

PROSECUTION STORIES

PROSECUTION STORIES

by
Bennett L. Gershman



TWELVE TABLES PRESS

XII



www.twelvetablespress.com

P.O. Box 568
Northport, New York 11768

© 2017 by Twelve Tables Press
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Name: Bennett L. Gershman
Title: Prosecution Stories
Description: Northport, New York: Twelve Tables Press, 2017
ISBN: 978-1-946074-10-2
Subjects: Law—United States/Criminal Law,
LC record available at <https://lccn.loc.gov/>

Twelve Tables Press, LLC
P.O. Box 568
Northport, New York 11768
Telephone (631) 241-1148
Fax: (631) 754-1913
www.twelvetablespress.com

Printed in the United States of America

To Becky, Benji, David, and Jack.

Table of Contents

Acknowledgments	ix
Introduction	xi
Chapter One—Prosecutorial Discretion	1
Chapter Two—The Prosecutor and the Grand Jury	31
Chapter Three—Trial Stories	53
Chapter Four— <i>Florida v. George Zimmerman: The Killing of Trayvon Martin</i>	87
Chapter Five— <i>The People of the State of New York v. Dominique Strauss-Kahn</i>	119
Chapter Six—Hiding Evidence	141
Chapter Seven—Conflicts	177
Chapter Eight—Fighting Corruption	205
Chapter Nine—Prosecutors and Money	241
Chapter Ten—The Prosecutor as a Minister of Justice	263

Acknowledgments

This book probably would never have been written without the help, inspiration, and friendship of many persons. Mel Glass, the complaints bureau chief, taught us how to be good prosecutors and good persons. Michael Juviler, my appeals bureau chief, taught me how to think clearly, write well, and do justice. Larry Goldman, my colleague then and friend now, inspired me to focus on the use and misuse of prosecutorial power. Joel Cohen, a frequent collaborator who worked alongside me in the special prosecutor's office, taught me how to be a responsible critic of prosecutorial power. Vicky Gannon, my longtime research assistant, kept me alert to news, changes, and trends in prosecution. Ellen Yaroshesky has been a mentor and courageous voice for ethics reform. Anything I write would not be written without the support, companionship, inspiration, and love of a remarkable teacher, scholar, and moral force in my life, my wife Lissa.

I am grateful to the many others who have educated and inspired me, especially Bill Bastuk, Adele Bernhard, Tucker Carrington, Michael Cassidy, Jeffrey Deskovic, Bruce Green, Tom Hoffman, Peter Joy, Herman Kaufman, Sam Levine, Laurie Levenson, Kevin McMunigle, Dan Medwed, Vanessa

Merton, Tom McDonnell, Marie Newman, Ellen Podgor, Kathleen Ridolfi, Marvin Schechter, and Abbe Smith. These people continue to set a standard of intelligence, integrity, and service that gives me hope that the criminal justice system can be fair, compassionate, and effective.

I would also like to thank Hannah Estreicher for making the manuscript more readable and Sharon Ray for the cover design.

Introduction

Why Tell These Stories?

When I was a young boy of no more than seven or eight years old, I used to listen to the radio as I went to bed at night. One program always stood out. It was called “Mr. District Attorney.” I remember the opening lines vividly: “Mr. District Attorney! Champion of the People! Guardian of Our Fundamental Rights to Life, Liberty, and the Pursuit of Happiness.” The show featured dramatic stories of prosecutors and prosecutions.

This book is also an attempt to tell stories about prosecutors and prosecutions. I was a prosecutor for many years but this book is not a memoir, although I am part of some of the stories; this book is not a compilation of famous criminal cases, although some of the cases will be recognizable. This book doesn't try to glamorize or demonize prosecutors; the cases, anecdotes, and experiences speak for themselves. This book shows emphatically that the prosecutor is the most powerful official in American government. The book is an attempt to help students, new lawyers, and others interested in criminal law understand how the prosecutor uses, and misuses, this extraordinary power to convict wrongdoers and vindicate the criminal law, while at

the same time subject to an array of legal and ethical constraints on the exercise of that power. Also, what happens when prosecutors misuse their power?

There are roughly 50,000 federal, state, and local prosecutors nationwide. This book describes how these prosecutors are featured in criminal courtrooms in America as the producer, director, and star of a system that processes thousands of criminal cases a week. As we shall see, virtually every important decision in a criminal case is made by the prosecutor: who to investigate, who to charge, what to charge, who to reward, who to punish, and how much to punish. These decisions are momentous. While they help protect citizens and provide the safety of communities, these decisions also destroy people's lives, break up families, ruin reputations, and imprison people with more substantial punishments than any other country in the world. And most strikingly, prosecutors wield their enormous powers without any meaningful supervision or accountability.

The use and misuse of prosecutorial power often make headlines. On the dark side, prosecutors like Andrew Thomas, district attorney of Phoenix, Arizona, along with his sidekick, the infamous Sheriff Joe Arpaio, engaged in a ruthless five-year reign of terror against judges, municipal leaders, and lawyers. The office of Charles Hynes, district attorney in Brooklyn, New York, was responsible for a record number of wrongful convictions. A team of elite federal prosecutors deliberately hid exculpatory evidence to bring down the late U.S. senator Ted Stevens. North Carolina

prosecutor Michael Nifong, in order to win a tough election, brought unsubstantiated rape charges against three Duke Lacrosse players who were innocent of wrongdoing.

