The Professional Responsibility of the Prosecuting Attorney

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THE PROFESSIONAL RESPONSIBILITY OF THE PROSECUTING ATTORNEY*

MONROE H. FREIDMAN**

This is the first of a two-part treatment of the ethical problems of prosecuting attorneys. Mr. Freedman explores certain practices allegedly engaged in by prosecutors, pointing up the unique decisions they must make and the ethical implications of their actions. He examines six areas of particular difficulty, attempting to delineate the fine line between strategy and unethical activity in each. Finally, he attempts to answer some of the challenges to his thesis raised by Mr. Braun in the second article.

In an earlier paper,1 I analyzed the three most difficult ethical problems faced by the criminal defense attorney: (1) Is it proper to use cross-examination to make a witness appear to be mistaken or lying when you know that his testimony is accurate and truthful? (2) Is it proper to put a witness on the stand when you know he will commit perjury? (3) Is it proper to give your client advice about the law when you have reason to believe that the knowledge you give him will tempt him to commit perjury?

In a substantial number of instances, the attorney who recognizes that he functions in an adversary system of criminal justice will be compelled, however reluctantly, to answer yes to these questions. The adversary system presupposes that the most effective means of determining truth is by placing upon a skilled advocate for each side the responsibility for investigating and presenting the facts from a partisan perspective. Thus, the likelihood is maximized that all relevant facts will be ferreted out and placed before the ultimate fact-finder in as persuasive a manner as possible. It may be true that this system is not beyond criticism, but the purpose of this paper and the previous one is not how to reform it, but how to act responsibly within it.

Question-begging responses are common in this area: the attorney is an officer of the court; he participates in a search for truth. Indeed he is and indeed he does, but these propositions merely serve to state the problem in different words: As an officer of the court, participating in a search for truth, what is the attorney's special responsibility, and how

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* This paper was presented by the author as Guest of Honor and Principal Speaker at the 1967 Annual Banquet of the Georgetown Law Journal.

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does that responsibility affect his resolution of the questions posed? This question requires further consideration of the adversary system.

If such a system is to function effectively, it is necessary that each adversary have "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability." Moreover:

The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. . . . To permit the attorney to reveal to others what is so disclosed would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance.

This "sacred trust" of confidentiality, which is also enjoined upon attorneys by Canon 37, must "upon all occasions be inviolable," or else the client could not feel free "to repose [confidence] in the attorney to whom he resorts for legal advice and assistance." Destroy that confidence, and "a man would not venire to consult any skillful person, or would only dare to tell his counsellor half his case." The result would be impairment of the "perfect freedom of consultation by client with attorney," which is "essential to the administration of justice."

Thus, the role of advocate and counsellor in an adversary system may require the attorney to withhold truthful and relevant information from the court in a particular case—even though the search for truth may thereby be frustrated to some extent—because greater injury would be done to the adversary system of truth-finding if clients had reason to be fearful of confiding in their attorneys.

This conclusion might appear to be precluded by the attorney's obligation of candor to the court, and the proscription of any "violations of law or any manner of fraud or chicane." However, insofar as the "general guide" provided by these canons conflicts with the attorney's obligations to his client, they must give way. For example, in Opinion 287 an eminent panel, headed by Henry Drinker, held that a lawyer should sit silently by when his client lies to the judge by saying that he has no

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2 ABA, CANONS OF PROFESSIONAL ETHICS 15 (1908) (hereinafter cited as CANON).
3 2 MERCHIM, AGENCY § 2297 (2d ed. 1914).
4 ABA COMM. ON PROFESSIONAL ETHICS & GRIEVANCES, OPINION 150 (1936) (hereinafter cited as OPINION), quoting THORNTON, ATTORNEYS AT LAW § 94 (1914).
6 OPINION 91.
7 CANON 22.
8 CANON 15.
9 CANON, Preamble (1908).
prior record, despite the attorney’s knowledge from the client to the contrary. William B. Jones, then a trial lawyer and now a judge in the United States District Court for the District of Columbia, wrote a separate opinion to emphasize his view that the attorney is duty-bound to withhold the truth from the court even if the information has come to him from a source other than the client.

In the criminal case, of course, the adversary system has further ramifications. The defendant is presumed innocent. The burden is on the prosecution to prove beyond a reasonable doubt that the defendant is guilty. Even the accused who knows he is guilty has an “absolute constitutional right” to remain silent and to put the government to its proof. Consequently, the defense lawyer’s obligation may well be to advise his client to withhold the truth. As Justice Jackson said, “[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.” In doing so, according to Chief Justice Warren, an attorney is

merely exercising the good professional judgment he has been taught. . . . He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

Thus the lawyer “of necessity may become an obstacle to truthfinding,” in Justice Harlan’s words, “in fulfilling his professional responsibilities.”

