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The Academic PERSPECTIVE

The Prosecutorial Ethic: With Great Power Comes Great Responsibility

by Professor Maureen Howard '86

ALTHOUGH THE AMERICAN TRIAL SYSTEM HAS BEEN LIKENED TO AN ARENA IN WHICH MENTAL COMBATANTS FIGHT "TO THE DEATH" (THE VERDICT), EACH WARRIOR SIMILARLY SKILLED AND EQUALLY COMMITTED TO VANQUISHING THE OTHER IN A FORUM WITH FORMAL RULES OF ENGAGEMENT ENFORCED BY A LEARNED AND IMPARTIAL JUDGE, THE ROLE OF THE CRIMINAL PROSECUTOR IS QUALITATIVELY DIFFERENT FROM THAT OF OTHER ADVOCATES. THIS IS BECAUSE, UNLIKE ANY OTHER LAWYER, A CRIMINAL PROSECUTOR HAS AN AFFIRMATIVE DUTY TO THE OPPOSING PARTY.

A lawyer who represents an individual client is duty-bound to advance that client's interests vigorously within the bounds of the law. A prosecutor, however, does not represent a single individual, but the collective good. As such, a prosecutor's loyalties—unlike other lawyers—are not undivided. A prosecutor's duties include insurance of procedural and substantive fairness to persons accused of crime because, as one element of a just society, it is in the interests of the collective good. Further, because the defendant is a member of the "represented" collective, a prosecutor must take the defendant's interests into account in assessing the validity of the prosecution.

Under most ethical rules and guidelines, including the Model Rules of Professional Conduct, the Model Code of Professional Responsibility, and the ABA Standards for Criminal Justice, prosecuting attorneys are generally held to a different, and some have said higher, standard from that of attorneys representing clients. This differing standard takes into account the fact that the roles of prosecutor and defense counsel are not symmetrical. The defense attorney is charged only with her client's well-being; she has no corresponding "duty" to the government during the course of the case. Not so for the prosecutor. The ethical duty of a prosecuting attorney goes beyond advocacy; unlike other trial lawyers, a prosecutor is duty-bound to "seek justice." This

responsibility to seek justice includes a duty to the defendant.

As such, ethical guidelines recognize that a prosecutor is a "minister of justice" whose duty is to seek justice, not merely convict. Jurists and scholars have long opined on the meaning of the prosecutor's role as a "minister of justice." Former U.S. Supreme Court Justice William O. Douglas asserted that the prosecutor's role is "to vindicate the rights of people as expressed in the laws and give those accused of crime a fair trial." In *Berger v. United States*, the Supreme Court noted that the prosecutor stands in the place of the sovereign "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." The Court emphasized that the prosecutor's interest in a criminal case is not to win but to see that justice is done: "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."

Not only is the ethical duty of the prosecutor distinct from that of other lawyers, but some scholars have called for a "moral standard" as well, given the immense, unregulated discretionary power of the prosecutor's office. As law professor and former prosecutor Bennett L. Gershman wrote: "Why a standard of moral certainty? Such a standard fits the reality that the prosecutor is the gatekeeper of justice. It requires the prosecutor to engage in a rigorous moral dialogue in the context of factual, political, experiential, and ethical considerations. It also requires the prosecutor to make and give effect to the kinds of bedrock value judgments that underlie our system of justice—that the objective of convicting guilty persons is outweighed by the objective of ensuring that innocent persons are not punished."

The prosecution has the full weight and power of the government behind it (including the assistance of police investigative and enforcement resources) as it enters a criminal trial. The constitutional protections afforded criminal defendants—such as the privilege against self-incrimination, the presumption of



innocence, the stringent beyond a reasonable doubt standard, the requirement of a unanimous jury verdict to convict—exist to counter the innate power imbalance that favors the government.

The prosecution carries a disproportionate burden as a matter of public policy in other areas of criminal law practice as well. One example is the duty to produce exculpatory evidence to the defense—voluntarily and without request. The prosecutor may also have a duty to search for evidence that may potentially damage her case, whereas the defense clearly has no corresponding duty.

Likewise, prosecutors have a different duty from that of defense counsel with respect to witness examination. A prosecutor cannot cross-examine a defense witness to attack his credibility for truthfulness when she knows the witness is truthful. A defense attorney, however, is not likewise so clearly prohibited. Nor can a prosecutor call a witness to the stand whom she knows is likely to perjure himself. In some jurisdictions, however, a defense lawyer may allow the defendant to testify in the narrative, even when aware the testimony will be false.

Some jurisdictions also recognize there need not be an equal number peremptory challenges afforded the prosecution and the defense. With respect to non-capital felonies, the prosecution is allotted fewer peremptory challenges than the defense in many states as well as in the federal system. This policy has existed for decades. It was recognized in the English system

as well, which eliminated peremptory challenges for prosecutors in criminal actions in 1825.

The responsibilities of a prosecutor do not, however, extend exclusively to those cases assigned to her. National ethical guidelines charge prosecutors with the duty to “seek to reform and improve the administration of criminal justice.” This requires a prosecutor to look beyond her caseload, or even the practices of her unit, or her office, and be a champion for accountability and change if needed.

A recent study by The Center for Public Integrity of local prosecution practices across 2,341 jurisdictions reported an unsettling account of prosecutorial misconduct—cases where prosecutors broke or bent the rules to win convictions. In the study, *Harmful Error: Investigating America’s Local Prosecutors*, the authors report that, since 1970, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges, reversing convictions or reducing sentences in over 2,000 cases. In another 500 cases, appellate judges offered opinions—either dissents or concurrences—in which they found the misconduct warranted a reversal. In thousands more, judges labeled prosecutorial behavior inappropriate, but upheld convictions reasoning the behavior constituted “harmless error.”

The abuse of prosecutorial discretion and power by any prosecutor is, on some level, a failure of prosecutors everywhere. The goal of each prosecutor should not just be ethical practice and personal accountability in his or her assigned cases, but systemic accountability and defensibility of practice nationwide.

In May 2008, the School of Law hosted a symposium on the prosecutorial ethic in honor of alumna King County Prosecutor Norm Maleng. National scholars, judges, prosecutors and defense counsel came together to exchange ideas and challenge preconceptions about the role and responsibilities of the prosecutor. The exercise was invigorating and generated several innovative ideas, including a proposal to create a prosecutorial clinic at the School of Law where student instruction would be jointly undertaken by law professors, judges, prosecutors and defense lawyers.

The concept of a multi-disciplined faculty endorses Harvard Law School Professor Alan Dershowitz’s view that “[d]espite the theoretically adversarial nature of our system, the prosecutor is among the most important arbiters of justice” due to her discretion in investigating and resolving criminal matters, thus elevating her to a “quasi-judicial” role. Early education regarding the prosecutorial ethic at the law school level can better prepare students who embark on careers in prosecution to understand and embrace the challenge that ethical prosecution across all cases, in all jurisdictions, is a societal benefit that every prosecutor is duty-bound to pursue.

Director of the Trial Advocacy Program, Professor Maureen Howard also directs the National Institute of Trial Advocacy’s Northwest Regional Trial Skills Program.