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Why Prosecutors Misbehave

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The authors—perhaps the nation's top authority on prosecutorial misconduct—raises and analyzes two questions: Why does this misconduct occur? (It often pays off.) And why does it continue? (There are no effective sanctions.)

The duties of the prosecuting attorney were well-stated in the classic opinion of Justice Sutherland fifty years ago.[1] The interest of the prosecutor, he wrote, "is not that he shall win a case, but that justice shall be done. 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."[2]

Despite this admonition, prosecuters continue to strike "foul blows," perpetuating a disease which began long before Justice Sutherland's oft-quoted opinion. Indeed, instances of prosecutorial misconduct were reported at least as far back as 1897,[3] and as recently as the latest volume of the *Supreme Court Reporter*.[4] The span between these cases is replete with innumerable instances of improper conduct of the prosecutor, much of which defies belief.

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[1] Berger v. United States, 295 U.S. 78 (1935).

[2] *Id.* at 88.

[3] See Dunlop v. United States, 165 U.S. 486 (1897), where the prosecutor, in an obscenity case, argued to the jury "I do not believe that there are twelve men that could be gathered by the venire of this court . . . , except where they were bought and perjured in advance, whose verdict I would not be willing to take. . . ." *Id.* at 498. Following this remark, defense counsel objected and the court held that statement to be improper.

[4] See Caldwell v. Mississippi, 105 S. Ct. 2633 (1985) (improper argument to capital sentencing jury); United States v. Young, 105 S. Ct. 1038 (1985) (improper argument but not plain error).

One of the leading examples of outrageous conduct by a prosecutor is *Miller v. Pate*,[5] where the prosecutor concealed from the jury in a murder case the fact that a pair of undershorts with red stains on it, a crucial piece of evidence, were stained not by blood, but by paint. Equally startling is *United States v. Perry*,[6] where the prosecutor, in his summation, commented on the fact that the "defendants and their counsel are completely unable to explain away their guilt."[7] Similarly, the *Dubose v. State*,[8] the prosecutor argued to the jury: "Now, not one sentence, not one scintilla of evidence, not one word in any way did this defendant or these attorneys challenge the credibility of the complaining witness."[9] At a time when it should be clear that constitutional and eithical standards prevent prosecutors from behaving this way,[10] we ought to question why prosecutors so frequently engage in such conduct.

Much of the above misconduct occurs in a courtroom. The terms "courtroom" or "forensic misconduct" have never been precisely defined. One commentator describes courtroom misconduct as those "types of misconduct which involve efforts to influence the jury through various sorts of inadmissible evidence."[11] Another commentator suggests that forensic misconduct "may be generally defined as any activity by the prosecutor which tends to divert the jury from making its determination of guilt or innocence by weighing the legally admitted evidence in the manner prescribed by law."[12] For purposes of

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[5] 386 U.S. 1 (1967). In this case, the Supreme Court overturned the defendant's conviction after the Court of Appeals for the Seventh Circuit had upheld it. The Court noted that the prosecutor "deliberately misrepresented the truth," and that such behavior would not be tolerated under the Fourteenth Amendment. *Id.* at 67.

[6] 643 F.2d 38 (2d Cir. 1981).

[7] *Id.* at 51.

[8] 531 S.W.2d 330 (Texas 1975).

[9] *Id.* at 331. The court noted that the argument was clearly a comment on the failure of the defendant to testify at trial.

[10] See Griffin v. California, 380 U.S. 609 (1965), where the Supreme Court applied the Fifth Amendment to the states under the Fourteenth Amendment.

[11] Alschuler, "Courtroom Misconduct by Prosecutors and Trial Judges," 50 Tex. L. Rev. 627, 633 (1972).

[12] Note, "The Nature and Function of Forensic Misconduct in the Prosecution of a Criminal Case," 54 Col. L. Rev. 946, 949 (1954).

this analysis, the latter definition applies, as it encompasses a broader array of behavior which can be classed as misconduct. As will be seen, prosecutorial misconduct can occur even without the use of inadmissible evidence.

This article will address two aspects of the problem of courtroom misconduct. First, it will discuss why prosecutors engage in courtroom misconduct, and then why our present system offers little incentive to a prosecutor to change his behavior.

Why Misconduct Occurs?

Intuition tells us that the reason so much courtroom misconduct by the prosecutor[13] occurs is quite simple: it works. From my experience as a prosecutor for ten years, I would hypothesize that most prosecutors deny that misconduct is helpful in winning a case. Indeed, there is a strong philosophical argument that prosecutorial misconduct corrupts the judical system, thereby robbing it of its legitimacy. In this regard, one would probably be hard pressed to find a prosecutor who would even mention that he would consider the thought of some form of misconduct.

Nonetheless, all of this talk is merely academic, because as we know, if only from the thousands of cases in the reports, courtroom misconduct does occur. If the prosecutor did not believe it would be effective to stretch his argument to the ethical limit, and then risk going beyond that ethical limit, he would not take the risk.

