

COMMENTARY

On Prosecutorial Ethics

By Carol A. Corrigan*

The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor. Some readers may view this concept with skepticism. Yet this notion lies at the heart of our criminal justice system and is the foundation from which any prosecutor's authority flows.

I. The Prosecutor's Function

The prosecutor occupies a unique role in a legal system predicated generally on individual representation. The prosecutor does not represent the victim of a crime, the police, or any individual.¹ Instead, the prosecutor represents society as a whole. His goal is truth and the

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1. "A prosecutor represents the People of the State of California, *not* the police and *not* the victim(s) involved in any particular case except insofar as they are included among the People." ETHICS AND RESPONSIBILITY FOR THE CALIFORNIA PROSECUTOR 2, Commentary to Chapter 1, Section 1 (California District Attorneys Ass'n 1985) (emphasis in original).

"Witnesses for the prosecution, including the victim himself are not parties to a criminal prosecution and the action is not brought in their interests as individuals or on their behalf. Thus the relationship between them and the district attorney is not that of attorney and client." *People v. Municipal Court (Pellegrino)*, 27 Cal. App. 3d 193, 207, 103 Cal. Rptr. 645, 655 (1972); *see also* NATIONAL PROSECUTION STANDARDS 418 (Nat'l District Attorneys Ass'n 1977); UNIFORM CRIME CHARGING STANDARDS 2, (California District Attorneys Ass'n 1974); UNIFORM CRIME CHARGING MANUAL (California District Attorneys Ass'n 1974).

achievement of a just result.² The distinction between the roles of competing advocates in a criminal case was articulated by Justice White, joined by Justices Harlan and Stewart in their concurring and dissenting opinion in *United States v. Wade*:

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.³

The difference in our roles as advocates derives from the degree of our authority and the disparity of our obligations. Defense counsel's legitimate and necessary goal is to achieve the best possible result for his client. His loyalty is to the individual client alone. The prosecutor, however, enters a courtroom to speak for the People⁴ and not just some of the People. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of "The Peo-

2. *Berger v. United States*, 295 U.S. 78, 88 (1935); *People v. Superior Court (Greer)*, 19 Cal. 3d 255, 266, 561 P.2d 1164, 1171, 137 Cal. Rptr. 476, 483 (1977); *In re Ferguson*, 5 Cal. 3d 525, 531, 487 P.2d 1234, 1238, 96 Cal. Rptr. 594, 598 (1971).

3. 388 U.S. 218, 256-58 (1967).

4. "The style of all process shall be 'The People of the State of California' and all prosecutions shall be conducted in their name and by their authority." CAL. GOV'T CODE § 100(b) (West 1980).

ple" includes the defendant and his family and those who care about him. It also includes the vast majority of citizens who know nothing about a particular case, but who give over to the prosecutor the authority to seek a just result in their name.

II. Critical Case Evaluation

Practically every prosecutor has at some time had to field a question like this one: "Your job must be interesting and it must be rewarding to convict a guilty person. But isn't it hard to prosecute somebody when you aren't sure he did it?" The answer is that no prosecutor should ever be in that position. No prosecutor should charge or handle a case at any stage of its progress through the system unless he is personally satisfied that the defendant is guilty. The California District Attorney's Association has adopted an extensive set of technical and operational standards relating to the exercise of the prosecutorial function.⁵ Among these guidelines are the Uniform Crime Charging Standards which provide:

The prosecutor should charge only if the following four basic requirements are satisfied:

- a. The prosecutor, based on a complete investigation and a thorough consideration of all pertinent data readily available to him, is satisfied that the evidence shows the accused is guilty of the crime to be charged.
- b. There is legally sufficient, admissible evidence of a corpus delicti.
- c. There is legally sufficient, admissible evidence of the accused's identity as the perpetrator of the crime charged.
- d. The prosecutor has considered the probability of conviction by an objective fact-finder hearing the admissible evidence. The admissible evidence should be of such convincing force that it would warrant conviction of the crime charged by a reasonable and objective fact-finder after hearing all the evidence available to the prosecutor at the time of charging and after hearing the most plausible, reasonably foreseeable defense that could be raised under the evidence presented to the prosecutor.⁶

This standard reflects a respect for the power inherent in the ability to accuse. D. Lowell Jensen, Deputy Attorney General of the United States, and formerly the District Attorney for Alameda County, Califor-

5. See UNIFORM CRIME CHARGING STANDARDS, *supra* note 1; UNIFORM CRIME CHARGING MANUAL, *supra* note 1; ETHICS AND RESPONSIBILITY FOR THE CALIFORNIA PROSECUTOR, *supra* note 1.

