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The Burger Court and Prosecutorial Misconduct

By Bennett L. Gershman*

Professor Gershman critically examines a series of recent Supreme Court decisions dealing with prosecutorial misconduct. In each case, the Court reversed the lower court and reinstated the conviction.

There are a broad range of issues involved; from suppression of evidence to trial misconduct. As a former prosecutor in New York City, the author is forced to conclude that, "Prosecutorial misconduct occurs because it works and because sanctions for misbehavior are virtually nonexistent."

Much of the debate surrounding the Burger Court's criminal justice jurisprudence has focused on its Fourth and Fifth Amendment decisions and the extent to which they loosen some of the due process restrictions imposed on police conduct by the Warren Court. But commentators have largely overlooked the Burger Court's treatment of an area in criminal justice that is even more malignant and unchecked than police misconduct: abuse of power by prosecutors.

The prosecutor is the dominant figure in the U.S. criminal justice system. The prosecutor decides whether to bring criminal charges; whom to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a correctional program in lieu of criminal charges; and whether to confer

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As this article went to press, the Supreme Court decided another case of prosecutorial misconduct which involved highly improper arguments to the jury. The decision in *United States v. Young*, — U.S. — (Feb. 20, 1985), strikingly reinforces one of the central theses of this article: the Supreme Court's undue tolerance of prosecutorial transgressions at the expense of the defendant's right to a fair trial. In *Young*, the Court of Appeals for the Tenth Circuit reversed a mail fraud conviction, holding that the prosecutor's remarks during summation, although not objected to, and allegedly in response to defense counsel's summation, constituted "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure and denied the defendant a fair trial. Reversing the Tenth Circuit, the Supreme Court agreed that the prosecutor's conduct was improper but nevertheless ruled 5-4 that the misconduct was not sufficiently prejudicial in view of the strength of the government's case and defense counsel's failure to object to the offending remarks.

immunity from prosecution. In short, the prosecutor holds the power to make decisions that control and even destroy people's careers, reputations, and lives. Long ago, the Supreme Court wrote what has become the classic statement of the prosecutor's role:

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.¹

This practical and ethical obligation was put to the test in a series of decisions of the Burger Court during the past three terms. In each case, an appellate court reversed a conviction on grounds of prosecutorial misconduct, and in each case the Supreme Court reversed the lower court and reinstated the conviction. Apart from their crucial holdings, these decisions have a darker significance. They evince a consistent, unyielding philosophy of judicial permissiveness toward prosecutorial excesses. The emerging themes are unmistakable: (1) an undue deference to the executive branch; (2) curtailment of the federal courts' supervisory power to discipline and deter prosecutorial misconduct; (3) imposition of procedural rules rendering proof of misconduct virtually impossible; and (4) refusal to articulate or even require ethical standards of prosecutors. When juxtaposed with recent pronouncements of the Court that have tolerated other instances of outrageous government misbehavior,² these decisions have the further unwholesome effect of encouraging prosecutorial overreaching. If one were keeping a box score of the Burger Court, the tally would read:

¹ *Burger v. United States*, 295 U.S. 78, 88 (1935).

² *United States v. Morrison*, 449 U.S. 361 (1981) (violation of Sixth Amendment rights); *United States v. Payner*, 447 U.S. 727 (1980) (violation of Fourth Amendment rights); *Hampton v. United States*, 425 U.S. 484 (1976) (entrapment).

PROSECUTORIAL MISCONDUCT

Foul Blows—7

Fair Play—0

The decisions cover a broad range of procedural issues. *Smith v. Phillips*,³ *United States v. Valenzuela-Bernal*,⁴ and *California v. Trombetta*⁵ are concerned with the prosecutor's suppression of evidence; *United States v. Hasting*⁶ with forensic misconduct; *Mabry v. Johnson*⁷ with breach of a plea bargain; *United States v. Goodwin*⁸ with vindictiveness in charging crime; and *Oregon v. Kennedy*⁹ with trial misconduct that provokes a mistrial. In each case, the lower court found that the prosecutor engaged in blatant or otherwise improper behavior prejudicing the defendant's right to a fair trial.

Suppression of Evidence

In the landmark case of *Brady v. Maryland*,¹⁰ the Warren Court held that due process was violated when a prosecutor secreted material evidence favorable to the defendant. The reports are filled with reprehensible examples of prosecutorial suppression of exculpatory evidence. The Burger Court, although adhering to the *Brady* doctrine in principle,¹¹ has confined its application to only the most self-evident violations. This area is an outstanding example of the Court's insensitivity to prosecutorial misconduct and the right of defendants to a fair trial.

