Hofstra Law Review

Volume 30 | Issue 1 Article 3

2001

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PROFESSIONAL DISCIPLINE OF PROSECUTORS: A RESPONSE TO PROFESSOR ZACHARIAS

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In a recent article, *The Professional Discipline of Prosecutors*,[1] Professor Fred C. Zacharias reports the results of an empirical study he has conducted of disciplinary actions against prosecutors.[2] Based on a computer search of reported cases, he concludes that there is an "overall trend of infrequent [disciplinary] prosecutions," suggesting "neglect or sloth" on the part of the authorities,[3] and he properly calls for more effective use of professional discipline of prosecutors.[4]

Professor Zacharias also notes that "judges ... need some reeducation" regarding the effectiveness and adequacy of professional discipline to discourage prosecutorial abuse.[5] For example, in *Imbler v. Pachtman*,[6] the Supreme Court referred to the existence of professional discipline as a ground for immunizing prosecutors from legal action for

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1. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001).

2. *See generally id.* at 743-55 (reporting the results of the study which was conducted by examining reported cases of prosecutorial discipline).

3. *Id.* at 774.

4. *See id.* at 774-77. Zacharias calls for a "proactive approach to discipline." *Id.* at 774. Such an approach might require the bar to "amend[] the[ir] regulatory regime." *Id.* at 775. For example, he argues that "[d]isciplinary agencies should assign staff to review media reports of prosecutions that refer to potentially questionable prosecutorial conduct ... and to review local court opinions that identify prosecutorial misconduct." *Id.* at 774 (citing Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697, 735-36 (1987)). Additionally, Zacharias argues that the bar should develop internal guidelines to serve as standards for resource allocation issues when potential cases arise. *See id.* Zacharias also calls for disciplinary authorities to "embrace bar action" when it is found that professional discipline is needed. *Id.* at 775.

5. *Id.* at 777 (arguing that judges must be made aware that "[b]ar authorities do not, and probably cannot, fill the void in prosecutorial oversight across the board").

6. 424 U.S. 409 (1976).

depriving citizens of their constitutional rights.[7] As Professor Zacharias says, however, it is unrealistic to rely on discipline alone to discourage prosecutors from this kind of unprofessional conduct.[8]

In reaching these conclusions, Professor Zacharias is reiterating what a number of authorities have been saying for many years.[9] Indeed, his research could fairly be summarized as follows: *Numerous authorities on prosecutorial ethics and discipline have maintained for many years that prosecutors are far too infrequently subjected to professional discipline and that courts cannot responsibly defer to disciplinary authorities to oversee prosecutorial misconduct that deprives individuals of fundamental rights. The new research discussed in this article demonstrates that these authorities have been right all along.*[10]

That is not, though, what Professor Zacharias does. Instead of saying simply and directly that his empirical research confirms what numerous scholars have been saying for many years, Professor Zacharias seems to be at pains to make his research appear to differ significantly from the work of previous commentators in its conclusions as well as in its methodology.[11] As a result, there is much in Professor Zacharias' article that might actually serve to discourage more effective use of professional discipline of prosecutors and also to reinforce the fallacy that courts can responsibly defer to professional disciplinary committees to deal with prosecutorial misconduct like suppressing evidence and presenting false testimony.[12]

For example, Professor Zacharias disparages most of the previous commentators by saying that their "traditional lamentations" are "somewhat overblown,"[13] and that their observations are "tinged with an element of handwringing" as they "bemoan" the failure of disciplinary

7. *See id.* at 428-29 & n.30 (stating that prosecutorial immunity from liability in civil suits under § 1983 does not leave the public without recourse to censure prosecutorial misconduct because prosecutors are subject to "professional discipline by an association of [their] peers" pursuant to the ABA *Model Code of Professional Responsibility*).

8. *See* Zacharias, *supra* note 1, at 777 (arguing that the professional bar is probably unable to serve as the primary discipliner of prosecutorial misconduct).

9. *See id.* at 722 n.3 (listing commentators who have reacted to the Supreme Court's decision in *Imbler* to immunize prosecutors from civil liability by noting the virtual absence of cases where prosecutors were sanctioned by disciplinary authorities).

10. *See id.* at 743-55 (concluding that the results of the study revealed that prosecutors are infrequently, but not "never," disciplined by either professional authorities or the courts).

11. *See id.* at 743-48 & nn.77-85.

12. *See infra* notes 13-16 and accompanying text.

