

Bennett Gershman on the Prosecutor's Role as "Minister of Justice"

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Abstract

Professor Bennett Gershman has written extensively about the role of prosecutors as "ministers of justice." Where others question or criticize the concept, he has found meaning in it. This essay in his honor briefly highlights his work on this theme and then offers additional reflections on the concept of prosecutors as ministers of justice.

I. INTRODUCTION

Courts and professional associations have described prosecutors as "ministers of justice."¹ That is what distinguishes prosecutors from other lawyers. For criminal justice to be administered fairly, it is essential for prosecutors to act in conformity with this role. But one might fairly ask, what does it mean to say that prosecutors are "ministers of justice"?

Some scholars challenge the utility of the concept or criticize it as being vague to the point of it being meaningless.² But over the course of three decades of writings examining the work of prosecutors, Professor Bennett Gershman has taken the concept to heart. He seeks to imbue it with meaning in order to guide prosecutors and to provide a basis for critiquing them when they fall short. His writings build on his inside knowledge as a former Manhattan prosecutor, but also bring to the task the critical eye and analytical rigor of an academic.³

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¹ E.g., ABA MODEL RULES OF PROF'L CONDUCT, r. 3.8 cmt (Am. Bar Ass'n, 2015) ("A prosecutor has the responsibility of a *minister of justice* and not simply that of an advocate.") (emphasis added).

² See, e.g., Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301 (1996) (discussing critically the history and use of the phrase "minister of justice").

³ Bennett L. Gershman, *The Prosecutor as "Minister of Justice,"* 60 N.Y. ST. B. J. 8 (1998).

This essay, in deserving tribute to Professor Gershman and his scholarly career, begins by highlighting some of his insights about prosecutors as ministers of justice, follows by adding some further thoughts of my own, and concludes with brief reflections.

II. PROFESSOR GERSHMAN ON “MINISTERS OF JUSTICE”

Throughout his career as a scholar, Professor Gershman has reminded prosecutors of their role as ministers of justice and of the significance of this role. His earliest work on the topic is a 1988 bar journal article, written when he was an adjunct professor. His latest work appeared in a chapter of his 2017 book, *The Prosecution Stories*.⁴ In between, recognizing the importance of the concept, Professor Gershman emphasized prosecutors’ unique role in an impactful article in the early 1990s on changes to the nature of criminal prosecution,⁵ and he selected “the prosecutor as a minister of justice” as the theme of his 2011 tribute to the late Fred Zacharias, another giant in our field.⁶ This theme is no less fitting for an essay honoring Professor Gershman.

Professor Gershman’s 1988 bar journal article, titled, *The Prosecutor as “Minister of Justice,”* recognized that the Supreme Court, having lost interest in criminal defendants’ fair process rights, could no longer be counted on to regularly issue opinions protecting criminal defendants from abuses of state power as it had during the years of the Warren Court’s criminal procedure revolution.⁷ But this did not mean that prosecutors should be allowed to exploit their considerable power. Rather, Professor Gershman was among the first to identify prosecutorial discretion, left virtually unrestricted by the Supreme Court, as a criminal procedure subject of particular concern given the possibilities for abuse.⁸ He called on trial courts to “exercise more vigilance and control” in overseeing prosecutorial discretion.⁹ He

⁴ BENNETT L. GERSHMAN, *The Prosecutor as a Minister of Justice*, in PROSECUTION STORIES 263–85 (2017) (providing stories of cases that he declined to prosecute and that might be considered by some as cases that he lost).

⁵ Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (noting changes that occurred to the prosecutor’s role).

⁶ See Bennett L. Gershman, *The Zealous Prosecutor as Minister of Justice*, 48 SAN DIEGO L. REV. 151 (2011) (providing a tribute to Fred Zacharias and his work pertaining to prosecutors as ministers of justice).

⁷ See Gershman, *supra* note 3, at 8 (discussing a post-*Mapp*, *Huntley* and *Wade* environment).

⁸ Professor Gershman states that “[n]o area of criminal justice is more complex and controversial than that of the prosecutor’s discretion, particularly as it relates to charging, plea bargaining, dismissing, and granting immunity.” *Id.* at 63.

