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In this article, Heather Schoenfeld discusses the relationship between prosecutorial misconduct at trial and wrongful convictions. She proposes a comprehensive theory of prosecutorial misconduct that views prosecutors as agents of trust and that sees prosecutorial misconduct as violations of the norms of trust. Arguing that the public “trusts prosecutors to use their skills, knowledge, and power to prosecute people who break the law,” Schoenfeld suggests that “misconduct occurs when prosecutors positively evaluate motives and opportunities for misconduct in a way that neutralizes symbolic constraints against misconduct.” She discusses the motivations that prosecutors have for engaging in misconduct and the opportunities for misconduct that arise at trial. She also explores the sanctions for prosecutorial misconduct, which she characterizes as underutilized and ineffective.

Violated Trust

Conceptualizing Prosecutorial Misconduct

Heather Schoenfeld

In the past 30 years, the prosecutor has become the most powerful position in the criminal justice system (Saltzburg & Capra, 2000). Unfortunately, this power has contributed to convictions of innocent defendants. Although the full extent of prosecutorial misconduct is unknown (Meares, 1995), recent studies suggest cause for concern. Prosecutorial misconduct was a factor in 45% of recent cases overturned because of DNA evidence (Scheck, Neufeld, & Dwyer, 2000, p. 361) and 24% of recently overturned death penalty cases (Warden, 2001). The Center for Public Integrity found that since 1970, appellate courts have reviewed 11,452 criminal cases where the defendant claimed the prosecutor acted improperly. In 20% of the cases, the court dismissed, reversed, or reduced the original sentence partly because of the misconduct (Weinberg, Gordon, & Williams, 2005).

The aforementioned reports and the recent media coverage of wrongdoing by prosecutors point to the need for systematic analyses of prosecutorial misconduct and its causes.¹ New empirical research on misconduct

should be grounded in a comprehensive theory. However, existing theories of prosecutorial misconduct do not take into account the structure of the prosecutorial profession while specifying conditions under which prosecutorial misconduct is more likely. This article proposes an alternative more comprehensive theory—with the goal of generating testable hypotheses. The theory builds from the characterization of prosecutors as agents of trust and prosecutorial misconduct as violations of the norms of trust. Borrowing from theories of occupational crime to explain how the structure of the trust relationship creates motivation and opportunities for misconduct, the theory can explain why some prosecutors, despite their mandate to seek justice, use improper and unethical tactics.

Prosecutorial misconduct can occur during any part of the criminal justice process, including presentation to the grand jury, charging decisions, discovery, plea negotiations, trial, and postconviction appeals. However, the following argument focuses on prosecutorial misconduct around criminal trials—either during pretrial discovery,

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trial, or posttrial appeals—because this type of misconduct is most implicated in wrongful conviction cases.² Because most convictions are obtained through a guilty plea, the scope of the argument is necessarily limited. However, because approximately one third of murder defendants' cases go to trial (Rainville & Reaves, 2003), including many high-profile cases, the potential incidence of prosecutorial misconduct presents a significant obstacle to the legitimacy and reliability of the current criminal justice system.

Explanations for Prosecutorial Misconduct

Knowledge of prosecutorial conduct is derived mainly from journalistic accounts and legal scholarship, none of which adequately explains why some prosecutors engage in misconduct and others do not. Alternatively, social scientists have developed theories of legal decision making; however, these theories do not specifically address misbehavior.

Legal Accounts of Misconduct

Legal analysts usually rely on either a so-called tunnel vision or a conviction psychology explanation for prosecutorial misconduct. The first contends that prosecutors ultimately seek justice, and because most defendants are guilty, prosecutors feel compelled to sidestep problems that could sacrifice a guilty verdict (Jonakait, 1987). For example, some prosecutors feel justified allowing a witness to lie about his or her background because they believe this behavior serves the interest of so-called truth (Dershowitz, 2003). Tunnel vision, or the cognitive process of applying stereotypes to cases, can also cause legal actors to discount conflicting information (Anderson, Lepper, & Ross, 1980) or neglect evidence that is contrary to their version of events (Martin, 2002; McCloskey, 1989). In this scenario, prosecutors' unwavering belief in the defendant's guilt is the prime cause of their misconduct.

Other accounts blame misconduct on prosecutors' "score-keeping mentality" or conviction psychology that compels them to win at all costs (Felkenes, 1975).³ This mentality stems from institutional, professional, and political pressures to win convictions (Bresler, 1996; Fisher, 1988; Gershman, 2001). For example, district attorneys

(DAs) feel pressure to convict because voters use convictions as a quantifiable measure of success when choosing a DA candidate (Gordon & Huber, 2002). Legal analysts argued that the desire to win convictions, coupled with limited sanctions for misconduct, can lead to misconduct (Meares, 1995).

