

They Must **Answer** for What They've Done

Prosecutors who misuse discretion or abuse power should be held accountable.

BY ANGELA J. DAVIS

Prosecutors are the most powerful officials in the criminal justice system. When they misuse their power, people can be gravely harmed, as two infamous cases in recent years make disturbingly clear. In Georgia, a teenage boy was sent to prison for having consensual oral sex with a teenage girl. In North Carolina, three college students were wrongfully accused of a gang rape. For a long time, no one could or would rein in the prosecutor in either case.

In a democracy, we hold accountable those to whom we grant power. Yet prosecutors are rarely accountable to the people they serve. Too often, when prosecutors misbehave, justice depends on the defendants' wealth or the media's attention. It's not supposed to work that way.

The case of an African-American teenager named Genarlow Wilson shows what can happen to a powerless defendant. Three years ago, Wilson and his friends rented a hotel room for a party, where they engaged in the kind of behavior that is common among teens but criminal under Georgia laws: They drank alcohol, smoked marijuana, and had sex. They also videotaped themselves. The next morning the police arrived. The boys were arrested and charged with several sex offenses. All except Wilson accepted a plea offer with a five-year prison sentence and the requirement to register as sex offenders.

Wilson refused to plead guilty. The jury acquitted him of rape but found him guilty of aggravated child molestation. At the time, the latter offense included oral sex with a child under the age of 16—even, as in this case, if the victim is 15, the offender is 17, and the sex is consensual. The videotape clearly demonstrated that Wilson had oral sex with

the girl, but she did not call the police or want him to be prosecuted. Several jurors were upset when they later found out that the penalty was 10 years in prison with no possibility of parole. Responding to public outrage, the Georgia Legislature reduced Wilson's offense to a misdemeanor—but only for future teenage offenders.

When Douglasville, Ga., District Attorney David McDade learned that Wilson had engaged in consensual oral sex with another teenager, he wasn't legally required to charge Wilson with anything. He could have used his discretion wisely and determined that this college-bound senior with no prior record should not be charged. The girl and her mother begged McDade not to proceed. But he did, and Wilson has spent the past two years doing hard time. Even today, despite the legislature's action and overwhelming public support for Wilson's release, state Attorney General Thurbert Baker is appealing a judge's order to release the young man.

It is true that McDade did not violate any legal or ethical rules when he charged Wilson with aggravated child molestation. His refusal to support Wilson's release is likewise legal. But both decisions represent a poor exercise of discretion at a terrible human cost.

On the other hand, Durham, N.C., District Attorney Mike Nifong's decision to withhold exculpatory evidence was neither legal nor ethical.

To be clear, Nifong's initial decision to charge three Duke University students with rape was not unreasonable. Prosecutors frequently charge alleged rapists on the complainant's word alone. Nifong was undoubtedly mindful of the justice system's poor treatment of rape victims, especially African-American women. If he had failed to pursue the prosecution of wealthy white men accused of raping a poor black woman, he would have been justifiably criticized.

Facing an election in a jurisdiction with a sizable African-American community, he had the three students indicted for rape, first-degree sexual offense, and kidnapping.

But along the way, Nifong's behavior crossed the line from zeal to misconduct. In *Brady v. Maryland* (1963), the U.S. Supreme Court established a constitutional requirement that prosecutors turn over exculpatory information to the defense. All 50 states and the District of Columbia have disciplinary rules enforcing that requirement. Nifong clearly violated the rule when he failed to turn over a DNA report that supported the suspects' innocence. He also withheld contradictory statements that cast serious doubt on the complainant's credibility.

When it became clear that the state could not possibly prove guilt, North Carolina Attorney General Roy Cooper removed Nifong from the case and dismissed the indictments. State disciplinary authorities quickly brought ethical charges, and Nifong was disbarred in June.

But such accountability is rare. Whether their misdeeds are legal, like McDade's, or illegal, like Nifong's, prosecutors who abuse their power and discretion usually skate free.

UNCHECKED POWER

Prosecutors are the most powerful officials in the criminal justice system because they alone decide whether to charge a person with a crime, what charges to bring, and when to accept a plea to a lesser offense. Because more than 95 percent of criminal cases are resolved by a guilty plea, prosecutors determine the outcome of almost all such cases. And they do this behind closed doors, with no requirement to justify these crucial decisions (except possibly to other prosecutors).

Despite its potential for abuse, prosecutorial discretion is essential to the administration of justice. Among the vast array of criminal statutes, there are laws—against fornication and adultery, for example—that stay on the books long after social mores have changed. There are broadly defined offenses that do not always warrant prosecution. We want prosecutors to differentiate between a large-scale gambling operation and a Saturday night poker game.

We also want prosecutors to recognize when evidence is strong enough to get an indictment but not to prove guilt beyond a reasonable doubt. Prosecutors should know when to husband their resources by pursuing serious or strong cases, while dismissing or quickly resolving minor or weak cases.

Just prosecutions also require a consideration of the individual facts and circumstances of each case. Some defendants have long criminal histories, while others are first-time offenders. Some victims are totally innocent of wrongdoing, while others provoked the crime with their own criminal behavior.

It is not prosecutorial discretion itself that undermines the criminal justice system but the lack of accountability for its abuse. The ineffectiveness of all remedies blurs the line not only between appropriate and inappropriate exercises of discretion (as in McDade's case) but also between legal and illegal prosecutorial conduct (as in Nifong's case).

