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The Exercise of Prosecutorial Discretion

By Joel Cohen

In his column on Ethics and Criminal Practice, Joel Cohen discusses prosecutorial discretion in relation to the Jeffrey Epstein case, the Mueller Investigation, and the Jussie Smollett case, and writes: "Is prosecutorial discretion a good thing? Many argue that it can be lawless and tyrannical." He then looks at why discretion makes sense, "even if there is a glitch or two."

> *"The qualities of a good prosecutor are as elusive and as impossible as those which mark a gentleman. And those who need to be told would not understand it anyway."*
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> Robert H. Jackson, "The Federal Prosecutor," 31 J. Crim. L. 3 (1940).

There is a certain type of criminal defendant that doesn't—maybe shouldn't—have any chance whatsoever. Their conduct is undisputed, and so reprehensible, so disturbing, that no prosecutor can possibly keep a totally open mind in choosing to bring the most onerous charges against them. The weight of public opinion and, more important, the facts, are so heavily against them that any prosecutor who has them in their crosshairs simply can't be fully objective, as we ideally might expect them to be. Think Jeffrey Dahmer, Ted Kaczynski, El Chapo, John Gotti, Osama bin Laden.

While this type of defendant is rare, he or she does surface every now and again. We trust that our prosecutors will resist public outcry and decide whether to bring a case with total objectivity and professionalism. In theory at least, we want the prosecutor to exercise the same degree of "prosecutorial discretion"—which often favors a criminal target—as if the target were some random nobody. That random nobody deserving as much prosecutorial discretion as the guy who is armed with a high-powered defense lawyer; maybe even a lawyer who recently emerged from the U.S. attorney's office.

In truth, the Dahmer, et al. cases simply don't involve the need for discretion. There is no chance that a prosecutor would forego those prosecutions. Each of those cases would have been res ipsa, and warranted prosecution to the full extent of the law.

The 'Epstein' Case

But what about cases like Jeffrey Epstein? There seems little question that Epstein, despite his great business success and commendable philanthropic activity, has a sordid history of engaging in (criminal) physical relations with and serial rape of underage girls. Those actions led to a seemingly light criminal prosecution by the state attorney's office in West Palm Beach, Florida, and a contemporaneous and related criminal investigation by the U.S. attorney in Miami that, somewhat astonishingly given the reach of applicable federal statutes and a 53-page indictment, was essentially folded into the local prosecution.

The prosecutions resulted in a non-prosecution agreement in the federal case and a guilty plea in the state court action. Epstein registered as a sex offender and served a 13-month sentence in a private wing of a Palm Beach County jail, where he was granted work release so he could go to his office daily.

More relevant to this discussion, in exercising his discretion to decline to prosecute Epstein, the U.S. attorney went to extraordinary lengths to accede to the requests of Epstein's high-powered lawyers to keep the deal under wraps—even going so far, according to a federal district judge revisiting the case just this year, as violating the federal Crime Victims Reporting Act that requires federal prosecutors to notify victims of settlements in cases in which they are involved.

Let's assume that the Epstein case is an outlier—we don't know why the prosecutors did what they did, and may never know. But this case allows us to look at the question, as a matter of law and legal ethics, of the limitations concerning a prosecutor's discretion in deciding whether, and how leniently, to prosecute a defendant who has engaged in criminal activity.

Prosecutorial Decision-Making

Whenever discussing prosecutorial discretion, one must immediately turn to Professor Bennett Gershman's Prosecutorial Misconduct, 2d Ed., Thomson Reuters. Succinctly, "[t]he prosecutor decides whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial; plead guilty… . The prosecutor, in short, holds the power to invoke or deny punishment." §4.1.

The ABA Criminal Justice Standards for the Prosecution Function (the standards) 3-1.2, reminds us that the "primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict." The prosecutor serves the public interest and, as a "zealous advocate," "should exercise sound discretion and independent judgment." While discretion is not entirely unbridled, the fact is that a prosecutor enjoys enormous independence. Gershman §4.1.