II.

One consequence of the paper on defense counsel’s ethical problems has been the inference drawn by some that it is only the defense attorney who has such problems, and that the prosecutor’s ethical difficulties have all been solved, if indeed they ever existed at all. For example, in his comment on my article in the Michigan Law Review, David G. Bress, United States Attorney for the District of Columbia, begins by quoting from the familiar language of Berger v. United States, to the effect that the job of the prosecutor is not necessarily to convict, but to see that justice is done. He then goes on to suggest that prosecutors live by this

13 Id. at 514 (dissenting opinion).
15 295 U.S. 78 (1935).
standard, and to argue that defense counsel's ethical problems would readily be solved if defense attorneys would simply take their guide from this same standard.

Unfortunately, however, these problems are not so facilely resolved, since defense counsel and prosecutor have significantly different roles and functions, and because their ethical difficulties vary accordingly. Defense counsel has obligations deriving from the importance, to the adversary system, of confidentiality between attorney and client, the presumption of innocence and burden of proof, the constitutional right to counsel, and the constitutional privilege against self-incrimination. The prosecutor, who does not represent a private client, is not affected by these considerations in the same way. For example, the defense attorney is privileged to withhold evidence: there is nothing unethical in keeping a guilty defendant off the stand, and putting the government to its proof. The Constitution guarantees nothing less than this. Obviously, however, it does not follow that the prosecutor is also privileged to withhold or suppress material evidence, or that there is something essentially unfair in this double standard.

Similarly, it is ethical for defense counsel to cross-examine a prosecution witness to make him appear to be inaccurate or untruthful, even when the defense attorney knows that the witness is testifying accurately and truthfully. Although it appears to be inconsistent with their general position that counsel should never mislead the court in any way, both Mr. Bress and Judge Warren E. Burger agree with this conclusion. They reach this result on the reasoning that the defense is entitled to "put the government to its proof" and to "test the truth of the prosecution's case," whereas I base the same conclusion on the necessities of the obligation of confidentiality. However, neither of these rationales would justify a prosecutor in obtaining a conviction by making a defense witness appear to be lying when the prosecutor knows that the witness is testifying truthfully. The defendant, who is presumed innocent, does

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10 Freedman I, at 1474-75.
18 Bress, supra note 14, at 1494.
19 Burger, supra note 17, at 14.
20 Freedman I, at 1474-75.
21 It is not clear whether Mr. Bress approves of this tactic on the part of the prosecutor. See Bress, supra note 14, at 1494.
not have a burden of proof to be tested, nor does the prosecutor function under the burden of an obligation of confidentiality in conducting himself at trial.

Also bearing upon the different obligations of defense counsel and prosecutor are the relevant and important distinctions between the government and the individual citizen who is prosecuted. One such distinction is the paramountcy of the individual and the sanctity of his personality in our society. Another is the awesome power of the government, a power that the Founding Fathers had good reason to circumscribe in the Bill of Rights and elsewhere in the Constitution. A third difference is the majesty and dignity of our government. Conduct that may be tolerable in individuals may be reprehensible when done "under color of law" on behalf of the nation or a state. These considerations must be given due regard in setting the standards of ethical conduct to be expected of the prosecutor as attorney for the government. In addition, the prosecutor has enormous and unique discretion in defining the particular crime, affecting the punishment, and even in deciding whether to prosecute at all. Thus, to say that the prosecutor has special responsibilities in exercising his discretion is simply to recognize that he is the attorney who has discretion to exercise.\(^22\)

Indeed, there can be no area of professional ethics more in need of analysis than that of the prosecuting attorney, since there are a substantial number of ethical problems that are unique to his high and difficult calling. I will discuss briefly six such problems, arising from common prosecutorial practices.

First, cases where the primary motive for the prosecution relates to matters other than commission of the particular crime for which the defendant is being prosecuted. An instance often suggested to justify this kind of conduct is the prosecution of Al Capone for tax evasion. If the government cannot successfully prosecute a notorious criminal for the numerous serious offenses he is suspected of having committed, some prosecutors consider it to be proper to subject him to prosecutions for a variety of other crimes, ranging from traffic offenses to tax evasion, for which he would not be investigated and charged were it not for his notoriety. In support of such practices, it is argued that if the individual is in fact guilty of the crime with which he is charged, the motive of the prosecutor is immaterial. This contention overlooks the fact that there are few of us who have led such unblemished lives as to prevent a de-

terminated prosecutor from finding some basis for an indictment or an information. Thus, to say that the prosecutor's motive is immaterial, is to justify making virtually every citizen the potential victim of arbitrary discretion.