Prosecutorial Decision Making

Sociologists' and criminologists' analyses of decision making by prosecutors, defense attorneys, and judges have primarily focused on plea bargaining (Albonetti, 1986; Emmelman, 1997; Sudnow, 1965) or sentencing (Albonetti, 1991; Maynard, 1982; Steffensmeier, Ulmer, & Kramer, 1998) as these activities constitute the core activity of most courts (Ulmer, 1997).⁴ They posited that to make decisions under conditions of uncertainty, legal actors use socially constructed subjective definitions of "normal crimes" or "typical defendants" that act as "short-hand reference terms for [legal actors'] knowledge of the social structure and criminal events" (Sudnow, 1965, p. 275; see also Albonetti, 1986; Farrell & Holmes, 1991). These notions develop through the interaction and interdependency of prosecutors, defense attorneys, and judges who must work together to run an efficient system with limited financial or human capital (Eisenstein, Flemming, & Nardulli, 1988; Ulmer, 1997).

Professional identities and internal organizational culture also structure legal actors' decisions. In their comprehensive research of nine court communities in the late 1970s, Flemming, Nardulli, and Eisenstein (1992) identified three DA leadership styles. Insurgent DAs work aggressively to increase the power of their office, organize their offices hierarchically, employ lax charging standards but implement strict restrictions on plea bargaining in favor of tough punishment. Reformer DAs, also interested in increasing the power of their office, tend to focus more on office efficiency—requiring tight charging standards along with plea-bargaining restrictions. Finally, conservator DAs are satisfied with the status quo and allow their assistant district attorneys (ADAs) more discretion within a decentralized organization structure.

While neither of these literatures directly focuses on prosecutorial misconduct, they identify structural realities and individual-level cognitive factors that could contribute to misconduct. Legal scholarship, for example,

points to the inherent contradictions within the profession and the external and internal systems of rewards and sanctions for misconduct. The decision-making literature points to cases that, falling outside of understood categories of crime and criminals, are less likely to be subject to plea bargaining and more likely to be subject to the adversarial process (Sudnow, 1965). It is often in the context of these so-called exceptional cases that the opportunity for misconduct arises (Farrell & Holmes, 1991).

Prosecutors as Agents of Trust

Characterizing the Trust Relationship

The Supreme Court held in 1935 that prosecutors have a unique role in the legal system as the “representatives” of the “sovereignty.” The opinion states

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. . . . 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. (*Berger v. United States*, 1935, p. 88)

Where the sovereignty derives its power from the people, prosecutors represent the public within the bounds of a trust relationship. In the sociology of trust, principals (in this case the public) transfer power and delegate resources to agents (prosecutors), so that the agents may perform specialized services or complex projects (Shapiro, 1990, p. 348). In the United States’ judicial system, the public entrusts prosecutors to develop specialized skills and gain specialized knowledge through the powers bestowed on the role (such as the right to subpoena; Guerrieri, 2001). The public then trusts prosecutors to use their skills, knowledge, and power to prosecute people who break the law.

Trust relationships are inherently unbalanced for three reasons. First, agents hold monopolies of information from

which their actions are based. Second, because of their status as repositories for delegated power and their rights to resources and discretion they have the power to control principals’ well-being. Third, agents’ role is ambivalent, creating conflict between an “acting for” role and self-interest (Shapiro, 1990, p. 348). To properly balance the trust relationship, both parties tacitly agree to the following norms of the trust: (a) both parties disclose fully and honestly, (b) agents put the interests of principals above their own, and (c) agents maintain role competence and duties of diligence and prudence (Shapiro, 1990). Agents who violate the trust relationship do so by violating the norms of trust—of disclosure, disinterestedness, and role competence.

Violations of the Norms of Trust

Prosecutors’ acts of misconduct are essentially violations of the norms of trust and, therefore, stem from the nature of trust relationships. The courts have identified three categories of prosecutor misconduct during trial: personal remarks, remarks promoting bias, and improper conduct around the facts of the case. The Court’s opinions about the first two types of misconduct clearly demonstrate how the trust relationship creates the violation.

It is fair to say that the average jury, in a greater or less degree, *has confidence* [emphasis added] that . . . [obligations to serve justice] will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. (*Berger v. United States*, 1935, p. 88)

Later, in *United States v. Young* (1985), the Court wrote that the “prosecutor’s opinion carries with it the imprimatur of the Government and *may induce the jury to trust the Government’s judgment* [emphasis added] rather than its own view of the evidence” (p. 18).

