

NEAL PEIRCE COLUMN

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LAW AND ORDER DILEMMA:  
WHO CHECKS THE PROSECUTORS?

By Neal Peirce

With a recent uptick in crime, tough prosecutors who are ready to convict and imprison perpetrators are likely to be more popular than ever.

But a warning flag is being hoisted by American University law professor Angela J. Davis, past director of the District of Columbia Public Defender Service (and no relation to the more famed liberal activist Angela Y. Davis).

Prosecutors, notes Davis, are "the most powerful officials in the criminal justice system" -- more so even than judges. Why? "The charging and plea bargaining power they exercise almost predetermines the outcome of most criminal cases. Over 95 percent of all criminal cases are resolved by a guilty plea."

Consider a person arrested for having a quantity of drugs on them. Depending on the amount, the prosecutor can charge simple possession (a misdemeanor), or possession with intent to distribute (a felony which in most jurisdictions means a mandatory prison sentence). So it's the prosecutor, through his charge and plea bargaining powers, who really decides prison time (and most likely a wrecked life) for the defendant, or not.

The most serious system-wide issue, argues Davis in her forthcoming book, "Arbitrary Justice: The Power of the American Prosecutor," isn't the isolated, fairly rare case of a prosecutor coercing witnesses, fabricating evidence, or consciously targeting racial minorities.

Rather, it's the lack of controls on, or accountability for, the every-day decisions of prosecutors. Their legal responsibility isn't just to represent the state in seeking convictions; it's to pursue justice. But too often, Davis asserts, prosecutors exercise their discretion "haphazardly at worst and arbitrarily at best, resulting in inequitable treatment of both victims and defendants."

There's the "win-win-win" ethos in many prosecutors' offices -- elected prosecutors and their staffs out to show how tough they are on crime, or how eager to impose death penalties in heinous cases (especially when there's strong media interest, or photogenic victims). Sometimes prosecutors overcharge grossly so they can wring heavier plea bargains out of defendants. Or adopt a "don't ask, don't tell" policy toward potential police abuses in the arresting phrase.

Views on class and race, even unconsciously, lead prosecutors to make shoot-from-the-hip decisions easily at odds with true justice, Davis asserts: "I saw it all

the time in the D.C. system. A rich kid comes in (though few are arrested) with parents and family lawyer, explaining 'Little Johnny has a drug problem and let's put him in a program, not lock him up.' The prosecutor usually agrees. But a poor, black or Latino kid comes in on a parallel drug case, maybe with a public defender, and the prosecutor figures -- 'I can't let you back into the neighborhood, I'll send you to jail.'"

Davis also pinpoints how appointed U.S. Attorneys, pursuing the country's "war on drugs," have focused relentlessly on convicting and incarcerating even small-time neighborhood drug dealers and their girlfriends and family members, especially from inner-city neighborhoods, even on the scantiest of evidence. Federal drug prosecutions tripled between 1981 and 1990.

Under our system, all officials wielding government power should be and are subject to checks -- but we've ended up, Davis asserts, "giving prosecutors a pass" -- no effective control by voters, legislatures, or the judiciary itself. Voters have little idea of how prosecutors are actually handling cases. Legislatures (and Congress) pay scant attention beyond frequently bolstering prosecution powers.

The U.S. Supreme Court has severely circumscribed conditions under which prosecutors' judgment can be questioned at all, referring cases to states' attorney disciplinary authorities that are themselves known to be weak. From 1970 to the mid-1990s, one study found, there were only 44 cases nationwide in which prosecutors faced disciplinary hearings of misconduct; even then, a reprimand was generally the worst punishment.

So what's to be done? Prosecutors themselves have traditionally resisted oversight. The public has been inundated with television programming that justifies prosecutors going right up to the edge on ethics and law to get the "bad guys." The American Bar Association publishes standards of behavior for prosecutors, but the strictures have no teeth -- they're just "aspirational," Davis notes.

Davis would have national, state and local bar associations conduct in-depth investigations to determine adequacy of current prosecutorial misconduct controls, and possible reforms. She'd have bar associations set up state and/or local prosecution review boards -- not only to receive specific complaints brought by the public, but undertake random reviews of prosecutions and (with colleges and universities) launch surveys to reveal discriminatory practices by race or class.

The idea is that an outside eye could discourage arbitrary, hard-to-justify choices by prosecutors without chilling the essential, fair law enforcement we all depend on prosecutors to perform.

Against the formidable, entrenched power of today's federal-state-local prosecutorial systems, any prospect of significant culture reform seems remote. But if we're ever to dare a start, Davis offers a group of eminently reasonable first steps.