


2014

Threats and Bullying by Prosecutors

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Recommended Citation

Bennett L. Gershman, Threats and Bullying by Prosecutors, 46 Loy. U. Chi. L.J. 327 (2014), <http://digitalcommons.pace.edu/lawfaculty/981/>.

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Threats and Bullying by Prosecutors

*Bennett L. Gershman**

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INTRODUCTION

U.S. prosecutors are difficult to type. The 40,000 or so federal, state, and local prosecutors occupy many and varied investigative, administrative, and litigation functions. Also variable, and sometimes misleading, are the labels used to describe the legal and ethical roles of the prosecutor. Prosecutors have been called “Champions of the People,”¹ “Ministers of Justice,”² “Courtroom Warriors,”³ and even

* Professor of Law, Pace University. I am grateful, as always, for the insights from my colleague, Professor Lissa Griffin. I also wish to thank the participants in the Criminal Justice Ethics Schmooze held at Fordham Law School in June 2014 for their valuable comments.

1. See *Mr. District Attorney on the Job*, BIG LITTLE BOOKS, http://www.biglittlebooks.com/dist_attorney.html (last visited Oct. 30, 2014) (describing the popular NBC radio show, “Mr. District Attorney,” which first aired on April 3, 1939 and glorified the public prosecutor).

2. See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2013) (stating that a prosecutor has the responsibility of “a minister of justice”).

3. See RICHARD O’CONNOR, COURTROOM WARRIOR: THE COMBATIVE CAREER OF WILLIAM

“Avengers.”⁴ They have been described as “virtuous,”⁵ “prudent,”⁶ “ethical,”⁷ “good,”⁸ “neutral,”⁹ “unique,”¹⁰ and “gamesmen.”¹¹ But there is one persona that seems to have eluded characterization and commentary: the prosecutor as a bully. In fact, one of the most prominent features of U.S. prosecutors is their ability to threaten, intimidate, and embarrass anyone—defendants, witnesses, lawyers—without any accountability, or apology. This is the conduct of a bully.

The idea to write about prosecutorial threats and bullying came from the *Loyola University Chicago Law Journal*'s conference on sentencing and punishment.¹² In presenting remarks about prosecutorial discretion in sentencing, I was struck more than ever by how U.S. prosecutors employ their vast charging and sentencing powers to coerce defendants to plead guilty and cooperate, with the most dire consequences if they refuse: “sentences so excessively severe they take your breath away,” as one federal judge recently observed.¹³ This phenomenon is hardly new or sudden.¹⁴ But in recent years, the power of prosecutors to inflict

TRAVERS JEROME 1 (1963) (describing the career of New York District Attorney William Travers Jerome, also referred to as a “Dragon-Slayer on the Bench”).

4. JEANINE PIRRO, *TO PUNISH AND PROTECT* 1 (2003).

5. See Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 *AM. J. CRIM. L.* 197, 201 (1988) (discussing whether prosecutors are capable of being virtuous).

6. See Leslie C. Griffin, *The Prudent Prosecutor*, 14 *GEO. J. LEGAL ETHICS* 259, 259 (2001) (arguing that prosecutorial discretion is not the same as moral discretion and that a good prosecutor needs to be prudent of office procedures and policies to avoid disciplinary sanctions).

7. See Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 *CRIM. L. BULL.* 500, 551–61 (1987) (describing the pressure on prosecutors to be ethical).

8. See Janet C. Hoefel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 *PENN. ST. L. REV.* 1133, 1135 (2005) (discussing the expectation that the “ethical” prosecutor is a realizable model for the “good” prosecutor); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 *GEO. J. LEGAL ETHICS* 355, 359 (2001) (recognizing that most people believe prosecutors are “the good guys”).

9. See H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *FORDHAM L. REV.* 1695, 1696 (2000) (explaining that the investigative responsibility requires neutrality).

10. See Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 *GEO. L.J.* 207, 210 (2000) (describing how federal prosecutors are “ethically unique”).

11. See Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 *CASE W. RES. L. REV.* 531, 565 (2007) (arguing that prosecutors have learned to bend rules in a “sporting event” fashion).

12. The *Loyola University Chicago Law Journal* held its Symposium, entitled “Sentence Structure: Elements of Punishment” on April 4, 2014.

13. *United States v. Kupa*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013).

14. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 257–60 (2011) (describing how the last several decades have witnessed much more powerful sentencing laws—mandatory minimums, three-strikes laws, and sentence enhancements—that give prosecutors more power than ever before to more easily induce guilty pleas and impose harsher sentences).

ultra-harsh punishments—often for minor drug offenses—has attracted increasing scrutiny from courts, commentators, and lawmakers.¹⁵ The greatest concern is the ability of prosecutors to bring criminal charges carrying mandatory minimum sentences and then to enhance the already severe punishment if the defendant persists in refusing to plead guilty, without offering any cogent or coherent explanation for this seemingly arbitrary use of power.¹⁶

But the prosecutor's use of threats and coercion is not limited to sentencing. Prosecutors throughout every stage of the criminal justice process have the power to threaten and bully anyone who is at the prosecutors' mercy: defendants, witnesses, attorneys, and even judges. The exercise of this power is often done recklessly and, as with bullies generally, with a wanton disregard for the sensibilities of the persons being abused. To be sure, some of these threats and bullying might appear as a necessary, if overly aggressive, means of investigating and prosecuting crime. Prosecutors often encounter persons who refuse to cooperate, claim not to remember details, are reluctant to incriminate a friend or relative, or are afraid of retribution. Prosecutors are in the business of convicting guilty people and this compelling objective