In *Smith v. Phillips*, for instance, the prosecutor learned during a murder trial that one of the jurors was vigorously seeking employment as an investigator with the same prosecutor's office. The prosecutor suppressed this information

³ 455 U.S. 209 (1982).

⁴ 458 U.S. 8585 (1982).

⁵ 104 S. Ct. 2528 (1984).

⁶ 103 S. Ct. 1974 (1983).

⁷ 104 S. Ct. 2543 (1984).

⁸ 457 U.S. 368 (1982).

⁹ 456 U.S. 667 (1982).

¹⁰ 373 U.S. 83 (1963).

¹¹ See *United States v. Agurs*, 427 U.S. 97 (1976); *Moore v. Illinois*, 408 U.S. 786 (1972); *Giglio v. United States*, 405 U.S. 150 (1972).

until after the jury convicted the defendant. The Second Circuit, on a petition for habeas corpus, found that due process had been violated and vacated the conviction.¹² The Supreme Court, per Justice Rehnquist, disagreed. First, since there was no showing of "actual bias" by the juror—the standard required by the Court—the lower court's finding of "implied bias" was irrelevant. Second, although the prosecutor's conduct was "not condoned," there was no showing that the defendant was prejudiced by the nondisclosure. Ethical standards may be overlooked, said the Court, because the "touchstone of due process analysis is the fairness of the trial, not the culpability of the prosecutor." The Court finally admonished tribunals not to use their authority to correct prosecutorial misbehavior in state courts absent a specific constitutional violation.

Another variation of the *Brady* doctrine occurred in *United States v. Valenzuela-Bernal*. Here the prosecutor ordered the deportation of illegal-alien eyewitnesses to the defendant's crime before they would be interviewed by defense counsel. The Ninth Circuit reversed the conviction, finding that the prosecutor's conduct deprived the defendant of his Fifth Amendment due process and Sixth Amendment compulsory process rights to obtain material and relevant evidence to prove his innocence.¹³ The Supreme Court, per Justice Rehnquist, reversed. The lower court "misapprehended the varied nature of the duties of the Executive Branch." The prompt deportation of illegal aliens is an overriding duty to which the Court will defer absent a "plausible showing" that the lost evidence would be material and favorable to the defense. Of course, as the dissent pointed out, showing the importance of evidence without an opportunity to examine that evidence can be exceedingly difficult.

Finally, in *California v. Trombetta*, the Court addressed for the first time a *Brady* issue that had divided lower courts: the prosecutor's responsibility to preserve favorable evidence for the defendant's later use. In *Trombetta*, law enforcement officials destroyed breath samples taken from the defendant and used in his prosecution for intoxicated driving. The California appeals court reversed the conviction, finding that the failure to

¹² 632 F.2d 1019 (2d Cir. 1980).

¹³ 647 F.2d 72 (9th Cir. 1981).

preserve vital evidence used against the defendant violates due process.¹⁴ The Supreme Court disagreed. Although a duty to preserve evidence was not entirely ruled out, "that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." To meet this standard of materiality, the evidence must possess an exculpatory quality that was apparent before the evidence was destroyed and be of such nature that the defendant would be unable to obtain comparable evidence. Neither of these tests was met, according to the Court.

Forensic Misconduct

The prosecutor's abuse and disregard of forensic propriety is a familiar complaint. Dean Roscoe Pound observed more than fifty years ago that such misconduct "threatened to become staple in U.S. prosecutions."¹⁵ Today, virtually every federal and state court has bemoaned the "disturbing frequency" and "unheeded condemnations" of flagrant and unethical prosecutorial behavior.¹⁶ The failure of courts to deal firmly with such misconduct, Judge Jerome Frank warned, encourages prosecutorial excesses and "breeds a deplorably cynical attitude towards the judiciary."¹⁷ Apart from occasional ceremonial language, the Burger Court has defaulted in this area as well. In *United States v. Hasting*, the Court's most recent decision addressing forensic misconduct, the Seventh Circuit reversed a kidnapping conviction because during summation the pros-

¹⁴ 142 Cal. App. 3d 138, 190 Cal. Rptr. 319 (1983).

¹⁵ R. Pound, *Criminal Justice in America* 187 (1930).

¹⁶ See, e.g., *United States v. Maccini*, 721 F.2d 840, 846 (1st Cir. 1983) ("reprehensible . . . disregard to our directives"); *United States v. Modica*, 663 F.2d 1173, 1174, 1183 (2d Cir. 1981) ("frustration" at "unheeded condemnations"); *United States v. Rodriguez*, 627 F.2d 110, 112 (7th Cir. 1980) ("problem continues to arise with disturbing frequency throughout this circuit despite the admonition of trial judges and this court"); *Eberhardt v. Bordenkircher*, 605 F.2d 275, 280 (6th Cir. 1979) (court repeatedly condemns unethical activity of prosecutors); *United States v. Agee*, 597 F.2d 350, 371 (3d Cir.) (repeated warnings to prosecutors becoming familiar routine), *cert. denied*, 442 U.S. 944 (1979); *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978) ("continuing problem" of prosecutorial misconduct). The state appellate courts express similar frustration. See *People v. Biondo*, 76 Mich. App. 166, 157, 256 N.W.2d 60, 61 (1977).