⁹ *Id.*

also called on “[c]ourts and bar associations . . . to send out better messages, and provide stronger incentives for prosecutors to behave fairly.”¹⁰

A few years later, in his 1991–92 article on “the new prosecutors,” Professor Gershman described how prosecutors had acquired increased power, “more insulat[ion] from judicial control over their conduct,” and increasing immunity from ethical restraints.¹¹ Attributing these changes to the then-prevalent crime-control environment,¹² he provided examples of “a radical skewing of the balance of advantage in the criminal justice system in favor of the state.”¹³ He questioned whether U.S. prosecutors can be the ministers of justice in this environment or whether they can “‘temper zeal with human kindness’ as Justice Jackson recommended,”¹⁴ and he called for the “[e]quilibrium [to be] restored because the prosecutor, with the power of the state behind him or her, should not have this unfair advantage.”¹⁵ He warned that “[g]iven the well-documented existence of [prosecutorial] misconduct, the current laissez-faire attitude of the courts, and the disappointing response of professional grievance committees, there is a potential for even greater misuse.”¹⁶

In his 2011 tribute to Professor Zacharias, Professor Gershman returned to the minister-of-justice theme.¹⁷ He expressed appreciation for Professor Fred Zacharias’s “faith that the adversarial system has the capacity to correct itself and that prosecutors have the courage and integrity to step out of their purely adversarial roles and ensure that justice is done.”¹⁸ But Professor Gershman advocated a less “romantic” and more forceful approach to ensuring proper prosecutorial conduct.

Most recently, Professor Gershman’s 2017 book, *Prosecution Stories*, described his experiences as a Manhattan prosecutor in cases presenting ethical and professional dilemmas. A chapter titled, *The Prosecutor as a Minister of*

¹⁰ Gershman notes that “if the prosecutor were forced to appear before the appellate tribunal to defend his or her conduct, the incidence of courtroom misconduct might diminish.” *Id.* at 64.

¹¹ Gershman, *supra* note 5, at 393.

¹² *Id.*

¹³ *Id.* at 394.

¹⁴ *Id.* at 457.

¹⁵ *Id.* at 394.

¹⁶ *Id.* at 458.

¹⁷ *See* Gershman, *supra* note 6.

¹⁸ *Id.* at 155.

Justice,¹⁹ and subtitled Fair Blows and Foul Blows²⁰ contains stories about “confessing error,” handling a case when the accused is innocent of the charges, moving to dismiss a case that is not legally supported, and handling cases that are not supported by enough evidence to obtain a conviction. In each instance, Professor Gershman made the right call, sometimes overcoming obstacles placed in his path. For example, he describes persuading a court to dismiss a case over the court’s initial resistance. What is particularly important in these examples is that the ethics rules did not dictate the right course of action. The prosecutor was called on to exercise discretion wisely, often when facing adversity from a judge or others.²¹ The prosecution might be described as “losing” each of the cases in the chapter. But the stories illustrate that successfully “doing justice” does not always mean securing a conviction. While Professor Gershman’s earlier writings educated prosecutors about how to fulfill their role as ministers of justice while encouraging judicial oversight to assure that prosecutors stay within the appropriate legal and ethical lines, the book chapter contributes something more: it offers stories that can be used for teaching and reflecting on how a prosecutor, making discretionary decisions, resolves hard questions as a “minister of justice.”²²

III. FURTHER THOUGHTS ON PROSECUTORS AS “MINISTERS OF JUSTICE”

Professor Gershman has not written the last word on the implications of the prosecutor’s role as “minister of justice” and no one could. Continued thinking is warranted in light of ongoing changes in the criminal process and in the nature of criminal prosecution. Frustration with the “minister of justice” concept is understandable. Like defense lawyers, prosecutors are advocates in the criminal justice process,²³ but they have further responsibilities to ensure the fairness of the criminal justice process that makes them different from one-sided advocates.²⁴ The prosecutor represents the public²⁵ and has a responsibility to assure a fair process for

¹⁹ GERSHMAN, *supra* note 4, at 263–85.

²⁰ *Id.* at 263. (Professor Gershman notes the source of this terminology from *Berger v. United States*, 295 U.S. 78, 88 (1935)) (“while he may strike hard blows, he is not at liberty to strike foul ones”).

²¹ *Id.*

²² See Bruce A. Green & Samuel Levine, *Disciplinary Regulations of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143 (2016) (looking at the best ways to regulate prosecutorial discretion).

²³ MODEL RULES OF PROF’L CONDUCT, r. 3.8, cmt (Am. Bar Ass’n, 2015).