15. See, e.g., *Kupa*, 976 F. Supp. 2d at 420, 438 (stating that federal prosecutors use sentencing powers as “sledgehammer” and “two-by-four to the forehead” to coerce guilty pleas); *United States v. Young*, 960 F. Supp. 2d 881, 882 (N.D. Iowa 2013) (“[D]eeply disturbing, yet often replayed, shocking, dirty little secret of federal sentencing: the stunningly arbitrary application by the Department of Justice (DOJ) of § 851 drug sentencing enhancements.”); Smarter Sentencing Act, S. 1410, 113th Cong. (2013) (enlarging safety valve relief from drug offense mandatory minimums); HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 1–2 (2013) [hereinafter AN OFFER YOU CAN'T REFUSE], available at http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf (detailing how federal prosecutors extract guilty pleas by threatening to charge them with harsh mandatory sentences); Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1402 (2003) (“[I]t is hard to take seriously the notion that ninety percent of those serving our remarkably heavy sentences are the beneficiaries of ‘bargains’”); Eric H. Holder, Attorney General, Keynote Address at the Vera Institute of Justice's Third Annual Justice Address (July 9, 2009) (“We know that people convicted of drug possession or the sales of small amounts of drugs comprise a significant portion of the prison population. Indeed, in my thirty years of law enforcement, I have seen far too many young people lose their claim to a future by committing non-violent drug crimes.”).

16. See *Kupa*, 976 F. Supp. 2d at 434–36 (finding that the plea was coerced and rejecting prosecutor's claim of making “individualized assessment” as disingenuous “patter,” reflecting “lack of candor,” and evincing an effort to save face after defendant refused to plead guilty initially); *United States v. Jones*, No. CR 08-0887-2, 2009 WL 2912535, at *5–7 (N.D. Cal. Sept. 9, 2009) (concluding that the prosecutor failed to offer a cogent explanation for coercive threats that constituted “preemptive ultimatum” and failed to explain terms of plea agreement); AN OFFER YOU CAN'T REFUSE, *supra* note 15, at 8–11 (describing several cases involving harsh consequences of prosecutors making good on threats but refusing to comment on whether they thought resulting sentence was just or to even explain why defendant such harsh sentence).

requires prosecutors to sometimes use their considerable leverage, including threats, to induce people to assist law enforcement. But sometimes the threats are not aimed at legitimate law enforcement objectives. In several of the cases discussed below,¹⁷ the prosecutor's threats often appear to be gratuitous, unduly abusive, humiliating, and without any legal justification.¹⁸

Determining whether a threat is legitimate or illegitimate is often difficult. Threats may be tacit, and even made in a seemingly benign manner suggesting prosecutorial benevolence rather than oppression. Moreover, just because a court may find that a threat is legally permissible does not necessarily mean that the threat is an appropriate form of prosecutorial behavior. To make matters worse, some courts not only find threats legally permissible, but also encourage their use.¹⁹ In many instances, however, threats cannot be justified as a legitimate law enforcement tactic, and as with bullying generally, almost always inflict some type of harm. In the end, prosecutors, like all bullies, make threats because they have the power to do so; the people they threaten are at their mercy, and they have the legal weapons to back up their threats with sometimes devastating consequences.

17. See *infra* Part I (discussing several hypothetical cases of prosecutorial bullying, all based on real-life situations).

18. The language that prosecutors use often reveals the language of a bully. For example, a prosecutor who promoted herself as an "avenger" for victims described her job this way: "I often have to deal with slime." PIRRO, *supra* note 4, at 6. Her solution to prosecuting criminals was blunt: "Cage the bastards." *Id.* The notorious "Perp Walk," masterminded by former federal prosecutor and later New York City mayor Rudolph Giuliani, spotlighted the plight of the white-collar criminal at the prosecutor's mercy, who even though innocent, or presumed innocent, was publicly humiliated, and his reputations ruined. See *infra* note 46 and accompanying text (discussing prosecutors' use of the "Perp Walk"). Closely studying arguments by prosecutors is also illuminating. A prosecutor's summation often features abusive and ridiculing name-calling, the trademark of a bully. See, e.g., *Darden v. Wainwright*, 477 U.S. 168, 169 (1986) ("animal"); *United States v. Cook*, 432 F.2d 1093, 1095 (7th Cir. 1970) ("subhuman man with rancid, rotten mind, a true monster" (internal citations omitted)); *Volkmer v. United States*, 13 F.2d 594, 595 (6th Cir. 1926) ("cheap, scaly, slimy crook"); *United States v. Wolfson*, 322 F. Supp. 798, 798 (D. Del. 1971) ("crook," "viruses" and "germs"). The incendiary rhetoric used by the Arizona county prosecutor in attacking persons who were at his mercy, and whom he knew were unable to respond to his attacks, is the hallmark of the bully. See *infra* note 35 and accompanying text (discussing Arizona prosecutor Andrew Thomas). The "macho culture" in some prosecutor offices likely contributes to bullying tactics. See Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 957-58 (1999) (explaining how some prosecutors "yell and scream," they engage in the "confrontational approach," and claim "You have to break the guy down").