The third category of misconduct, improper conduct, includes knowingly presenting false testimony, letting false testimony stand without correction, making material misstatements of law or fact (or evidence),⁵ and not disclosing evidence favorable to defendant (Hetherington, 2002). Each jurisdiction has its own rules of disclosure.⁶

However, because of constitutional requirements for a fair trial, prosecutors must also disclose evidence that is “material either to guilt or punishment” or of “sufficient probative value” to create reasonable doubt as to guilt.⁷ While the criteria for materiality and probative value can be ambiguous, the Court has increasingly ruled in the spirit of *United States v. Agurs* (1976) that the “prudent prosecutor will resolve doubtful questions in favor of disclosure” (p. 108). It is these violations of disclosure that are most often implicated in wrongful convictions (Innocence Project, 2001).

Role Duality in Trust Relationships

The problem of prosecutorial misconduct is intimately linked to the role of the prosecutor in the U.S. legal system as the repository for delegated power. As agents in trust relationships, prosecutors have a dual role—they are to be impartial representatives and vigorous advocates (Fisher, 1988). Recall the Supreme Court opinion, *Berger v. United States* (1935), which obliges prosecutors to “govern impartially” and “prosecute with earnestness and vigor.” The American Bar Association (1993) also recognizes this duality calling the prosecutor an “administrator of justice, an advocate, and an officer of the court” (sec. 3-1.2). Prosecutors, similar to other agents of trust, can face a conflict between their acting-for role and their self-interest as a vigorous lawyer.

As an impartial judicial officer of the court, prosecutors seek truth, fairness, and the rights of the accused. As a zealous advocate, prosecutors seek convictions and penal severity (Fisher, 1988). Thus, the role of a prosecutor, as an agent of trust, necessitates constant discretion concerning when to act impartially and when to advocate.

The nature of the trust relationship with its monopoly on information, necessary discretion, and role conflict generates conditions that can lead to prosecutorial misconduct. A theory of prosecutorial misconduct should start from the premise that prosecutorial misconduct is a violation of delegated trust. In this sense, theoretical explanations for occupational crimes that violate the norms of trust are useful in generating a comprehensive theory of prosecutorial misconduct (Shapiro, 1990).⁸ Although differential association theory (Akers, 1998) or social control theory (Hirschi, 1969) could be used to explain occupational crime, an integrated

theory of occupational crime can better explain how structural factors interact with individual-level social-psychological variables to cause misconduct. Borrowing from integrated theories of occupational crime that focus on confluence of motivation, opportunity, and choice (Coleman, 1987; McKendall & Wagner, 1997), the following sections lay out a theory of prosecutorial misconduct that posits that misconduct occurs when prosecutors positively evaluate motives and opportunities for misconduct in a way that neutralizes symbolic constraints against misconduct.

Toward a Theory of Prosecutorial Misconduct

Prosecutorial Motivation

In his often-cited article synthesizing the research on white-collar crime, Coleman (1987) used a symbolic interactionist approach to define motivation as the “meaning that individuals attribute to a particular situation and to social reality . . . [which] structures their experience and makes certain courses of action seem appropriate while others are excluded or ignored” (p. 410). Socially created meanings or symbolic constructs (Blumer, 1969; Goffman, 1959) also allow individuals to anticipate the responses of others that, in turn, help them to define the situation. Prosecutors’ motivation to engage in misconduct is structured by the meanings they attach to so-called success, their perceived expectations of their role as prosecutors, and the availability of neutralizations for misbehavior.

Defining Success

Coleman (1987) argued that motivation to engage in occupational crime originates in the “culture of competition” that stresses the value of personal gain, winning, and success as measures of people’s intrinsic worth. Essentially, prosecutors want, as do most professionals, to be good at their job. As one prosecutor who had four cases reversed because of misconduct said, “Nobody told us to cheat. Nobody told us to do wrong. It was to be smart, be tenacious . . . [be] the best prosecutors in the office” (Armstrong & Possley, 1999c, p. 1).

It is how prosecutors understand the role of a so-called good prosecutor that motivates their behavior. However,

because of the intrinsic nature of the trust relationship, prosecutors are likely to have role ambivalence. If, as suggested by many legal scholars, DAs use convictions as a criterion for raises and promotions, ADAs are likely to define success through convictions (Bresler, 1996; Ferguson-Gilbert, 2001; Fisher, 1988). Political ambitions and the political impetus to be “tough on crime” (Garland, 2001) may also cause prosecutors to tend toward their advocate role (Fisher, 1988; Medwed, 2004). In addition, insurgent DAs could induce ADAs to emphasize punishment over fairness (Flemming et al., 1992). For example, one DA who was cited for misconduct in more than 20 felony trials stated, “It’s my obligation as District Attorney to present the evidence in the light most favorable to the state . . . the people are entitled to have a D.A. who argues their position very vigorously” (Armstrong & Possley, 1999b, p. 13).