²⁴ *Id.* (stating that “[t]his responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”)

²⁵ STANDARDS FOR CRIMINAL JUSTICE § 3-1.3 (AM. BAR ASS’N 2015) (“[T]he prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit,

the accused.²⁶ How one reconciles these responsibilities is sometimes clear, but prosecutors can face hard questions in all aspects of their work.²⁷ Sometimes prosecutors respond by relying on gut instinct,²⁸ making decisions for reasons that are unarticulated or not fully articulated. But one cannot assume that prosecutors have such well-refined instincts that, without training and conscious deliberation, they can be counted on to act wisely.

At the very least, prosecutors must comply with the law and ethics rules, and those who fail to do so cannot fairly call themselves “ministers of justice.”²⁹ Prosecutors’ professional misconduct is well documented and described in Professor Bennett Gershman’s book, *Prosecutorial Misconduct*.³⁰ Sadly, in the quest to win convictions, prosecutors have crossed the lines in a host of ways.³¹ The list of improprieties includes *Brady* violations in failing to turn over favorable evidence to the defense,³² using pretextual peremptory challenges in jury selection to foster

witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor’s clients . . .”). This Standard differs from the Standard used in the Third Edition of the *ABA Criminal Justice Standards* which stated that “[A] prosecutor’s client is the people who live in the prosecutor’s jurisdiction.” STANDARDS FOR CRIMINAL JUSTICE, § 3-1.3 cmt. (AM BAR ASS’N 1993).

²⁶ E.g., MODEL RULES OF PROF’L CONDUCT, r. 3.8(b) (AM BAR ASS’N 2015) (stating that prosecutors shall “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.”).

²⁷ See generally Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35 (2009). (noting that in examining the role of a “minister of justice” one needs to not only look at prosecutors’ pre-trial and trial conduct, but also at their post-conviction conduct.)

²⁸ See Bruce A. Green, *Why Should Prosecutors “Seek Justice,”* 26 FORDHAM URB. L.J. 607, 608 (1999) (noting that in discussing the prosecutor’s job to “do justice,” that “[s]ometimes the concept was implicit in the way a senior lawyer worked through a hard question with a new prosecutor: What, she might ask, was the right thing to do?”)

²⁹ See Abbe Smith, *Can You Be A Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 376–77 (2001) (discussing the prosecutor’s duty to seek justice); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 103 (1991) (examining the “do justice mandate”).

³⁰ See generally BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* (2d ed. 2015–16).

³¹ See Kenneth Bresler, *“I Never Lost a Trial”: When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 546 (1996) (“When prosecutors count convictions, they are hardly wearing the mantle of power humbly.”); see also Peter A. Joy, *Prosecution Clinics: Dealing With Professional Role*, 74 MISS. L.J. 955, 958 (noting how a prosecutor should not be merely an “advocate focused on winning each case,” but that the prosecutor also has the role of being a “minister of justice.”).

³² *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that prosecutors are required to provide to defense counsel evidence favorable to the accused). The ethics rule on providing exculpatory evidence to the defense is stricter in stating that in a criminal case, the prosecutor shall “make timely

racial bias,³³ and trial improprieties that can taint the trial process,³⁴ such as commenting on a defendant's failure to testify at trial.³⁵ Prosecutors' unethical conduct has gained public notoriety, such as the case of the wrongful prosecution of Duke lacrosse players in North Carolina.³⁶ Changes in the law have also resulted, as seen following the Michael Morton case in Texas.³⁷

One hard question, addressed in many of Professor Gershman's writings, is how to prevent or punish prosecutorial misconduct. In August 2018, New York became the first state to establish a commission to investigate complaints of prosecutorial misconduct—an idea that Professor Gershman had advocated for in his writing for more than four years.³⁸

Equally hard are the questions involving prosecutorial conduct that are not forbidden by the law or ethics rules but that may still fall short of what is or should

disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." MODEL RULES OF PROF'L CONDUCT, r. 3.8 (AM BAR ASS'N 1983). It does note that the prosecutor is relieved of this responsibility when the prosecutor has "a protective order of the tribunal." *Id.* Many cases since *Brady* had expounded upon the responsibilities of the prosecution. *See, e.g.,* Giglio v. United States, 405 U.S. 150, 154–55 (1972) (holding that the prosecutor's discovery obligations include impeachment material). But *Brady* violations continue to infect the criminal justice system. *See generally* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016) (discussing *Brady* violations and how the information age has changed prosecutorial accountability).