19. E.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978) (holding that it was permissible for a prosecutor to threaten to re-indict defendant on more serious charges for refusing to plead guilty); *United States v. Mandel*, 415 F. Supp. 1033, 1043 (D. Md. 1976) (describing the prosecutor's duty to make a witness aware that there may be adverse consequences to witness's evasions).

Part I of this Essay describes ten contexts in which prosecutors make threats and behave like bullies. Some of these contexts are familiar, such as grand jury proceedings or plea discussions, where threats are generally upheld. Threats in other contexts are not as easy to justify, such as threats to obtain testimony from prosecution witnesses, retaliating for the exercise of constitutional rights, forcing a waiver of civil rights claims, and publicly humiliating people. Other threats clearly are illegitimate and unethical, such as threats that drive defense witnesses off the stand, bringing criminal charges against outspoken critics and defense experts, and threats to charge corporations unless they refuse to pay the legal fees of employees. Then, Part II examines the legitimacy and illegitimacy of threats, provides a framework for analyzing the legitimacy of threats, and uses this framework to determine whether a prosecutor's threats have crossed the line.

I. THREATS AND BULLYING

Given the contemporary focus on bullying—in schools, workplaces, the military, and elsewhere—it occurred to me that bullying might be an apt window through which to examine several areas of criminal procedure where prosecutors threaten and bully to implement various discretionary decisions, particularly to force people to relinquish rights and comply with the prosecutor's demands. As shown below, a prosecutor's threats and bullying pervade virtually every stage of the criminal justice process. These examples are designed to illustrate the most common instances where threats and bullying occur. The problems have been created for purposes of exploring the subject. They are based on real cases.

*A. Intimidating Grand Jury Witnesses*²⁰

A federal grand jury is investigating a state senator for corruption. The focus of the probe is on the relationship between the senator and a wealthy real estate developer, and whether the developer made large financial contributions to the senator's re-election campaign in return for the senator's help in avoiding onerous licensing, construction, and development requirements. The prosecutor served grand jury subpoenas on the senator requiring him to produce numerous documents related to his political and senatorial work. The prosecutor also subpoenaed the senator's longtime chief of staff to testify about several encounters between the senator and the developer in which the parties

20. See BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 2:2–2:8 (2d ed. Supp. 2013–2014) (discussing grand jury misconduct).

discussed the construction project.

The prosecutor advises the chief of staff that he is not a target of the investigation, but he refuses to testify. To compel his testimony, the prosecutor grants him immunity, and advises him that his refusal to testify can be punished with contempt, and that if he testifies falsely, he can be charged with perjury. The chief of staff agrees to testify, but claims he does not recall any conversations with the senator related to the financial arrangement with the developer. He is shown an email he wrote immediately after one of the meetings, and is asked again to recount the meeting. He again claims he does not remember.

The prosecutor, in an extremely agitated tone of voice exclaims: “You know you are lying. Don’t insult this grand jury. You’ll be in jail in a heartbeat unless you tell the truth. You’ll be finished. You will never work again.”

Are the prosecutor’s threats a legitimate exercise of prosecutorial power? Do these threats enhance or degrade the prosecutor’s ethical duty to serve justice?

B. *Coercing Guilty Pleas*²¹

Nancy Morris was charged with possession with intent to distribute fifty grams of crack cocaine. The charge carries a mandatory minimum sentence of ten years.²² Morris has a troubled history. She was sexually abused as a child, overcame a crack addiction, earned a college degree, and was gainfully employed until she found herself in an abusive relationship and again became addicted to crack.

Morris had two previous state marijuana arrests, pleaded guilty to both, and was sentenced to probation on one conviction and a \$100 fine on the other. Pursuant to a policy for drug prosecutions, the prosecutor advises Morris’s lawyer that he would accept a guilty plea to the drug charge and the imposition of the mandatory minimum sentence of ten years. The prosecutor also advises Morris that if she does not plead guilty within a week, he will file a new complaint adding the prior two drug convictions that would elevate the mandatory minimum sentence to twenty years with a maximum punishment of life.²³ The prosecutor also insists that as part of the “deal,” Morris must agree to pre-trial detention and make no motions challenging any aspects of the case.

21. See *supra* notes 13–16 and accompanying text (presenting cases and other sources discussing the prevalence and severity of coercion in obtaining guilty pleas).

22. The Anti-Drug Abuse Act of 1986 created mandatory minimum sentences and enhanced maximum sentences that are the most prominent features of U.S. drug sentencing. See generally 21 U.S.C. § 841 (2012) (creating mandatory minimum sentences).

23. See *id.* § 841(b)(1)(A) (providing for a mandatory minimum sentence of twenty years).

Morris refuses to plead guilty and elects to go to trial, where she is found guilty. At her sentencing, the prosecutor makes good on his threat, and Morris is sentenced to life imprisonment where she will probably remain until she dies.

Were the prosecutor's actions a proper exercise of prosecutorial power? Even if the prosecutor's threats are a legally permissible exercise of power, should there be limits on the use of this power?

