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THE PROSECUTOR'S ROLE: A RESPONSE TO PROFESSOR DAVIS

Randall D. Eliason*

Editor's Note: The following article is in response to Prosecutorial Misconduct: An Abuse of Power and Discretion, 1 CRIM. L. BRIEF 16 (2006), by American University Washington College of Law Professor and former Director of the Public Defender Service for the District of Columbia, Angela Davis. In her article, which appeared in the last issue of this journal, Professor Davis argued that there is a widespread culture of prosecutorial misconduct that has gone unchecked by the courts, that this misconduct has reached epidemic proportions, and that the legal profession must take the lead in instituting meaningful reform. Professor Davis's article can be found at: <http://www.wcl.american.edu/journals/clb/>

"The United States wins its point whenever justice is done its citizens in the courts." ¹

Johnny St. Valentine Brown, Jr. was a veteran narcotics detective. Brown – who went by the nickname “Jehru” – had nearly thirty years of experience investigating drug cases on the streets of the District of Columbia. He had worked as an undercover officer buying drugs, as a detective investigating major drug rings, and in virtually all other aspects of narcotics law enforcement. He had worked for the federal government in the Office of National Drug Control Policy and as an investigator for a congressional committee studying drug trafficking. Brown was so good that the D.C. United States Attorney's Office regularly asked him to teach new prosecutors about illegal drugs and how they are used, packaged, and sold. When I joined the U.S. Attorney's Office in 1989, Brown gave the narcotics lecture to my training class of new Assistant U.S. Attorneys.

Jehru's real fame, however, was as an expert witness. Almost all criminal drug cases, even the most routine, require the prosecution to present a “drug expert.” These witnesses, usually experienced narcotics investigators, testify about such matters as police procedures for handling drug evidence and the packaging and sale of illegal drugs on the street. Due to the volume of drug prosecutions, these experts are in great demand. Good ones may testify in several different cases in a single day.

As a drug expert, Brown was a prosecutor's dream. He was good looking, well-dressed, and charismatic, with a rich baritone voice. He would turn and speak directly to the jury when testifying, like a college professor patiently instructing a class of freshmen. He was always professional, always prepared, incredibly knowledgeable, and never lost his cool. Juries loved him. Defense lawyers feared him. Prosecutors would rearrange the order of witnesses they intended to call, just to accommodate Jehru's busy schedule. Brown was not only good, he was prolific. According to one report, by the late 1990's Brown had testified in more than four thousand trials in twenty-six jurisdictions and one hundred and twelve cities, although his primary venue was the District of Columbia.²

Expert witnesses usually begin their testimony by discussing their background and training, in order to establish their

qualifications. Brown was no exception, and each time he testified he began with a lengthy recitation of his considerable experience. It was almost a matter of rote; while he was talking to the jury about his background, prosecutors would review their notes and defense attorneys would plan their cross-examination. Everyone who tried drug cases knew Jehru. Everyone knew he was eminently qualified and that there could be no serious challenge to his expertise.

In the summer of 1999, Brown was retained by the D.C. government as an expert witness for the defense in a civil case. The government was being sued by the family of a young man who was killed while working as a confidential informant for the police. When the plaintiff's lawyer took his deposition, Brown testified that in addition to his extensive experience within the police department, he had earned a graduate degree from the Howard University School of Pharmacy. The plaintiff's lawyer was unfamiliar with Brown and decided to check him out. With a few phone calls, he learned that Brown had never attended Howard University, much less obtained a degree. When the civil attorney exposed these lies, Brown was removed as an expert witness in the case.³

This all came to light while I was serving as the Chief of the Public Corruption/Government Fraud section of the U.S. Attorney's Office – the unit charged with prosecuting police misconduct. Our review of the transcripts in a few recent drug cases confirmed our fears: Brown had told similar lies in a number of criminal trials while testifying as an expert for the prosecution. He had regularly claimed to have earned an undergraduate or graduate degree in pharmacology from Howard University in the 1960's. In a number of cases he had falsely testified that he was a board-certified pharmacist. Sometimes he had testified that he actually worked for a time as a pharmacist, dispensing prescription drugs at several local drugstores and grocery stores. These claims had been made during the rote recitations of his credentials that lawyers in drug cases had heard so many times, and had gone unchallenged by both prosecutors and defense attorneys.

Faced with what we had learned, my colleagues and I had to decide what to do. We considered it extremely unlikely that Brown's lies had actually affected the outcome of any cases. There was no evidence that he had lied about anything other than his own credentials. He had testified only as an expert, he was not a fact witness who identified the particular defendants or testified about their involvement in the case. The matters about which he testified were generally uncontroversial and could have been testified to by scores of other experts. Most significantly, Brown's true expertise was based on his years of work on the streets as a narcotics investigator; any formal education that he did or did not have paled in significance next to that experience. Nevertheless, although the prosecutors had not known it at the time, our office now had information that a government witness had lied under oath in numerous cases that had resulted in criminal convictions. We also knew that most defense attorneys who had represented clients in those cases probably were unaware that this was even an issue, and likely would remain unaware – unless we told them about it.

So we told them about it. The U.S. Attorney's office identified every case we could in which Brown had testified for us as an expert. We wrote to all defense counsel in those cases and informed them of the potential issue, in order to allow them to review the records and consider filing any appropriate motions. We also wrote letters to the local and federal public defender's offices notifying them of the potential problems with Brown's testimony. In addition, we published a notice about Brown's perjury in the *Daily Washington Law Reporter*, a widely-read local legal periodical, to try to get the word out to as many defense attorneys as possible.⁴ In a few cases where we believed Brown's testimony was arguably more consequential, we voluntarily agreed to vacate the convictions or allowed the defendants to plead guilty to lesser charges. In dozens of other cases, defense attorneys filed motions to vacate the convictions, and those motions were resolved by a judge.⁵

We also indicted Brown on multiple counts of perjury and sent him to federal prison.⁶

Nearly ten years before the Jehru incident, when I was prosecuting narcotics cases in federal court, a case was transferred to me that was about to go to trial. The defendant was charged with distribution of crack cocaine. It was a typical "buy-bust" case. In such a case, a team of investigators went to a known drug market and an undercover officer walked into the area to buy drugs. After a successful purchase, the undercover officer would leave the area and radio a description of the seller to an arrest team waiting nearby. The arrest team (also called the "jump outs") would then drive quickly to the area, jump out of their vehicles, and stop the suspect who fit the description. The undercover officer would come by in a car and make a "drive-by identification," telling the jump outs whether they had the right person. If the identification was positive, the suspect would be placed under arrest. I had handled dozens of such cases, as had every prosecutor in the narcotics section.

As I began to prepare for trial, however, some things about this particular case didn't feel right. The more I examined the evidence, listened to the tapes of the police radio transmissions, and interviewed the officers, the more uncomfortable I became. No single glaring problem stood out, but based on my experience with many such cases, I was troubled. Too many little things did not add up. I began to doubt whether the police had actually arrested the right person.

I knew that if I took the case to trial, there was a good chance the defendant would be convicted. After all, the undercover officer was ready to testify that the defendant was the same man who had sold him the drugs. Jurors who had not seen many such cases before might not pick up on some of the issues that were bothering me, and the defense attorney might miss some or all of them as well. I knew my doubts could be wrong, and that the defendant might well be guilty. But I also knew that the defendant was facing a mandatory minimum ten-year sentence, and that I would be the one putting him in jail.