For example, the Chinese laundrymen in *Yick Wo v. Hopkins* were undoubtedly operating laundries in wooden buildings without licenses, thereby maintaining fire hazards and violating an ordinance lawful on its face. What made the convictions improper, despite the guilt of the defendants, was the demonstrated motive of city officials to discriminate against Chinese in enforcing the ordinance. Similarly, a recent conviction for income tax evasion was reversed when it was shown that the prosecution had been motivated by the defendant's political views and activities. Prosecutions have even been motivated by personal grudges of public officials. From the day that James Hoffa told Robert Kennedy that he was nothing but a rich man's kid who never had to earn a nickel in his life, Hoffa was a marked man. When Kennedy became Attorney General, satisfying this grudge became the public policy of the United States, and Hoffa, along with Roy Cohn and perhaps other enemies from Kennedy's past, was singled out for special attention by United States Attorneys. This is, of course, the very antithesis of a rule of law, and serves to bring into sharp focus the ethical obligation of the prosecutor to refrain from abusing his power by prosecutions that are directed at individuals rather than at crimes.

Second, various plea-bargaining tactics that are, to a great extent, beyond court supervision. These include multiplication of counts (e.g., by adding conspiracy counts, or by breaking up what is essentially a single offense into numerous parts), prejudicial joinder of defendants, and unfair selection of the place of trial in offenses that cross state lines (like mail fraud which "takes place" in every state through which a letter passes).

For example, it is common practice for prosecutors in the District of Columbia Court of General Sessions to overcharge defendants, with the expectation of coercing a plea to the offense for which the defendant should have been charged in the first place. According to the Office of Criminal Justice, in its excellent study of the Court of General Sessions:

> [T]he great volume of business at the court makes rapid disposition of cases extremely important. This in turn requires that most defendants...
eventually plead guilty and that they not persist in demands for trials. One method of encouraging such a plea is to charge a felony at the outset, and in this way set the stage for subsequent bargaining. Commonly, cases are pattered as felonies, with the [prosecutor] . . . noting that a plea to some misdemeanor should be accepted. Note that the practice described here is not the one involved in routine plea bargaining, where charges are reduced after further exploration by counsel. In the present context, reference is to the cases which may technically be brought as felonies, but which in all probability will be resolved as misdemeanors because general prosecutive policy requires it. Negotiation in such cases is a formality.20

In other words, in a case that would be prosecuted as a misdemeanor if the defendant insisted upon going to trial, the prosecutor nevertheless makes the charge a felony. Thereby, the defendant, in order to avoid the false threat of a ten- or fifteen-year felony sentence, is coerced into pleading guilty to the misdemeanor and foregoing his right to trial by jury on that offense. Although the reason for this practice—"the great volume of business at the court"—is a serious practical problem, it does not justify the unethical practical effect of impairing a constitutional right by a combination of duress and trickery.

Third, condoning and covering up police abuses, such as brutality, perjury and unlawful arrests, searches, and interrogation. The difficulty here stems from the fact that the prosecutor has special problems in his relationship with the police. They must work together closely and constantly. The prosecutor's job can be made extremely onerous if he does not have willing cooperation from the police, both in investigating and in presenting evidence in court. As a consequence, the prosecutor sometimes finds himself compelled either to present charges against members of the police department for brutality or perjury—which impairs cooperation—or to condone or cover up police crime—which is unethical.

For example, in 1964 two Negro men were stopped, interrogated, and searched for no other apparent reason than that they were walking with a white woman. They disputed the propriety of this arrest and, as a result, were charged with disorderly conduct.27 The police officers attempted to justify the initial arrest by swearing under oath that the men corresponded to a description of two burglars, broadcast over the squad car radio the same evening. The police log book revealed, however, that no such burglary had taken place, and no such description had been broadcast. The prosecutor made strenuous efforts to prevent defense counsel from examining the log book, which implies that the prosecutor

20 Office of Criminal Justice, U.S. Dep't of Justice, Criminal Justice in a Metropolitan Court 34-35 (1966) [hereinafter cited as SUBJiN REPORT].
was aware of the perjury and was attempting to prevent its exposure. Although a police trial board subsequently found the officers guilty of unlawful arrest and perjury, it subjected them only to small fines, rather than dismissal from the force. Despite demands of civic organizations, the United States Attorney for the District of Columbia has failed to prosecute the officers. 28

A related practice is the institution of criminal prosecutions to retaliate against citizens who complain of police misconduct, or conditioning a nolle prosequi on the defendant’s release of civil claims against the arresting officers. Such practices have been condemned by the Virginia State Bar Legal Ethics Committee, 29 the President of the Board of Commissioners of the District of Columbia 30 and the President’s Commission on Crime in the District of Columbia. 31 Nevertheless, these practices continue. For example, in a case recently decided, the Chief of the Law Enforcement Division of the Office of the Corporation Counsel admitted that the prosecution had been reinitiated, after having been dropped, solely because the defendant had made a complaint against the arresting police officer:

Three months later he comes in and makes a formal complaint. So we said, "If you are going to play ball like that why shouldn’t we proceed with our case?"