C. Attacking Defense Experts²⁴

Barbara Allen, a licensed day care worker, was charged with the murder of a fifteen-month-old boy in her care. Several doctors testified for the prosecution that the constellation of head injuries the child suffered were the result of a diagnosis called Shaken Baby Syndrome.²⁵ Dr. Frank Logan, a forensic pathologist called by the defense, testified that the cause of death resulted from the child falling and hitting his head. As the basis for his opinion, Dr. Logan pointed to evidence that the child, who was just starting to walk, had fallen from a chair in the kitchen and hit his head on the floor. Pediatric records showed the child had lost his balance and fallen several times before, and one witness had seen the child run into a wall and bang his head at a day care center a few days earlier. Dr. Logan is a critic of Shaken Baby Syndrome and has written and lectured that the diagnosis has never been scientifically validated and is an illegitimate label for an often unknown and ambiguous event. He has testified as a defense witness in several other cases in which the diagnosis was claimed by the prosecution as the cause of death. Allen was acquitted.

Shortly after her acquittal, the prosecutor charged Dr. Logan with three counts of perjury for giving false testimony in the Allen trial that: (1) Dr. Logan had been asked to write a chapter in a new edition of a book about child abuse and head injuries; (2) denying that he had ever testified in the same case as another prosecution-oriented expert; and (3) his estimate of the amount of money he made giving lectures on Shaken Baby Syndrome. Logan was acquitted.

Were these charges brought as a legitimate exercise of prosecutorial discretion? Or were they brought to silence an outspoken prosecution

24. See *United States v. Stein*, 435 F. Supp. 2d 330, 367 (S.D.N.Y. 2006) (holding that prosecutor's threats violated employees' right to counsel and right to substantive due process).

25. Shaken Baby Syndrome is a controversial medical diagnosis that forcible shaking killed an infant, and this diagnosis often results in a charge of murder. See Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH U. L. REV. 1, 1 (2009) (exploring what ensues when medical certainty underlying science-based prosecutions dissipates).

critic?

*D. Bullying Defense Witnesses*²⁶

Frank Daly has been charged with conspiracy to distribute drugs. He has elected to go to trial and seeks to call in his defense a witness named Sally Long, who Daly claims will testify that Daly was not involved in the conspiracy. Sally was originally indicted along with Daly, but her case was dismissed because she was a juvenile. Learning of Sally's prospective testimony, the prosecutor sends messages to her through Daly's lawyer warning her that if she testifies, she is likely to be prosecuted for the drug charges that were previously dismissed, that her testimony will be used against her, and that if she lies, she will be prosecuted for perjury.

Not content with just these warnings, the prosecutor serves a subpoena on Sally and has her brought to his office by three federal agents. There, the prosecutor tells Sally that if she admits she was involved in the drug ring she will be prosecuted as a juvenile in state or federal court. Sally takes the witness stand but refuses to answer any questions relating to the drug ring on the ground that her answers might incriminate herself.

Was the prosecutor's conduct in warning Sally of the consequences of her testifying proper? Could the prosecutor be compelled to grant Sally immunity to allow her to testify without fear of incrimination?

*E. Bullying Prosecution Witnesses*²⁷

Michael Thomas witnessed a drive-by shooting outside a bar in which two people were killed. He told the police that he knew the victim, but was not sure he could identify the gunman. The police showed him several photos and he picked out the picture of the person he believed was the shooter. The prosecutor is preparing the case for the grand jury against defendant Ted Cruz and tries to contact Thomas without success. Thomas is asleep at a friend's house when two detectives burst into the apartment, roust him from bed, order him to dress, handcuff him, and escort him to a room in a Holiday Inn Hotel where he is greeted by a member of the District Attorney's office who tells Thomas he will not be allowed to leave unless he cooperates.

The prosecutor informs Thomas that a judge has issued an arrest warrant to take him into custody as a "material witness," that he is

26. See *infra* note 38 and accompanying text (citing cases that included questionable conduct by the prosecutors in regards to treating witnesses for the defense).

27. See *infra* note 44 and accompanying text.

required to testify in the grand jury, and that if he refuses to testify truthfully he will be charged with perjury and obstruction of justice. The prosecutor also tells Thomas that he would consider dropping a pending drug charge against Thomas if Thomas cooperated. The prosecutor reviews the facts and Thomas's earlier statements to the police, including Thomas's identification of Cruz's photo. The prosecutor then rehearses the questions he will ask Thomas in the grand jury. Thomas testifies in the grand jury and identifies Cruz as the killer.

Were the prosecutor's use of the material witness order, threats to jail Thomas and charge him with perjury and obstruction of justice, and promise to drop the drug charges permissible exercises of prosecutorial power? Even assuming an abuse of prosecutorial power, does the defendant have any remedy?

*F. Compelling Waiver of Civil Rights Claim*²⁸

Police Officer Paul Bennett spotted Adam DeRosa sitting on a stoop and smoking marijuana in Brooklyn, New York. According to Officer Bennett's complaint, as he walked up to DeRosa, DeRosa "lunged at him aggressively, striking him about the face and chest." However, according to DeRosa, Bennett approached him and told him to freeze. As DeRosa stood up, Bennett grabbed him around the neck, threw him to the ground, handcuffed him, and arrested him for disorderly conduct and resisting arrest. A bystander supports DeRosa's account. At DeRosa's arraignment, Assistant District Attorney Steven Walsh confers with DeRosa's attorney.

Walsh knows that smoking marijuana is a minor offense, that a bystander claims that the officer used excessive force, and that the officer's use of a chokehold may have violated police department policy. Nevertheless, as Walsh explains to DeRosa's attorney, Walsh would agree to dismiss the charges against DeRosa only if DeRosa agreed not to bring a civil lawsuit against the City, the Police Department, or Officer Bennett. If DeRosa does not agree, then Walsh will prosecute DeRosa and, as DeRosa's attorney reasonably knows, might result in his client's conviction.

