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Vanessa Martin
American University Washington College of Law

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A Discussion of "The American Prosecutor: Power Discretion and Accountability"[1]

*Vanessa Martin**

The *Criminal Law Brief* ("*Brief*") is a publication committed to creating a forum to foster dialogue and encourage debate, while not shying away from controversy in exploring pertinent, yet sometimes contentious issues in criminal justice. In its first two issues, the *Brief* succeeded in drawing attention to a crucial, and often debated, issue in the U.S. criminal justice system: the role of the American prosecutor and the use of prosecutorial discretion.[2]

The *Brief*'s inaugural issue featured an article written by Professor Angela Davis,[3] entitled "Prosecutors Who Intentionally Break the Law."[4] Using statistical analysis and specific case studies, Davis examined reported cases of prosecutorial misconduct and argued that prosecutors across the country have committed gross abuses of both their power and discretion.[5] Davis went on to criticize the court system, which she asserted has helped facilitate the "widespread and unchecked" problem of prosecutorial misconduct.[6] In her critique, Davis argued that prosecutorial misconduct is often purposeful, vindictive, and done to fuel the personal careers of prosecutors, not the goals of the criminal justice system.[7] Davis' article called for meaningful reform so as to create greater prosecutorial accountability.[8]

In response to Davis' article, members of the prosecutorial community expressed incredulity. For many prosecutors, the type of culture and behavior Davis described was foreign. One such community member was Professor Randall Eliason.[9] Eliason issued a response to Davis in the *Brief*'s second issue, calling Davis' vision of the "role of the prosecutor" an unfair and inaccurate characterization.[10] In his article, entitled "The Prosecutors Role: A Response to Professor Davis,"[11] Eliason asserted that the behavior Davis described is the exception rather than the norm.[12] Eliason's article differentiated "prosecutorial misconduct," from "prosecutorial error."[13] He argued that prosecutorial errors are often the simple mistakes committed in criminal cases by the prosecution. These errors are typically routine, inadvertent missteps that almost *all* attorneys commit at some point.[14] However, when done by the prosecution in a criminal case they are subject to court objections, possible legal challenges, and subsequently labeled "misconduct."[15] He argued that when prosecutorial errors are mischaracterized as "purposeful" prosecutorial misconduct, it distorts both the meaning of the term, as well as the statistics concerning the behavior.[16] Further, Eliason noted, a prosecutor's duty is to seek justice, both legally and ethically, and for most prosecutors, that duty defines the very essence of how they do their work.[17]

Professors Davis and Eliason's articles illustrate the tension that exists within our criminal justice system between prosecutors and defense counsel, each seeking to ensure that justice is done in an imperfect system. Attorneys who dedicate themselves to the field of criminal law embody a dedication and passion unimagined by most. Prosecutors and defense counsel alike strive to do what they believe is right, and at the same time challenge the system, and thus their adversary, when they believe that their adversary is not upholding his duty to our system of justice.

> The prosecutor in a criminal trial shall:
>
> (d) make timely 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 know to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
>
> Model Rules Of Prof'l Conduct R. 3.8(d) (2000)

How Does A Community Resolve The Tension?

While no solution can be found overnight, to start, a discussion must be initiated, there must be an acknowledgment of a problem, and there must exist a mutual desire for a solution. On January 31, 2007, the *Brief*, in conjunction with the Program on Law and Government at American University, Washington College of Law sponsored an event that took the dialogue initiated between Professors Davis and Eliason in the first two issues of the *Brief* to a new level.[18] In a conversation lasting more than two-hours, moderated by the Honorable William Jackson of the District of Columbia Superior Court, panelists debated the role of "The American Prosecutor." Professors Davis and Eliason were joined by Timothy P. O'Toole, Chief of the Special Litigation Division of the Public Defender Service for the District of Columbia, and Amy Jeffress, Deputy Chief of the Organized Crime and Narcotics Trafficking Section of the United States Attorney's Office for the District of Columbia. Together with an audience filled with students, professors, alumni, and distinguished practitioners, the panelists addressed various ideas and beliefs about the status of the prosecutorial system.

Not surprisingly, the four panelists had different perspectives on the use of prosecutorial discretion and issues associated with "prosecutorial misconduct." Yet, there was one underlying commonality amongst all panelists: all agreed that prosecutorial discretion, a fundamental element of the criminal justice system, is often where "prosecutorial misconduct" is rooted.