... I had no reason to file until he changed back on his understanding of what we had all agreed on. That is done in many criminal cases. 32

Similarly, in a recent unreported California case, it was stipulated that six prosecutors were prepared to testify that they were familiar with the case, that they considered it to be unmeritorious and that they would not care to prosecute it. The case was nevertheless prosecuted because of the likelihood that the defendant would file a civil action against the police department. According to one prosecutor, "the duty of the [prosecutor], in addition to prosecuting criminals, [is] to protect the police officers, and in so protecting the police officers ... any [prosecutor] worth his

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28 The United States Attorney sought to justify his failure to prosecute by saying that he could not obtain indictments from a grand jury. This explanation is wholly inadequate, however, in view of the fact that "grand juries in the District of Columbia by and large follow the lead of the prosecutor. They are always theoretically free to ignore cases, but as a practical matter they do so only when the alternative is suggested to them." SUBIN REPORT 37.


30 Letter From President of Board of Commissioners of the District of Columbia to the National Capital Area Civil Liberties Union, Feb. 3, 1964.

31 PRESIDENT’S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 338 (1966).

salt would have at that point included any offense... on which the defendant could have been convicted.\textsuperscript{33}

Fourth, suppression of evidence, the purposeful introduction of false and misleading evidence, and coercion of witnesses. The most notorious recent case in this category is Miller v. Pate.\textsuperscript{34} This was a case involving the rape-murder of an eight-year old girl, in which the prosecutor presented as evidence a pair of man's undershorts, allegedly the defendant's, and repeatedly described them as being stained with blood of the same type as the victim's and different from the defendant's. In fact, the undershorts were covered with red paint and contained no blood at all. One could cite numerous such instances, perhaps not as flagrant, but equally unethical.

In another recent case,\textsuperscript{35} for example, the prosecutor persistently drummed into the jury—without any evidentiary basis, and contrary to the uncontradicted testimony of the Government psychiatrist called by the defense—the assertion that organic [brain] damage was negatived by the failure to detect it by physical test, and that psychological tests could not establish organic damage.... Also improper and indeed glaring was his representation—or rather misrepresentation—that Dr. Ruch agreed that organic damage had been negatived.\textsuperscript{36}

The court, after extensive quotations from the record, found the misconduct "so persistent and prejudicial" as to require reversal on grounds of "plain and prejudicial error."\textsuperscript{37} The court noted that the prosecutor's actions might have been the result of "his zeal and the excitement of the trial" rather than "deliberate intention" on his part.\textsuperscript{38} However, the excitement of the trial could hardly justify the deliberate efforts of the prosecutor's office in seeking to uphold the conviction on appeal.

A related problem is the coercion of witnesses by threat of prosecution or by deferment of sentencing (of one who has already been convicted) until after he has testified for the prosecutor in another case. Yet another unethical tactic in this category is the use of prior convictions for impeachment of a defendant or of witnesses for the defense, where the prejudicial effect on the jury far outweighs the asserted justification of casting doubt on credibility. In one recent unreported case, the prosecutor's true motive in using prior convictions to impeach defense witnesses was made manifest by his argument to the jury that they should

\textsuperscript{33} Information supplied by counsel for defendant in California v. MacDonald, the unreported case referred to in the text.
\textsuperscript{34} 386 U.S. 1 (1967).
\textsuperscript{35} King v. United States, 372 F.2d 383 (D.C. Cir. 1966).
\textsuperscript{36} Id. at 390.
\textsuperscript{37} Id. at 396.
\textsuperscript{38} Id. at 390.
consider the kind of person the defendant was in the light of the criminal records of the defense witnesses with whom he had been associating. Even without such argument, the prejudicial effect, and the prejudicial intention, is clear. As one prosecutor wrote to me in a recent letter: “I prefer to use [prior convictions] as heavy weights affixed to an object I intend to sink in deep water.”