But on the bright side, there are many outstanding prosecutors like Craig Watkins in Dallas, Texas, Kym Worthy in Wayne County, Michigan, Jeffrey Rosen in Santa Clara, California, and the late Ken Thompson in Brooklyn, New York, who have created Conviction Integrity Units to review claims of wrongful convictions by their office and have generally spearheaded innovative law enforcement programs to protect the community and serve justice.

Indeed, the prosecutor has been explicitly called a “Minister of Justice.” The prosecutor is legally and ethically mandated not just to win convictions but to seek justice. Most prosecutors try to do the right thing. For these prosecutors, convicting guilty people is important, but equally important is freeing innocent people. The prosecutor has rightly been called a “Champion of the People” who is committed to making the community safe in a battle against lawbreakers. For most prosecutors, not everyone arrested is a lawbreaker. Some prosecutors believe, understandably, that most persons accused of a crime are probably guilty. But most prosecutors see themselves not as zealots seeking punishment of lawbreakers, but as neutral officials with a mission to administer justice fairly and impartially.

Prosecutors are admonished to play fair, in the words of the U.S. Supreme Court to “strike hard blows,” but not “foul blows.” Foul blows happen. Federal judge Alex Kozinski

recently described prosecutorial misconduct as an “epidemic.” Experts in cognitive psychology who have studied the prosecutor’s conduct recognize that various cognitive biases may impact on a prosecutor’s conduct that can lead to overestimating the strength of a case (“confirmation bias”), make it difficult for a prosecutor to maintain an open mind (“tunnel vision”), and cause the prosecutor to discount evidence of innocence (“selective information processing” and “belief perseverance”).

This book is about the “hard strikes” as well as “foul blows” that prosecutors commit. As a former prosecutor, academic, defense lawyer, and expert witness, I’ve watched for a long time how prosecutors behave. To me, it is indisputable that a prosecutor confronts the most daunting challenge of any government official. A prosecutor has the lawful power to take away a person’s liberty, reputation, and even life itself. Prosecutors are admonished by legal rules, ethical standards, court opinions, and office manuals not to cross the legal and ethical line of proper conduct, but these guideposts are broadly and often vaguely defined. Given these abstract markers, it may often be difficult for a responsible prosecutor to locate exactly where that line is situated. And even when the line may be clearly delineated, one of the most enormous challenges for any good prosecutor is to get close to the line without crossing it. A prosecutor often has to walk a tightrope in protecting society’s interests aggressively against an equally aggressive defense attorney, while at the same time trying to serve justice.

This book also shows how the prosecutor's power has been systematically augmented by courts and lawmakers. Prosecutors have been armed with an increasing arsenal of new legal weapons to fight crime. A vast array of criminal statutes give prosecutors powerful ammunition to fight terrorism, corruption, racketeering, drugs, and financial fraud more aggressively, and give prosecutors much more leverage to punish offenders through enhanced punishments and charges carrying mandatory minimum sentences. Indeed, the possibility of sentences ranging from twenty years to life for a minor drug offense upon an offender with a modest criminal record has given prosecutors the ability to compel cooperation and guilty pleas, even from persons who may be innocent. Critics claim that the U.S. criminal justice system has reached a point where we imprison more people for longer periods of time than any other country in the world. It is the prosecutor who bears significant responsibility for this condition.

This book has two major themes. Firstly, it explains why—for good or ill—the prosecutor is the most powerful figure in the criminal justice system. Secondly, it explains how prosecutors use their prodigious power not only to serve justice, but also to produce alarming injustices. An objective of this book is long range reform. It is worth considering whether current restraints on some prosecutorial excesses are effective. Educating the public about the difficulty of a prosecutor trying to serve justice while getting convictions—as this book tries to do—may help bring about reform.

These stories are all memorable in different ways. They represent a significant part of my postgraduate legal education. They remind me of what it felt like to be a young prosecutor just starting out in an office described by a journalist as a “Ministry of Justice.” The ethos in that office was quite remarkable and should inspire a culture of justice in every prosecutor’s office in the country.

These stories illuminate the many roles that prosecutors play, well beyond the familiar charging, plea bargaining, and litigation functions. These stories do not necessarily reveal anything unique about what a prosecutor’s role is or should be. I am sure that people reading this book will come away with very different impressions and opinions about prosecutors. Suffice to say it that stories of significant events in the work of prosecutors may be meaningful in imagining or reimagining what an ideal prosecutor should be like. It is indeed a challenge to imagine how prosecutors should conceive of their work in order for them to play the most salutary role in our society. This challenge should not be just for those who are prosecutors but for those who have never served as prosecutors but aspire to become prosecutors. In the end, my hope is that these stories may contribute to a better understanding of the prosecutor as a special guardian of justice.