Neutralizations

The meaning that prosecutors attribute to situations not only motivates behavior, but also constrains it. For example, while prosecutors want to be good at their jobs and meet their supervisors’ expectations, their actions are also constrained by their understanding that fabricating evidence is wrong. Consequently, when people behave against norms they must neutralize their symbolic constraints (Sykes & Matza, 1957). Common techniques to neutralize occupational crime include denial that the act causes harm to others, insistence that the laws violated are wrong or unfair, arguing that the position necessitated the illegal behavior, or taking the so-called everyone does it stance (for a review, see Coleman, 1987). These neutralizations allow people who behave illegally to construct their behavior as “right,” thus becoming part of their motivational framework.

While there is no systematic data on prosecutors’ neutralizations for their misbehavior, certain structural realities of the prosecutorial profession make various neutralizations available—increasing the likelihood that prosecutors could think they are doing the right thing despite their misconduct. First, because part of the prosecutor’s role is to serve justice—an undefined concept—prosecutors can neutralize misconduct that ultimately ends in their idea of justice. Commenting on the indictment of three former prosecutors and four police officers for the framing of Rolando Cruz, who spent 12 years

wrongfully incarcerated, Larry Marshall, a leading expert on wrongful convictions, stated, “There’s a feeling that that is how it works, that it’s legitimate to bend the truth sometimes when you are doing it with—‘the greater good’—in mind” (as cited in Armstrong & Possley, 1999d, p. 1).

Second, prosecutorial behavior often walks a fine line between legitimate behavior and misconduct. For example, when selecting a jury prosecutors are not allowed to use race as a determining factor in peremptory challenges (*Batson v. Kentucky*, 1986). After the defense claimed that prosecutors deliberately eliminated African Americans from the jury in all three trials of the Ford Heights 4 in Illinois, who were later exonerated, the lead prosecutor stated, “I wouldn’t say it [race] was a totally irrelevant factor—but it certainly wasn’t a determining factor” (Armstrong & Possley, 1999d, p. 1). Third, because the system (including prosecutors and defense attorneys) in practice assumes defendants’ guilt, prosecutors could neutralize misconduct because they believe they are prosecuting guilty defendants (Sudnow, 1965; Ulmer, 1997). As one judge stated about a prosecutor whose office has repeatedly wrongly withheld evidence:

From [the prosecutor’s] perspective, bad guys are bad guys and whatever we need to do to put them away is OK. But the problem is, every now and then, it’s not a bad guy. Every now and then, you’ve got the wrong guy. (Armstrong & Possley, 1999e, p. 1)

Fourth, prosecutors are held to different standards than defense attorneys who have “a special prerogative to engage in truth defeating tactics” (Fisher, 1988). Consequently, some legal scholars argue that prosecutors engage in misconduct because they find it difficult to understand why defense attorneys can behave in ways that are prohibited for prosecutors (Dershowitz, 2003). Prosecutors could potentially use this discrepancy as a neutralization technique.

Opportunity for Prosecutorial Misconduct

Motivation alone, however, does not lead to improper behavior. For improper behavior to take place, the actor must have opportunities to misbehave. Coleman (1987)

defined *opportunity* as “a potential course of action, made possible by a particular set of social conditions, which has been symbolically incorporated into an actor’s repertoire of behavioral possibilities” (p. 424). According to research on occupational crime, certain structural realities provide more opportunities for misbehavior (McKendall & Wagner, 1997). Similarly, routine activity theory suggests that, given the motivation, certain situations will give rise to misconduct (Clarke & Felson, 1993; Cohen & Felson, 1979). In the case of prosecutorial misconduct, the nature of trust relationships shapes opportunities through the structure of professional standards, office organization, and informal and formal social control.

Professional Standards

In a trust relationship, principals must allow agents discretion within the norms of trust because principals do not have access to all pertinent information (Shapiro, 1990). Accordingly, prosecutors have discretion within the rules laid out by court decisions and are not subject to uniform standards (B. A. Green & Zacharias, 2004, p. 843). For example, although it is clear that prosecutors must disclose evidence that points to defendants’ innocence, the law does not explicate guidelines that help prosecutors make the determination between exculpatory and nonexculpatory evidence. This type of ambiguity provides a central opportunity for misconduct. In fact, the Illinois Governor’s Commission on Capital Punishment (2002) cited lack of standards for disclosure as one of the factors behind wrongful convictions in Illinois. The Commission recommended that the state Supreme Court adopt a rule defining exculpatory evidence to provide clear guidance to prosecutors (Governor’s Commission on Capital Punishment, 2002).