Fifth, attempting to preclude resolution of important issues by depriving the courts of jurisdiction. In *Easter v. District of Columbia* the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, unanimously held that chronic alcoholism is a legal defense to the charge of public intoxication, thereby putting an end to the practice of punishing chronic alcoholism as a crime. However, when the National Capital Area Civil Liberties Union first sought to raise this issue in the courts, the prosecutor’s office attempted to preclude an adverse decision by entering a *nolle prosequi* in every public drunkenness case in which a Civil Liberties Union attorney appeared. Similarly, when I attempted to challenge the constitutionality of the vagrancy ordinances of the District of Columbia, the prosecutor’s office adopted the policy of entering a *nolle prosequi* in any vagrancy case in which I appeared as counsel. In the case in which I successfully raised the constitutional issues, making a record regarding enforcement policies and practices by cross-examining the police officers and the Chief Prosecutor, the prosecutor moved to revoke the appellant’s bond pending appeal. Since the appellant was then in jail, serving a longer sentence on another conviction, the vagrancy sentence would have run concurrently, with no practical effect other than to moot the vagrancy appeal. This was recognized by Chief Judge Harold H. Greene of the General Sessions Court, who denounced it as “outrageous” and as having been filed for the sole purpose of preventing the appellate courts from resolving the important constitutional issues involved.

Sixth, failure to advise the court regarding, and even purposefully taking advantage of, ineffective assistance of defense counsel. A few years ago a defendant was prosecuted for crimes arising out of his practice of law without a license. In the course of his trial, an experienced member of the prosecutor’s office testified that in a case in which he had served as prosecutor and in which the imposter had served as defense counsel, it had been the prosecutor’s judgment that the imposter had

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rendered ineffective assistance of counsel. The prosecutor admitted his obligation to advise the court of ineffective assistance, but admitted further that he had not done so. In fact, he had taken the trouble to praise defense counsel’s ability in his summation to the jury. When I suggested to a member of the United States Attorney’s office that this indicated that the imposter had indeed rendered effective assistance, I was informed that it indicated precisely the contrary, since it has been the practice of members of the prosecutor’s office to put favorable comment about defense counsel into the trial record whenever they are concerned that the issue of ineffective representation might legitimately be raised on appeal.

In a case currently on appeal from the denial of a motion to withdraw a guilty plea on grounds of ineffective assistance of counsel, it was shown that the attorney had advised his client to plead guilty under an admittedly mistaken understanding of the elements of the crime, and where the defendant had not in fact committed all the necessary elements. In addition, when the client indicated his unwillingness to plead guilty, the attorney advised him that he could appeal without difficulty after learning what his sentence would be. This case is not an isolated instance. According to the Office of Criminal Justice, in a majority of cases in the United States Branch of the General Sessions Court, “defense counsel is unaware of the legally essential elements of the offense, the facts of the case, or the existence of legal defenses.”

Even more serious than those cases in which the prosecutor fails to expose ineffective assistance of counsel, are those in which the prosecutor purposefully seeks out a forum in which defense counsel is likely to overlook defects in the prosecutor’s case. “It is not uncommon in the District to prosecute a case in General Sessions Court in order to avoid problems which might be raised in a district court trial, where defense counsel and judges may be more meticulous in their treatment of the case or, in some instances, more likely to recognize flaws in the prosecution.” In other words, in cases in which conviction might be precluded by an adequate defense, some prosecutors have nevertheless pressed charges in the hope that inadequate representation might result in conviction.

Equally reprehensible is the practice of cooperating with unscrupulous defense counsel in misleading the defendant into believing that a real plea bargain has been made, when in fact both attorneys know that the defendant was overcharged in the first instance. In some plea-bargaining sessions,

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43 Subin Report 82.
44 Id. at 36.
defense counsel, in order to convince his client that he has performed a valuable service, and the [prosecutor], in order to dispose of a case, agree to break an overly severe felony charge to a misdemeanor charge, in "exchange" for a guilty plea. No real bargain occurs, since both sides know that the original charges are too heavy to sustain. Cases such as these are pandered heavily by the [prosecutor] for the very purpose of encouraging a guilty plea to a lesser offense. When this is done, experienced defense counsel will normally be aware of it. He may not, however, always communicate this knowledge to his client, who may feel that a reduction in charges is in all cases a disposition well worth a plea of guilty, and well worth the fee which the attorney demands for obtaining it. When defendants are overcharged, however, there may be no real advantage to pleading guilty. . . . It is open to question how many "real" felony cases—i.e., those which the [prosecutor] believes can be successfully prosecuted as felonies—actually are compromised at the plea-bargaining session.46

In such cases, of course, the prosecutor and the defense counsel are not only aware that no real bargain is taking place, they must both also be aware that the defendant is being duped into believing that he is receiving the benefit of genuine negotiation. The fact that such practices exist today in the District of Columbia, where standards are probably as high as any place in the country, is an indication that the level of ethical standards among some prosecutors, as well as some defense attorneys, is a matter of real concern.