I have always believed that, as a prosecutor, you can't stand in front of a jury and ask them to do something you would not do yourself. I was not convinced beyond a reasonable doubt of this defendant's guilt, so I knew I could not in good conscience ask a jury to convict him. I spoke with my supervisor

about my concerns, and he said I was authorized to do what I thought was best. On the morning of trial, I walked into court and dismissed the case.

In a more recent and much more high-profile case, federal prosecutors in Alexandria, Virginia were seeking the death penalty in the prosecution of Zacarias Moussaoui. Moussaoui, the so-called "twentieth hijacker," was accused of being involved in the plotting that led up to the September 11, 2001 terrorist attacks. During the trial, an attorney for the Transportation Security Administration ("TSA") committed a flagrant violation of the court's orders. The attorney (who was not a prosecutor but had been working with the prosecution team) e-mailed transcripts of trial testimony to upcoming government witnesses, thus sharing with them what other witnesses had said. This was a violation of the so-called "rule on witnesses" typically invoked in almost every case. The TSA attorney also appeared to be coaching the witnesses on how to shape their upcoming testimony.⁷

I have always believed that, as a prosecutor, you can't stand in front of a jury and ask them to do something you would not do yourself.

How did the judge learn of this misconduct? The prosecutors told her. As soon as they learned of the TSA attorney's actions, the prosecutors notified the court and defense counsel, who did not know about it and who may have never learned about it. The prosecutors did so even though they knew the revelation would do tremendous damage to the most important case of their careers. In court papers disclosing the TSA attorney's actions to the court and defense,

the prosecutors called her behavior "reprehensible."⁸ The judge, when explaining to the jury what had happened, noted that the prosecutors deserved "great credit" for bringing the matter to the court's attention.⁹

None of these stories strike me as particularly remarkable or noble. They are simply examples of prosecutors doing their jobs and trying to do the right thing. These stories would seem strangely out of place, however, in the prosecutorial world described by Professor Angela J. Davis in the debut issue of this Journal (*Prosecutorial Misconduct: An Abuse of Power and Discretion*, Criminal Law Brief, Spring 2006). Professor Davis argues that prosecutorial misconduct is widespread and routine and has reached epidemic proportions.¹⁰ She claims that prosecutors consistently and deliberately violate their ethical and professional obligations, and even break the law, in pursuit of a "win at any cost" agenda.¹¹

In the world portrayed by Professor Davis, the U.S. Attorney's Office no doubt would have tried to bury the information about Detective Brown's lies in the criminal trials, in hopes that defense attorneys would never learn about them. We certainly would not have prosecuted our former star witness for perjury, thus calling attention both to his misdeeds and to our own failure to notice them. In that world, I vigorously would have sought to convict the defendant in the drug case, despite my personal doubts, in order to add another "win" notch to my belt. The prosecutors in the Moussaoui trial would have simply instructed their witnesses to say nothing about how they had been improperly coached and would have gone on with their case. But fortunately for the criminal justice system, and for all of us, Professor Davis has painted a seriously flawed and distorted picture of what prosecutors do every day.

Let me be clear at the outset: my aim is neither to deny that prosecutorial misconduct occurs nor to condone it when it does. There are more than 35,000 prosecutors working around the country in more than 2,300 state and local prosecutor's offices, U.S. Attorney's Offices, and at the Department of Justice.¹² Any time you have a human enterprise that large, you are going to have some people who will break the rules. There are bad prosecutors, just as there are bad corporate CEO's, bad doctors, bad bankers, and bad defense attorneys. And because prosecutors wield a great deal of power, a prosecutor with corrupt motives can cause tremendous harm. True prosecutorial misconduct, when it occurs, should be condemned and swiftly punished.

Prosecutorial misconduct, however, is the exception, not the norm. When it does take place, good prosecutors – who know how serious true misconduct is and who must live with the fallout and damage to the reputation of their profession – are perhaps more upset by it than most people. The vast majority of prosecutors are dedicated public servants striving to do a difficult job in an ethical and honorable way. The prosecutorial world described by Professor Davis would be completely alien to them, as it is to me.

The Prosecutor's Role

A criminal defense lawyer's duty is to her client. Her job is to represent her client zealously within the bounds of law and ethics and to try to win, even if she knows her client is guilty. She has no obligation to seek the truth; in fact, in many cases, she will be doing her job if she can obscure the truth and keep it from coming to light.¹³

The prosecutor, however, has a different role, one unlike that of any other advocate. That role was most famously described by the Supreme Court decades ago:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹⁴

Many other cases have likewise recognized this duty of a prosecutor to seek to do justice and not merely to win.¹⁵ Prosecutors are expected to be zealous, but are to temper that zeal with a recognition of their broader obligations. As one former prosecutor has written, “[p]rosecutors of course are not as impartial as judges, nor are they asked to be. But they are asked to be more impartial than defense attorneys.”¹⁶

The unique role of the prosecutor also is recognized in various ethical and professional standards. The American Bar Association's Model Rules of Professional Conduct, which

have been adopted by nearly every state,¹⁷ include Rule 3.8, entitled “Special Responsibilities of a Prosecutor.”¹⁸ Rule 3.8 provides, among other things, that a prosecutor must not knowingly bring charges not supported by probable cause, must work to ensure that the rights of the defendant are protected, and must make timely disclosure to the defense of all exculpatory evidence (also known as *Brady*¹⁹ material). The American Bar Association Standards for Criminal Justice similarly provide that the “duty of the prosecutor is to seek justice, not merely to convict.”²⁰ The National District Attorneys Association Prosecution Standards state that the “primary responsibility of prosecution is to see that justice is accomplished.”²¹

Each day, in thousands of cases around the country, prosecutors decline to bring indictments, dismiss charges, turn over evidence favorable to the defense, and take countless other actions that benefit criminal defendants or make prosecuting a case more difficult. They do it because it's their job, and their professional obligation, to be focused on something more than simply winning. Their duties require them to do their best to play by the rules, respect the rights of the accused, be completely candid with the court, and above all, to be certain they are prosecuting the right people.

These obligations were drilled into me from the beginning of my time at the U.S. Attorney's office.²² Over the years, I attended – and later taught – numerous training sessions on issues such as *Brady* obligations, charging decisions, and the proper exercise of prosecutorial discretion. I attended professional conferences with other prosecutors from around the country, where we shared our experiences and talked about how best to fulfill our obligations while doing our jobs. I participated in countless discussions with colleagues concerning such issues as whether to bring particular charges, whether to investigate a particular defendant, or whether certain evidence constituted *Brady* material. We often wrestled with these issues, not to decide how best to win (because then the decision is easy) but to decide how best to fulfill our legal and ethical responsibilities during the course of a prosecution.

Many may believe the notion that prosecutors would actually seek to do justice is nothing more than a quaint platitude. Prosecutors are often portrayed in books and movies as ruthless, political animals bent on winning at any cost, even if it means knowingly convicting the innocent. Some of the recent excesses of the current Justice Department in alleged furtherance of the fight against terrorism have further added to public skepticism of law enforcement. In this cynical age, it is easy to dismiss the special obligation of prosecutors as simply a naïve and unrealistic ideal.