Was Walsh's threat to prosecute DeRosa unless DeRosa agreed not to sue a permissible exercise of prosecutorial power? What factors are relevant to answer this question?

28. See *infra* notes 47–48 and accompanying text.

*G. Retaliation*²⁹

Defendant was charged with one count of income tax fraud. The venue was placed in the District of Columbia. The defendant moved to change the venue to California, his state of residence, claiming that the heavy burden of litigating the case would be alleviated, including the difficulty and expense of securing counsel far from home, and finding witnesses, especially character witnesses, who would be unable to travel to such a distant forum. The prosecutor vigorously opposes the motion, which the district court nonetheless grants. The prosecutor moves for reconsideration, advising defendant's counsel that he is considering adding new counts and "restructuring" the case against the defendant if he insisted on his venue rights.

The defendant refuses to accede to the prosecutor's demand, and the prosecutor obtains a second indictment based substantially on the same facts as the first indictment but adding a new count—charging the defendant with making a false statement to an IRS agent.

Was the prosecutor's warning to "up the ante" if the defendant insisted on securing his venue rights a proper exercise of prosecutorial power? What factors are relevant in answering this question?

*H. Demagoguery*³⁰

A county prosecutor in Arizona has been waging a bitter campaign of intimidation and retaliation against judges, lawyers, and municipal officials who he claims are obstructing his efforts to root out corruption and prosecute illegal aliens. The judges have ruled against him in several cases, and the municipal officials have allocated funds for county building projects but not for law enforcement. The prosecutor demanded that these judges submit to interviews with members of his staff, placed members of his staff in their courtrooms to monitor their conduct, and assigned his chief assistant to "troll" the Internet to look for suspicious information about the municipal officials, especially their financial records. He issued press releases publicly attacking the "cabals" and "factions" of judges and other officials who he claimed were thwarting his efforts.

Believing that his efforts to silence his critics were unsuccessful, he convened a grand jury that indicted three of the judges and two county supervisors on felony charges involving filing false financial statements. He arrested the supervising criminal court judge for hindering

29. See *infra* note 49 and accompanying text.

30. See *infra* notes 35–38 and accompanying text.

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prosecution just before the judge was to rule on a motion to disqualify the prosecutor for a conflict of interest. He filed a massive Racketeer Influenced and Corrupt Organizations Act (“RICO”) conspiracy complaint against four judges, the entire county legislature, and their attorneys for engaging in a “pattern of racketeering activities,” “intimidating and retaliating” against county prosecutors and law enforcement personnel, “threatening and extorting” the county prosecutor and his wife, and “corruptly seeking to deny prosecutors their license to practice law.”

Are the prosecutor’s actions under any circumstances an ethical, responsible, and effective way to serve justice, enforce the law, and protect the safety of the community?

*I. Shaming*³¹

A federal prosecutor is investigating an investment banker in connection with a highly publicized Wall Street insider-trading scandal. The prosecutor summons the banker to his office, with his attorney, to discuss possible cooperation. The banker appears to have no credible information that gives the prosecutor any reason to offer him any benefits. The prosecutor tells the lawyer that he believes his client is withholding information about criminal conduct by his superiors, and that if he does not reveal the full extent of his knowledge, he may be charged with federal crimes. The banker has nothing more to say.

The following week the prosecutor has the banker arrested at his place of business. Federal marshals handcuff him and forcibly escort him off the trading floor. The media has been notified and reporters and photographers surround the man as he is walked out the door and driven to the police station to be booked and arraigned.

Is the conduct of the prosecutor in publicly humiliating the defendant a proper exercise of power? What is the prosecutor’s justification for using this infamous “Perp walk”?

*J. Coercing Corporate Cooperation*³²

Federal authorities are investigating SaniWaste, a corporation involved in disposing of low-level radioactive waste, for numerous violations of federal environmental regulations. Three of the top officials are targets of the probe. It has been SaniWaste’s policy for many years to pay the legal expenses of its personnel, regardless of cost and regardless of whether the personnel were charged with crimes. In

31. See *infra* note 46 and accompanying text.

32. See *infra* note 39 and accompanying text.

the course of its investigation of SaniWaste, the federal prosecutor has met several times with SaniWaste's attorneys. The prosecutor explains that in considering whether to bring criminal charges against a corporation, federal policy focuses on several different factors, one of which is whether the corporation has demonstrated a willingness to cooperate in the investigation. And, according to the federal policy, corporate cooperation typically is shown by making timely and voluntary disclosures of wrongdoing and a willingness to assist in the investigation of its agents and employees, including the waiver of attorney-client and work product privileges, and the refusal to support potentially culpable agents and employees through advancing attorneys legal fees.

Is the prosecutor's tacit threat a permissible means of encouraging the corporation's cooperation?

