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Book Review

Prosecutorial Misconduct

By Bennett L. Gershman. Clark Boardman Company,
Ltd., 1986

Reviewed by John S. Edwards†

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.

The preceding words, first expressed in 1935 by Mr. Justice Sutherland in his landmark opinion in *Berger v. United States*,¹ capture perhaps better than any others the essence and the weight of the prosecutorial responsibility. The prosecutor's goal is a lofty one: to see "that guilt shall not escape or innocence suffer";² to ensure that justice is done. And because he is a public official, commissioned to act in the public's best interest

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1. 295 U.S. 78, 88 (1935), *quoted in* B.L. GERSHMAN, PROSECUTORIAL MISCONDUCT vii (1986).

2. *Id.*

rather than simply to vindicate the rights of a single victim or client, the prosecutor is expected to carry out his responsibilities with the utmost fairness. He must set aside the egotistical desire to win at any cost, a shortcoming of which many trial lawyers seemingly suffer. His motivations, as well as his tactics, must be above reproach at all times. In short, as so aptly stated by Mr. Justice Sutherland, "while he may strike hard blows, he is not at liberty to strike foul ones."³

The prosecutor, however, is not above the shortcomings that plague the rest of the legal profession. He is just as human as everyone else. Consequently, it is not surprising to find instances — perhaps far too many — where the prosecutor has failed to live up to society's high expectations. In his treatise entitled *Prosecutorial Misconduct*,⁴ Bennett L. Gershman explores in great detail the different ways in which prosecutors, either carelessly or by design, abuse and breach their public trust. He takes the reader step by step through the criminal justice system, noting where the various opportunities for misconduct exist and how prosecutors, over the years, have exploited those opportunities almost with impunity. He does so, not by the use of personal anecdotal experiences — although his first-hand knowledge of this area of the law clearly flavors the text⁵ — but rather by extensive citation to hundreds of cases which seemingly give credence to his concerns.

Two basic themes run throughout the text: 1) the nature and prevalence of misconduct as a problem; and 2) the failure of the courts and the legal profession to take effective steps to curb such abuse. Broadly defined, "prosecutorial misconduct" includes any situation "in which the prosecutor engages in improper behavior usually to gain an unfair advantage over the accused or otherwise to prejudice the trier of fact."⁶ In the author's view, such misconduct pervades the prosecutorial process. It often surfaces as early as the investigative stage where police (with or without the blessing of the Government's attor-

3. *Id.*

4. B.L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* (1986).

5. Gershman tells us in the Introduction that prior to entering academic circles he served as an assistant district attorney in the New York County office of Frank S. Hogan and as an assistant special prosecutor under Maurice H. Nadjari.

6. B.L. GERSHMAN, *supra* note 4 § 2.1, at 2-4.

ney) sometimes create crime where it otherwise would not exist by utilizing such tactics as entrapment and improper sting operations. Additional examples of misconduct in the investigative process include illegal electronic eavesdropping, conducted without or beyond the scope of prior court approval, and the use of informants (sometimes co-defendants) to intrude surreptitiously on meetings between a defendant and his attorney or to cleverly elicit incriminating statements under circumstances violative of a defendant's sixth amendment right to counsel. Thus, the term "prosecutor," like misconduct, is used broadly by the author to include the police and any other person working with or at the behest of the Government in the investigative process.⁷

The area perhaps most rife with the opportunity for, if not the actual occurrence of, misconduct is undoubtedly the process by which persons are initially charged with and ultimately plead guilty to criminal conduct.⁸ Few will deny that the prosecutor is a powerful figure in criminal justice. It is he who decides whom to charge, when to charge, how to charge and what to charge. Similarly, it is he who decides whether and on what terms a plea bargain should be made. Indeed, in some jurisdictions, he may even insist that a particular sentence be imposed as a condition of his consent to the plea bargain.⁹ In the view of the author and most other commentators, the reason for his power lies largely in one word — "discretion." Discretion is defined as "the power or right to decide or act according to one's own judgment";¹⁰ and the prosecutor's discretion in the above matters is virtually unfettered.