It might be contended that the foregoing discussion has dwelt upon isolated instances of unethical conduct, and that it would be unfair to suggest that these instances are in any sense representative of general prosecutorial practice or policy. On the contrary, however, several references were to practices reported by the Office of Criminal Justice,47 and in many of the cases discussed, the prosecutor's office made the individual unethical conduct a matter of office policy by ratifying it in seeking affirmance of the conviction on appeal rather than confessing error. In Miller v. Pate, for example, the state's attorneys not only used the paint-stained undershorts, but defended all the way to the Supreme Court of the United States, the conviction of a man who had been sentenced to death. Certainly, an individual prosecutor can be carried away in the heat of a trial and use tactics, such as making inflammatory statements, that he would not himself approve upon cooler reflection. Too often, however, cooler reflection never takes place, and the unethical trial tactic

46 Id. at 47-48.
47 This report is, of course, a sample of the highest level of professional responsibility in the Justice Department.
is compounded by unethical support on appeal of the conviction thereby obtained.\textsuperscript{47}

Finally, the unsophisticated notion of Mr. Bress and of Judge Warren E. Burger—that "there is not a dual standard of conduct, one for the prosecutor and one for the defense counsel"\textsuperscript{48}—is demonstrably false. Defense attorney and prosecutor must be subject to different rules, at least insofar as they have significantly different roles. This was recognized by the American Bar Association and the Association of American Law Schools in their 1958 Joint Conference Report on Professional Responsibility:

The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on the behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged.

\textbf{POSTSCRIPT}

The response that follows this article, it seems to me, fails to come to grips with the substantive issues raised above. Thus, one of the first concerns of the response is to suggest that the views expressed in the earlier article on defense counsel's responsibilities have been overwhelmingly repudiated by the bench and bar. On the contrary, however, a number of eminent members of the profession have commented favorably on that article.\textsuperscript{49} In addition, the article has been reprinted by Professor Livingston Hall of Harvard (formerly a prosecutor) and Professor Yale Kamisar of Michigan in their casebook \textit{Modern Criminal Procedure},\textsuperscript{50}

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\textsuperscript{47} For two recent illustrations of this problem, see King \textit{v.} United States, 372 F.2d 383 (D.C. Cir. 1966); Brown \textit{v.} United States, 370 F.2d 242 (D.C. Cir. 1966).


\textsuperscript{49} They include the following comments: "I read Professor Freedman's remarks. They are a responsible and thoughtful discussion of a defense attorney's obligation not to reveal facts disclosed to him by a client which indicate that the client is guilty." Letter From Judge Thurman Arnold to the Editor, The Washington Post, April 22, 1966, p.20, col.3.

Professor Freedman's speech is a probing and responsible attempt to answer difficult and intensely practical problems created for the defense lawyer by our adversary system of justice and compounded by the habitual refusal of judges, grievance or other bar committees, professional associations and the law schools to think hard and realistically about ethical questions.

Letter From Anthony G. Amsterdam (former prosecutor) to the Editor, The Washington Post, May 1, 1966, p.6, col.3.

The article by Monroe H. Freedman ... is outstanding in its erudition, refreshing in its honesty, and thoroughly enjoyable in its disdain of ... sophistry and hair-splitting. ... So fascinating and absorbing is Professor Freedman's article that I have circulated it among a number of my layman friends, ... Every one of them ... indicated a complete understanding of and sympathy with the treatise.


\textsuperscript{50} \textit{Hall \\& Kamisar, Modern Criminal Procedure} 783 (1966).
\end{flushright}
and it is used as the basis for discussion in the First Year Group Work Program at Harvard and in courses on Professional Responsibility at a number of other leading law schools.

Moreover, some of the authorities cited in the response do not in fact take the position ascribed to them. Addison Bowman, Esq., for example, was one of the four panelists who were said to have "unanimously concluded, without qualification, that it is improper for an attorney under any circumstances to use the known perjured testimony of a witness or to be a party to the giving of known perjured testimony by a defendant." 51

Compare Mr. Bowman's own words:

I would advise the defendant that I cannot permit him to testify falsely because of my ethical obligations and because he would be committing perjury. Occasionally, defendants nevertheless insist on testifying. In these cases my practice is to seek leave to withdraw from the case immediately. The court is generally reluctant to grant leave to withdraw, although my failure to present reasons for my request presumably makes it clear that I have ethical difficulties. If my request is denied, I will renew it immediately prior to trial before the trial judge. If again denied, and being unable to dissuade the defendant from testifying—and clearly he cannot be prevented from testifying—I would be inclined to present his testimony in the same fashion I would any other witness. In these circumstances counsel has attempted twice to fulfill his obligation to the court, and the court, cognizant of the reason for the request, has twice declined to relieve counsel of his obligation to his client. I do not believe it is proper for defense counsel to present the defendant's testimony in a fashion that may lead the jury to conclude that counsel does not believe his client. I repeat, however, that it would be clearly improper for counsel to present any other witness whose testimony he knows is not the truth. 52

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51 Braun, Ethics in Criminal Cases: A Response, 55 GEO. L.J. 1048, 1052 & n.23 (1967) [hereinafter cited as Braun].