I don't agree. To most prosecutors – and to all good prosecutors – this duty to seek justice really does mean something. It becomes ingrained as part of your professional identity. I saw it practiced every day during my twelve years as an Assistant U.S. Attorney. Prosecutors may not always agree with each other, and certainly may not always agree with defense counsel, about how best to fulfill that obligation in a given situation. But they always know that the obligation is there.

It is interesting, although perhaps not surprising, that those commentators who believe that prosecutors do in fact seek to meet this higher obligation tend to be former prosecutors,²³ while those who are the most vocal about alleged wide-

spread prosecutorial misconduct tend to be current or former criminal defense attorneys.²⁴ In my experience, relations between prosecutors and defense attorneys are generally collegial and certainly no worse than relations among attorneys in other segments of the bar. It has also been my experience, however, that some criminal defense attorneys – particularly those who, like Professor Davis, work or have worked as public defenders – have very strong feelings about prosecutors. They seem to believe that prosecutors are morally suspect, simply by virtue of their profession. Indeed, in the title of a recent article, one former public defender went so far as to ask, “Can you be a good person and a good prosecutor?”²⁵ Her answer: probably not.²⁶

I have no quarrel with the role of the defense attorney in the criminal justice system: to represent her client with vigor and put the government to its proof. I do take issue, however, with Professor Davis’s portrayal of how prosecutors operate within that same system. The prosecutor’s role carries with it a unique set of obligations. Seeking to fulfill the duty to do justice is the foundation of the prosecutor’s job, and is at the heart of every good prosecutor’s professional identity. There is no basis for the claim that prosecutors are routinely disregarding these ethical and legal obligations to “abuse [their] power and discretion.”²⁷

Prosecutorial “Misconduct” vs. Prosecutorial Error

The first difficulty with Professor Davis’s analysis lies in the term “prosecutorial misconduct” itself. Although this problem did not originate with Professor Davis, it severely undermines her arguments. The problem is this: much of what is labeled “prosecutorial misconduct” is not “misconduct” at all, at least not as that term is commonly understood.

The word “misconduct” generally denotes some kind of intentional wrongdoing.²⁸ “Prosecutorial misconduct” therefore suggests that the prosecutor has purposely acted in a way that is unfair, unethical, or even illegal. In truth, however, “prosecutorial misconduct” is a catch phrase used by the courts to describe virtually anything done by the prosecution in a criminal case that is subject to objection and possible legal challenge.²⁹ Use of the term says nothing about the prosecutor’s intent or lack of good faith.³⁰

In many cases, the label “prosecutorial misconduct” is actually quite unfair to the prosecutor. It is applied even to routine, inadvertent missteps that may be made by advocates in any case – the kinds of mistakes that everyone who tries cases will make from time to time. It may refer to asking an improper question, mentioning evidence that has not been properly admitted, or making a misstatement during closing argument. Such mistakes can occur as a result of inexperience, nerves, carelessness, a misjudgment about what the law allows, or simply through an excess of zeal in the heat of battle. The mistakes may still be serious and may even justify reversal of a conviction, but they are not “misconduct” as that term is commonly understood.³¹ In such cases, a more appropriate term would be “prosecutorial error.”³²

Let me provide a couple of examples. In the District of Columbia, as well as in other jurisdictions, it is generally considered misconduct for the prosecutor to say during closing argu-

ment that the jury should “send a message” on behalf of the community by finding the defendant guilty.³³ This is considered improper because the jury is supposed to focus only on the facts and whether the government has proved its case, not on pursuing social policy by sending messages.³⁴ In another D.C. case, it was held to be misconduct when the prosecutor in closing argument referred to the victim of a brutal homicide as having been “shot down like a dog in the street” and called the killing an “assassination.”³⁵ The court said these statements were an improper attempt to inflame the passions of the jury.³⁶

One can debate the merits of the rulings in such cases. All can agree, however, that this type of so-called “misconduct” by an advocate in the middle of trial is fundamentally different from the behavior of a prosecutor who deliberately buries exculpatory evidence or knowingly prosecutes an innocent man. All of these wide-ranging acts, however, are routinely grouped together under the single heading of “prosecutorial misconduct.”³⁷

Nor are the rules about what will constitute “misconduct” always clear. For example, some cases hold that it is prosecutorial misconduct in closing argument to call the defendant or a witness a liar.³⁸ Other cases, however, have found that this is not misconduct.³⁹ In any event, it is fine to argue that the evidence proves a witness’s testimony could not be true (in other words, the witness is lying) as long as you don’t use the “L” word.⁴⁰ Similarly, a prosecutor cannot vouch for a witness by saying “I believe he was telling you the truth,” but is free to argue, “the evidence shows that he was telling you the truth,” which of course tells the jury exactly what the prosecutor believes.⁴¹ The “shot down like a dog in the street” line was held to be unduly inflammatory, but other cases have upheld language that seems indistinguishable or even worse, including such lines as calling the defendant a “sadistic killer.”⁴² Distinctions are made in the minds of appellate judges that likely are lost on juries, as well as on most advocates.⁴³ Even seasoned prosecutors are sometimes uncertain where the lines will be drawn.

There are several important points to note about this category of “prosecutorial misconduct” – the category that I suggest would better be called “prosecutorial error.” First, the errors take place in open court. The defense attorney is able to object, and the trial judge is able to intervene, admonish the prosecutor, and issue a curative instruction to the jury if necessary. Nothing is done in secret or concealed from the defense, the jury, or the judge. The defense attorney is able to follow up with her own questioning and argument and may even be able to exploit the “misconduct” by suggesting to the jury that the prosecution is not playing fair.

Second, these types of errors are not committed only by prosecutors. Defense attorneys also make improper arguments, refer to inadmissible evidence, and harass witnesses, both intentionally and inadvertently.⁴⁴ Indeed, given their duty of zealous representation, they may be more likely to do so than the prosecutor, who has to worry about her obligations to justice and about creating appellate issues.⁴⁵ The difference is that a defense lawyer who breaks the rules, even deliberately, likely will receive at worst a scolding from the judge. A prosecutor who makes even an honest mistake, however, will be branded as having engaged in “misconduct.”

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but that justice shall be
done.”*

Justice Sutherland

As Professor Davis notes, alleged *Brady* violations are another common source of claims of prosecutorial misconduct.⁴⁶ *Brady* violations take place when the government fails to fulfill its obligation to disclose material information in the government's possession that is favorable to the defense.⁴⁷ Again, however, simply labeling something a "*Brady* violation" tells you nothing about the underlying circumstances or the motives of the prosecutor, and the fact that a *Brady* violation is found does not mean that the prosecutor engaged in willful misbehavior. The good faith or bad faith of the prosecutor is irrelevant to the *Brady* analysis.⁴⁸ In fact, a *Brady* violation may be found where the prosecutor himself *didn't even know* about the information that was not disclosed, as long as the police or someone else on the prosecution team was aware of it.⁴⁹

Brady material can range from compelling evidence that clearly exculpates the accused to evidence that is arguably cumulative and may not even be admissible. Most difficult *Brady* questions involve judgment calls about the value of the evidence, and reasonable people can disagree. Trial judges and appellate judges themselves often differ over whether particular information was *Brady* material. As a prosecutor, however, if you make a good-faith decision about *Brady* material and a judge later disagrees, you haven't just made a mistake: you've engaged in "prosecutorial misconduct."