It is thus appropriate that the author should devote several chapters to the charging and plea processes. For example, the treatise explores in considerable detail the problems of selective, vindictive and demagogic prosecutions. Although a prosecutor

7. *Id.* § 1.1, at 1-3.

8. It is estimated that between 75 and 90% of all convictions are by plea. *Id.* § 7.1, at 7-2.

9. In *People v. Farrar*, 52 N.Y.2d 302, 419 N.E.2d 864, 437 N.Y.S.2d 961 (1981), the New York State Court of Appeals held that where a plea offer is conditioned by the prosecution upon the imposition of a specified minimum sentence the prosecution has the right to withdraw consent to the bargain, effectively nullifying it, if the court concludes that a lesser sentence would be more appropriate.

10. B.L. GERSHMAN, *supra* note 4 § 4.2(a), at 4-4.

cannot be compelled to file charges or, in most instances, to proceed with charges though filed,¹¹ it does not perforce follow that there are no constitutional limitations on whom and with what motivation a prosecutor may decide to charge. Clearly, he may not consciously single out a defendant for prosecution based on race or some other impermissible classification. Nor may a prosecutor penalize a defendant who has successfully exercised his right to appeal by thereafter charging him with a higher grade offense based on the same facts and circumstances.¹² On the other hand, courts have upheld selective prosecutions based upon the defendant's membership in organized crime, his particular occupation (if it involves a special responsibility to uphold the law), and even the defendant's prominence in the community.¹³ They have likewise upheld — in the absence of proof of "actual" vindictiveness — the use of threats by the prosecutor to file higher charges, to "up the ante" in the author's words, if the defendant does not agree to plead guilty to the charges then pending.¹⁴

No thorough discussion of prosecutorial misconduct in the charging process would be complete without some reference to the grand jury. Appropriately, the author devotes an entire chapter to this topic.¹⁵ When first introduced in England in 1166,¹⁶ the grand jury was intended to serve as a buffer between the ordinary man and the awesome power of the sovereign. In recent years, however, it has come increasingly under attack as more a sword of the prosecutor than a shield for the individual. The reasons offered to support such a claim derive largely from the nature of the institution itself, which in fact does vest a great deal of power in the hands of the prosecutor. It is, of course, a secret body, the nature of whose proceedings is known only to the grand jurors, its witnesses and the prosecutor. It is presided over by the prosecutor who acts as both judge and advocate. It is the prosecutor who decides what evidence the grand jury will hear and, more importantly, what evidence it will not

11. *Id.* § 4.2(c), at 4-7.

12. *Id.* § 4.4, at 4-28 to 4-29.

13. *Id.* § 4.3(d)(6), at 4-22 to 4-24.

14. *Id.* § 4.4(a)(2)(A), at 4-31; *Id.* § 7.2(i)(2), at 7-14 to 7-16.

15. *Id.* at ch. 2.

16. D.M. WALKER, *THE OXFORD COMPANION TO LAW* 534 (1980).

hear. Additionally, and of no small consequence, there is no right of confrontation before the grand jury. Indeed, in the federal system, as in a majority of the states which still retain the institution, a witness is not even permitted to have counsel present while he testifies.¹⁷

In light of the nature of the process, it is no great wonder that examples of flagrant prosecutorial abuse in the grand jury can readily be found in the cases. The author methodically catalogs a wide variety of such abuses. Among those cited are: 1) the suppression of evidence favorable to the accused;¹⁸ 2) the use of "shoddy" evidence (hearsay and otherwise unreliable or misleading evidence);¹⁹ 3) coercion of the grand jury vote to obtain a desired result;²⁰ and 4) deliberate deception.²¹ Prosecutorial misconduct, we are shown, may also involve improper examination — a technique which takes particular advantage of the absence of immediate judicial supervision. Such misconduct includes the harassment of witnesses, attempts to elicit privileged matters and the use of abusive and inflammatory remarks.²²