52 Bowman, Standards of Conduct for Prosecution and Defense Personnel: An Attorney's Viewpoint, 5 AMERICAN CRIM. L.Q. 28, 30 (1966). (Emphasis added.) Mr. Bowman's statement also indicates how misleading is the oversimplification in the quote from Judge Holtzoff's Buffalo speech. Braun at 1052. If the defendant insists upon taking the stand and committing perjury, Judge Holtzoff suggests that "counsel may well request the court to grant him leave to withdraw." This does not solve the problem, but only compounds and postpones it. It fails to tell us what the attorney is to do when his request for leave to withdraw is denied—as it almost certainly will be, by Judge Holtzoff and most other judges.

I have already commented upon the merits of Mr. Bowman's position. See Freedman I, 1475-77. A recent case pointedly illustrates how an attorney can seriously prejudice his client when he violates the obligation of confidentiality by seeking leave to withdraw on "ethical" grounds or by otherwise suggesting to the court that his client is guilty. The majority voted to remand the case to determine whether the defendant had been denied a preliminary hearing and, if so, whether he had been prejudiced thereby. Judge Danaher dissented, basing his opinion in part on incriminating information that had been put into the record by the defendant's own counsel:

Finding the Holmes testimony at variance from the opening statement made by his trial attorney, the latter in the absence of the jury addressed the court: "For purposes of the record, Your Honor, about half of what the defendant said on the stand was a complete surprise to me."
Thus, Mr. Bowman in fact concluded that it would be proper for an attorney, under some circumstances, to be a party to presenting known perjured testimony by a defendant.

With reference to the problem of using prior convictions to impeach defendants or witnesses for the defense, the entire discussion in the response is: "Such practices involve so many questions of courtroom strategy and are so closely supervised by the courts that this charge of unethical tactics can be dismissed without further comment." This, of course, ignores the fact that courts have in general been extremely lenient in permitting impeachment by prior convictions, and that even an innocent defendant with a prior conviction has the Hobson's choice of sitting mute (which is, of course, highly prejudicial), or of taking the stand and permitting the prosecutor to present his past crime to the jury. Necessarily, therefore, defense counsel will take this problem of "courtroom strategy" into account, and may well advise his client to plead guilty and forego the right to trial by jury. When this happens, little judicial supervision can be brought to bear. In addition, with respect to the unsupported assertion that prosecutors are closely supervised by the courts on matters of trial strategy, compare the recent holding of the District of Columbia Court of Appeals:

The trial court should remember that the District Attorney's office is not a branch of the court, subject to the court's supervision. It is a part of the executive department, separate and apart from the judicial department. The District Attorney, and he alone, must determine the policies of that office. On the District Attorney rests the responsibility to determine whether to prosecute, when to prosecute and on what charges to prosecute.

Regarding the recent case in which a criminal prosecution was dropped but then reinstated by the prosecutor when the defendant filed a complaint against the police officer, the response is that "it certainly does not prove the existence of any 'practice' to cover up for the police." This misses the point, which was not that this one case in itself proved a practice. What does tend strongly to show a practice, however, is the admission of the existence of such a practice by the Chief Prosecutor,
which was set in italics: "That is done in many criminal cases." In the same paragraph a similar statement of policy is quoted from a California prosecutor.

In the case involving police perjury, the response disputes the inference that the prosecutor inadequately presented the case to the grand jury. Rather, the assertion of the prosecutor involved is accepted, that "the decision was strictly that of the grand jury." The opposing view is said to be "without foundation in fact," deriving from a general statement in the Office of Criminal Justice report "not related to this specific case." However, the facts of the specific case are compelling. Two police officers testified under oath that the men they had arrested had shortly before been described as burglars on the squad car radio. The official police logbook showed that no such burglary had taken place and that no such description had been broadcast. On these documented facts, even a police trial board found the officers guilty of perjury. It seems unlikely, therefore, that the case was fully and persuasively presented to the grand jury and that the grand jury nevertheless declined to issue an indictment. Moreover, this inference is certainly reinforced by the finding of the Office of Criminal Justice that grand juries typically follow the lead of the prosecutor.

The response is also incorrect in interpreting Judge Burger and Mr. Bress as holding it to be improper for defense counsel to cross-examine a witness to make him appear to be lying when the attorney knows that the testimony is truthful. The hypothetical case that they were discussing involved an alleged rape victim who is the 22-year-old daughter of a local bank president, and who is engaged to a promising young minister in town. Under one of the alternative questions, the accused admits to his attorney that he raped the girl. However, a rejected suitor is willing to testify, truthfully, that he frequently had intercourse with the girl and that she has behaved in a scandalous way towards strange

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67 Text accompanying note 32, supra. Even accepting the facts as the response states them, the case presents a troublesome problem for the prosecutor who took part. It is a fair inference from those facts that the police officer carried out a threat to reinstitute a criminal prosecution should the defendant file a complaint against the officer. Compare D.C. CODE ANN. § 22-2305 (1961).