Simply looking at statistics about the number of cases that discuss prosecutorial misconduct or *Brady* violations therefore tells you very little about what actually happened in those cases. Such statistics also greatly overstate the incidence of true willful misbehavior by the prosecution. Most cases involving allegations of "prosecutorial misconduct" do not involve deliberate wrongful conduct by the prosecution, and would more accurately be characterized as prosecutorial error.⁵⁰ Lumping all of these cases together under the heading "prosecutorial misconduct" obscures the very different issues and concerns that underlie the different types of claims, and makes the problem of true willful misconduct sound far greater than it actually is.

It's Called Harmless Error for a Reason

As Professor Davis points out, most cases involving allegations of prosecutorial misconduct are upheld under the "harmless error" doctrine.⁵¹ In other words, courts usually find that the events labeled "prosecutorial misconduct" did not affect the fundamental fairness of the trial or call into question the result, and thus do not require a new trial. This would be harder to understand if most prosecutorial misconduct actually involved deliberate wrongdoing by the prosecution. It makes sense, however, when we realize that much that is labeled "misconduct" when done by the prosecution is better understood simply as trial error, and often harmless error at that.

Professor Davis seems to suggest that the harmless error standard is somehow illegitimate, a way for judges to ignore or excuse the misbehavior of prosecutors. The harmless error doctrine, she argues, demonstrates that the courts place a "higher premium on affirming convictions than [on] punishing prosecutors who do wrong."⁵² The problem with this claim is that it suggests (incorrectly) that most allegations of "misconduct" involve willful misbehavior that would make "punishment" appropriate. Because most of what is termed misconduct does not involve deliberate wrongdoing, this criticism is mis-

placed.

The harmless error doctrine, of course, was not something invented by judges to allow them to excuse prosecutorial misconduct. In federal cases, for example, the harmless error standard is contained in both the Criminal Rules and the United States Code and applies to all aspects of a trial, not just to mistakes by prosecutors.⁵³ Furthermore, it's not clear exactly what Professor Davis would propose as an alternative. She may believe it would be more appropriate if *any* finding of prosecutorial error – whether deliberate or not, and no matter how trivial or inconsequential in the scheme of the overall trial – resulted in the automatic reversal of a conviction. This is an argument that a defendant is entitled to a perfect trial, not merely a fair one. That is a worthy ideal but is something that has never been required and, given the frailties of human actors, probably can never be achieved.⁵⁴

It is true that most cases where prosecutorial misconduct is alleged are not reversed on appeal. This is not because judges are blindly allowing prosecutors to run roughshod over the rights of defendants. Rather, it is because most claims of prosecutorial "misconduct" are either without merit or involve what is better characterized as prosecutorial error. It's easy for the defense to cry "prosecutorial misconduct" and attempt to create an issue on appeal, and this is increasingly done as a defense tactic. In reality, however, most such claims have little basis. Most of the errors that do occur truly are harmless, and characterizing them as "misconduct" doesn't change that.

Lies, Damned Lies, and Statistics⁵⁵

The second major flaw in Professor Davis's analysis is the lack of any empirical basis for her claims of widespread, flagrant prosecutorial misconduct. The few studies on which she does purport to rely do not come close to supporting her conclusions.

To bolster her claims about an "epidemic" of prosecutorial misconduct, Professor Davis relies primarily on two studies.⁵⁶ The first, by the nonpartisan Center for Public Integrity ("CPI"), examined 11,452 cases in which allegations of prosecutorial conduct were reviewed by appellate judges. The study looked at cases over about a 30-year period.⁵⁸ The second study involved a series published in the *Chicago Tribune* in 1999 by reporters Ken Armstrong and Maurice Possley.⁵⁹ This study also examined about 11,000 cases, this time over a 36-year period.⁶⁰

A few points need to be made about these studies. First, as discussed above, statistics on the number of cases involving allegations of prosecutorial misconduct or *Brady* violations say nothing about the intent of the prosecutors, the underlying merits of the allegations, or whether true professional misconduct was involved. In the CPI study, of the more than 11,000 cases reviewed only about 2,000 resulted in reversal of a conviction or other relief to the defendant.⁶¹ In the great majority of cases, either the claim of misconduct was not upheld or the misconduct was found to be harmless error – again, most likely because the "misconduct" was in fact simply a trial error or minor *Brady* violation that did not affect the trial. Similarly, the *Chicago Tribune* study found that convictions were reversed in only 381 of the 11,000 cases studied.⁶²

I do not condone or excuse the conduct of any prosecutor found to have engaged in true misconduct. Any intentional misconduct by the prosecution is reprehensible and must be taken seriously. At the same time, however, these numbers have to be considered in context. The 2,000 cases of serious misconduct over 30 years found in the CPI study works out to a rate of about 66 cases per year; the 381 reversals in 36 years in the *Tribune* study is an average of about 11 cases per year. By contrast, in 2003 there were more than 70,000 federal criminal cases filed in the United States District Courts, and more than *twenty million* criminal cases filed in state courts.⁶³ Even if we limit the state criminal cases to felonies, the number is still nearly three million.⁶⁴ Sixty-six cases a year out of several million is a vanishingly small number. Even if the true incidence of prosecutorial misconduct, reported and unreported, were *500 times greater* than what was found in the CPI study, it would still involve only about one percent of all serious criminal cases filed in a year.

There are about 30,000 state and local prosecutors in the United States and more than 5,000 more working for the Department of Justice.⁶⁵ Sixty-six cases of misconduct in a year means that fewer than one-fifth of one percent of all prosecutors were found to have committed misconduct. If we assume that the truly bad prosecutors are recidivists with multiple claims of misconduct filed against them, then the number of individual prosecutors involved is even smaller.⁶⁶

These are hardly “epidemic” numbers. If anything, the data from these studies actually demonstrates that prosecutorial misconduct is quite rare.⁶⁷ Recognizing the limitations of what they had found, the authors of the CPI study noted that “[m]ost of the nation’s approximately 30,000 local trial prosecutors strive to balance their understandable desire to win – a desire supported by the vast majority of the citizenry – with their duty to ensure justice.”⁶⁸ One will search in vain for any such acknowledgement by Professor Davis.

Cases of egregious misconduct make headlines. This is the same phenomenon that applies to all news. When media coverage is criticized as too negative or sensationalistic, it is often observed that no one reports on all the planes that don’t crash. Similarly, no one reports on the thousands of cases every day where prosecutors fulfill their obligations and follow the rules. Those cases don’t make their way into the reported decisions or legal treatises. Nobody writes lengthy newspaper series investigating how prosecutors are doing their jobs properly. Like the thousands of safe airline flights every day, these cases proceed unnoticed through the system, because the system is operating as it should.

Studies talking about a few dozen cases per year therefore provide no support for claims of routine, widespread prosecutorial misconduct. Professor Davis, however, has a response to this: because much of what prosecutors do takes place in secret, she says, a great deal of misconduct must occur that we simply never hear about.⁶⁹ She notes darkly that “there are many opportunities for prosecutors to engage in misconduct that are nearly impossible to discover.”⁷⁰ Prosecutors interview witnesses, make charging decisions, conduct grand jury investigations, and carry out other duties shielded from the public

eye. These activities provide many opportunities for misconduct that may never come to light. Because they have the opportunity, she argues, prosecutors routinely and purposefully engage in misconduct, believing they will never be caught.⁷¹

Of course, defense attorneys also do a great many things in secret. Defense attorneys may mislead, intimidate, or even threaten witnesses when meeting with them prior to trial. They have the opportunity to coach witnesses, including their clients, to commit perjury, and knowingly to sponsor perjured testimony. They have the ability to destroy or otherwise tamper with physical evidence. There have certainly been documented cases of all of these things occurring,⁷² and all of this takes place outside of the public eye. Indeed, unlike prosecutors, defense attorneys are unhampered by any special ethical responsibilities to be fair or to seek the truth, and they know for certain that their actions will never be reviewed as part of a claim of “misconduct.” Presumably they would feel even more at liberty than prosecutors to engage in secret wrongdoing.