Notably, the author does not attempt to answer the burning question of whether the abuse and the opportunities for abuse by the prosecution are so great as to warrant abolition of the grand jury. He simply calls attention to what history has already written. In doing so, however, he quite plainly provides proponents of abolition or other reform with an arsenal of weapons with which to fight their battle. On the other hand, those wishing to take up the banner of grand jury reform should be prepared to address a variety of practical arguments, not mentioned by the author, which favor retention of the time-honored institution. Similarly, they should be prepared to recognize that grand jury systems differ from jurisdiction to jurisdiction and that not all suffer the myriad of faults described in the text.²³

17. B.L. GERSHMAN, *supra* note 4 § 2.1, at 2-3 to 2-4 n.9.

18. *Id.* § 2.6(b), at 2-37 to 2-38.

19. *Id.* § 2.7, at 2-43 to 2-47.

20. *Id.* § 2.8(b), at 2-48 to 2-49.

21. *Id.* § 2.6(d)(1), at 2-42 to 2-43.

22. *Id.* § 2.3, at 2-11 to 2-17; *Id.* § 2.4, at 2-17 to 2-30.

23. New York's grand jury system, for example, is much more solicitous of the rights of defendants and more restrictive of the role of the prosecutor than is its federal coun-

In the author's view, the plea bargaining process provides a particularly fertile setting for misconduct, again largely because of the power which the prosecutor wields at that stage of the proceedings.²⁴ As previously mentioned, the prosecutor has virtually unfettered discretion to grant or to withhold plea bargains. And, even though many offices have written guidelines covering this area, such wide-ranging discretion, nevertheless, effectively enables the prosecutor to exert a considerable amount of pressure — some proper and some improper — in his effort to extract a plea. For example, he can induce a guilty plea by simply offering to accept a plea to a lesser offense. Implicit therein is a threat of more severe punishment should the defendant refuse the plea offer and ultimately be convicted of a greater offense. Other guilty pleas have been induced by promises of leniency in the treatment of third persons, usually family members. Although the Supreme Court has not squarely addressed the propriety of such plea offers, it has noted that they do pose a greater danger of inducing false guilty pleas than do agreements in which the consideration inures directly to the defendant.²⁵ Several other courts, however, have concluded that there is "no intrinsic constitutional infirmity" in plea agreements involving third party beneficiaries.²⁶ The author notes that the courts are divided on whether it is impermissibly coercive to require a defendant to waive his right to appeal as a condition of a plea bargain.²⁷

Prosecutors, of course, may not induce pleas by fraud or

terpart. Thus, unlike the federal system, New York does not permit the introduction of hearsay evidence and applies the same rules of corroboration as apply at trial. N.Y. CRIM. PROC. LAW § 190.30(1) (McKinney 1982). When charges are pending against a defendant in a local criminal court, he is entitled, as a matter of right, to testify before the grand jury and the failure to afford such a right will result in the dismissal of the indictment. *Id.* § 190.50(5). Further, any witness who testifies under a waiver of immunity has the right to have an attorney present in the room to advise him. *Id.* § 190.52.

24. B.L. GERSHMAN, *supra* note 4 § 7.1, at 7-2 to 7-4.

25. *Id.* § 7.2(e)(1), at 7-7 n.34 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978)).

26. *See, e.g.*, *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979). *See Mosier v. Murphy*, 790 F.2d 62, 66 (10th Cir. 1986); *United States v. Castello*, 724 F.2d 813, 815 (9th Cir. 1984); *United States v. Diaz*, 733 F.2d 371, 375 (5th Cir. 1984); *United States v. Usher*, 703 F.2d 956, 958 (6th Cir. 1983); *Harman v. Mohn*, 683 F.2d 834, 838 (4th Cir. 1982); *United States v. Carlino*, 400 F.2d 56, 58 (2d Cir. 1968).