Although the state attorney general characterized Nifong's obvious misconduct as an aberration, nothing could be further from the truth. In 2003, the Center for Public Integrity issued a report revealing widespread misconduct. Investigative reports by the *Chicago Tribune* and the *Pittsburgh Post-Gazette* provide additional proof that prosecutors routinely violate their obligation to show exculpatory evidence to the defense. The result has been wrongful convictions—even wrongful death sentences.

Unlike the Duke students, the overwhelming majority of the victims of prosecutorial misconduct are poor, and a disproportionate number are people of color. Almost all are represented by court-appointed lawyers. One of the attorneys for the Duke students discovered exculpatory information after spending 60 to 100 hours analyzing 1,844 pages of laboratory data. No public defender or other court-appointed counsel has the resources to mount that type of investigation. Nor would such investigations be necessary if prosecutors fulfilled their ethical obligations.

The courts provide no legal recourse for McDade's misjudgment and ineffective remedies for Nifong's misconduct. The Supreme Court has upheld prosecutorial discretion in a variety of contexts. Even with outright misconduct, criminal convictions are reversed in only the most extreme cases under the Court's "harmless error" standard. The Court has repeatedly suggested that the appropriate remedy for prosecutorial misconduct is a referral to state disciplinary authorities.

But such referrals almost never occur. In its 2003 report, the Center for Public Integrity found only 44 cases since 1970 in which prosecutors faced disciplinary proceedings for misconduct that infringed upon the constitutional rights of criminal defendants. Out of those 44 cases, the prosecutor's license to practice law was suspended in only 12 cases. In only two cases was the prosecutor disbarred.

The uncomfortable truth is that Nifong has been held accountable because his victims were wealthy and white, with the resources to demand justice. Genarlow Wilson remains incarcerated for behavior that teens engage in every day because he is poor and black. If Wilson is freed, it will be because the press revealed the prosecutor's behavior and the public demanded accountability. We need a system that demands accountability in all cases, not just the lucky few.

AGENTS OF ACCOUNTABILITY

Reform must come from the public, the bar, the judges, and the prosecutors.

Most state and local prosecutors are elected officials who serve at the pleasure of the voters. Too often those voters demand nothing more than a vague promise to be tough on crime. The voters should ask questions about prosecutors' charging and plea-bargaining policies. And when prosecutors use poor judgment in the exercise of their discretion, the voters should hold them accountable.

Indeed, it is only the voters who can step in when prosecutors make bad but legal decisions. Since Wilson's incar-

ceration, several rallies in support of his release have sent a very clear message that the voters of Douglasville are dissatisfied with McDade's actions. It is doubtful that he will be re-elected.

While citizens render their verdict at the ballot box, the organized bar must improve its disciplinary system to better handle the abuse of prosecutorial power. The current rules are woefully inadequate in addressing the most important prosecutorial functions.

In the Model Rules of Professional Responsibility, only Rule 3.8 specifically looks at prosecutors, and it fails to address a number of important issues, including conduct before the grand jury, relations with police and other law enforcement officers, relations with victims and government witnesses, and selective prosecution.

In addition, some of the rule's language is vague and open to too much interpretation. For example, Rule 3.8(d) requires "timely disclosure" of exculpatory information. But where does "timely" fall in the weeks between the first suggestion that such evidence exists and the start of opening arguments?

Rule 3.8(a) permits prosecutors to bring charges based on the very low standard of probable cause. While that is the same standard used by grand juries in issuing an indictment, shouldn't ethical rules require that prosecutors meet a higher standard to proceed with a case? After all, they must meet a much higher standard—proof beyond a reasonable doubt—to obtain a conviction. As long as they can bring charges on mere probable cause, the charging power can be used to intimidate, harass, or coerce a guilty plea where the government suspects that it cannot meet its burden at trial.

When presented with an opportunity to revise the rules that apply to prosecutors, the American Bar Association's Ethics 2000 Commission dropped the ball. It's time to revive that effort.

The members of the bar with the keenest eye for prosecutorial misdeeds, defense attorneys, are understandably

hesitant to refer prosecutors to bar counsel. Every defense attorney knows that her future clients may find themselves at the mercy of this same prosecutor, who will determine what plea offers will be made. Given the poor odds of prevailing, challenging the bar license of an official who holds all the cards is risky business. Judges, however, do not have such concerns.

That's why judges have a responsibility to do more than occasionally impose modest sanctions in the context of particular cases. When they observe misconduct, judges should refer prosecutors to state disciplinary authorities. Faced with a real threat of referral to bar counsel, prosecutors might think twice before withholding exculpatory evidence or engaging in other forms of misconduct.

Prosecutors themselves must step up to the plate. Inherent in their discretion is the power to change policies and practices without new laws or rules. The National District Attorneys Association and the Justice Department should establish mandatory training on the ethics rules and the appropriate exercise of discretion. The ABA Commission on Effective Criminal Sanctions has recommended training on discretion; the ABA Standards for the Prosecution Function should be included in the curriculum.

Finally, individual prosecutors should hold regular town hall meetings in which they explain their policies and practices and receive feedback from the people they are elected to serve.

Inscribed on the Justice Department walls are these words: "The United States wins its point whenever justice is done its citizens in the courts." Too many prosecutors seem to have forgotten this. Without reform, they will continue to wield their power to produce grave injustice.

Angela J. Davis is a professor at American University's Washington College of Law and the author of Arbitrary Justice: The Power of the American Prosecutor (Oxford University Press, 2007).