6. UNIFORM CRIME CHARGING STANDARDS, *supra* note 1, at 13; see also ETHICS AND RESPONSIBILITY FOR THE CALIFORNIA PROSECUTOR, *supra* note 1, at 79.

nia,⁷ once told an audience of district attorneys, "You should always remember that as a group you have more direct power over the lives, property and reputations of those in your jurisdiction than anyone else in this nation. . . ."⁸ Such authority carries great responsibility.⁹ While all that is legally required to bring a charge is probable cause to believe in a defendant's guilt,¹⁰ reliance on such a standard is misplaced. The prosecutor does no one a service when, entertaining a doubt himself, he charges with the intent to "let the jury decide."

Like most ethical standards this one is both philosophically and practically sound. From a philosophical perspective, charging a person because he *might* be guilty simply is not good enough. Not only is the potential for individual injustice intolerably great, but also charging without confidence in the truth of the charge puts the entire system at risk. Certainly citizens want to see the guilty held accountable. But they also want to see responsibility rightfully laid at the feet of the culpable. Justice is twice disserved if an innocent defendant is convicted. Not only is the blameless blamed, but the blameworthy escapes.

The prosecutor also carries the burden of upholding the public faith. He is empowered to make charging decisions, but it is his duty to make them fairly.¹¹ If he fails to be fair, his failure affects not only himself and the accused, but that level of public trust on which the system depends. "Where the prosecutor is recreant to the public trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself."¹²

In a democracy, the law must reflect the values of those who live under it. Americans take great pride in our commitment to justice. Ac-

7. Mr. Jensen served as District Attorney for Alameda County from 1969-81.

8. Remarks by D. Lowell Jensen at the dedication of the Edward O'Neil Municipal Court Branch of the Alameda County District Attorney's Office, Oakland California (October 28, 1983).

9. "Powers so great impose responsibilities correspondingly grave. They demand character incorruptible, reputation unsullied, a high standard of professional ethics and sound judgment of no mean order." *Attorney General v. Tufts*, 239 Mass. 458, 489, 132 N.E. 322, 326 (1921).

10. Probable cause has been defined as: "[A] state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." *Taylor v. Superior Court*, 3 Cal. 3d 578, 582, 477 P.2d 131, 133, 91 Cal. Rptr. 275, 277 (1970).

11. "As concerns the enforcement of the criminal law the office of the district attorney is charged with grave responsibilities to the public. These responsibilities demand integrity, zeal and conscientious effort. . . ." *Taliaferro v. Locke*, 182 Cal. App. 2d 752, 755-56, 6 Cal. Rptr. 813, 815 (1960).

12. NATIONAL PROSECUTION STANDARDS, *supra* note 1, at 419 n.5 (citing A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 33, EC 7- 13 and *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958)).

cordingly, we use the law as a tool to assure a level of predictability, fairness and safety in our lives. Yet any tool is only as good as the workmen who use it. The prosecutor who works to obtain a conviction without regard for the actual guilt of the accused abuses the law and undercuts its very purpose. As one commentator put it: "The United States is a nation of laws. If laws are to be obeyed they must be respected; to be respected they must be just. A system which fails to be equitable cannot survive."¹³ The prosecutor must be satisfied that the only just result is a conviction. He should never ask a jury to do something he himself would not do were he seated in their place.

From a practical standpoint, the dictate is equally sound. To invest limited time and resources without a reasonably provable case is not sound policy. Further, it runs the risk that while attention is misdirected, the guilty will avoid responsibility. In commenting on this issue, the Uniform Crime Charging Standards state:

These standards draw a distinction between mere probable cause to arrest and legally sufficient evidence to convict. . . . The probable cause standard for arrest is proper because it enables police to make a proper investigation and, frequently, to alleviate a dangerous situation. While the prosecutor is legally justified in charging on mere probable cause, he serves no useful, legitimate purpose in so doing.¹⁴

The obligation to critically evaluate a case is a continuing one. Sometimes the strength of a case may change as the investigative and trial preparation processes continue. New information may come to light. Witnesses may provide additional or different information. If a once solid case becomes less so, the prosecutor has a duty to reconsider the matter. In commenting on the prosecutor's participation in plea bargaining, for example, state ethical standards note:

Of course, if a prosecutor, after discussing a matter with defense counsel who claims a client's innocence, entertains a valid, serious, reasonable doubt as to guilt, and this doubt is not resolved by further factual inquiry, the prosecutor should not engage in plea bargaining. Dismissal of charges in a manner consistent with office policy would be appropriate.¹⁵

There are many other specific areas in the criminal process which depend on the prosecutor's sound ethics. These areas have been the sub-

13. *President's Task Force on Victims of Crime, Final Report* 16 (Washington, D.C., 1982).