Applying Professor Davis’s reasoning, then, are we to conclude that deliberate misconduct by defense attorneys is widespread and has reached epidemic proportions? I think not, although my logic and evidence are just as compelling as hers – which is to say, not compelling at all.

If history teaches us anything, it is that the truth has a way of coming out.⁷³ Some witnesses who are abused will report what happened to them. Evidence that was thought to be destroyed will come to light in another form.

Individuals victimized by misconduct or scandal will come forward to report it. If this pervasive, secretive “culture of misconduct” existed, at least some of the hundreds of thousands of people involved in various aspects of law enforcement would come forward as whistleblowers to expose it. It is simply implausible to suggest that prosecutorial misconduct is as widespread and routine as Professor Davis claims, but we just don’t hear about it.

There is no empirical support for Professor Davis’s charges of rampant prosecutorial misconduct. Her argument boils down to a claim that this lack of proof is simply evidence of how effectively the secretive “culture of misconduct” is operating.⁷⁴ This reminds me of the old joke that prosecutors tell about conspiracy: “Don’t worry if you have no evidence of the conspiracy; that simply proves how effective the conspirators have been at covering it up!” One can only imagine how Professor Davis, as a defense attorney, would justly ridicule any prosecutor who leveled charges against a defendant with evidence as flimsy as that used by her to accuse all prosecutors.

Don’t Go to Aruba!

To further attempt to bolster her claims of widespread misconduct, Professor Davis discusses the facts of a few specific cases where the prosecutors’ behavior was truly abhorrent. From those cases, she then leaps to the conclusion that this type of misconduct is the norm. This is a flawed argument, a fallacy known as Hasty Generalization.⁷⁵ It is akin to discussing the facts of the highly-publicized disappearance of Natalee Holloway, and concluding that therefore most teenage girls who travel to Aruba disappear without a trace⁷⁶

For example, Professor Davis spends a fair amount of time discussing the case of Delma Banks.⁷⁷ The conduct of the prosecutors in that case was indeed appalling: they concealed evidence proving that the prosecution's star witnesses had been coached and had perjured themselves, and that one was a paid government informant. They also knowingly relied on the perjured testimony to argue their case to the jury. Banks was convicted of murder and nearly executed before the Supreme Court intervened.⁷⁸ As Professor Davis notes, the misconduct was so outrageous that a number of former judges and other public officials – including several former U.S. attorneys, a former Assistant Attorney General for Civil Rights, and a former FBI director – filed *amicus* briefs on Banks' behalf.⁷⁹

After discussing *Banks*, however, Professor Davis makes the startling assertion that *Brady* violations “as egregious as those in Banks’ case” are “very common in prosecutors’ offices,” and that the prosecutorial misconduct in that case was “not unusual.”⁸⁰ In other words, she believes it is “very common” and “not unusual” for prosecutors to coach witnesses to lie, and to commit crimes themselves by knowingly sponsoring perjured testimony. This is the stuff of police states: kangaroo courts and show trials where the prosecution has no concern for due process or the rule of law. If Professor Davis is correct that such conduct is commonplace, then the foundations of the criminal justice system have truly crumbled. Surely she must have some convincing evidence to back up this serious accusation?

No, she does not. In fact, in support of her sweeping charge, Professor Davis cites only a single article, written by a law student, which actually makes no such claim and certainly contains no facts to support such a claim.⁸¹ The reality, of course, is that there is no support for the accusation that such blatant misconduct is routine because that is simply not true. The Banks case is notorious precisely because the misconduct in that case was so unusual and shocking.⁸²

Professor Davis makes a similar error when she argues that prosecutors who engage in misconduct suffer no adverse consequences. She discusses a handful of particular cases before concluding that therefore “[m]ost prosecutors” who engage in misconduct “not only escape punishment, but advance in their careers.”⁸³ This is the Aruba fallacy again: because we can identify a few prosecutors who have been accused of misconduct and have gone on to further their careers, therefore this is what happens in “most” such cases.

Some of Professor Davis's arguments in this area are particularly interesting, coming from a former defense attorney. For example, she discusses the trial of several prosecutors and sheriff's deputies indicted for alleged misconduct in an Illinois case involving a defendant named Rolando Cruz.⁸⁴ All of the law enforcement defendants were ultimately acquitted, and several went on to advance in their careers. Professor Davis criticizes this result as evidence that misbehaving prosecutors are rarely held to account. Ordinarily, one would expect a defense attorney to argue that a defendant who is acquitted by a jury is still presumed to be innocent and is fully entitled to get on with his life. Perhaps this principle does not apply when the defendant is a prosecutor.⁸⁵

Once again, discussing a handful of particular cases proves nothing about what happens to “most” prosecutors who commit misconduct. As Professor Davis acknowledges, many

types of state bar disciplinary proceedings are not public.⁸⁶ Federal prosecutors are also subject to investigation and discipline by the Department of Justice Office of Professional Responsibility.⁸⁷ Perhaps most important, the many forms of internal discipline that take place – denial of a promotion, denial of plum assignments, a negative performance evaluation that affects a prosecutor's salary, and the like – are confidential personnel matters that are not made public.⁸⁸ The truth is that neither Professor Davis nor anyone else has sufficient information to say what happens to “most” prosecutors who engage in wrongful behavior. It is safe to say, however, that there is no reason to believe that prosecutors may routinely engage in deliberate misconduct with no fear of professional repercussions.

Why Do Prosecutors Seek Justice?

I believe that most prosecutors, most of the time, try to uphold their duty to seek justice and do not engage in deliberate misconduct. Other than my personal experiences with many prosecutors over the years, why do I believe this is the case?

The first and most important reason is simply that it is a prosecutor's job to do so. As outlined above, prosecutors are ethically, legally, and morally bound to seek justice; to see that the guilty are punished but the innocent do not suffer. They are required to prosecute only those they honestly believe to be guilty, to safeguard the rights of the defendant, to disclose exculpatory evidence to the defense, and to be completely candid with the court.

In the law, as in other fields, we generally presume that practitioners will strive to follow the ethical and legal requirements of their profession. If this were not the case, codes of professional conduct and other such rules would be of little use. Prosecutors will strive to fulfill their obligation to seek justice first and foremost because they are bound by law, ethics, and their oaths of office to do so. I do not believe we should just assume that such obligations have no effect on an individual.⁸⁹

Indeed, this is what I find most remarkable about Professor Davis's article. She has no hesitation about impugning the character of tens of thousands of attorneys, despite the lack of any solid support for her claims. She asserts that prosecutors – simply by virtue of their profession – routinely engage in conduct that in many cases is not only unethical, but criminal. Apparently we are to presume that prosecutors, unlike attorneys in any other area of practice, routinely disregard their legal and ethical obligations when given the opportunity. I am at a loss to understand how Professor Davis can make such a broad accusation based on such flimsy evidence. Perhaps she too believes that one cannot be both a good prosecutor and a good person.

