

The Power of the Prosecutor in the United States

Introduction

Prosecutors hold a significant and unique position within the American criminal justice system. They possess extensive discretion and authority, impacting the lives of arrestees and defendants profoundly. This document aims to provide a comprehensive understanding of the power wielded by prosecutors, their discretionary abilities, and the ethical and legal frameworks guiding their actions. This material accompanies a course on the power of prosecutors in the United States, featuring insights from law professors and former prosecutors, Bruce Green and Rebecca Roiphe.

Prosecutorial Discretion and Charging Decisions

Overview

Prosecutors have the power to make critical decisions, including initiating charges, selecting charges, negotiating plea bargains, and recommending sentences. This power, however, is bound by constitutional standards and ethics rules, ensuring that prosecutorial discretion is not entirely unfettered.

Probable Cause Standard

Both ethical and legal standards mandate that prosecutors only institute criminal charges supported by probable cause. The American Bar Association (ABA) Prosecution Standard and the ABA Model Rules of Professional Conduct Rule 3.8(a) explicitly require this. Notably, probable cause sufficient for an arrest does not necessarily suffice for initiating charges.

State vs. Federal Prosecutors

Conviction rates differ significantly between state and federal prosecutors. Federal prosecutors generally have higher conviction rates due to their ability to be more selective in the cases they pursue, often opting for cases with a higher likelihood of conviction. Additionally, federal prosecutors have jurisdiction over certain crimes that might also be civil offenses, allowing them to decide whether to pursue criminal charges or defer to civil enforcement agencies.

Charging Decisions at the State Level

At the state level, the charging decision process involves multiple steps, starting with police arrests based on probable cause, followed by assessments from Assistant District Attorneys

(ADAs) and bureau chiefs. Factors considered in charging decisions include the severity of the crime, victim impact, financial aspects of the crime, deterrent effects, and any mitigating circumstances.

Grand Jury Proceedings

Prosecutors present cases to grand juries either to bring charges or to investigate further. At the federal level, presenting a case to the grand jury typically results in a true bill, indicating probable cause for trial. However, this is not always the case at the state level. High-profile cases, like the Ferguson case involving Officer Darren Wilson, illustrate the complexities and public scrutiny surrounding grand jury proceedings.

Disclosure Obligations

Standards

The Due Process Clause of the Fourteenth Amendment requires prosecutors to disclose all materially exculpatory evidence. The Brady Rule encompasses both exculpatory and impeachment evidence. The ABA Model Rule 3.8(d) imposes an even higher standard, requiring the disclosure of all exculpatory evidence without a materiality requirement, though it does not extend to impeachment evidence.

Materiality and Timeliness

Prosecutors may interpret the materiality of evidence differently, creating a gap between constitutional and ethical requirements. Timeliness in disclosure varies, with some prosecutors opting for early disclosure to gain judicial credibility, while others may withhold evidence for strategic reasons.

Overcharging and Plea Bargaining

Overcharging Practices

Overcharging involves filing multiple charges for a single criminal act or charging an offense at a higher level than warranted. This practice is subjective and often perceived as a tactic to leverage plea bargains. The threat of harsh sentences can pressure defendants into pleading guilty, though this does not necessarily imply insufficient proof.

Plea Bargaining

Plea bargains are agreements where defendants plead guilty to certain charges in exchange for the prosecution dropping other charges. This practice is especially prevalent in federal drug-related cases, where harsh mandatory minimum sentences are common. A significant

majority of federal drug defendants (97%) resolve their cases through plea bargains, often due to the daunting prospects of trial.

Extrajudicial Communications

Standards

The ABA Model Rules of Professional Conduct prohibit lawyers from making extrajudicial statements that could materially prejudice a case. Additional obligations on prosecutors aim to prevent comments that might heighten public condemnation of the defendant.

Notable Examples

Several high-profile cases illustrate the impact of extrajudicial statements. For instance, Angela Corey's comments during the Trayvon Martin case, Patrick Fitzgerald's remarks about Rod Blagojevich, and Preet Bharara's statements in the Sheldon Silver case have all drawn ethical scrutiny. These examples highlight the delicate balance prosecutors must maintain between public communication and ethical responsibilities.

Conclusion

Prosecutors wield considerable power within the American criminal justice system, shaping the outcomes of countless lives through their discretion as to which cases to bring and which crimes to charge. Understanding the legal and ethical frameworks governing prosecutorial conduct is crucial in understanding the criminal justice system. This course material aims to provide an exploration of these dynamics, guided by the expertise of Professor Green and Professor Roiphe.