¹⁷ *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (dissenting opinion).

ecutor repeatedly commented on the defendants' failure to testify in violation of their Fifth Amendment rights under *Griffin v. California*.¹⁸ Because prosecutors in that circuit consistently defied the court's repeated admonitions against such improper remarks, the court used its supervisory powers to discipline the prosecutor and deter future similar misconduct.¹⁹ The Supreme Court reversed. In its zeal to chastise prosecutorial overreaching, the Chief Justice wrote, the circuit court ignored the harmless error doctrine. Since no trial is error-free, the harmless error doctrine protects society's and the victim's interest in preserving convictions of guilty defendants. Here the forensic impropriety was harmless, the Court concluded. Punishment of errant prosecutors may be accomplished by other procedures but not by reversal.

Plea Bargaining

Since guilty pleas account for over 90 percent of all criminal convictions, their regulation by the courts is essential to the fair administration of criminal justice. The Supreme Court has legitimized plea bargaining and even authorized the prosecutor's use of extremely coercive tactics to force a plea.²⁰ In this twilight zone of criminal justice, the prosecutor's virtually unfettered power can deny fundamental fairness. A good illustration is *Mabry v. Johnson*. There the prosecutor offered a plea bargain which the defendant accepted, only to be told later that the prosecutor "made a mistake" and was withdrawing his offer. The Eighth Circuit, in accord with other circuits, granted the defendant's petition for habeas corpus following his conviction, finding that fairness precluded the prosecutor's reneging on a plea proposal once it was accepted by the defendant.²¹ The Supreme Court reversed, holding that the guilty plea implicates the Constitution; the bargain is merely an "executory agreement" which, until embodied in the formal plea, does not deprive an accused of any constitutionally protected interest.

¹⁸ 380 U.S. 609 (1965).

¹⁹ 660 F.2d 301 (7th Cir. 1981).

²⁰ *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Parker v. North Carolina*, 397 U.S. 790 (1970).

²¹ 707 F.2d 323 (8th Cir. 1983).

"The Due Process Clause is not a code of ethics for prosecutors," said the Court in upholding the prosecutor's conduct.

Vindictive Charging

The prosecutor's vast power to charge crime is modestly limited by the doctrine of vindictiveness. Invoked for the first time by the Warren Court to remedy retaliatory sentences by judges on due process grounds,²² the doctrine was extended to prosecutors who increased charges after defendants exercised constitutional or statutory rights.²³ The procedural contexts in which prosecutors have retaliated vary. Several courts invoked a presumption of vindictiveness when it reasonably appeared from the procedural setting and circumstances that the prosecutor was acting with a retaliatory motive.²⁴ Thus in *United States v. Goodwin* the Fourth Circuit reversed the conviction because the prosecutor increased assault charges from a misdemeanor to a felony after the defendant refused to plead guilty.²⁵ Although no actual vindictiveness was found, the court applied a presumption, placing the burden on the prosecutor to show by objective reasons that the increased charges could not have been brought before the defendant exercised his rights. The Supreme Court reversed. The Court once again adopted the prosecutor's position, refusing to assume that prosecutors might seek to penalize or deter a defendant's exercise of rights. Particularly in the pretrial setting, said the Court, a prosecutor should remain free to exercise his broad discretion and not be bound by his previous conduct. The broad language of the decision, however, seems to extend well beyond the pretrial period. The prosecutor's charging decision, said the Court in conclusion, is "presumptively lawful," and a defendant can rebut that presumption only by proving objectively that the prosecutor was vindictively motivated.

²² *North Carolina v. Pearce*, 395 U.S. 711 (1969).

²³ *Blackledge v. Perry*, 417 U.S. 20 (1974).

²⁴ *United States v. Motley*, 665 F.2d 186 (9th Cir. 1981); *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974); *United States v. Lippi*, 435 F. Supp. 808 (D.N.J. 1977).

²⁵ 637 F.2d 250 (4th Cir. 1981).