27. B.L. GERSHMAN, *supra* note 4 § 7.2(h) at 7-10.1 to 7-13.

false promises. And, once a bargain is consummated (by entry of a plea), the prosecution is bound to honor its terms. Whether a breach will be remedied by vacatur of the plea or specific performance of the agreement apparently depends upon the jurisdiction involved and the facts and circumstances of the particular case.²⁸

For practicing trial lawyers — prosecutors and defense attorneys alike — the author's discussion of "Forensic Misconduct"²⁹ is enormously instructive. Focusing primarily on the proper limits of prosecutorial comment on summation, the treatise examines virtually every form of improper comment imaginable, both the subtle and the not so subtle alike. What types of comments implicate a defendant's constitutional right to remain silent? Clearly, a prosecutor may not directly advert to a defendant's failure to testify, but may he even allude to the fact by employing words such as "uncontradicted," or "unrefuted," or "undenied"? The author tells us no. Is there a difference between "post-arrest" silence and "post-Miranda" silence? When judged according to federal constitutional standards, there apparently is. It is grossly improper to comment on a defendant's silence after he has been advised that he has an absolute right to remain silent and has chosen to exercise that right. When, however, a defendant's post-arrest silence precedes *Miranda* warnings, the prosecutor may use that silence to impeach and to argue guilt without violating due process.³⁰

A prosecutor, of course, may not engage in name-calling, nor appeal to the fears, sympathies or emotions of the jurors. The so-called "safe streets" argument³¹ is but one example of such an improper plea to the jury's fear of crime. The treatise also examines how a prosecutor sometimes relies on evidence outside the record, or brings before a jury matters which have properly been

28. *Id.* § 7.5(b), at 7-29 to 7-31.

29. *Id.* at ch. 10. Although devoted primarily to summations, Chapter 10 also addresses, albeit briefly, misconduct in opening statements.

30. *Id.* § 10.3(c), at 10-24 to 10-26.

31. The "safe streets" argument refers to any appeal by the prosecutor to the jurors' general fear of crime and of what might happen if the defendant is allowed to go free. See, e.g., *People v. Galloway*, 54 N.Y.2d 396, 401, 430 N.E.2d 885, 887, 446 N.Y.S.2d 9, 11 (1981); *People v. Young*, 113 A.D.2d 852, 854, 493 N.Y.S.2d 516, 518 (1985); *People v. Watson*, 111 A.D.2d 888, 888, 491 N.Y.S.2d 24, 25 (1985).

excluded.

One point of criticism is warranted. In his chapter on forensic misconduct, the author appears to lose his objectivity — at least somewhat. More so than in earlier chapters, his style, when discussing misconduct on summation, seems to implicate prosecutors more generally — almost as a class — in such abuse. Rather than objectively identifying specific areas of, or opportunities for, misconduct in the criminal process and discussing relevant examples of such misconduct, he frequently prefaces an example with a generalization such as “prosecutors frequently,” “prosecutors often” or “prosecutors also,” as if suggesting that prosecutors as a class routinely engage in such misconduct.³² Whether they do or not is obviously a matter on which reasonable minds may differ. While the existence of such widespread misconduct may reflect the personal experience of the author, the authorities cited cannot be said to support such a broad claim.

Nor should the reader be misled into believing that the prosecution is governed by rules separate and distinct from those which govern the conduct of the defense. Defense counsel is no more entitled than is the prosecutor to resort to inflammatory language, to consciously seek to deceive or mislead the court or the jury, to refer to matters not in evidence or to express his personal opinion as to the credibility of a witness or the guilt or innocence of the defendant.³³ Although the prosecutor may be held to a higher standard on review because he is a public official, both the courts and the public have a right to expect that criminal matters will be tried fairly by both sides. Indeed, it is for that very reason that courts often cite provocation by the defense in answer to claims of forensic misconduct by the prosecutor.