Organizational Structure

The organizational characteristics of trust relationships can also lead to opportunities for deception. Although prosecutors’ offices are not all organized in the same manner (Flemming et al., 1992), organizational theory suggests that similarly situated professional organizations will tend toward uniformity for reasons of efficiency (DiMaggio & Powell, 1983). For example, Flemming et al. (1992) found that DA office size affects organizational structure:

Smaller offices can maintain looser structures, while large offices have to bureaucratize, with midsize offices variable. As such, the following are opportunities that develop from potential organizational impediments to informal social control. First, agent activities tend to be socially, organizationally, temporally, and geographically distant from their principals (Shapiro, 1990). In other words, agents’ activities are not transparent to the intended beneficiaries. Likewise, the activities of prosecutors’ offices are hidden from public purview, except in the case of trials. While the public holds prosecutors accountable through elections, the public does not scrutinize prosecutors’ daily activities. Even when trials face heavy public scrutiny, as in the trials of the Oklahoma City bombers, prosecutors can fail to disclose evidence and present perjured testimony (Romano, 2003; Thomas, 2001).

Second, the organizational structure common to trust relationships includes hierarchy, specialization, and internal diversification—all of which mask illicit acts and block the flow of information, not only from outsiders but also from insiders as well (Shapiro, 1990). For example, ADAs in midsize to large offices are often responsible for certain types of cases or cases from certain geographical areas (Flemming et al., 1992). This segmentation could allow prosecutors to act in bad faith without internal checks (B. A. Green & Zacharias, 2004). Third, the outputs of trust relationships provide few red flags indicating violation. In other words, an outcome (or process) that involves misconduct may look exactly like a legitimate outcome or process (Shapiro, 1990). Consequently, misconduct can be concealed as discretionary decision making. Violations such as nondisclosure or allowing perjured testimony are very difficult to detect because the violations are based on the prosecutors’ discretion and knowledge. Finally, trust services are typically carried out and recorded in documents that can be destroyed or easily falsified (Shapiro, 1990). Demonstrating prosecutorial misconduct often requires, for example, uncovering documents that prove that evidence was not turned over or documents that show that the prosecutor made a deal with a witness.

Punishment Structure

In addition to the opportunities created by the organizational structure, trust relationships also bring about formal punishment structures that make misconduct a

viable option. Punishment structures are particularly important because the attractiveness of misconduct is strongly influenced by perceptions of the certainty and severity of punishment (Nagin, 1998). Perceptions, although not always in line with reality, will necessarily be based on the actual structure and imposition of available sanctions (Keppler & Nagin, 1989). Shapiro (1990) argued that accountability and punishment are difficult within trust relationships because, one, agents can easily diffuse culpability for their misdeeds to others or to the nature of their position; and, two, enforcers are reluctant to destroy the organizational apparatus through individual sanctioning (see also Hagan & Parker, 1985). The trust relationship enjoyed by prosecutors similarly leads to an underused and ineffective system of sanctions including appellate review and reversal, professional or judicial sanctions, civil penalties, and criminal prosecution (Lawless, 2003; Meares, 1995).

Appellate review and reversal. The Supreme Court has held that if prosecutorial misconduct violates a defendant's right to due process, federal appeals courts must reverse the conviction unless the "error was harmless beyond reasonable doubt" (*Chapman v. California*, 1967). If harmless, appeals courts must ignore the error in the interest of the "prompt administration of justice" (*United States v. Hastings*, 1983). Circuit courts use a variety of factors to determine so-called harmless error, such as the severity of the misconduct, the curative measures taken by the trial court, whether the weight of the evidence made conviction certain absent the improper conduct, and the impact on the jury (Hetherington, 2002). In general, courts are reluctant to use reversal as a means to discipline prosecutors because of concern for finality and trial resources (Gershman, 1985).

Professional or judicial sanctions. State bar associations or disciplinary agencies can provide professional sanctions (such as censure, temporary suspension, or permanent disbarment) for prosecutors who engage in misconduct. However, bar associations, interested in upholding the credibility of the legal profession, infrequently sanction prosecutors for misconduct (Meares, 1995). The 1999 investigation by the *Chicago Tribune* found that of 381 convictions that were reversed on appeal because of misconduct, not one single prosecutor received a public

sanction from the state disciplinary agency and only two were privately censured (Armstrong & Possley, 1999a, p. 1). Internal review offices are also often ineffective in sanctioning misconduct because of lack of will or resources (Abramowitz & Scher, 1998; Meares, 1995).

In addition, courts are unwilling to use judicial sanctions (such as contempt of court, fines, public reprimand, suspension and/or recommendation for a professional investigation) to punish prosecutors for misconduct. Rarely do courts identify the violating prosecutor by name, and when they do, the court writes an unpublished opinion (Ferguson-Gilbert, 2001).