II. LEGITIMATE AND ILLEGITIMATE THREATS AND BULLYING

Curiously, despite considerable attention by courts and commentators to the prosecutor's conduct generally, and to specific contexts in which prosecutors are claimed to overreach, there is a marked absence of commentary that focuses exclusively on the prosecutor's use of threats and bullying tactics, and whether this conduct is legitimate or illegitimate. This absence is even more surprising given that the subject of bullies and bullying has emerged as a significant topic of contemporary discourse.³³

Searching for ethical guidance on a prosecutor's use of threats is equally unavailing. There is certainly a moral dimension to a prosecutor's use of threats and behaving like a bully. It is wrong to treat people that way, even for a prosecutor. But the absence of ethical oversight is not all that surprising. Indeed, professional disciplinary bodies probably assume that prosecutors need to use threats to persuade witnesses to cooperate with law enforcement and tell the truth, and obtain guilty pleas, while at the same time trying to respect their rights and sensibilities.³⁴ And these disciplinary bodies probably would acknowledge that attempting to draw a clear line between permissible

33. See generally EMILY BAZELON, *STICKS AND STONES* (2014) (exploring teenage bullying); GARY NAMIE & RUTH NAMIE, *THE BULLY AT WORK* 111–268 (2000) (teaching employees how to address workplace bullying); Donna Miles & Tyrone C. Marhsall, Jr., *Dempsey: Hazing, Bullying 'Intolerable' in Military*, U.S. DEP'T OF DEFENSE (Dec. 23, 2011), <http://www.defense.gov/news/newsarticle.aspx?id=66590> (highlighting bullying in the military).

34. See MODEL RULES OF PROF'L CONDUCT R. 4.4 (2013) (stating that a lawyer must avoid engaging in conduct that has no other substantial purpose other than to embarrass, delay, or burden a third party).

and impermissible threats is either too difficult or unmanageable.

The examples in Part I are used to illustrate the many occasions in which prosecutors use threats and to provide a context for discussion. I do not claim that there is a clear and unequivocal answer in any of these cases to the permissibility of threats, although some of the cases are much more clear-cut than others. Given the absence of significant ethical or legal guidance on the subject of prosecutorial threats, I suggest the following framework for evaluating which threats are legitimate and which threats constitute impermissible and unethical bullying.

In order for a prosecutor's threat to be legally and ethically legitimate: (1) there must be a legal basis for the threat; (2) the prosecutor must have a good faith belief that the individual has the ability to comply; (3) the prosecutor must reasonably believe that the threat will cause the individual to comply; (4) and the prosecutor must reasonably believe that the need for the threat in light of legitimate law enforcement interests outweighs any burden on the rights, interests, and sensibilities of the person threatened.

Let us revisit the examples of threats presented above. Under the articulated standard, some threats clearly appear to be beyond the pale, and even aberrational; there is no need for moral guidance or close scrutiny into the legitimacy of these threats. These cases expose, in different ways, the nature and extent of the prosecutor's awesome powers, and how bullying tactics can enhance or supplement the prosecutor's already virtually unlimited and uncontrolled discretion. The most outrageous example of bullying is the conduct of the Arizona county prosecutor who charged judges, municipal officials, and lawyers with serious crimes—indeed, virtually every person who publicly challenged his authority.³⁵ There are legitimate ways to respond to a judge who makes a ruling adverse to a prosecutor, or a lawmaker who

35. See *Arizona v. Wilcox*, No. CR-2010-005423-001, slip op. at 3–4 (Ariz. Super. Ct. Feb. 24, 2010) available at <http://blogs.phoenixnewtimes.com/valleyfever/thomas%20ruling%20wilcox.PDF> (disqualifying Andrew Thomas based on conflict of interest in retaliating against members of Maricopa County Board of Supervisors, prosecuting people for political reasons, targeting members of board for political reasons, and misusing power by his alliance with Maricopa Sheriff Arpaio); Terry Carter, *The Maricopa Courthouse War*, A.B.A. J. 43, 44–49 (2010) (discussing the political showdown at the Maricopa Courthouse); Sarah Fenske, *Andrew Thomas, Joe Arpaio Dismiss RICO Claim Against County Officials—Ask Justice Department to Investigate Instead*, PHOENIX NEW TIMES (Mar. 11, 2010, 12:48 PM), http://blogs.phoenixnewtimes.com/valleyfever/2010/03/thomas_arpaio_dismiss_rico_cla.php (covering the dismissal of the suit); Michael Kiefer & JJ Hensley, *Andrew Thomas Files Criminal Charges Against Judge*, ARIZ. REPUBLIC (Dec. 10, 2009, 12:00 AM), <http://www.azcentral/news/election/azelections/articles/2009/12/09/20091209donahoecomplaint1209-ON.html> (highlighting the charges against The Honorable Gary Donahoe).

makes policy choices adverse with a prosecutor's. Appealing the judge's ruling, or enlisting law enforcement allies to propose remedial legislation are obvious recourses. But bringing outlandish criminal and civil charges against these individuals in the context of an inflammatory political campaign appears to be undertaken without any valid legal purpose and solely to retaliate and punish opponents for their opposition, and cause untold harm to them, their families, and the justice system generally. These prosecutors should be punished, even disbarred, as the Arizona prosecutor eventually was.³⁶

By the same token, some threats appear to be gratuitous exercises of unconstrained power and evince an all-out effort to insult, humiliate, and intimidate: the telltale sign of a bully. I refer to the prosecutor's indictment of an expert witness for perjury based on the defense expert's seemingly innocuous testimony about his credentials and other peripheral and immaterial details. The fact that these charges were brought right after the defendant's acquittal for the murder of a child suggests that the prosecutor's motive was to retaliate against the expert and silence him.³⁷ Any legal basis for the charges is minimal, the prosecutor's good faith purpose clearly is suspect, and the impact on the expert's right to pursue his calling and provide critical testimony for a defendant charged with murder outweighs any arguable interest by the prosecutor in vindicating the rule of law or exposing perjury.