There is another, and much more practical, reason to believe that prosecutors will generally play by the rules and try to do the right thing: that is the type of prosecutor who is most effective and, in the long run, most successful. Much of what a prosecutor does depends upon the ability of others to trust her word and her character. Judges must be willing to trust that when the prosecutor makes a representation to them, it is the truth. Witnesses must be able to rely on the prosecutor's word about what will happen at trial. Defense attorneys representing a client who is considering pleading guilty and cooperating

with the government must be able to trust the prosecutor's word concerning their client's status and what the prosecution will do in exchange for the client's cooperation. A prosecutor who cannot be trusted cannot, in the long run, be successful.

The single most important asset that any prosecutor has is his good name. Even in large cities, the criminal bar is a relatively small community. If a prosecutor gains a reputation for being dishonest or corrupt, the consequences will be extremely damaging. For one thing, judges will no longer accept the prosecutor's word, which will make his day-to-day life in court much more difficult. Unlike most attorneys, prosecutors regularly appear before the same judges time and time again. Those judges make countless rulings in the prosecutor's cases, not only on substantive issues, but on matters such as scheduling. A disgruntled judge has the ability to make a prosecutor's life extremely unpleasant.⁹⁰

Similarly, if defense attorneys believe that a prosecutor cannot be trusted, they will be less likely to advise their clients to cooperate with the government. Without cooperating witnesses, building any kind of major prosecution is virtually impossible.⁹¹ A defense lawyer can also make an untrustworthy prosecutor's life much more difficult simply by refusing to engage in the informal give-and-take that normally takes place concerning discovery, possible guilty pleas, and other matters. Everything will become formalized. Defense counsel will insist that everything be in writing and on the record, generating more work for the prosecutor. The defense also will be more likely to file discovery motions and other pleadings seeking the court's intervention if they feel the prosecutor cannot be trusted to fulfill her obligations. These pleadings must be responded to, further increasing the prosecutor's workload.

Even juries have the ability to punish the unscrupulous prosecutor. In a trial, if the prosecutor's conduct draws repeated objections from the defense and admonitions from the judge, the jury may come to believe that the prosecutor is not "playing fair" and may register their disapproval with their verdict. On a broader scale, if a prosecutor's office gains a reputation in the community for being unethical or for engaging in misconduct, the public will come to distrust the prosecutor's office. Because the members of the community also make up the jury pools for all of the office's cases, this reputation will damage a prosecutor's ability to win the confidence of a jury.

Finally, there is the matter of professional reputation and standing. No prosecutor wants to have his name in a judicial opinion finding that he committed "misconduct." In addition to tarnishing his professional reputation, any such finding, whether or not it has merit, will likely result in disciplinary proceedings and reviews of the prosecutor's conduct. None of this will be very pleasant for the prosecutor. It is not a badge of honor among prosecutors to be known as some kind of cowboy who flaunts the rules. Just as a defense attorney presumably does not relish a court finding that he rendered "ineffective assistance of counsel," so too a prosecutor has a personal and professional interest in seeing that she retains a reputation for fairness and competence.

In short, the best way for a prosecutor to be effective and to advance her career is to be scrupulously fair and ethical.

An unethical or dishonest prosecutor may be able to secure a conviction in a particular case, but over the long run the acts of such a prosecutor will catch up with her.

Conclusion

I believe that criminal prosecution is an honorable profession, and is one of the most rewarding jobs a lawyer can have. Standing before a court and jury as the representative of the people in a criminal proceeding is both humbling and immensely gratifying. I never met a prosecutor who chose his career out of some immoral lust for abusing witnesses and locking up innocent people. Lawyers become prosecutors because they rightly see it as satisfying, fulfilling work and as an important service to the community. Those who work as prosecutors often make considerable personal and financial sacrifices to pursue a career in public service. They deserve better than to be tarred by sweeping, unsupported attacks on their ethics and character.

** Randall Eliason served as an Assistant United States Attorney for the District of Columbia from 1989 to 2001 and was the Chief of the Public Corruption/Government Fraud Section from 1999 to 2001. He is a Professorial Lecturer in Law teaching a course on White Collar Crime at American University, Washington College of Law and George Washington University Law School.*

¹ Inscription on the wall of the U.S. Department of Justice, Washington D.C., quoted in *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

² Jason Cherkis, *False Witness*, WASH. CITY PAPER, July 21-27, 2000, at 1.

³ See Bill Miller, *Narcotics 'Expert' Said to Be Fraud*, WASH. POST, Feb. 4, 2000, at B8.

⁴ See Daily Wash. Law Reporter, Dec. 21, 1999, at 2283.

⁵ Of the cases that were litigated, the U.S. Attorney's Office won more than fifty and lost only one. In other words, in virtually every case, a judge agreed with our assessment that Brown's lies about his background had no material impact on the verdict.

⁶ *United States v. Johnny V. Brown, Jr.*, CR 00-35-01 (HHK) (D.D.C. 2000). See Bill Miller, *D.C. Detective Receives Two-Year Term*, WASH. POST, June 3, 2000, at B2.

⁷ See Jerry Markon & Timothy Dwyer, *Judge Halts Terror Trial*, WASH. POST, Mar. 14, 2006, at A1.

⁸ *Id.*

⁹ *Id.*

¹⁰ Angela J. Davis, *Prosecutorial Misconduct: An Abuse of Power and Discretion*, 1 CRIM. L. BRIEF 16, 24 (2006).

¹¹ *Id.*

¹² See <http://www.usdoj.gov/criminal> (listing 430 attorneys employed by the Department of Justice Criminal Division); E-mail from Executive Office of U.S. Attorneys to the author, June 9, 2006 (listing 5,263 Assistant United States Attorneys currently employed) (on file with the author); Prosecutors in State Courts – 2001, Bureau of Justice Statistics, available at <http://www.ojp.usdoj.gov/bjs>; Steven Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, The Center for Public Integrity, available at <http://www.publicintegrity.org/pm/default.aspx?act=main> [hereinafter *Breaking the Rules*] (noting there are more than 30,000 state and local prosecutors nationwide).

¹³ See *United States v. Wade*, 388 U.S. 218, 256-58 (1967)

(White, J., concurring in part and dissenting in part).

¹⁴ *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹⁵ See, e.g., *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995); *United States v. Bagley*, 473 U.S. 667, 676 n.6 (1985); *United States v. Agurs*, 427 U.S. 97, 110 (1976); *Brady*, 373 U.S. at 87-88.

¹⁶ David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 527-28 (1999). See also Bruce Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 615 (1999) ("The professional obligation to 'seek justice' places prosecutors somewhere between judges, on the one hand, and lawyers advocating on behalf of private clients, on the other.").

¹⁷ See http://www.abanet.org/cpr/mrpc/model_rules.html. According to the American Bar Association, New York, California, and Maine are the only states that have not adopted the Model Rules of Professional Conduct. See *id.* The ethical codes of these states, however, also contain rules that contain special obligations for prosecutors. See CAL. RULES OF PROF'L CONDUCT, R. 5-110; MAINE CODE OF PROF'L RESPONSIBILITY, R. 3.7(i); NEW YORK STATE BAR ASS'N, LAWYER'S CODE OF PROF'L RESPONSIBILITY, DR 7-103.