³³ *See, e.g.,* Foster v. Chatman, 136 S. Ct. 1737, 1768 (2016) (striking of black prospective jurors denied the defendant of constitutional rights); *see also* Ellen S. Podgor, *The Role of the Prosecution and Defense Function Standards: Stagnant or Progressive?*, 62 HASTINGS L.J. 1159, 1173 (2011) (discussing the writing of the criminal justice standard on requiring prosecutors not to strike jurors premised on sexual orientation).

³⁴ BENNETT L. GERSHMAN, *Prosecutorial Misconduct* (2d ed. 2015–16) (examining all aspects of prosecutorial misconduct); *see also* Ellen S. Podgor & Jeffrey S. Weiner, *Prosecutorial Misconduct: Alive and Well, and Living in Indiana?*, 3 GEO. J. LEGAL ETHICS 657 (1990) (providing examples of different types of prosecutorial misconduct that has occurred in criminal trials).

³⁵ *See* Griffin v. California, 380 U.S. 609, 615 (1965) (holding that it is violation of defendant's Fifth Amendment Self-Incrimination rights when a prosecutor comments on the accused failure to testify).

³⁶ *See generally* Robert P. Mosteller, *The Duke LaCrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337 (2007) (discussing prosecutor Michael Nifong's actions in the Duke lacrosse case).

³⁷ *See* Gerald S. Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, or Not*, 48 TEXAS TECH L. REV. 893, 899 (2016) (discussing the actions of former District Attorney Ken Anderson in his handling of the case of Michael Morton; a case that resulted in Anderson being removed from the bench as a judge and being sentenced to ten days in prison).

³⁸ *See* Bennett L. Gershman, *New Commission to Regulate Prosecutorial Misconduct*, HUFFINGTON POST (May 20, 2014, 12:09 PM) https://www.huffingtonpost.com/bennett-l-gershman/new-commission-to-prosecutorial-misconduct_b_5353570.html.

be expected of a “minister of justice.” The normative expectations are not always clear and certainly not set in stone. This is where the important analytic work must be done by academics and members of the legal profession, to help prosecutors and the public understand where the lines should be drawn.

Prosecutors are expected to exercise sound judgment and a sense of proportionality. This can be seen when examining prosecutors who bring criminal charges that they believe the law permits, without first considering whether prosecution, or the harshest prosecution, is truly necessary.³⁹ Former Attorney General Ashcroft took this approach by requiring prosecutors to charge the highest possible offense without consideration of whether that offense was the most appropriate for the defendant.⁴⁰ Former Attorney General Jeff Sessions appears to have followed suit, although perhaps allowing federal prosecutors slightly more flexibility.⁴¹ A prosecutor is not a true “minister of justice” when their rigid approach to charging crimes takes no account of potential defendants’ individual circumstances. Prosecutors should make an individualized assessment of each defendant’s conduct and characteristics, to determine the defendant’s level of moral culpability and the extent to which a prosecution will serve the need for punishment. Merely matching people’s conduct to the elements of a criminal statute may offer insight into whether the law has been broken, but it does not answer the question whether that individual should be prosecuted.

There is a premium on prosecutors’ sound exercise of discretion, with an eye toward the public interest and the legitimate objectives of the criminal process. In exercising discretion, prosecutors must avoid the temptation to placate a victim or to promote their own reputation (such as by garnering favorable publicity) or their careers (such as, in the case of elected prosecutors, by making decisions simply

³⁹ See Ellen S. Podgor, *Race-ing Prosecutors’ Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461 (2009) (discussing problems with merely matching conduct to statutes).

⁴⁰ See Memorandum from Att’y Gen., to All Federal Prosecutors, *Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing*, (Sept. 22, 2003), https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm; Alan Vinegrad, *The Sessions Memo: Back to the Past?* THE VERA INSTITUTE OF JUSTICE (May 25, 2017), <https://www.vera.org/blog/the-sessions-memo-back-to-the-past> (discussing how Attorney General Sessions is moving away from the policy of the Obama Administration that focused on prosecutors using an “individualized assessment” in charging).

