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PROSECUTION LAW SYMPOSIUM

FOREWORD*

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With this symposium issue of the *Stetson Law Review*, Stetson University College of Law continues its commitment to educate judges and lawyers involved in litigation about their ethical and professional obligations. In 1996, as a part of its commitment, Stetson created the Institute for Litigation Ethics at Stetson.¹ Additionally, Stetson has won extensive national recognition for its production of trial lawyers.² The College of Law's mission includes educating not only future lawyers, but current lawyers as well.³ This symposium, devoted to the criminal prosecutor, further signifies Stetson's continued dedication to educate trial lawyers.

Fortunately, this Prosecution Law Symposium comes at a time when criticism of prosecutors is at an all time high.⁴ This criti

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1. For a detailed description of the Institute, see Patrick E. Longan, *Foreword to LITIGATION ETHICS AND PROFESSIONALISM SYMPOSIUM*, 28 STETSON L. REV. 247 (1998).

2. See *Best Graduate Schools, Exclusive Rankings*, U.S. NEWS & WORLD REP., Mar. 29, 1999, at 95; *1998 Annual Guide to Best Graduate Schools*, U.S. NEWS & WORLD REP., Mar. 2, 1998, at 77.

3. During 1997, Stetson conducted over 30 Continuing Legal Education programs. These programs included: Law and Higher Education, Labor Law Litigation, Bankruptcy, Police Legal Issues, and Trial and Appellate Advocacy.

4. Several newspapers have run series devoted to such criticism. See, e.g., Ken

cism ranges from that leveled at the prosecutors in recent murder cases,⁵ to the heated condemnation of Independent Counsel Kenneth Starr.⁶ Critics across the nation have lamented the decline in prosecutorial ethics and professionalism. Courts have begun to take unprecedented steps to curb perceived prosecutorial misconduct. The Florida Supreme Court recently condemned prosecutorial misconduct in closing arguments, not only reversing the conviction and death sentence in the case, but also referring the case to the bar grievance authority.⁷ In another case, the Tenth Circuit Court of Appeals found that a prosecutor had violated the federal bribery statute by offering a plea bargain to a defendant in exchange for testimony.⁸ Finally, prosecutors are beginning to face criminal prosecution for their professional behavior. Recently in Chicago, several former prosecutors were tried for conspiracy in framing a man for murder.⁹

Criticism of prosecutors is nothing new. Many commentators have long discussed and debated the abuses committed by prosecu-

Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10–Jan. 14, 1999, at A1; Bill Moushey, *Failing to Police Their Own: Justice's Oversight Office Called Ineffective, Unresponsive*, PITT. POST-GAZETTE, Nov. 30–Dec. 13, 1998, at A1; see also Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 611 (1999).

5. See Charlie Brennan, *The Restive Murder Case of JonBenet; Two Years After Crime, Two Defense Attorneys See Opposite Outcomes If Parents Put on Trial*, ROCKY MTN. NEWS (Denver), Dec. 20, 1998, at A6; *Courts Favor Prosecution's Leaks*, NEWSDAY, July 13, 1994, at A29; *JonBenet Investigator's Criticism Raises Heat on District Attorney; Detective Says Case 'Effectively Crippled'*, CHI. TRIB., Aug. 8, 1998, at N2; Brian Masters, *Up the Bloody Garden Path*, ASSOCIATED NEWSPAPERS LTD. (London), Oct. 1, 1995, at 45.

6. See George D. Brown, *The Gratuities Offense and the RICO Approach to Independent Counsel Jurisdiction*, 86 GEO. L.J. 2045, 2047 n.7 (1998) (noting that Judge Starr's investigation has increased the criticism of the independent counsel statute); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 559 (1998) (criticizing Judge Starr for "blindly applying possible charges to a defendant without analyzing the likelihood of success").

7. See *Ruiz v. State*, No. 89-201, 1999 WL 176049, at *1 (Fla. Apr. 1, 1999) (per curiam); see also Jo Becker, *High Court Denounces Prosecutors' Conduct*, ST. PETERSBURG TIMES, Apr. 2, 1999, at A1.

