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CARDOZO LAW REVIEW
de•novo

INTRODUCTION

NEW MODELS FOR PROSECUTORIAL
ACCOUNTABILITY

Russell Shapiro[†]

The criminal justice system in the United States was established on a simple notion: “that it is better that ten guilty persons escape, than that one innocent suffer.”¹ It is for this reason that a prosecutor’s burden at trial is so demanding, requiring proof beyond a reasonable doubt. Yet, while a vast majority of prosecutors are committed to the highest ethical standards, with troubling frequency,² some high profile exonerations shed light on systemic problems, most often involving failures by prosecutors and other law enforcement officials to disclose exculpatory and impeachment evidence³ as required by *Brady v. Maryland*.⁴

To address this serious challenge, we held a symposium at Cardozo Law School entitled *New Models for Prosecutorial Accountability*,⁵

[†] Head *de•novo* Editor, *Cardozo Law Review*, Volume 37. J.D., Benjamin N. Cardozo School of Law, 2016; B.A., Binghamton University, 2011. I would like to thank Professors Jessica Roth and Ellen Yaroshefsky for their help in organizing the symposium, as well as the authors for their insightful work. I would also like to thank our *de•novo* editor, John Brill, for his hard work and enthusiasm throughout the year.

¹ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (11th ed. 1791).

² For a recent example of an exoneration stemming from prosecutorial misconduct, see *Les Burns*, NAT’L REGISTRY OF EXONERATIONS (Aug. 1, 2016), <http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4955> (Les Burns, exonerated on July 21, 2016, based on a failure by the prosecutor to turn over impeachment evidence).

³ Opinion, John Hollway, *Reining in Prosecutorial Misconduct*, WALL STREET J. (July 4, 2016 7:00 PM), <http://www.wsj.com/articles/reining-in-prosecutorial-misconduct-1467673202>.

⁴ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁵ The Innocence Project, the Jacob Burns Center for Ethics in the Practice of Law, the Center

with each panel representing a unique perspective within our criminal justice system: bar counsel; state and federal judges; academics; and prosecutors. The following essays stem from these discussions.

Professor Ellen Yaroshefsky lays the groundwork for our discussion of prosecutorial accountability by defining “misconduct” as a term that captures the acts of various law enforcement agencies, not merely the prosecutor, while also covering both intentional and unintentional actions. Next, Professor Yaroshefsky compares the legal obligation with the ethical obligation of prosecutors to disclose exculpatory and impeaching evidence. Finally, Professor Yaroshefsky addresses the magnitude of the problem, paving the way for solutions offered in the subsequent essays.

Judge Emmet Sullivan of the U.S. District Court for the District of Columbia details the eight-year effort to amend Rule 16 of the Federal Rules of Criminal Procedure: to exceed the government disclosure requirements set out in *Brady* and *Giglio*⁶ regarding exculpatory and impeachment evidence. While the amendment did not pass, Judge Sullivan shares his own attempts at providing defendants with the protection of a federal disclosure rule. In addition to issuing a standing *Brady* Order for each criminal case on his docket, Judge Sullivan also urged the formation of an ad hoc committee in the District Court for the District of Columbia, which drafted a proposed disclosure rule.

Finally, Dallas County District Attorney Susan Hawk and Special Fields Bureau Chief of the Conviction Integrity Unit in the Dallas DA’s Office, Patricia Cummings, discuss the unique approach taken in their office. The impetus for change involved Michael Morton—a man incarcerated for twenty-five years for his wife’s murder⁷—only to be cleared by DNA evidence⁸ and recently released offense reports that had been withheld—egregious *Brady* violations. As a result of lobbying by Morton and others that were wrongfully convicted, the authors detail the legislative changes in Texas regarding criminal discovery. In addition, the Dallas DA’s Office has taken a unique approach in resolving both intentional and unintentional violations, changing the focus from assigning blame to taking prophylactic measures. Along with its Conviction Integrity Unit (CIU), the Dallas DA’s Office has also incorporated training, performance evaluations, and hiring practices focused on ethics.

It is our hope that the conference and these short essays increase

for Rights and Justice at Cardozo School of Law, and the Cardozo Law Review, Symposium: New Models for Prosecutorial Accountability (Apr. 21, 2016).

⁶ *Giglio v. United States*, 405 U.S. 150 (1972).

⁷ *Morton v. State*, 761 S.W.2d 876 (Tex. Ct. App. 1988).

⁸ *Ex parte Morton*, No. AP-76663, 2011 WL 4827841 (Tex. Crim. App. Oct. 12, 2011) (per curiam).

the public discussion of prosecutorial accountability. A larger dialogue that engages all stakeholders of the criminal justice system—prosecutors and defense attorneys, the judiciary, bar associations, and academia—will help to address the systemic problem of failures to disclose evidence. Through the interchange of ideas and practices, both prospective and unsuccessful, we can limit the number of wrongful convictions at the earliest juncture possible.