Also illegitimate are threats that appear to have no recognizable law enforcement purpose except to punish or deter persons from exercising their constitutional rights. Thus, driving a defense witness off the stand with inflammatory threats of bringing criminal charges against the witness—including perjury—is a gratuitous exercise of power whose purpose is not to caution the witness about her rights and obligations but to intimidate the witness into refusing to testify.³⁸ By the same token,

36. See John Rudolf, *Andrew Thomas, Phoenix Prosecutor, Disbarred For "Defiled" Public Trust*, HUFF. POST (Apr. 11, 2012), http://www.huffingtonpost.com/2012/04/11/andrew-thomas-disbarred-phoenix-prosecutor_n_1415815.html (reporting on Andrew Thomas' disbarment).

37. See Mark Hansen, *Battle of the Expert: A Forensic Pathologist Successfully Fights Criminal Charges Stemming From His Testimony in a Shaken Baby Case*, 91 A.B.A. J. 54, 56-7 (2005) (discussing the false swearing charge of Dr. John Plunkett).

38. See *United States v. Morrison*, 535 F.2d 223, 228 (3d Cir. 1976) (reversing because prosecutor's actions infringed defendant's constitutional rights); *People v. Shapiro*, 409 N.E.2d 897, 905 (N.Y. 1980) (citing prosecutorial misconduct by threatening witnesses). A prosecutor has no obligation to grant immunity to a defense witness and a court cannot compel the prosecutor to do so. See *United States v. Quinn*, 728 F.3d 243, 254 (3d Cir. 2013) (holding that the grant of witness immunity is reserved for the executive branch and is not for the judicial branch to decide); see also *Webb v. Texas*, 409 U.S. 95, 97-98 (1972) (finding a violation of due process for a judge to gratuitously single out a defense witness for a lengthy admonition on dangers of perjury and effectively driving witness off the stand).

advising a corporation to throw its employees to the wolves by refusing to pay their legal fees or face criminal prosecution is a gratuitous threat that has no legal basis, and is an abuse of prosecutorial power and discretion. The prosecutor knowingly violates the right to counsel of the corporate employees, as well as their fundamental right to due process.³⁹ Even assuming the government's interest in securing the corporation's cooperation is valid, this interest is clearly outweighed by the burden on the rights of the employees.

Some prosecutorial bullying is probably legally permissible even if it is troubling as an ethical matter. Prosecutors are authorized to use mandatory minimum sentences and enhanced punishments to coerce repeat offenders to plead guilty.⁴⁰ However, the resulting sentence is so harsh that some prosecutors probably would concede that the harm they inflict is disproportionate to the offense, especially against low-level drug offenders.⁴¹ Some plea bargain threats, however, clearly are out of bounds, such as forcing a defendant to submit to pre-trial detention and make no pre-trial motions. These threats have no legal basis and are used to intimidate the defendant into forfeiting nearly all of his constitutional rights.⁴²

Also ethically troubling is the heavy-handed treatment of uncooperative grand jury witnesses⁴³ and threatening prosecution witnesses with punitive consequences unless they tell the truth.⁴⁴ These threats and bullying tactics would probably pass the legitimacy test. The prosecutor has a legal basis for issuing these threats—to persuade reluctant witnesses to cooperate with law enforcement—and there is a reasonable basis to believe that the threats will cause the witness to

39. *E.g.*, *United States v. Stein*, 435 F. Supp. 2d 330, 367 (S.D.N.Y. 2006) (finding prosecutor's threats violated employees' right to counsel and right to substantive due process).

40. *See Bordenkircher v. Hayes*, 434 U.S. 357, 361 (1978) (holding that a prisoner's due process was not violated when a state prosecutor carried out a threat made during plea negotiations).

41. Attorney General Eric H. Holder last year announced a new "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases." The new policy reflects both the unfairness of the using harsh mandatory sentences against low-level drug offenders and the unnecessary expense from the current regime. *See* Charlie Savage, *Justice Department Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES, Aug. 12, 2013, at A1 (reporting on Eric Holder's speech about the impact of the United States' high incarceration rate).

42. *E.g.*, *United States v. Jones*, No. CR 08-0887-2 MHP, 2009 WL 2912535, at *7 (N.D. Cal. Sept. 9, 2009) (prosecutor violated defendant's due process rights by attempting to have her waive nearly all constitutional rights before entering plea).

43. *See* GERSHMAN, *supra* note 20, §§ 2:2-2:8 (discussing grand jury misconduct).