8. See *United States v. Singleton*, 144 F.3d 1343 (10th Cir.), *vacated*, 144 F.3d 1361 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999), *cert. denied*, No. 98-8758, 1999 WL 185874 (U.S. June 21, 1999).

9. See Armstrong & Possley, *supra* note 4. The prosecutors were eventually acquitted. See Jeff Coen et al., *Cruz, Lack of Evidence Hurt Case, Jurors Say*, CHI. TRIB., June 6, 1999, at A8.

tors in their pursuit of “justice.”¹⁰ Much of the concern stems from the extreme power that prosecutors wield. The prosecutor has been described as “the single most powerful figure in the administration of criminal justice.”¹¹ In 1940, Justice Robert Jackson, then serving as Attorney General, recognized that prosecutors have more power over the ordinary citizen because even the investigation of an individual can have a devastating effect on a person's life and reputation.¹²

Several articles in this issue recognize the extraordinary power of the American prosecutor. Professor Frank Bowman of Indiana University College of Law discusses the extreme power granted to prosecutors through the Federal Sentencing Guidelines, which require that any sentence departure based on a defendant's cooperation with the government be initiated by a prosecution motion.¹³

Judge Lloyd King, a federal immigration judge in Miami, notes the wide range of plea bargaining tools available to the prosecutor.¹⁴ Yet another observation is that prosecutors have extraordinary discretion in their positions, one example of which is the ability to seek the death penalty.¹⁵ Roscoe Howard, Professor of Law at the University of Kansas School of Law, states that prosecutorial discretion is “one of the fundamental operating principals of our criminal justice system.”¹⁶

This extraordinary power carries with it extreme responsibility.

10. See generally BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (West Group 1998) (1985); Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972).

11. Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision-Making*, 12 AM. CRIM. L. REV. 473, 477 (1976); see also Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 672.

12. See Robert H. Jackson, The Federal Prosecutor, Address at the Annual Conference of the United States Attorneys (Apr. 1, 1940), in NATIONAL DISTRICT ATTORNEYS, ETHICAL CONSIDERATIONS IN PROSECUTION: ROLES AND FUNCTIONS OF THE PROSECUTOR 2 (John J. Douglass ed., 1977).

13. Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on “Substantial Assistance” Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7 (1999).

14. Hon. H. Lloyd King, Jr., *Why Prosecutors Are Permitted to Offer Witness Inducements: A Matter of Constitutional Authority*, 29 STETSON L. REV. 155 (1999).

15. Roscoe C. Howard, Jr., *Wearing a Bull's Eye: Observations on the Differences Between Prosecuting for a United States Attorney's Office and an Office of Independent Counsel*, 29 STETSON L. REV. 95 (1999).

16. *Id.* at 113.

As one court instructed, “Powers so great impose responsibilities correspondingly grave.”¹⁷ An article in this symposium by Assistant U.S. Attorney Caroline Heck Miller characterizes this important responsibility as one way in which prosecuting attorneys differ from other lawyers.¹⁸ Judge King justifies this extraordinary responsibility based on the prosecutor’s membership in the executive branch of government.¹⁹ Urging control over the use of another powerful tool by prosecutors, Professor Bowman advocates the necessity for the responsible use of the substantial assistance agreement.²⁰ It is clear that these powers, duties, and responsibilities of a prosecutor far exceed being a mere advocate and include being a “minister of justice.”²¹

This symposium also contains several suggestions for encouraging prosecutors to live up to their responsibilities in light of their extraordinary power. In her article, Ms. Heck Miller, while condemning the practice of punishing individual prosecutors for merely enforcing policies, opines that the answer to ending undesirable methods used by the prosecution — bargaining with accomplices for testimony and contacting represented suspects in an investigation — is to change the policies regarding plea bargaining and undercover investigations.²² Professor Bowman suggests that the Department of Justice must take a more active role in controlling the unfettered discretion of prosecutors to ensure that the sentencing departure motion is not used by prosecutors as a plea bargaining tool to dispose of cases.²³ In his essay, George E. Tragos, a defense attorney in Clearwater, Florida, suggests that prosecutors are more effective if they have a clearer understanding of the defense lawyer’s role in the criminal justice system.²⁴

Prosecutors must also begin to control their behavior through

17. *Attorney General v. Tufts*, 132 N.E. 322, 326 (Mass. 1921).