¹⁸ The full text of Rule 3.8 provides:

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) 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;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(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 known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by an applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from mak-

ing an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

American Bar Association, MODEL RULES OF PROFESSIONAL CONDUCT, R. 3.8.

¹⁹ Under the doctrine announced in *Brady*, 373 U.S. at 87, the prosecution is required to turn over to the defense all material information in the government's possession that is favorable to the defense. See generally BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT, Ch. 5 (2d ed. 2002).

²⁰ American Bar Association, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993), at 3-1.2(c).

²¹ Nat'l District Atty's Ass'n, NATIONAL PROSECUTION STANDARDS (2d ed. 1991) at 1.1.

²² Other former prosecutors have also discussed the regular training they received concerning their ethical obligations. See, e.g., Panel Discussion, *The Regulation and Ethical Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 737, at 739-43 (1999) (comments of Mark Pomerantz and Michael Bromwich); B. Green, *supra* note 16, at 607.

²³ See D. Sklansky, *supra* note 16, at 528 ("Many people scoff at the notion that prosecutors have a 'twofold aim.' Prosecutorial impartiality, they suggest, is an oxymoron, an institutional impossibility. . . . But like most prosecutors and former prosecutors, I think the skeptics are wrong."). See also Fred C. Zacharias & Bruce Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553 (1999); Panel Discussion, *supra* note 22; B. Green, *supra* note 16; Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

²⁴ See, e.g., Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133 (2005); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 414 (2001); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001). See also Alan Dershowitz, *Foreword to First Edition* of J. LAWLESS, PROSECUTORIAL MISCONDUCT (3d ed. 2003) (alleging that prosecutorial misconduct is "rampant").

²⁵ A. Smith, *supra* note 24.

²⁶ See *id.*

²⁷ A. Davis, *supra* note 10.

²⁸ See, e.g., WEBSTER'S NEW WORLD DICTIONARY (2d college ed. 1978) (defining misconduct as "1. unlawful, bad, or dishonest management, esp. by a governmental or military official; specif., malfeasance; 2. willfully improper behavior").

²⁹ See Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L. Q. 713, 720-22 (1999) (noting that courts use the term "prosecutorial misconduct" as a catch-all that applies to a wide variety of conduct without regard to the prosecutor's intent).

³⁰ See *id.*

³¹ See Steven Weinberg, *A Question of Integrity: Prosecutors Dispute the Significance of "Prosecutorial Misconduct,"* The Center for Public Integrity (available at <http://www.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=34>) [hereinafter *A Question of Integrity*] (noting the concerns that have been raised by prosecutors about the use of the term "prosecutorial misconduct" to apply to non-willful behavior).

³² This idea is even recognized implicitly in the title of some commentary concerning prosecutorial "misconduct." See, e.g., Charles L. Cantrell, *Prosecutorial Misconduct: Recognizing Errors in Closing Argument*, 26 AM. J. TRIAL ADVOC. 535 (2003).

³³ See *Coreas v. United States*, 565 A.2d 594, 604-05 (D.C. 1989); C. Cantrell, *supra* note 32, at 555.

³⁴ See C. Cantrell, *supra* note 32, at 554-55.

³⁵ *United States v. DeLoach*, 504 F.2d 185, 193 (D.C. Cir. 1974).

³⁶ See *id.*

³⁷ See also Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 734 & n. 48 (2001) (noting that "[t]he phrase 'prosecutorial misconduct' is bandied about relatively indiscriminately").

³⁸ See, e.g., *United States v. Garcia-Guizar*, 160 F.3d 511, 520 (9th Cir. 1998). See also C. Cantrell, *supra* note 32, at 545 ("Characterizing a witness's testimony as a 'lie' or using the word 'liar' is usually considered improper").

³⁹ See, e.g., *United States v. Donato*, 99 F.3d 426, 432 (D.C. Cir. 1996); *United States v. Peterson*, 808 F.2d 969, 977 (2d Cir. 1987).

⁴⁰ See B. GERSHMAN, *supra* note 19, at § 11:26.

⁴¹ See B. GERSHMAN, *supra* note 19, at § 11:25.

⁴² *Drew v. Collins*, 964 F.2d 411, 419 (5th Cir. 1992) (not improper for prosecutor to refer to defendant as a "sadistic killer" and to trip during which murder occurred as a "rolling torture chamber"); see *United States v. Pungitore*, 910 F.2d 1084, 1127 (3d Cir. 1990) (not misconduct for prosecutor in closing to refer to defendants as "cold blooded murderers" and "mob killers").

⁴³ For just a sampling of the many confusing and seemingly inconsistent court rulings in this area, review the lengthy footnotes in the Georgetown Law Journal's *Annual Review of Criminal Procedure* under "Prosecutorial Misconduct." See 35 GEO. L.J. ANN. REV. CRIM. PRO. 576 (2006).

⁴⁴ I understand, of course, that errors by the defense do not implicate the due process concerns that are raised when the same errors are committed by the prosecution. My point is simply that these types of errors are not committed only by prosecutors and (unlike, for example, grand jury abuse) are not things that only the prosecution has the power to do. The fact that no one keeps track of instances of "defense attorney misconduct" does not mean that it does not frequently take place.

⁴⁵ See B. Green, *supra* note 16, at 617 ("Criminal defense lawyers play close to the line. Prosecutors play in the center of the court"); F. Zacharias, *supra* note 37, at 754 (noting the view of many commentators that "criminal defense lawyers have a higher than normal duty to press ethical boundaries to the limits when that is in the interests of their clients").

⁴⁶ See A. Davis, *supra* note 10, at 19.

⁴⁷ See *Brady*, 373 U.S. at 87. See generally B. GERSHMAN, *supra* note 19, at Ch. 5.

⁴⁸ See *Brady*, 373 U.S. at 87 (holding that failure to produce exculpatory evidence to the defense violates due process "irrespective of the good faith or bad faith of the prosecution").

⁴⁹ See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); B. GERSHMAN, *supra* note 19, at § 5.11.

⁵⁰ See S. Weinberg, *A Question of Integrity*, *supra* note 31, (quoting sources for the proposition that most prosecutorial "misconduct" would be better characterized as "prosecutorial error").

⁵¹ Under the harmless error doctrine, a mistake made during the course of a defendant's trial does not require reversal of a conviction if a court concludes that the error did not affect the substantial rights of the defendant and thus was harmless. See *United States v. Lane*, 474 U.S. 438, 445 (1986); *Chapman v. United States*, 386 U.S. 18, 21-22 (1967).

⁵² A. Davis, *supra* note 10, at 23.

⁵³ See 28 U.S.C. § 2111; FED. R. CRIM. P. 52(a).

⁵⁴ See *United States v. Hasting*, 461 U.S. 499, 508-09 (1983) ("[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial.").

⁵⁵ "There are three kinds of lies: lies, damned lies, and statistics." Attributed to Benjamin Disraeli; popularized in the U.S. by Mark Twain. THE COLUMBIA WORLD OF QUOTATIONS (1996).

⁵⁶ See A. Davis, *supra* note 10, at 17, 19.

⁵⁷ S. Weinberg, *Breaking the Rules*, *supra* note 12.

⁵⁸ See *id.*

⁵⁹ Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at C1, available at <http://www.chicagotribune.com/news/nationworld/chi-020102trial1,1,1548798.story?page=1>.