13. Zacharias, *supra* note 1, at 778 (concluding that although commentators' criticisms of the failure of professional authorities to discipline prosecutorial misconduct are exaggerated, the criticisms do contain a large amount of truth).

authorities "to do their jobs."[14] By contrast, he claims that his own article "approaches the issue of discipline of prosecutors from an impartial perspective," suggesting that he alone assesses the matter "realistically"[15] and "dispassionately."[16]

More important, at a number of points Professor Zacharias makes assertions that could give false comfort to those who oppose more effective discipline of prosecutors and to those judges who prefer to defer to disciplinary authorities to oversee prosecutorial abuse. For example, he claims that his own research "dispels at least one myth: that prosecutors are *never* disciplined."[17] That strong language contains a serious inaccuracy, and could convey a misleading impression. The inaccuracy is that no one to my knowledge has ever stated the "myth" that "prosecutors are *never* disciplined." That is, the "myth" that he claims to "dispel" is nonexistent. What commentators have in fact been saying is that prosecutors are far too seldom disciplined, especially for unethical conduct that violates defendants' fundamental rights.[18] Moreover, although Professor Zacharias does not acknowledge it, that conclusion is actually reinforced by his computerized search for all reported disciplinary cases.[19]

Indeed, in his effort to dispel the alleged myth created by previous scholars, Professor Zacharias asserts that although discipline of prosecutors is "far from staggering," nevertheless, "in appropriate cases, courts and disciplinary organizations sometimes have been willing to address prosecutorial misconduct."[20] Indeed, he contends, disciplinary authorities have "targeted particularly serious prosecutorial misconduct" as well as "cases in which private clients are affected and public

14. *Id.* at 723 (stating that many authorities have reacted to the Court's justification for immunizing prosecutors by citing to the paucity of cases where prosecutors have been sanctioned by professional authorities).

15. *Id.*

16. *Id.* at 778.

17. *Id.* at 744.

18. *See, e.g.*, Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (asserting that, even though Disciplinary Rules that prohibit prosecutorial suppression and/or falsification of evidence are in effect in all fifty states, "disciplinary charges have been brought infrequently and meaningful sanctions rarely applied"); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998) (stating that there exists "a notable absence of disciplinary sanctions against prosecutors, even in the most egregious cases").

19. *See* Zacharias, *supra* note 1, at 744-45 (noting that many of the reported cases of prosecutorial discipline are old and the number of reported cases is "far from staggering" when compared to the number of criminal cases prosecuted).

20. *Id.*

remedies are unlikely to address the prosecutor's behavior."[21] Unfortunately, those contentions—which are actually contradicted by Professor Zacharias' study—could lead to an undesirable complacency on the part of disciplinary authorities and judges.

The study consisted of a computerized review by a research assistant seeking all reported cases involving disciplinary actions against prosecutors.[22] What the assistant came up with was something over one hundred cases.[23] Considering the multitude of federal and state prosecutions in a year, one hundred disciplinary cases a year would not only be far from staggering, but, in my opinion, would be far from adequate. On the other hand, one hundred cases in a ten-year period would be staggeringly inadequate.

But what if the researchers were able to find only one hundred cases in more than a century—fewer, that is, than one a year? Would that dispel any myths about inadequate discipline of prosecutorial misconduct? I raise the question because Professor Zacharias' research went back at least to 1886—a fact one learns only by reading a footnote.[24] In the text, the reader is told only that "many of the cases are old," with no indication of how very old they are.[25]

Disregarding his own data, Professor Zacharias concludes that "in appropriate cases, courts and disciplinary organizations *sometimes* have been willing to address prosecutorial misconduct."[26] When "sometimes" translates into less than once a year—nationwide, federal and state, and including cases of bribery, extortion, conversion, and embezzlement of state funds—why not simply say, straight out, that the research confirms the general view of scholars that prosecutors are far too seldom subjected to professional discipline for unethically abusing the rights of citizens?[27] Indeed, it is striking, in an article replete with charts and statistics, that Professor Zacharias never says in so many words that his research produced less than one case a year.

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21. *Id.* at 774.

22. *See id.* at 744 n.80 (describing the instructions given to the research assistants).

23. *See id.* at 744. Professor Zacharias does not say how many cases over one hundred, so I infer that the number wasn't enough to matter significantly.

24. *See id.* at 745 n.86. The case referred to is *In re Cowdery*, 10 P. 47 (Cal. 1886) (en banc). This case is one of nine involving bribery. *See* Zacharias, *supra* note 1, at 745 n.86. Others in the one hundred included extortion, conversion, and embezzlement, which is not the kind of case that critics have been lamenting about. *See id.* at 745-46 & nn.87-89.

25. *Id.* at 744.

26. *Id.* at 745 (emphasis added).

27. *See, e.g.*, Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 963 (1996).

Professor Zacharias might respond that the careful reader will not misinterpret or misuse what he has said. But all readers are not careful (and some read with a partisan eye). Indeed, Professor Zacharias himself has interpreted his own data to mean that there are a "fair" number of cases of professional discipline against prosecutors.[28] A conclusion that there are already a "fair" number of disciplinary cases is not likely to inspire more vigorous efforts by disciplinary authorities or a more realistic attitude on the part of judges. And if Professor Zacharias can so easily mischaracterize his own findings, it is likely that others will do so as well.