⁴¹ See Memorandum from Att’y Gen., to All Federal Prosecutors, *Department Charging and Sentencing Policy*, (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> (“prosecutors should charge and pursue the most serious, readily provable offense.”) The Memo does note an exception in stating that “[t]here will be circumstances in which good judgment would lead a prosecutor to conclude that a strict application of the above charging policy is not warranted.” The Memo states that such deviations from the strict standard require higher approvals and “the reasons must be documented in the file.” *Id.*

because they will be popular).⁴² Not every case deserves to be prosecuted, not even when prosecutors are convinced of a person's guilt and convinced they can prove it. Prosecutors must decide which among these cases to prosecute based on sound reasoning. The law rarely dictates their decisions: Prosecutions are rarely dismissed for impermissible selectivity.⁴³ Moreover, legislatures' tendency to write too many criminal laws gives prosecutors too many statutes from which to choose.⁴⁴ When the cases prosecutors investigate turn out to be too hard to prove or too complicated to explain to jurors,⁴⁵ prosecutors can be tempted to take shortcuts, prosecuting people for false statements,⁴⁶ perjury⁴⁷ or obstruction of justice.⁴⁸

The minister of justice role also calls for a sense of fair play, and prosecutors acknowledge this to varying degrees. With respect to some areas of conduct, Department of Justice policy gives expression to prosecutors' roles as "ministers of justice" by recognizing the need for self-imposed obligations and self-restraint beyond what the law demands. For example, the Supreme Court has found that prosecutors, in seeking an indictment, have no obligation to alert the grand jury to exculpatory evidence.⁴⁹ Department of Justice guidelines nevertheless call upon federal prosecutors to be candid with the grand jury, recognizing that, as a matter of procedural fairness, the grand jury should be apprised of important exculpatory evidence so that it can make a well-informed decision whether to indict, and that a

⁴² Campaign pledges to prosecute certain individuals can be equally offensive. See Peter A. Joy & Kevin C. McMunigal, *Campaign Pledges to Prosecute*, 21 CRIM. JUST. 40 (2007) (discussing the conflict of interest issues arising from campaign pledges to prosecute).

⁴³ See *Wayte v. United States*, 470 U.S. 598, 608 (1985) (holding that selective prosecution claims required a showing that the government's decision "had a discriminatory effect and that it was motivated by a discriminatory purpose.").

⁴⁴ See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM U. L. REV. 703 (2005) (discussing the increasing number of federal statutes and the problems of overcriminalization).

⁴⁵ See Ellen S. Podgor, *White Collar Shortcuts*, 2018 U. ILL. L. REV. 925 (2018) (discussing the use of shortcut offenses in prosecuting white collar crime).

⁴⁶ There are many "false statement" statutes in the federal code, including false statements on tax returns (26 U.S.C. § 7206 (2018)), false statements related to the sale of any mortgage to a bank (18 U.S.C. § 1011 (2018)), and the generic false statement statute (18 U.S.C. § 1001 (2018)).

⁴⁷ Prosecutors often use charges of perjury (18 U.S.C. § 1621 (2018)) or false declarations (18 U.S.C. § 1623 (2018)), as these offenses can be easier to prove.

⁴⁸ "It is often easier for the government to prove the destruction of documents, lying to investigators, or lying to a grand jury, than to present fraudulent complicated financial transactions." PODGOR ET AL., *WHITE COLLAR CRIME* 167 (2d ed. 2018) (providing a comprehensive review of the law of obstruction of justice).

⁴⁹ According to the Supreme Court, presenting exculpatory material to a grand jury is not constitutionally required. See *United States v. Williams*, 504 U.S. 36 (1992).

prosecutor who withholds such evidence, though law-abiding, is not acting as a minister of justice.⁵⁰

Prosecutorial self-restraint is also called for when a person's guilt is uncertain and when the evidence is not strong enough to make a conviction likely. Prosecutors don't always recognize this approach. As United States Attorney for the Southern District of New York, James B. Comey reportedly challenged prosecutors to bring cases, branding those who were fearful of proceeding with difficult cases because of a possible loss, as members of the "chickenshit club."⁵¹ While he was correct that prosecutors should not be preoccupied with securing convictions,⁵² one might challenge his premise that prosecutors should bring weak cases, thereby employing the criminal process as punishment for those unlikely to be convicted.⁵³

Professor Gershman's 2017 collection of prosecution stories illustrates the importance of assessing individuals' guilt. For example, he describes how in prosecutions arising out of student demonstrations at Columbia University in the late 1960s, the evidence was deficient because the "officers who entered the buildings

⁵⁰ The Department of Justice U.S. Attorneys Manual instructs its attorneys "that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." U.S. DEPT. OF JUSTICE, ATTORNEYS' MANUAL § 9-11.233 (2018). This guideline, however, is not enforceable at law and merely internal department guidance. See U.S. DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL § 1-1.200 (2018). See also Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J. OF L. & PUB. POL'Y 167 (2004) (discussing enhanced compliance with Department of Justice guidelines); Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1 (1971) (discussing the reasons for having Justice Department guidelines as non-mandatory).