Trial Misconduct

Prosecutorial misconduct during trial often is pervasive and persistent. Such conduct can include presenting inflammatory or otherwise inadmissible evidence, refusing to heed the court's admonishments, admitting false evidence, and insinuating guilt by attacking the defendant's character. When the conduct becomes egregious, a mistrial may be declared on the defendant's demand. In such cases, some courts have invoked the double jeopardy clause to bar retrial on the ground that the prosecutor's behavior literally deprived the defendant of his chosen jury, thereby forcing him to be twice placed in jeopardy. Two standards have been applied to determine whether double jeopardy should be invoked. First, some courts looked to the extent and seriousness of the prosecutor's misconduct and barred retrial when such conduct constituted "overreaching" or "harassment" that deprived the defendant of a fair trial. The second test barred retrial only when the prosecutor's misconduct was specifically intended to provoke a mistrial. In *Oregon v. Kennedy* a state prosecutor during trial asked a highly improper question insinuating that the defendant had a prior criminal record. A mistrial was declared at the defendant's request, and retrial was barred under double jeopardy because the conduct was found sufficiently overreaching and prejudicial.²⁶ The Supreme Court, in reversing, adopted the more restrictive standard requiring proof that the prosecutor's actions were specifically intended to goad the defendant into seeking a mistrial. The more stringent standard was chosen because the more liberal test was considered too "amorphous" and "standardless." In criticizing the majority's choice, several members of the Court suggested that proving that the prosecutor's motive was to provoke a mistrial, instead of simply trying to prejudice the defendant generally, is "almost inconceivable."

Breeding Cynicism and Encouraging Disrespect

Prosecutorial misconduct occurs because it works and because sanctions for misbehavior are virtually nonexistent. If effective sanctions did exist, prosecutors would be less tempted to indulge in some of the practices described above. The num-

²⁶ 49 Or. App. 415, 619 P.2d 948 (1980).

ber of prosecutors held in contempt, disciplined by bar association grievance committees, or sued civilly is astonishingly low.

Although the major responsibility for controlling prosecutorial excesses rests on the judiciary, many courts, and most notably the Supreme Court, have defaulted and have abdicated much of their power to the executive branch and its prosecutorial agents. Time and again the Supreme Court has deferred to the prosecutor's conduct, judgment, and exercise of discretion. The presumption of prosecutorial good faith echoes throughout the decisions. When no specific constitutional right has been implicated, as in *Valenzuela-Bernal*, the deference is total. The Court could have preserved its independence in that case simply by requiring the prosecutor to elect which of the two overriding policies to pursue—deportation or criminal prosecution. Instead, the Court gave the prosecutor the entire loaf, but at the cost of denying the defendant a fair trial.

The Court also has undermined the efforts of lower courts to control prosecutorial excesses through use of the supervisory power doctrine. Although this doctrine has been invoked sparingly, the Court has reprimanded such attempts to discipline errant government officials as an improvident exercise by the judiciary of a "chancellor's foot veto over law enforcement practices of which [a court] does not approve."²⁷ Such a response is most regrettable in a case like *United States v. Hastings*; first, because the circuit court of appeals used its disciplinary powers properly and only after repeated admonitions to prosecutors were flaunted; and second, because the Supreme Court elevated the harmless error doctrine to a level that all but dwarfed the interests of a fair trial. Such blinking at misconduct truly breeds cynicism and disrespect.

By the same token, the Court's fashioning of procedural rules governing proof of misconduct has been unrealistic and at times absurd. Requiring proof, as in *Oregon v. Kennedy*, that a prosecutor engaged in trial misconduct with the specific intent to cause a mistrial is practically impossible, short of an outright admission. Equally unrealistic is proving a juror's actual bias (*Smith v. Phillips*); a prosecutor's actual vindictiveness (*United States v. Goodwin*); the probative value of absent eyewitnesses (*United States v. Valenzuela-Benal*); or of other lost evidence

²⁷ *United States v. Russell*, 411 U.S. 423, 435 (1973).

(*Trombetta v. California*). When misconduct is insulated from attack, there is no incentive to discontinue the practice.

Conclusion

Most troubling of all, however, is the Court's failure to articulate ethical norms to guide prosecutors. The theme too often heard is that the due process clause is not a code of ethics for prosecutors and that prejudice to the defendant, not the culpability of the prosecutor, is the touchstone concern. This philosophy is intolerable. First, it offers no guideposts from the highest court in the nation to the most powerful official in the criminal justice system on the ethical limits of conduct. Second, it invites the prosecutor to be a law unto himself, as long as no specific constitutional rights are violated and the prejudice is kept to a moderate level, or even raised to an immoderate level if the proof of guilt is strong enough to render misconduct "harmless."

In policing prosecutorial misconduct, then, the Burger Court has been a friendly traffic cop which has given the prosecutor the green light almost all of the time. If prosecutors cannot restrain themselves and resist the temptation to misconduct, victims of misconduct will find no ally in the Supreme Court.