Also, in the course of providing justifications for the failure of disciplinary committees to discipline prosecutors more frequently, Professor Zacharias gives some reasons that are subject to question, and that could also discourage disciplinary action against prosecutors. He says, for example, that prosecutors who engage in the kind of misconduct decried in the cases and literature are typically "driven by an excess of zeal in pursuing the public good" and not, typically, for reasons of personal gain.[29]

A laudable motive like pursuing the public good should, of course, weigh against disciplinary action against any lawyer. Particularly coming from one who favors empirical research, however, the conclusion as to what "typically" motivates unethical prosecutors is a questionable one. Some of us, for example, have seen overzealous prosecutors motivated, at least in part, by career ambitions,[30] such as advancement to district attorney, judge, governor, senator, and even President; others have been motivated by a desire to gain experience, contacts, and public attention as credentials for a switch to a lucrative

28. *See* Audio tape: Ethics in Criminal Advocacy, Annual Meeting, held by Association of American Law Schools (Jan. 6, 2000) (on file with Author).

29. Zacharias, *supra* note 1, at 757. Professor Zacharias offers other justifications for infrequent discipline of prosecutors, including the availability of alternative remedies such as the appellate reversal of convictions, *see id.* at 758; the desire to avoid extensive litigation regarding the substantive basis of the prosecutor's legal theory where a new legal argument regarding a statutory or constitutional principle is at issue, *see id.* at 760; and a concern by disciplinary committees to avoid any infringement upon the separation of powers, since prosecutors are arguably members of the executive branch, while bar authorities usually operate under the rubric of the judiciary branch, *see id.* at 761.

30. *See, e.g.*, James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2124 n.231 (2000) (discussing instances where overzealous prosecutors' careers advanced after prosecutorial misconduct was committed); Penny J. White, *Errors and Ethics: Dilemmas in Death*, 29 HOFSTRA L. REV. 1265, 1280 & n.104 (2001) (stating that several prosecutors, whose conduct was described by an Illinois Appellate Court as "'[i]nexcusable'" and "'[a]n insult to the court and to the dignity of the bar,'" all "received promotions within their offices and now serve as judges") (alterations in original)).

job in private practice.[31] Also, one might question whether a commentator is as "impartial" and "dispassionate" as he claims when he presumes a pro bono motive when prosecutors suppress evidence or use false testimony.[32] One wonders whether Professor Zacharias is aware of the recent scandals involving prosecutorial suppression of evidence in cases—even in death penalty cases—in which the defendants have been found to have been innocent in fact.[33]

Similarly, Professor Zacharias asserts flatly in the text of his article that judicial opinions citing prosecutorial misconduct sometimes have "proven" to be no more than "literary exaggerations."[34] Again, only a careful reader of footnotes will find an acknowledgment that the proof that is unequivocally asserted in the text is in fact scant and far less than compelling.[35]

Further, Professor Zacharias suggests that there may be less discipline of prosecutors than of lawyers representing private clients because of the "lesser need ... in order to protect individuals."[36] However, every citizen who is convicted unjustly because of suppressed evidence or false testimony is an individual seriously in need of protection, no less than the victim of, say, solicitation (which is a favorite of bar authorities).[37]

In short, then, it would have been far better, even if less dramatic, if Professor Zacharias had simply reported that his research confirms that the conventional wisdom has been right all along—that prosecutors are far too seldom subjected to professional discipline, even for serious

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31. *Cf.* Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech*, 58 FORDHAM L. REV. 865, 888-89 (1990) (stating that "secur[ing] private sector legal employment and clients sometime in the future" is an economic motive for prosecutors to comment on cases outside the courtroom).

32. *See* Zacharias, *supra* note 1, at 757 & n.123. Elaborating on his theme of pro bono prosecutorial misconduct, Professor Zacharias offers the following apologia:

> [T]he offending prosecutors typically engage in misconduct ... because they are seeking to convict defendants they honestly believe should be convicted. Although such misconduct may be improper in light of the prosecutor's broad obligation to do overall justice, the misconduct occurs because of the prosecutor's misunderstanding of the nature of that role.

Id. at 757 n.123.

33. *See* Liebman, *supra* note 30, at 2110-11 (arguing that the Supreme Court's standard for releasing exculpatory evidence encourages prosecutors to suppress evidence, thereby causing the "overproduction of death").

34. Zacharias, *supra* note 1, at 759.

35. *See id.* at 759 n.132.

36. *Id.* at 758.

37. *See generally* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 237-65 (1990) (justifying solicitation in the interest of potential clients).

violations of their ethical obligations in the administration of justice. As shown in the beginning of this response, Professor Zacharias does that, in effect and in part. Unfortunately, however, much of his article is also dedicated to inaccurate and misleading assertions that suggest the contrary, and to questionable justifications for the failure to discipline prosecutors for unethical conduct. For those reasons, there is ground for concern that Professor Zacharias' article could encourage disciplinary authorities and judges to remain complacent about an extremely serious ethical problem in the administration of criminal justice.

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