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Back to Article

Combating Prosecutorial Misconduct

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Recent headlines in high-profile matters — from the post-conviction dismissal of the charges against the late Sen. Ted Stevens, after federal prosecutors admitted to withholding exculpatory evidence during his trial, to the scandal that engulfed the San Francisco district attorney's office after it failed to turn over impeachment material on more than 75 law enforcement witnesses — expose the huge costs imposed on the accused and the society as a whole by prosecutorial misconduct.

The Supreme Court first addressed this issue more than 75 years ago, famously declaring in Berger v. United States that "while a prosecutor may "strike hard blows, he is not at liberty to strike foul ones." The problem has not abated since then, and many believe it has grown worse.

Two important developments in recent years have shed new light on the scope and severity of prosecutorial misconduct. First is the publication of three widely reported studies that attempt to document and quantify the problem: by the Center for Public Integrity (2,012 indictments, convictions and sentences reversed from 1970 to 2003 due to prosecutorial misconduct), the Northern California Innocence Project (707 cases of misconduct by California prosecutors from 1997 to 2009) and *USA Today* (201 instances of misconduct by federal prosecutors from 1997 to 2010). Second is the advent of more sophisticated DNA testing, which has exposed an unsettling number of instances in which misbehavior by wayward prosecutors sent innocent people to prison, and in some cases, even to death row. Controversy continues to swirl around the questions of how serious and widespread a problem prosecutorial misconduct poses, but now it is joined by sobering statistics — and human faces — that cast into stark relief the costs imposed by prosecutors who do not play by the rules.

Generally speaking, prosecutorial misconduct occurs whenever a conviction is pursued in violation of the law or the rules of court. Most commonly, it consists of the failure to turn over exculpatory material, arguing facts not in evidence, inflaming the passions of the jury with improper argument, disparaging a defendant or his attorney, or relying on false evidence. The legal test for assessing both the existence of prosecutorial misconduct and its impact in a particular case is objective and outcome-oriented. The focus is on the impact of the prosecutor's conduct on the fairness of the trial, rather than the murkier

and more elusive question of what was going through the prosecutor's mind as the conduct was occurring. Thus, while the word "misconduct" suggests a willful, unethical or even criminal mind-set, the definition is broad enough to capture violations resulting from ignorance, tunnel vision and heat-of-the-moment poor judgment, as well as violations that were the product of calculation and malevolence.

It is important to remember, of course, that of the approximately 30,000 prosecutors working in more than 2000 jurisdictions in the United States today, the vast majority discharge their duties with fairness and integrity. Prosecutorial misconduct occurs in only a fraction of cases. But it is also true that many instances go undetected or unreported, and the breadth of the problem is remarkable: Prosecutorial misconduct occurs across racial, ethnic, socioeconomic and jurisdictional lines, at the state and federal levels, in cases involving poor defendants and rich ones, the high-profile and the obscure. As the late scholar Fred Zacharias noted, while it is not a routine occurrence, "a fair number (though perhaps a small percentage) of prosecutors introduce false evidence, make false statements to tribunals, withhold evidence and obstruct access to witnesses."

In short, prosecutorial misconduct is a fact of life in American criminal courtrooms. For that reason, lawyers who represent those accused of committing crimes may confront prosecutorial misconduct whether they work for a public defender's office, as a solo practitioner, or in a prominent firm specializing in white-collar defense.

I first began thinking about prosecutorial misconduct when it arose unexpectedly in a case I tried early in my career as a federal public defender. In that case, my client was charged with being a felon in possession of a firearm. According to the arrest report turned over by the prosecutor, my client denied possessing the gun when he was interviewed by two LAPD officers following his arrest. Several hours after my client denied his guilt to the police, a second interview took place, which was conducted by an LAPD internal affairs officer. The point of this interview was to allow my client to make an official report of the beating he said he received by the arresting officers. My client did not testify, rendering his exculpatory statement in the first interview inadmissible hearsay. With the prosecutor's agreement, however, the tape recording of his second interview — the one that discussed the beating allegations — was played for the jury.

During his closing argument, the prosecutor told the jury it could infer guilt based on the fact that my client had failed to say during this second interview: "What [the defendant] doesn't say anywhere in that interview is any denial that he had a gun. He never said, 'Hey, this is a bogus arrest. Gun? I didn't have a gun. These cops are framing me. They didn't just beat me. They are framing me.'"

At this point, at the urging of my supervisor, I objected to these statements as an impermissible comment on my client's post-arrest silence. The basis for the objection was wrong (far from remaining silent, my client had affirmatively asked to speak with the Internal Affairs officer), but the judge allowed the parties to go to sidebar. When it became clear that the issue was far more complicated than it initially appeared, she broke off the closing arguments, told each side to research the legal issues, and called for a recess.