Civil penalties. Prosecutors are granted wide immunity from civil suits, even if their conduct at trial is unlawful and malicious or causes direct harm to defendants. The courts hold that for prosecutors to fulfill their duties as advocates they must be free from the threat of litigation (*Imbler v. Pachtman*, 1976). Consequently, victims of wrongful convictions can rarely sue the individual prosecutors responsible for their convictions.

Criminal prosecution. Criminal sanctions for misconduct are practically nonexistent. In one rare case, a prosecutor who was convicted of fabricating evidence, withholding evidence, and knowingly introducing misleading and perjured testimony received a US \$500 fine and an official censure from the court (Hessick, 2002). The criminal prosecution of prosecutors creates a conflict of interest because the state attorney's office is usually responsible for initiating criminal proceedings against prosecutors, yet doing so is tantamount to prosecuting one of their own—thereby bringing public scrutiny to the office as a whole. In addition, the individuals charged with investigating and indicting the prosecutor may be current or former coworkers of the accused.

Dynamics of Choice

The negligible likelihood of detection, punishment or official rebuke, coupled with ambiguous professional standards, creates opportunities for prosecutorial misconduct. However, despite the opportunities trust relationships provide for misconduct, many, if not most, agents adhere to the norms of trust. A rational choice framework suggests that, in general, agents make decisions to violate

the norms of trust loosely based on the expectation that their choice will provide benefits with minimal risk (for a review, see Tallman & Gray, 1990). Alternatively, a framework of “bounded rationality” suggests that actors do not always maximize outcomes but choose the first alternative that is “good enough” (Simon, 1979). Either way, agents’ evaluation of their options is influenced by the ethical context of the decision and moral considerations.

Ethical Environment

Theorists of occupational crime recognize that choice to engage in illegal activity on the job often depends on the ethical climate of the workplace (McKendall & Wagner, 1997). Coleman (1987) noted that members of professions such as medicine and law enforcement are expected to identify with their profession, support their colleagues, and work to advance their common interests. The more insular a work-related subculture, the easier it is for members of the subculture to “maintain a definition of certain criminal activities as acceptable or even required behavior, when they are clearly condemned by society as a whole” (Coleman, 1987, p. 423).

Prosecutors function within the subculture of law enforcement in their district and the occupational subculture of prosecutors in general. Some initial work on these subcultures suggests that law enforcement officers are isolated, insular, and defend each other to outsiders (Jackall, 1997). This behavior may be reinforced by conservator-style DA offices, where ADAs are chosen for their similar views (Flemming et al., 1992). The tendency to defend other prosecutors’ actions is evidenced, in part, by a pattern among prosecutors to defend police officer testimony and resist postconviction claims of innocence in the face of new evidence highly suggestive of innocence (Liptak, 2003; Medwed, 2004; Possley & Mills, 2003). For example, in spite of the resignation of the ADA assigned to defend Rolando Cruz’s conviction (because of her belief that Cruz was innocent), the Illinois Attorney General stated

It is not for me to look at the record and make a ruling . . . a jury has found this individual guilty and given him the death penalty. It is my role to see to it that it is upheld. That’s my job. (Frisbie & Garnett, 1998, p. 224)

Prosecutors also work within their immediate organizational subculture that can vary on the value placed on punishment and/or efficiency and inform office practices such as charging or plea bargaining (Flemming et al., 1992). As one former ADA commented about prosecutors who place a high value on punishment:

They cannot make the distinction, in my opinion, between innocence and not guilty, and there is a distinction. An innocent man never committed the crime; a not guilty one cannot be proved without a reasonable doubt. They say he’s either innocent or he’s guilty. There is no middle ground. There’s no not guilty. (Flemming et al., 1992, p. 42)

On the other hand, an organizational culture that places equal emphasis on punishment and efficiency reinforces prosecutors’ “reasonableness” and concern with fairness (Flemming et al., 1992, p. 44). Finally, the culture of the so-called court community could either encourage or constrain misconduct (Eisenstein et al., 1988).

Moral Considerations

The values, attitudes, and beliefs that individuals bring to the workplace also play a role in “determining which of the definitions they learn on the job become part of their taken-for-granted reality . . . and which are rejected out of hand” (Coleman, 1987, p. 423). Consequently, even when the workplace defines motivations and opportunities for illegality as acceptable, individual actors have the capacity to reject them because of earlier socialization on acceptable behavior (McKendall & Wagner, 1997; Paternoster & Simpson, 1993). However, some actors bring attitudes to the workplace that make it easier for them to construe misbehavior as right. Prosecutors who engage in misconduct may exhibit orienting attitudes and beliefs that neutralize normative constraints on misconduct. For example, some prosecutors could have preconceived notions of the prototypical criminal because of media portrayals of young African-American men as criminals (Russell, 1998) and residential segregation by race (therefore limiting their exposure to people of color; Massey & Nancy, 1993). As suggested by analysts of prosecutorial

decision making in routine situations (Albonetti, 1986; Farrell & Holmes, 1991; Sudnow, 1965), these preconceived notions then play out in criminal investigations (as, e.g., when police and prosecutors focus their investigations in minority communities), and decisions to prosecute (as when prosecutors feel justified in ignoring signs of innocence because the suspect fits the criminal profile; Lofquist, 2001). Conversely, those who become prosecutors without racial prejudices or with the goal of increasing social justice may be less likely to take advantage of opportunities for misconduct (see Smith, 2001, for a discussion of so-called well-intentioned prosecutors).