68 Text accompanying note 32, supra. Even accepting the facts as the response states them, the case presents a troublesome problem for the prosecutor who took part. It is a fair inference from those facts that the police officer carried out a threat to reinstitute a criminal prosecution should the defendant file a complaint against the officer. Compare D.C. CODE ANN. § 22-2305 (1961).

69 See Braun 1058.

70 Id. at 1058.

men. Should the defense attorney use these facts to impeach the girl and, if necessary, call the suitor as a witness?

In answer to this question, Judge Burger stated in his prepared statement that the attorney should "use all the legitimate tools available to test the truth of the prosecution's case," and that "the testimony of bad repute of the complaining witness, being recent and not remote in point of time, is relevant to her credibility." Judge Burger was even more explicit in the question period following the panel discussion: he considers it ethical to cast doubt on the girl's credibility by destroying her reputation, even though the lawyer knows that she is telling the truth. Similarly, Mr. Bress wrote that the rejected suitor "should certainly be called by the defense." 

This, of course, is sanction for nothing less than a deliberate attempt to mislead the finder of fact. The lawyer knows that the client is guilty and that the prosecutrix is truthful. He has one purpose, and one purpose only, in using the suitor's testimony to impeach the girl: to destroy her credibility before the jury and thus to make it appear, contrary to fact, that she is lying about the rape. When the lawyer does this, does he not "confuse" the court? Does he not, in fact, "affirmatively participate in deceiving the court or jury?"

Furthermore, there is only one difference in practical effect between permitting the defendant to present a perjured alibi, and impeaching a truthful prosecutrix. In both cases, the lawyer attempts to free a guilty defendant. In both cases, he participates in misleading the finder of fact. In both cases, if he is successful, society is wronged, and the administration of criminal justice is impaired. The difference is that no innocent person is injured by the defendant's perjury, but when the lawyer deliberately sets out to destroy the character and credibility of the truthful prosecutrix, he wreaks untold suffering on the girl, her family, and the minister to whom she is engaged.

This case, I think, takes us to the heart of my disagreement with Judge Burger and Mr. Bress. Their system of professional responsibility appears to rest upon rigidly legalistic adherence to norms, regardless of the context in which the lawyer may be acting, his motives, and the con-

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62 Burger, supra note 17, at 11, 14-15.
63 Bress, Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint, 5 AMERICAN CRIM. L.Q. 23, 26 (1966). The quoted statements was in response to a question that assumed that the defendant had not confessed his guilt to the lawyer. However, in response to the question as to how the conduct of the defense should be changed if the defendant does admit his guilt to the lawyer, Mr. Bress, in a prepared statement, indicated no contrary view on this point. See id. at 26-27.
64 Braun 1049.
65 In the case of impeachment, of course, he does so himself, with leading questions. In the case of the perjured witness, the attorney asks only non-leading questions.
sequences of his act. Perjury is bad, therefore no lawyer, in any circumstance, should knowingly permit perjury. However, cross-examination is good, therefore any lawyer, under any circumstances and regardless of the consequences, can impeach a witness through cross-examination. The system of professional responsibility that I have been advancing in these articles, on the other hand, has been one that attempts to deal with ethical problems in context, giving full consideration both to motive and consequences. In this regard, the debate is closely related to a similar one that is being carried on currently among theologians, under the heading of “situation ethics.”

In all candor, I am less than completely satisfied with all of my answers to these vexing problems. (For example, I too would attack the credibility of the truthful prosecutrix, though for other reasons and with less self-assurance than Judge Burger and Mr. Bress.) I am convinced, however, that a situational approach is the more rational and responsible one. At any rate, we should no longer delude ourselves that the complexities of what constitutes responsible professional conduct in the context of an adversary system can be resolved by syllogistic deductions from vague canons or dogmatic precepts.

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66 See, e.g., FLETCHER, MORAL RESPONSIBILITY (1967); FLETCHER, SITUATION ETHICS (1966); VON HILDEBRAND, MORALITY AND SITUATION ETHICS (1965).
67 See Freedman 1, 1474-75. Compare the view of Mr. Justice White (citing, inter alia, Freedman 1):

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 not convicting 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 furnish no witnesses to the police, reveal any confidences of his client, nor furnish any other information to help the prosecution’s case. If he can confuse a witness, even a truthful one, or make him appear as 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.