Eliason argued that the role of the prosecutor is to use his power to make determinations legally, fairly, and as ethically as possible. The criminal justice system, Eliason noted, deals

with the lives and liberty of people, and thus while numerical calculations would eliminate certain types of misconduct, prosecutors cannot, and should not, make decisions about what happens to individual defendants using a simple arithmetic analysis. Every situation is colored by shades of gray; thus, there is no bright line by which to make decisions. A judgment appropriate for one defendant is not, and probably should not be, applicable to another. As such, prosecutors are given broad power to make determinations. Eliason argued that most prosecutors respect the responsibilities imposed on them by the system, and that the culture within most prosecutors' offices is one that not only values, but demands, proper and ethical behavior. Thus, according to Eliason, the characterization Davis paints of prosecutors routinely bending or breaking rules to fit their personal agendas does not reflect the majority of prosecutors, if anything, it reflects a "few bad apples."

Nevertheless, with power comes abuse and allegations of abuse, and often times it is the very prosecutorial discretion that is so fundamental to our system that gives rise to allegations of "prosecutorial misconduct." Misconduct can encompass a variety of behavior; however, the focus of the majority of the panel discussion was prosecutorial misconduct that stemmed from *Brady* violations. In 1963, in *Brady v. Maryland*[19], the Supreme Court held that the Government must disclose all exculpatory evidence known to the prosecution or in its possession to the defense. The Supreme Court stated that the "withholding of evidence violates due process 'where the evidence is material either to guilt or to punishment.'"[20] However, while *Brady* may be the law, it does not mean its tenets are abided by at all times. When they are not, problems arise, and not just for an individual defendant, because these violations then bring into question the legitimacy of the system as a whole.

Timothy O'Toole argued that *Brady* violations are among the most harmful types of misconduct that a prosecutor can commit. Acknowledging that the role of the prosecutor is a "tough one," he observed that it makes no sense to have a system that makes the job of a prosecutor even more difficult. A system in which the prosecutor possesses full control of evidence, creates a strain on prosecutorial obligations. While there are cases where it is clear that evidence is exculpatory and should be disclosed to the defense, more often than not, prosecutors are asked to evaluate the very evidence on which they have built their case and to determine if any of that evidence could possibly be exculpatory. The decision as to whether evidence is exculpatory is often an analysis of subtleties that are best determined by defense counsel. Davis and O'Toole argued that a prosecutor's power to control evidence, coupled with the pressure "to win," tempts him to seek convictions by "any means necessary," even if that includes not disclosing evidence, or just plain hiding key evidence from the defense. While Eliason and Jeffress vehemently contested the "conviction by any means" argument, the reality is that when it comes to control, the prosecutor does have a significant amount of unchecked power. Even if there is no vindictive intent not to disclose evidence from the defense counsel, prosecutors are charged with the responsibility of turning over exculpatory evidence to the defense. This determination, Davis and O'Toole argued, should not take place behind "closed doors," especially by the party that carries the burden of proof in the criminal system. The inherent tension that is created when demanding that prosecutors make such a determination, according to Davis and O'Toole, is what so easily gives rise to instances and allegations of abuse, and thus prosecutorial misconduct.

The Solution

Davis and O'Toole argued that a starting point in creating a solution to the problem created by *Brady* requirements would be open discovery. If the prosecution had to provide defense counsel access to all evidence, *Brady* violations would be curbed, if not eliminated. Yet is open discovery realistic? According to Eliason it is not. Open discovery would place an immense administrative burden on an already exhausted system. A bogged down system will impede the missions and duties of all participants in the criminal justice system.

Criminal Law Related Complaints of Misconduct Filed with the DC Bar*

Misconduct	2005	2004	2003	2002	2001	2000
Neglect	11	20	20	22	22	26
Dishonesty	5	0	4	6	5	1
Conduct Prejudicial	4	17	15	7	10	9

* Courtesy of the District of Columbia Bar, Office of Bar Counsel.

Moreover, Eliason and Jeffress argued that that the term "prosecutorial misconduct" is an over-used term, encompassing the egregious violations alleged by Davis and O'Toole, as well as minor courtroom errors. To suggest that most prosecutors engage in intentional and significant misconduct unfairly creates the impression that the problem of true misconduct is more widespread than it actually is. Jeffress further stressed that, aside from the innate ethical obligations which prosecutors are bound by, encompassed in the oath they take, there are additional mechanisms in place to provide oversight.

The discussion then shifted from the panel to the audience. Addressing Eliason's argument that the problem of misconduct stems from just "a few bad apples" and "distorted statistics," Cynthia Jones, former Director of the Public Defender Service ("PDS") for the District of Columbia and Professor of Criminal Law and Evidence at the Washington College of Law recalled a situation she faced during her tenure as Director of PDS. Her office discovered that the U.S. Attorney's Office was routinely distributing a brochure to all witnesses directing them to not speak with defense counsel "at any time." Citing to the Supreme Court, which has held that witnesses "belong to no one," Jones brought the illegality and *widespread* distribution of the brochure to the U.S. Attorney's office. Audience member Wilma Lewis, former United States Attorney for the District of Columbia, acknowledged that her office eventually found the distribution of the brochure improper, however she pointed out

that the conduct was public and not something hidden and "done in secret." Moreover, it was done not purposefully nor maliciously, but unintentionally. When Jones brought the distribution of the brochures to Lewis's attention, Lewis immediately investigated, and stopped the brochure distribution.