Conclusion: Studying Prosecutorial Misconduct

The report by the Center for Public Integrity concludes that prosecutors in all 2,341 jurisdictions in the United States “have stretched, bent or broken rules to win convictions” (Weinberg et al., 2005, p. 2). The theory of prosecutorial behavior presented here explains why misconduct is potentially widespread and why some prosecutors (or DA’s offices) are more likely to engage in misconduct than others. The theory develops from the intrinsic nature of the trust relationship between prosecutors and the public that requires prosecutors to act for the public and adhere to the norms of trust—disclosure, disinterestedness, and role competence. However, prosecutors’ trust relationship with the public is inherently conflictual as prosecutors strive to be successful in their roles.

Prosecutors’ misbehavior depends on the confluence of motivation, opportunity and choice—thus emphasizing the structural realities of the occupation and the agency of prosecutors. Motivation to engage in misconduct is a result of prosecutors’ definitions of success, which are influenced by the reward structure and the availability of techniques of neutralization. Opportunities for misconduct arise because of the organization of the prosecutorial role and weak informal and formal sanctions for prosecutors’ behavior. Finally, prosecutors’ decision to engage in misconduct, given the motivation and opportunity, depends on their evaluation of existing opportunities for rewards and risks, which is influenced by their workplace subculture and their values and beliefs.

Generating Hypotheses

Although the nature of the prosecutorial profession creates opportunities for misconduct through lack of informal and formal social control, variation in the organizational structure of prosecutors’ offices allows for variation in the probability that prosecutors will decide to misbehave. Thus, it can be hypothesized that opportunities for misconduct will be more available if (a) the jurisdiction has no guidelines (or underemphasized guidelines) for prosecutorial decision making, (b) the organization of the DA’s office is highly compartmentalized and provides little daily supervision of prosecutors, or (c) the DA’s office lacks an effective internal (or external) review system. Individual prosecutors will also vary in how they define success and interpret their situation. Prosecutors are more likely to positively evaluate opportunities to engage in misconduct if (d) they face a competitive reward structure or evaluations based on the number of convictions they win, (e) they feel political pressure to win convictions, or (f) they adopt available neutralizations for misbehavior. Finally, the context of prosecutors’ evaluation of opportunities for misconduct will increase the likelihood of misconduct if (g) prosecutors are firmly embedded in law enforcement culture, (h) the DA’s office culture emphasizes punishment over fairness, and (i) prosecutors hold prejudices against minority group members.

Developing a Research Agenda

Testing these hypotheses will require multiple research projects with different foci. For example, to learn which organizational variables affect prosecutorial misconduct, researchers could survey a national sample of DA offices to gather information on hiring and promotion policies, size, internal organizational structure, existence of guidelines, office political affiliation, and presence of internal review system. Researchers could then test for correlations between these variables and the jurisdictions’ number of cases appealed that include claims of misconduct during a specific time frame. Researchers could also use a comparative case study method to identify organizational factors in misconduct by selecting for variation on the dependent variable.

Ethnography or comparative ethnography of prosecutors’ offices could uncover how prosecutors manage

their dual role and whether they employ neutralizations if they subvert the law. Although it is difficult to generalize from a few cases, ethnographies can help refine theories of prosecutorial misbehavior, just as Sudnow's (1965) classic ethnography did 40 years ago. Only through systematic observation of the daily routine and narratives of prosecutors can researchers identify the meanings prosecutors attach to winning, succeeding, losing, and/or sanctions.

Finally, researchers could also replicate the self-report survey methods of occupational crime research to identify individual-level factors that contribute to misconduct. Survey questions could solicit information about why prosecutors chose their profession, their prejudices, values, ambitions, and their degree of embeddedness in law enforcement culture. Researchers could look for which of these factors correlate with prosecutors' own admission of various types of misbehavior. Self-report surveys could also provide a benchmark for future research.