14. UNIFORM CRIME CHARGING STANDARDS, *supra* note 1, at 22.

15. ETHICS AND RESPONSIBILITY FOR THE CALIFORNIA PROSECUTOR, *supra* note 1, at 94.

ject of extensive commentary.¹⁶ In addition, many cases in every jurisdiction address the guidelines of prosecutorial conduct. Yet, in the final analysis, the answers to any ethical question are found not in the cases, but in our consciences. Supreme Court Justice Robert H. Jackson stated it somewhat differently, in language reflective of another era:

The qualities of a good prosecutor are as elusive and impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.¹⁷

Virtually all of prosecutorial ethics¹⁸ can be reduced to a single precept: "Prosecute only those you believe to be guilty and press that prosecution forcefully, according to the rules." A concise summary of those rules is found in *People v. Kelley*:

As the representative of the government a public prosecutor is not only obligated to fight earnestly and vigorously to convict the guilty, but also to uphold the orderly administration of justice as a servant and representative of the law. Hence, a prosecutor's duty is more comprehensive than a simple obligation to press for conviction. As the court said in *Berger v. United States*: "[The Prosecutor] 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. . . .

Nevertheless, it is true that a public prosecutor, as representative of the People, must satisfy additional standards of conduct by reason of his position as the officer who possesses the power and

16. See, e.g., ETHICAL CONSIDERATIONS IN PROSECUTION (Nat'l College of District Attorneys 1977).

17. "The Federal Prosecutor." Address by Justice Jackson, Second Annual Conference of United States Attorneys, Washington, D.C. (April 1, 1940); published at 24 J. CRIM. L. 3 (1940).

18. Ethical standards also quite properly address ancillary issues including public accountability, conflict of interest, and use of public office. For a further discussion of these and other areas see UNIFORM CRIME CHARGING STANDARDS, *supra* note 1.

authority to speak for the State. In practical effect the public prosecutor functions in a dual capacity—as both agent and principal, as both attorney and client. Because he exercises a dual function, the prosecutor possesses additional responsibilities and becomes subject to broader duties than does defense counsel, who only exercises the one function of agent-attorney. Thus a prosecutor is required to meet standards of candor and impartiality not demanded of defense counsel. For example, a prosecutor must disclose unfavorable aspects of his case; defense counsel can remain silent. A prosecutor must disclose unfavorable evidence relating to the accusation and must make available impeaching evidence relating to witnesses. Defense counsel need not do either. A conviction in a criminal cause may be reversed if the prosecutor suppresses material evidence, makes improper comments during cross-examination, makes improper references to extrinsic matters, or fails to disclose important information to the defense. Lapses by defense counsel in these and other respects can never bring about reversal of an acquittal. To this extent the Attorney General's complaint about a double standard is correct, for "[t]he duty of the district attorney is not merely that of an advocate."

Yet in numerous respects the situation of the prosecutor is overwhelmingly advantageous when compared to that of defense counsel. The prosecutor is not required to believe or disbelieve any particular witness. Defense counsel is more or less bound to accept his client's key assertions at face value. The prosecutor is not required to prosecute any particular defendant. Defense counsel, and in particular public defenders, must defend persons entitled to claim the benefit of their services. The prosecutor may modify charges, abandon charges, or throw in his hand. Defense counsel, by himself, can do none of these things. In short, the prosecutor has tremendous freedom to rationally evaluate the merits of any accusation he brings and to pursue it accordingly. But with greater freedom comes greater responsibility. A prosecutor cannot keep his dual functions wholly separate, and to some extent he always remains the officer who acts for the State—even though in a given instance he may be merely arguing in his capacity as counsel. Accordingly, imposition of a broader standard of conduct on the prosecutor than on defense counsel is justified. . . .¹⁹

If our nation of laws is to remain both strong and free, we must have a system of criminal justice in which every citizen can have confidence. The weight of maintaining this confidence falls on the shoulders of those lawyers who walk into court to represent the People. It is, as it should be, the highest calling of an American advocate.

19. 75 Cal. App. 3d 672, 680, 688-90, 142 Cal. Rptr. 457, 461-62, 466-70 (1977) (citations omitted).