At the outset, I noted that the author weaved two basic themes throughout the text. The second of these was the failure on the part of the courts and the legal profession to take effective steps to curb the seemingly increasing incidence of

32. See, e.g., B.L. GERSHMAN, *supra* note 4 § 10.5, at 10-28; *Id.* § 10.6(b), at 10-36; *Id.* § 10.6(f), at 10-40.

33. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106 (1980); STANDARDS FOR CRIMINAL JUSTICE § 4-1.1 et seq. (2d ed. 1982).

prosecutorial misconduct. The remedies available to an aggrieved defendant naturally turn on the nature of the misconduct involved. Most chapters in the text, therefore, include at least a superficial discussion of the remedies appropriate to the particular form of misconduct addressed therein. In the final chapter, however, the author deals solely with the topic of sanctions. It is his thesis — shared, he says, by courts and other commentators alike — that “existing sanctions are either too infrequently employed or ineffective to punish or prevent misconduct.”³⁴

What are the existing sanctions and why don't they work? Sanctions for misconduct naturally include reversal of the conviction, suppression of tangible and testimonial evidence, contempt and civil damages. They also include removal of the prosecutor from public office, censure, suspension, perhaps even disbarment and various lesser judicial punishments.

Apparently, there is a split of authority concerning whether reversal and suppression are effective restraints on misconduct. Some commentators believe that they are not because such measures penalize society with very little effect on the offending party. Others believe that they are effective because they impact directly on the prestige of the offender and consequently on his office and, therefore, result in the unfavorable attention of the individual's superiors. In any event, because they are not generally viewed as disciplinary tools, such remedies are infrequently invoked.

Contempt, likewise, has been ineffective in large measure because of the hesitancy on the part of the courts to impose it. The same appears true of bar association and grievance committee proceedings. In the author's view, “[a]lthough bar associations frequently make bold and lofty pronouncements about self-policing and requiring attorneys to conform to the high standards of the profession, a review of their records of disciplining prosecutors for misconduct is disappointing.”³⁵ Finally, civil suits are always available as a private recourse, but frequently they are stymied by prosecutorial immunity.

What then is the answer? Can misconduct on the part of

34. B.L. GERSHMAN, *supra* note 4 § 13.1, at 13-1.

35. *Id.* § 13.6, at 13-16.

prosecutors be curbed? The author does not appear optimistic. The range of available sanctions seems sufficiently broad provided they are invoked. Yet, how to encourage the courts and the bar associations to take hold of the reins and utilize the powers they clearly possess is a question the treatise leaves unanswered.

The topics discussed in this review are only a sampling of those raised and thoroughly examined by the author. Misconduct in our criminal justice system — a system which deals in human lives and not simply in property rights — is undeniably a problem of grave concern. Whether it is as pervasive a problem as the author suggests might well result in differing opinions. But that it occurs at all is sufficient cause for alarm.

At the risk of being overly simplistic, perhaps the solution to the problem can be found in its cause. Generally speaking, prosecutors as a group tend to be young — in experience, if not necessarily in years. Except in the larger metropolitan offices, the extent of their post-graduate training is primarily received on the job and in the courtroom. They learn their craft from other, more experienced, but similarly trained practitioners in a highly competitive environment. These factors suggest that most of the wide range of misconduct discussed in the text may as readily be attributed to inexperience as to design. Indeed, in my judgment, inexperience is a more likely cause than any other, for surely there is no basis for imputing some fundamental lack of integrity to an entire profession.

If indeed that is the case, then *Prosecutorial Misconduct* will be a valuable addition to the libraries of both prosecutors and defense counsel. It is a well researched, objective presentation in an area of the law long overlooked by other commentators. At first glance, prosecutors may be offended by the author's failure to lay any blame at the doorstep of the defense. They should not be. The purpose of the text is obviously not to assign blame, but rather to instruct and to inform. A prosecutor who is aware of the constitutional, statutory and ethical limits on his conduct, and who understands what the law requires of a "fundamentally fair" proceeding, will be a better, more effective prosecutor. It follows also that a defense attorney who has a firm grasp on the proper limits of the prosecutor's conduct (and, of

course, of his own) will be better equipped to protect his client's rights. I highly recommend this text to all criminal law practitioners.