Regardless of whether one believes that the U.S. Attorney's Office was not aware such behavior was improper, the key point from Jones and Lewis was that they had a "coming together" and addressing of the issue. Moreover, in discussing the matter, they created a solution. Lewis suggested that perhaps the best starting place is to move away from the "blame" and the "rhetoric" and focus the discussion on creating a dialogue of the issues on local and national levels. Bringing the conversation back to *Brady*, she asserted that perhaps the community should not focus as much on the *size* of the issue and focus instead on the ***type of conduct*** that stems from *Brady* issues. As Lewis stated, and all panelists agreed, even one case of true prosecutorial misconduct is too much. As noted by audience member, and Washington College of Law Professor Adam Thurschwell, if each party keeps shifting the burden to the other side, instead of actually examining the underlying issues, the conversation will stay a conversation about the *problem* and never truly address the *solution*.

While the panelists may have left the discussion with differing views on the role of prosecutorial discretion, their "coming together" at the Washington College of Law brought light to a very important discussion. For those who are a part of the criminal justice system, and for those that about to enter it, the "take home" message of the conversation was that while controversial issues must be examined and debated, by coming together we can take the discussion to next level, that of moving toward a solution.

** Vanessa Martin is second year law student at the American University, Washington College of Law. She received a B. A. in Political Science from Vanderbilt University in 2005. During the summer of 2006, she interned in the Civil Rights Division of the United States Department of Justice.*

[1] In the *Criminal Law Brief*'s first two issues, it published two opposing articles concerning the role that the prosecutor plays in the U.S. Criminal Justice System. After the publishing of the second article, the *Brief* initiated a panel discussion to address formally the views of each author. The panel also incorporated the views of current practitioners within the field. During the debate, the panelists specifically addressed the ethical responsibilities of prosecutors, prosecutorial discretion, what is meant by "prosecutorial misconduct," the systems in place to prevent and/or detect misconduct and discipline errant prosecutors, and what additional steps (if any) should be taken, and by whom. The American Prosecutor: Power, Discretion, and Accountability (Jan. 31, 2007), *available at* http://www.wcl.american.edu/secle/video.cfm#.

[2] *See* Angela Davis, *Prosecutorial Misconduct: An Abuse of Power and Discretion*, 1 Crim. Law Brief 1, 16 (2006); Randall D. Eliason, *The Prosecutor's Role: A Response to Professor Davis*, 2 Crim. Law Brief 1, 15 (2006) .

[3] Angela J. Davis is a professor of Criminal Law, Criminal Procedure, and Criminal Defense: Theory and Practice at the American University, Washington College of Law. She was also the former Director of Public Defender Service for the District of Columbia.

[4] *See* Davis at 16.

[5] *See id*.

[6] *See id*. at 24.

[7] *See id*.

[8] *See id*.

[9] Randall Eliason is Professorial Lecturer in Law teaching White Collar Crime at the American University, Washington College of Law. He is also former Assistant United States Attorney for the District of Columbia.

[10] *See* Eliason at 18.

[11] *See id.*

[12] *See id*. at 17.

[13] *See id*. at 18.

[14] *See id*.

[15] *See id*.

[16] *See id*.

[17] *See id*. at 21.

[18] The American Prosecutor: Power, Discretion, and Accountability (Jan. 31, 2007), *available at* http://www.wcl.american.edu/secle/video.cfm#.

[19] *See* Brady v. Maryland, 373 U.S. 83 (1963).

[20] *See id*.

Exonerating Evidence*

A review 319 Exonerations produced the following statistics related to evidence used in exoneration:

Actual Culprit Found	170
DNA	103
Solid Alibi	15
Likely Culprit Found	9
Victim Found Alive	8
Informant Reversal	5
Evidence Suppressed	3
Finger Prints	3
Blood Type	2
Ballistic Test	1

* Inclusion in this review required:

1. The person was convicted of a crime.
2. New evidence after the conviction established that the convicted person was innocent. (Cases in which the person received a new trial and was deemed "not guilty" are not included unless the exonerating evidence is DNA.)
3. The convicted person was released or pardoned by some official representing the government.
4. There was a written document describing the details of the case and exoneration

Available at: http://www.dredmundhiggins.com/