⁶⁰ See *id.* Professor Davis also refers briefly to a 1998 study by reporter Bill Moushey that appeared in the Pittsburgh Post-Gazette and examined about 1500 cases. Bill Moushey, *Win at all Costs*, PITTSBURGH POST-GAZETTE, available at <http://www.post-gazette.com/win/default.asp>. After that series appeared, Deputy Attorney General Eric Holder wrote a letter to the Post-Gazette that spelled out in detail the many factual errors and distortions contained in the study and took issue with the study's conclusion that federal prosecutors and agents "routinely" engage in misconduct. See Eric Holder, *Win at all Costs: The Justice Department Responds*, available at <http://www.post-gazette.com/win/justice.asp>.

⁶¹ See S. Weinberg, *Breaking the Rules*, *supra* note 12.

⁶² See K. Armstrong & M. Possley, *supra* note 59.

⁶³ Data for the federal courts from Judicial Business of the United States Courts, available at <http://www.uscourts.gov/judbus/judbus.html>. Data for state courts from National Center for State Courts, available at http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Main_Page.html.

⁶⁴ National Center for State Courts, *supra* note 63.

⁶⁵ See sources cited *supra* note 12.

⁶⁶ See S. Weinberg, *Breaking the Rules*, *supra* note 12 (discussing recidivism among prosecutors who engage in misconduct).

⁶⁷ In connection with the PITTSBURGH-POST GAZETTE study,

Deputy Attorney General Holder made a similar point when he noted that the reporter had discussed only 70 cases during a time period when prosecutors had brought approximately 500,000 criminal cases. See E. Holder, *supra* note 60.

⁶⁸ See S. Weinberg, *Breaking the Rules*, *supra* note 12.

⁶⁹ See A. Davis, *supra* note 10, at 17.

⁷⁰ *Id.*

⁷¹ *Id.* at 18.

⁷² See, e.g., *United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998) (defense attorney convicted of conspiracy and obstruction of justice for working with his client to thwart a federal investigation of the client's conduct); *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987) (defense attorney convicted of conspiracy and obstruction for actions during criminal case).

⁷³ Consider, as recent examples, the revelations about abuse at the Abu Ghraib facility, clandestine overseas CIA prisons, and National Security Agency interception of domestic telephone calls.

⁷⁴ A. Davis, *supra* note 10, at 18.

⁷⁵ The logical fallacy of Hasty Generalization occurs when a person draws a conclusion about a population based on a sample that is too small. For example: "Fred, the Australian, stole my wallet. Thus all Australians are thieves;" or, "The plane that crashed was being flown by a woman. I guess women don't make very good pilots." See NICHOLAS CAPALDI, *THE ART OF DECEPTION: AN INTRODUCTION TO CRITICAL THINKING* 118-19 (1987).

⁷⁶ Natalee Holloway was an Alabama teenager who disappeared in May 2005 while on a graduating class trip to Aruba with more than one hundred other students. Despite widespread publicity, the case has yet to be solved. See http://www.allpointsbulletin.org/Natalee_Holloway.html.

⁷⁷ *Banks v. Dretke*, 540 U.S. 668 (2004).

⁷⁸ *Id.* at 689; see A. Davis, *supra* note 10, at 20-21.

⁷⁹ See *Banks*, *supra* note 77, Brief of John J. Gibbons et al. as *amicus curiae* in support of petitioner, at 2003 WL 21673772; Brief of William G. Broadus et al. as *amicus curiae* in support of petitioner, at 2003 WL 21649672.

⁸⁰ A. Davis, *supra* note 10, at 21.

⁸¹ See A. Davis, *supra* note 10, at 21, citing Carissa Hessick, *Prosecutorial Subornation of Perjury: Is the Fair Justice Agency the Solution We Have Been Looking For?*, 47 S.D. L. REV. 255 (2002). Indeed, far from supporting Professor Davis's accusations, Hessick concludes that "Whether or not prosecutors are repeatedly suborning perjury and engaging in other forms of misconduct remains a factual dispute." *Id.* at 280.

⁸² Professor Davis apparently misses the irony in her own discussion of the *Banks* case, where she points out that former federal prosecutors and other law enforcement officers joined in *amicus* briefs urging the Supreme Court to reverse *Banks*'s conviction. See A. Davis, *supra* note 10, at 21. If in fact the misconduct in the *Banks* case was "very common" and "not unusual," as Professor Davis claims, then presumably prosecutors and other law enforcement officers would not be upset by it – they would consider it business as usual. Cf. Steven Weinberg, *Turning on Their Own*, Center for Public Integrity, available at <http://store.publicintegrity.org/pm/default.aspx?act=sidebars&id=29> (discussing another case where former prosecutors filed a brief with the Supreme Court supporting the defendant and accusing the prosecution of misconduct).

⁸³ A. Davis, *supra* note 10, at 23.

⁸⁴ See *id.* at 22.

⁸⁵ Equally interesting is Professor Davis's discussion of the Paul Howes case, the most notorious example of prosecutorial misconduct to come out of my former office in recent memory. See A. Davis, *supra* note 10, at 23. Howes was found to have regularly abused the witness voucher system to make improper payments to cooperating witnesses and their families and friends. Howes had been one of the top homicide and gang prosecutors in the office. He left the office in disgrace, was subject to multiple bar and Department of Justice disciplinary proceedings and investigations, and moved across the country to the west coast to join a private firm. It's not clear to me how this constitutes "advancing in your career." About the best that can be said about the case from Howes' perspective is that he managed to avoid being indicted.

⁸⁶ There may be a number of institutional reasons why state bar disciplinary proceedings against prosecutors are relatively rare. Professor Zacharias performed a study which found that state bar authorities generally seem reluctant to proceed against any attorneys involved in the criminal process – both defense attorneys and prosecutors. He also notes that many ethical rules (such as those dealing with handling client matter or client funds) by their nature do not apply to prosecutors. See F. Zacharias, *supra* note 37, at 750-54. In addition, much of what prosecutors do falls within the realm of discretionary acts. Even if a court later finds that there was "prosecutorial misconduct," bar discipline proceedings generally will not be brought based on an exercise of a lawyer's discretion. See *id.* at 736; Leslie Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 282-84 (2001).

⁸⁷ Information on the Office of Professional Responsibility is available at <http://www.usdoj.gov/opr>.

⁸⁸ See F. Zacharias, *supra* note 37, at 763 (discussing the impact of allegations of misconduct on the performance evaluations, salaries, and job retention of prosecutors).

⁸⁹ Cf. G. Lynch, *supra* note 23, at 2150 ("[W]e should not be entirely cynical about the possibility that government officials can conduct themselves with fairness and in the broadest public interest . . . it is a simple fact that most do.").

⁹⁰ See F. Zacharias, *supra* note 37, at 740 (arguing that prosecutors are "fairly unlikely" to violate certain ethical rules "because of their need to maintain an ongoing professional relationship with judges before whom they appear routinely"); Bruce Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?* 8 ST. THOM. L. REV. 69, 70-71 (1995) (discussing informal "judicial controls" on prosecutors).

⁹¹ Cf. Frank Bowman, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt in "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 56-58 (1999) (arguing that a prosecutor cannot be effective if she gains a reputation for behaving unfairly during plea and cooperation agreement negotiations). See generally Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381 (1996) (discussing the use of cooperating defendants to build criminal cases).