44. *See* Joaquin Sapien, *A Powerful Legal Tool, and Its Potential For Abuse*, PROPUBLICA (Aug. 16, 2013, 8:41 AM), <http://www.propublica.org/article/a-powerful-legal-tool-and-its-potential-for-abuse> (writing about the abuse of material witness orders).

reveal truthful information about criminal wrongdoing.⁴⁵ Moreover, the balance between offending the sensibilities of people and obtaining relevant and truthful evidence would likely tip in favor of truth and effective prosecution. Also ethically troubling, but sustained by courts, is the public shaming of individuals arrested for white-collar offenses. The “Perp walk” has been justified as a means of deterring white collar crime and sending a message to the public that this type of crime will be treated no differently from crimes of violence, to wit, with equal law enforcement aggressiveness.⁴⁶

The release-dismissal threats are more difficult to justify—but may pass the test of legitimacy. The prosecutor’s purpose in seeking a release-dismissal is a relevant consideration, and so no hard and fast rule is possible. The prosecutor may be using the tacit threat of prosecution to protect the exposure of government misconduct.⁴⁷ That use would be clearly illegitimate. But the prosecutor might also be seeking to avoid an unnecessary prosecution, conserve scarce resources, and prevent a meritless civil lawsuit.⁴⁸

By the same token, a prosecutor’s apparently vindictive threat to increase charges after a defendant has exercised a right is also problematic, but may again depend on the prosecutor’s excuse for his conduct, such as the need in the early stages of a case to reevaluate the evidence and reformulate the charges. Thus, threats to add charges in the pre-trial setting almost always escape censure, unless it is clear that the prosecutor’s primary purpose is to prevent or punish the defendant’s exercise of constitutional rights.⁴⁹

As noted above, the prosecutor’s threats in almost every case may

45. Of course, the threats might induce a witness to give false testimony. See Yaroshefsky, *supra* note 18, at 918 (highlighting the concerns of eliciting false testimony from the perspective of a former Assistance U.S. Attorney). Moreover, it is questionable whether a defendant has a constitutional remedy against the admission of a coerced third-party statement. See Katherine Sheridan, *Excluding Coerced Witness Testimony to Protect a Criminal Defendant’s Right to Due Process of Law and Adequately Deter Police Misconduct*, 38 FORDHAM URB. L.J. 1221, 1247 (2011) (noting that the Supreme Court has yet to rule on this question).

46. See *Caldarola v. County of Westchester*, 343 F.3d 570, 577 (2d Cir. 2003) (upholding “Perp walk”). *But see* *Lauro v. Charles*, 219 F.3d 202, 216 (2d Cir. 2000) (finding violation due to fictional creation of “Perp walk”).

47. *E.g.*, *Dixon v. District of Columbia*, 394 F.2d 966, 969 (D.C. Cir. 1968) (striking down “odious” agreement as evincing “illegitimate desire to protect the two police officers”).

48. *E.g.*, *Town of Newton v. Rummery*, 480 U.S. 386, 392 (1987) (refusing to adopt a per se rule and enforcing release-dismissal agreement as it was voluntary and did not violate public policy).

49. See *United States v. DeMarco*, 550 F.2d 1224, 1227–28 (9th Cir. 1977) (dismissing new charge because appearance of prosecutorial vindictiveness chilled exercise of invoking venue rights); see also GERSHMAN, *supra* note 20, §§ 4:34–4:68 (abuse of charging function).

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burden the recipient's constitutional rights, but that burden must be balanced against the government's interests. Plea-bargaining threats burden one's right to trial; coercing corporate cooperation burdens their right to counsel and the right to fair criminal process; threats that drive defense witnesses off the stand burden the defendant's right to compulsory process; release-dismissal threats burden a defendant's First Amendment right to redress government misconduct; retaliatory and vindictive threats burden due process; demagogic threats burden the right to be free of government oppression; coercing testimony of prosecution witnesses burdens a defendant's right to a fair trial; threats to grand-jury witnesses and abuse of subpoenas burdens due process; attacking a defense expert burdens the expert's First Amendment right to free speech and the defendant's right to a fair trial; and shaming a person arrested burdens the right to privacy and the presumption of innocence.

CONCLUSION

Prosecutors use threats and bullying in virtually every stage of the criminal justice process. Despite the increased attention in U.S. society to the incidence of bullying and the harm inflicted by bullies, it is surprising that so little attention has been given to the conduct of prosecutors in using threats and bullying. Whether a prosecutor's threats and bullying is a legitimate or illegitimate exercise of power is rarely clear-cut. This Essay describes ten contexts in which threats and bullying are used. Some of these situations include threats that courts probably would permit, and even encourage. But several of the situations exceed any proper purpose for the use of threats.

In discussing the prosecutor's use of threats, I have proposed a framework to ascertain whether threats are legitimate or not. For threats to be legitimate, the prosecutor must have a legal basis for the threat, the prosecutor must have a good faith belief that the individual has the ability to comply, the prosecutor must reasonably believe that the threat will cause the individual to comply, and the prosecutor must reasonably believe that the need for the threat outweighs any burden on the individual's rights, interests, and sensibilities. Under this test, threats that are used to discover probative evidence of crime by forcing witnesses to reveal relevant and truthful testimony, or to persuade defendants to plead guilty, are typically allowed, even though their use may be ethically troubling. These threats serve valid law enforcement interests in deterring crime, convicting guilty people, and conserving limited resources. Other threats, such as forcing persons to waive rights, retaliating after the exercise of rights, and publicly shaming them

are far more questionable but usually are allowed by courts.

Some threats, however, are clearly beyond the pale. For many of these threats there is clearly no legal basis, and the prosecutor is using the threat for illegitimate law enforcement purposes, sometimes for self-serving reasons. Examples include bringing criminal charges against persons who are political enemies or outspoken critics, threatening to charge defense witnesses if they seek to testify for a defendant, or threatening corporations with sanctions if they provide legal fees for employees. These threats are abusive, humiliating, and involve the gratuitous infliction of harm. These threats resemble the conduct of a bully.