Most studies of prosecutorial behavior were completed before the mid-1980s, yet prosecutors' circumstances have changed dramatically in the past 20 years. With the proliferation of sentencing guidelines, mandatory minimum sentences, and truth-in-sentencing legislation, prosecutors' decisions about who and what to charge have increasing consequences for defendants, their families, and crime victims (Zimring, Hawkins, & Kamin, 2001). Although DNA technology now provides the occasional ability to detect wrongful convictions because of misconduct, most defendants have little recourse if wrongfully convicted. Thus it is vitally important that research begin anew on this topic. The alternative is the continued conviction of innocent people through prosecutorial misconduct and the eventual undermining of the legal system through the loss of the public's trust.

Notes

1. See, for example, the following news stories. In October 2003 and April 2005, a federal district court judge in Boston released two mafia members because of federal prosecutors' "extraordinary misconduct" (Murphy, 2005). In January of 1999, the *Chicago Tribune* ran a 5-part series titled "Trial & Error: How Prosecutors Sacrifice Justice to Win." The *Tribune* investigation found that since 1963, 381 people have had their convictions for homicide overturned because of prosecutorial misconduct

during trial. Sixty-seven of those defendants were sentenced to death (Armstrong & Possley, 1999e). The *Pittsburgh Post-Gazette* published a similar 10-part series in 1998 titled "Win at All Costs" that exposed systematic misconduct in the federal prosecutor's office.

2. In addition this argument focuses on wrongdoing designated by the courts as "misconduct" (such as personal remarks or remarks promoting bias, and improper conduct around the facts of the case). Even though this type of misconduct is often in contention, it differs from behavior that is deemed "unethical" by some, but not misconduct by the courts (see Smith, 2001). Thus the argument does not address practices of overcharging or undercharging (Alschuler, 1968; Brunk, 1979; Meares, 1995).

3. For a recent review of examples, see Ferguson-Gilbert, 2001, p. 291.

4. Feminist criminologists have been especially concerned with the decision making around domestic violence and sexual assault cases (Frohmann, 1991, 1997; Spears & Spohn, 1996; Spohn, Beichner, & Davis-Frenzel, 2001).

5. The Supreme Court has established that prosecutors' deliberate use of perjured testimony violates due process constitutionally guaranteed to defendants (*Mooney v. Holohan*, 1935). The Court later ruled that prosecutors' failure to correct testimony known to be false (*Alcota v. Texas*, 1957) and false testimony on witness credibility (*Napue v. Illinois*, 1959) also violates due process.

6. Rules of disclosure at a minimum require that prosecutors turn over to the defense statements made by the defendant, the defendant's prior record, documents, objects and reports to be used at trial, and expert witness testimony (see Federal Rule of Criminal Procedure, Rule 16[a]).

7. In *Brady v. Maryland* (1963) the Supreme Court held that a defendant's due process is violated when the prosecution suppresses evidence requested by the defense that is "material either to guilt or punishment" irrespective of the intentions of the prosecution (p. 87). This includes evidence that could impeach a government witness (*Giglio v. United States*, 1972). Later, the Court defined evidence as "material" if there is "reasonable probability" that the result of the proceeding would have been different if the evidence had been disclosed (*United States v. Bagley*, 1985, p. 82). When evidence is not specifically requested by the defense, prosecutors must disclose evidence of "sufficient probative value" to create reasonable doubt as to guilt (*United States v. Agurs*, 1976). In addition, prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" (*Kyles v. Whitley*, 1995, p. 421). The *Brady* rule includes evidence relevant to sentencing proceedings

(*Banks v. Dretke*, 2004) and evidence discovered postconviction if it “casts doubt upon the correctness of the conviction” (*Imbler v. Pachtman*, 1976, p. 427).

8. G. S. Green (1990) defined *occupational crime* as “any act punishable by law which is committed through opportunity created in the course of an occupation that is legal” (p. 12). Early conceptions of occupational crime hinged on the violation of delegated or implied trust (Sutherland, 1940).

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DISCUSSION QUESTIONS

1. Why does Schoenfeld focus on prosecutorial misconduct during pretrial discovery, trial, and posttrial appeals?
2. Summarize in your own words what the Supreme Court said about the role of the prosecutor in *Berger v. United States* (1935).
3. Explain how "violations of the trust relationship" create the three categories of misconduct that Schoenfeld discusses (personal remarks, remarks promoting bias, and improper conduct around the facts in the case).
4. Describe the dual role that the prosecutor plays, and explain how this leads to misconduct.
5. Schoenfeld states that "prosecutors' motivation to engage in misconduct is structured by the meanings they attach to so-called success, their perceived expectations of their role as prosecutors, and the availability of neutralizations for misbehavior." Explain how each of these motivates prosecutors to engage in misconduct.
6. Discuss the sanctions for prosecutorial misconduct, and explain why Schoenfeld characterizes them as "underused and ineffective."
7. You have been asked to submit a grant application to the National Science Foundation for a study of prosecutorial misconduct. Explain who you will study and how you will collect data on misconduct.