

Southern Methodist University

SMU Scholar

Faculty Journal Articles and Book Chapters

Faculty Scholarship

2012

The Conscience and Culture of Prosecution: An Introduction

Anna Offit

Southern Methodist University, Dedman School of Law

Recommended Citation

Anna Offit, *The Conscience and Culture of Prosecution: An Introduction*, 25 *Geo. J. Legal Ethics* 871 (2012).

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

INTRODUCTION

The Conscience and Culture of Prosecution: An Introduction

ANNA OFFIT, EDITOR IN CHIEF *GEORGETOWN JOURNAL OF LEGAL ETHICS*
VOL. XXV

This issue of *The Georgetown Journal of Legal Ethics* marks the *Journal's* 25th volume and 25th anniversary. But it also celebrates a special moment in the journal's history: for the first time, this past March, the *GJLE* hosted an interdisciplinary conversation between a filmmaker, former prosecutors, law professors, defense attorneys, and graduate students. Several questions prompted this gathering: First, do prosecutors have a distinctive legal "culture"? What are the shared assumptions that define it? And how do those assumptions synchronize or conflict with the behaviors we deem ethical?

If a U.S. Attorney, for instance, learns of DNA evidence exonerating a person she prosecuted, why might she be more likely to create alternate theories to support the conviction rather than confront the possibility of a horrific mistake? This is a psychological issue that goes beyond ethical rules and gaps in the law. What we're *really* talking about are the social and cultural forces acting on a person's mind.

To get at this issue, filmmaker Ofra Bikel shared excerpts from two of her PBS "Frontline" productions—"The Case for Innocence" (2000) and "An Ordinary Crime" (2002). Both describe wrongful convictions with ethnographic details often lost in legal opinions; each segment drew on the narratives of victims, their family members, and a community of legal scholars, advocates, and observers.

Our panelists, though they had very different perspectives, agreed that the social and psychological forces at work in prosecutors' offices create their own cultures—and affect the way attorneys treat exculpatory evidence. Professor Angela Davis, who formerly served as director of the D.C. Public Defender Service, believed that the culture of prosecutors' offices is set by those at the top. She pointed to Craig Watkins, the Dallas County District Attorney, who created a Conviction Integrity Unit to re-investigate cases where there were post-conviction claims of innocence.

As a former prosecutor, Professor Paul Butler offered insight into prosecutorial culture—where, in his experience, defendants were referred to as "cretins and

douchebags.” Butler also knows prosecutorial culture because he was prosecuted himself (for simple assault). He compared the experience to being on an assembly line and held that he, like most defendants, had been denied access to the evidence used against him.

Deborah Connor, who serves as Deputy Chief in the Federal Major Crimes section at the United States Attorney’s Office for the District of Columbia, agreed that prosecutors’ offices need to encourage an attitude of openness about revisiting convictions. But she also reminded us that prosecutors make ethical decisions—including those *not* to charge defendants—every day. These are just invisible parts of the process; documentaries don’t get made when prosecutors do their jobs correctly.

There is little question that prosecutorial misconduct and discretion will continue to fill conversations. Aside from changing the culture of prosecutors’ offices from the inside—or through greater external regulation—others advocate for empowering the jury to serve as a check to prosecutorial discretion. Roger Fairfax, who contributed an article to this issue, has written in the past about the greater role grand jurors could play in offsetting abuses of prosecutorial discretion.¹ And in the case of *trial* juries, there is concern that even prospective jurors are subject to unlawful elimination by prosecutors who use a disproportionate number of peremptory challenges to eliminate black jurors.²

Most of all, though, the symposium highlighted the benefit of disparate perspectives. By drawing on the insights of social scientists, practitioners, teachers, and outside observers, the *GJLE* was able to help illuminate the different ethical values embedded in criminal process—and how they are understood by those with the power to change them.

1. See generally Roger A. Fairfax, *Does Grand Jury Discretion Have a Legitimate (and Useful) Role to Play in Criminal Justice?*, in GRAND JURY 2.0, (2010).

2. Complaint, Dennis Hall et al. v. Valeska, Case No. 1:11-cv-00894-WHA-CSC, (M.D. Ala., Oct. 19, 2011); See generally *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, Equal Justice Initiative, (Aug. 2010), <http://eji.org/eji/files/EJI%20Race%20and%20Jury%20Report.pdf>.