18. Caroline Heck Miller, *Knowing the Dancer from the Dance: When the Prosecutor Is Punished for the Government’s Conduct*, 29 STETSON L. REV. 69 (1999).

19. See King, *supra* note 14, at 158.

20. See Bowman, *supra* note 13, at 63–65.

21. STEPHEN GILLERS & ROY D. SIMON, JR., REGULATIONS OF LAWYERS 253 (1998) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” (quoting MODEL R. PROF’L CONDUCT Rule 3.8 cmt.)).

22. See Heck Miller, *supra* note 18, at 90–91.

23. See Bowman, *supra* note 13, at 63.

24. George E. Tragos, *Prosecutors, Know Your Criminal Defense Lawyer*, 29 STETSON L. REV. 199 (1999).

an individual barometer. Christopher Frey, also a practicing defense lawyer in Clearwater, notes that self-restraint is a necessary ingredient to professional prosecution, especially when dealing with a *pro se* defendant.²⁵ For most experienced prosecutors, decisions are made intuitively. These prosecutors rarely think about why they react in certain ways in specific situations. As they move from case to case they react on “gut instinct.”²⁶ Prosecutors must train their instincts so that their assessment of the correct actions is consistent with the values shared by the criminal justice system, values that include “that guilt shall not escape or innocence suffer.”²⁷

To that end, skill is important and knowledge essential,²⁸ but what is imperative is a strong sense of professionalism within the prosecutors' offices. Prosecutors' offices should strive to develop a culture of professionalism.²⁹ Professor Bruce Green recently articulated the definition of a culture of professionalism in his description of the atmosphere at the U.S. Attorney's Office for the Southern District of New York.³⁰ He described that office as one in which the tradition of the office included

a reputation for excellence, skill and success. But the high esteem in which the office sought to be held by judges and the public involved more than this. The office was particularly jealous of its reputation for probity, for integrity, for judgment. It was important that its acts appear to be well motivated, that its lawyers' word be trusted.³¹

25. Christopher G. Frey, *The State v. The Self-Represented: A Florida Prosecutor's Concerns When Litigating Against a Pro Se Defendant in a Criminal Trial*, 29 STETSON L. REV. 181 (1999).

26. This same observation was made of most attorneys in Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 717 (1998).

27. *Berger v. United States*, 295 U.S. 78, 88 (1935).

28. The Massachusetts Supreme Judicial Court recognized that “[p]rofound learning and unusual intellectual acumen, although eminently desirable, are less essential” than “character incorruptible, reputation unsullied, a high standard of professional ethics, and sound judgment.” *Tufts*, 132 N.E. at 326.

29. The National District Attorneys Association suggests that a code of professionalism be developed within every office. See NATIONAL DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS 19–20 (2d ed. 1991) (suggesting code promulgation, scope, and provisions in §§ 6.3–6.5).

30. See Green, *supra* note 4, at 607.

31. *Id.* at 607–08.

He went on to note that, in the Southern District of New York, “doing justice was an animating principle; it was the office's life blood, often silent, unseen, taken for granted.”³² Such a motivating force within a prosecutor's office assists prosecutors to take seriously their role as ministers of justice. One step toward that goal is consistent training in ethics and professionalism. Additionally, formal mentoring programs for new prosecutors would teach younger lawyers not only the rules but how they apply to the routine decisions that are made countless times a day. Being with a seasoned prosecutor could assist the untrained prosecutor to learn the “moral fabric” of the office.³³ Judge William Hoeveler, a senior district court judge of the Southern District of Florida, notes in his essay that, in his experience, most prosecutors he has encountered have been “well-prepared, well motivated, and bring credit to the government.”³⁴ The suggestions and discussions within this symposium will assist those who *are* a credit to the government in discharging their duties and will suggest ways to eliminate or control those who *are not*.

32. *Id.* at 608.

33. Schiltz, *supra* note 26, at 718.

34. Hon. William M. Hoeveler, *Ethics and the Prosecutor*, 29 STETSON L. REV. 195, 197 (1999).