Courts will not tell a prosecutor who to charge, when to charge or what to charge. Remember Attica? What about its aftermath? Prisoners claimed they were subjected to cruel and inhuman treatment; they revolted and, during the ensuing riot, 32 inmates were killed and some 400

were wounded. Of the 37 people indicted, all were inmates. The wounded and families of the deceased sought mandamus to compel the U.S. attorney to investigate and prosecute the guards and administrators. The U.S. Court of Appeals for the Second Circuit reiterated the established rule that, incident to the separation of powers doctrine (the prosecutor being a member of the executive branch), courts "are not to interfere" with the discretionary powers of the U.S. Attorney.

This was the case even where the controlling statute stated that the U.S. attorney is "authorized and required" to prosecute certain crimes: "On balance, we believe that substitution of a court's decision to compel prosecution for the U.S. attorney's decision not to prosecute, even upon an abuse of discretion standard of review and even if limited to directing that a prosecution be undertaken in good faith [citation omitted] would be unwise." Inmates of Attica Correctional Facility v. Rockefeller, 477 F 2d 375 (2d Cir. 1973). See U.S. v. Batchelder, 442 U.S. 114 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.")

Is prosecutorial discretion a good thing/? Many argue that it can be lawless and tyrannical. Justice (then Attorney General) Robert H. Jackson famously told us: "If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted." (The Federal Prosecutor.)

But let's look at why discretion makes sense, even if there is a glitch or two—or, indeed, likely more. Discretion allows for individualized justice—each target can be looked at in context and treated accordingly. It will also weed out those crimes which are "on the books" but no longer practically enforceable because of changing social mores. Gershman, §4.3. Conflicts of interest or demonstrable bad faith, corruption or misconduct may allow a court to substitute a special prosecutor. But those cases are few and far between. Gershman §4.5.

The standards are instructive, and are an ethical guidepost. However, the charging decision involves "so many factors and considerations that it cannot be reduced to a simple formula." Gershman, "Prosecutorial Decisionmaking and Discretion in the Charging Function," 62 Hastings L. J., 1259 (2011). And isn't that the point? Prosecutors must be able to make a judgment call in order to properly and ethically do their jobs. Of course, prosecutors "should not use…improper considerations, such as partisan or political or personal considerations." 3-1.6(a). Indeed, a prosecutor should file charges "only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient…and that the decision to charge is in the interest of justice." 3-4.3(a).

A prosecutor, however, "should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence." 3-4.3(d). There can be no vindictive, bad faith or selective prosecution—no discriminatory intent, or even effect. See generally, Gershman, Chapter 4; Yick Wo v. Hopkins, 118 U.S. 356 (1886). Establishing discrimination,

however, is a "heavy burden" and the exercise of "some selectivity in enforcement of the law is not in itself a constitutional violation." People v. Goodman, 31 N.Y. 2d 262 (1972).

The Mueller Investigation

Finally, as it relates to the headlines involving the special counsel, attorney general and president, the term "prosecutorial discretion" has actually not been employed (at least thus far) in analyzing the controversial events surrounding Mueller's decision to conclude that the president obstructed justice. Still, couldn't it have been?

Putting aside the likely outcry had Mueller chosen to do so, couldn't he simply have said that he was exercising his "prosecutorial discretion" to decline prosecuting the president even if he had determined him to be guilty of obstruction on the basis that the American citizenry might have been disserved on the world stage by a public accusation against its sitting president—any president? While Second Circuit law actually accords a prosecutor such a right to decline prosecution without interference from the courts, don't we actually want prosecutors to be able to make such decisions, particularly when, unlike the facts in Epstein, the prosecutor is in full compliance with law (and is not abusively making his decision or making it on selective or discriminatory grounds)?

What about that discretion? Returning to Justice (then attorney general) Jackson:

> A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Finally, in considering these thoughts, what might Justice Jackson have thought about how discretion was exercised in the prosecution of Jussie Smollett, especially after the indictment against him was filed by the district attorney? Was power abused; was truth sought; was the law served; and was discretion exercised with humility? Clearly not a good precedent at all for the exercise of prosecutorial discretion!

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