⁵¹ See JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* ch. 5 (2017) (discussing then-United States Attorney James Comey's initial speech to his prosecutor's calling those who had not lost cases as members of the "chickenshit club." He stated, "[i]f it's a good case and the evidence supports it, you must bring it.").

⁵² Jesse Eisinger writes that James B. Comey called for prosecutors to be "righteous, not careerist." Eisinger wrote that "[v]ictory in the courtroom should be a secondary concern, meaning that government lawyers should neither seek to win at all costs nor duck a valid case out of fear of losing." *Id.*

⁵³ Bringing cases with weak or limited admissible evidence may be considered acceptable by some, so long as the prosecutor believes in the guilt of the accused and has probable cause for the bringing of the charges. ABA standards however, seem to counter that position and only provide for "*Minimum Requirements for Filing and Maintaining Criminal Charges.*" Specifically, the "Prosecution Standard" provides that "a prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, *that admissible evidence will be sufficient to support conviction beyond a reasonable doubt*, and that the decision to charge is in the interests of justice." See CRIMINAL JUSTICE STANDARDS, Prosecution Standard § 3-4.3(a) (AM BAR ASS'N 2015) (emphasis added). Additionally, there is the further minimum requirement that "[a]fter criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support the conviction beyond a reasonable doubt." *Id.* at Standard 3-4.3(b).

and removed the students were not the same ones who then took custody of the persons arrested” and placed them in buses transporting them downtown for arrest.⁵⁴ These cases presented a challenge to the local prosecutors, who fulfilled their obligations as “ministers of justice” by moving to dismiss the cases prior to trial, recognizing that no legitimate purpose would be served by prolonging prosecutions that would eventually fail.

Even when far more significant wrongdoing occurs, it is inappropriate to proceed with a prosecution when there is good reason to doubt the defendant’s culpability.⁵⁵ One should not be bullied into thinking that they are a member of a disdained “chickenshit club” when they decide not to prosecute a weak or doubtful case. A trial inflicts pain on the defendant and a cost on the public. The collateral consequences of trials, irrespective of the verdict, can be devastating to an individual or entity. Jobs may be lost, families may be torn apart, assets may be eaten up in legal fees, and companies may be thrown into bankruptcy. Of course, if a conviction results, the direct and collateral consequences can be even more severe.⁵⁶ Prosecutors have a duty to avoid not only wrongful convictions but also wrongful prosecutions.

⁵⁴ *Id.* at 282.

⁵⁵ See generally Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 342–52 (2001) (discussing how prosecutors “should have the courage to decline prosecution if he entertains a reasonable doubt of the defendant’s guilt.”).

⁵⁶ See, e.g., COLLATERAL CONSEQUENCES RESOURCE CENTER, <http://ccresourcecenter.org/> (last visited Aug. 15, 2018); JUSTICE CENTER NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.csgjusticecenter.org/> (last visited Aug. 15, 2018); OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE, NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, <https://www.nij.gov/topics/courts/pages/collateral-consequences-inventory.aspx> (last visited Aug. 15, 2018).

IV. CONCLUDING REFLECTIONS

Professor Gershman deserves to be celebrated for his devotion to the prosecutor's role as a "minister of justice." His work as a law professor and scholar in educating future and current "ministers of justice" serves an important purpose. Among other things, his work helps counterbalance the overly harsh "crime control" mentality that leads some prosecutors to focus more on ridding the streets of criminals than on assuring that the individuals being prosecuted are in fact the guilty parties and deserving of punishment. He has helped clarify the lines between proper and improper prosecutorial behavior and demonstrated the need to deter and sanction improper behavior. By magnifying the importance and complexity of prosecutors' work, he has inspired others to speak and write on the importance of "what would a "minister of justice" do" in various situations." More needs to be written on this question. Fortunately, Professor Gershman has shown no sign of slowing down. Both the profession and academy will be well served if Professor Gershman continues providing history, cases, stories and analyses of prosecutors' role as "ministers of justice" for many more years to come.