand, some misconduct has been circumscribed, one notable instance being the prosecutor's discriminatory use of jury challenges, which the U.S. Supreme Court struck down in 1986 in the landmark case of *Batson v. Kentucky* [476 U.S. 79].

Moreover, public awareness of the prosecutor's critical role in the legal system increased dramatically in recent years with media coverage of sensational trials and investigations, particularly the O.J. Simpson murder trial and the investigation by Independent Counsel Kenneth Starr of President Clinton. The public learned first-hand that a prosecutor had the power to bring down a President. The public also learned that a "Dream Team" of defense lawyers, a very unusual occurrence in most criminal cases, could check a prosecutor's power.

Additionally, prosecutorial misconduct did not escape media scrutiny or congressional examination. Investigative journalists for several major newspapers and television networks documented numerous instances of prosecutorial misconduct and provided further evidence of the prosecutor's abuse of power. Congress reacted to one prominent abuse by enacting the Citizens Protection

Act in 1998 to limit the power of federal prosecutors to interfere with a suspect's right to counsel. And some courts, increasingly sensitized to prosecutorial tactics that subvert a fair trial, scrutinized the prosecutor's conduct more diligently, and occasionally reversed convictions.

As the exigencies of law enforcement and adversarial combat press hard against a prosecutor's instinct to do justice, the prosecutor's institutional and ethical role as a "minister of justice" further atrophies. This second edition, regrettably, bears witness to that development.

White Plains, New York

July, 1999

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