When we reconvened outside the presence of the jury several hours later, I was able to explain the problem: The prosecutor was asking the jury to infer my client's guilt based on his failure to proclaim his innocence, when, as the prosecutor well knew, my client had done exactly that during an earlier

interview that the jury knew nothing about. The judge agreed, and when the jury was brought back, she explained that two different interviews had taken place and then took the extraordinary step of reading into the record my client's previously unadmitted exculpatory statement to the police.

The outcome was a good one for my client — a mistrial was declared after the jury was unable to reach a verdict and the prosecution later dropped the case for unrelated reasons. But what I remember best is the feeling I had when I heard the prosecutor say that my client had never denied having the gun — I froze, unsure what to do. In the district where I practiced, objections during closing argument were generally frowned upon as bad form and off-putting to the jury. And while I knew in my gut that this case was exceptional because the prosecutor's remarks were improper, I was too inexperienced and flustered to grasp, in the moment, *why* the remarks were improper or *how* to explain my position. Had my supervisor not elbowed me in the ribs, I doubt I would have objected at all, a realization I find deeply unsettling given what I believe was the game-changing impact of misconduct's exposure and the trial judge's remedy.

Ten years later, making the transition from a practicing lawyer to law school clinician, I continue to wrestle with prosecutorial misconduct, albeit from a different perspective. As a practicing criminal defense lawyer, I wanted to know how to *react* by responding effectively to a problem that had already occurred. As a clinical law teacher, I understand the importance of teaching effective reaction, but have come to believe that it is equally — or perhaps more — important to teach effective *prevention*. By teaching prevention, I mean giving students the skills and ethical training that will enable them, as defense attorneys, to anticipate, recognize and discover misconduct, and thereby reduce the likelihood that prosecutors' mistakes will negatively affect a defendant's rights. By teaching prevention, I also mean giving students the skills and ethical training that will enable them, as prosecutors, to avoid committing misconduct in the first instance.

Much has been written about the ways in which the legal system could enhance its response to prosecutorial misconduct after the fact: reversal of convictions and condemnation in judicial opinions, and investigation and sanctions by the state bar, for example. There is also a vein of scholarship critiquing the effectiveness of the internal controls within prosecutorial offices at the county, state and federal levels and agencies and urging important reforms.

Little has been written, however, about what the legal academy can do to address the problem proactively. I firmly believe that law schools have a critical role to play because of their unique opportunity to reach tomorrow's prosecutors and defense attorneys before they enter the whirlwind of practice. Law school faculty, who teach in criminal law-based clinics, have an unparalleled opportunity to thoughtfully explore prosecutorial misconduct with their students — both those aspiring to be defense attorneys and those who want to be prosecutors — and to help them develop the legal knowledge and sound judgment that are the hallmarks of competent, ethical advocates.

With proper training, tomorrow's prosecutors can better understand how to carry out their legal and ethical obligations in the crucible of high-pressure litigating, thus making them less likely to step over the line due to tunnel vision, inadvertence or error. Meanwhile, future defense counsel can learn to check certain kinds of prosecutorial errors before they take root, as well as act as an effective antidote to unpreventable prosecutorial misconduct, which, if left unchecked, can have devastating

consequences for their clients.

While the topic of prosecutorial misconduct is also suited to doctrinal courses such as criminal procedure, evidence, criminal law and ethics, the integrative learning approach that is the hallmark of clinical pedagogy is best suited to teaching the topic in the manner I advocate: through a module — that is, a series of classes revolving around this single topic — that combines analytical reasoning, skills acquisition and engagement in ethical issues. Examining the ways in which prosecutorial misconduct may be addressed in a clinical setting also provides an opportunity to respond to a critique that the legal academy in general — and clinical programs in particular — fails to integrate sufficiently the teaching of practical skills, professionalism and ethics into the curriculum. I believe that the topic of prosecutorial misconduct lends itself naturally to this important pedagogical goal.

By combining instruction on black letter law and ethics with readings that offer critiques of those rules and precedents, and most importantly, modeling the process of analyzing and responding to prosecutorial misconduct using cases drawn from the instructor's real-world experience, law school clinicians can push their students to think critically about their roles and responsibilities as future prosecutors and defense attorneys — ultimately developing their own informed view about how best to tackle a problem that, with more time and energy spent on prevention, may one day become vanishingly rare.

Lara A. Bazelon is a clinical teaching fellow at Hastings College of the Law. This piece is based upon her law review article, "Hard Lessons: The Role of Law Schools in Combating Prosecutorial Misconduct," which will be published by the Berkeley Journal of Criminal Law in the fall.

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