Intuition aside, however, several studies have shown the importance of oral advocacy in the courtroom, as well as the effect produced by such conduct. For example, the student of trial advocacy often is told of the importance of the opening statement. Prosecutors would undoubtedly agree that the opening statement is indeed crucial. In a University of Kansas study,[14] the importance of the opening statement was con-

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[13] Of course, there is also a significant amount of defense misconduct which takes place. In this respect, for an interesting article which takes a different approach than this article, see Kamm, "The Case for the Prosecutor," 13 U. Tol. L. Rev. 331 (1982), where the author notes that "courts carefully nurture the defendant's rights while cavalierly ignoring the rights of the people."

[14] Pyszczynski, "The Effects of Opening Statement on Mock Jurors' Verdicts in a Simulated Criminal Trial," 11 J. Applied Soc. Psychology 301 (1981).

firmed. From this study, the authors concluded that, in the course of any given trial,[15] the jurors were affected most by the first strong presentation which they saw. This finding leads to the conclusion that if a prosecutor were to present a particularly strong opening argument, the jury would favor the prosecution throughout the trial. Alternatively, if the prosecutor were to provide a weak opening statement, followed by a strong opening statement by the defense, then, according to the authors, the jury would favor the defense during the trial. It thus becomes evident that the prosecutor will be best served by making the strongest opening argument possible, thereby assisting the jury in gaining a better insight into what they are about to hear and see. The opportunity for the prosecutor to influence the jury at this point in the trial is considerable, and virtually all prosecutors would probably attempt to use this opportunity to their advantage, even if the circumstances do not call for lengthy or dramatic opening remarks.[16]

An additional aspect of the prosecutor's power over the jury is suggested in a University of North Carolina study.[17] This study found that the more arguments counsel raises with respect to the different substantive arguments offered, the more the jury will believe in that party's case. Moreover, this study found that there is not necessarily a correlation between the amount of objective information in the communication and the persuasiveness of the presentation.

For the trial attorney, then, this study clearly points to the advantage of raising as many issues as possible at trial. For the prosecutor, the two studies taken together would dictate an "action packed" opening statement, containing as many arguments that can be mustered, even those which might be irrelevant or unnecessary to convince the jury of the defendant's guilt. The second study would also dictate the same strategy for the closing argument. Consequently, a prosecutor who, through use

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[15] All of the cited studies include within the report a caveat about the value of the study when applied to a "real world" case. Nonetheless, they are still worthwhile for the purpose of this analysis.

[16] In some jurisdictions, attorneys may often use the voir dire to accomplish the goal of early influence of the jury.

[17] Calder, "The Relation of Cognitive and Memorial Processes to Persuasion in a Simulated Jury Trial," 4 J. Applied Soc. Psychology 62 (1974).

of these techniques, attempts to assure that the jury knows his case may, despite violating ethical standards to seek justice,[18] be "rewarded" with a guilty verdict. Thus, one begins to perceive the incentive that leads the prosecutor to misbehave in the courtroom.[19]

Similar incentives can be seen with respect to the complex problem of controlling evidence to which the jury may have access. It is common knowledge that, in the course of any trial, statements frequently are made by the attorneys or witnesses, despite the fact that these statments may not be admissible as evidence. Following such a statement, the trial judge may, at the request of opposing counsel, instruct the jury to disregard what they have heard. Most trial lawyers, if they are candid, will agree that it is virtually impossible for jurors realistically to disregard these inadmissible statements. Studies here again demonstrate that our intuition is correct, and that this evidence often is considered by jurors in reaching a verdict.

For example, an interesting study conducted at the University of Washington[20] tested the effects of inadmissible evidence on the decisions of jurors. The authors of the test designed a variety of scenarios whereby some jurors heard about an incriminating piece of evidence while other jurors did not. The study found that the effect of the inadmissible evidence was directly correlated to the strength of the prosecutor's case. The authors of the study reported that when the prosecutor presented a weak case, the inadmissible evidence did, in fact, prejudice the jurors. Furthermore, the judge's admonition to the jurors to disregard certain evidence did not have the same effect as when the evidence had not been mentioned at all. It had a prejudicial impact anyway.

However, the study also indicated that when there was a strong prosecution case, the inadmissible evidence had little, if any, effect.[21] Nonetheless, the most significant conclusion from

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[18] See Model Code of Professional Responsibility EC 7-13 (1980) ("The duty of the prosecutor is to seek justice.").

[19] Of course, this may apply to other attorneys as well.

[20] Sue, "The Effects of Inadmissible Evidence on the Decisions of Simulated Jurors—A Moral Dilema," 3 J. Applied Soc. Psychology 345 (1973).

[21] Perhaps lending validity to application of the harmless error doctrine, which will be discussed later in this article.

the study is that inadmissible evidence had its most prejudicial impact when there was little other evidence on which the jury could base a decision. In this situation, "the controversial evidence becomes quite salient in the jurors' minds."[22]

Finally, with respect to inadmissible evidence and stricken testimony, even if one were to reject all of the studies discussed, it is still clear that although "stricken testimony may tend to be rejected in open discussion, it does have an impact, perhaps even an unconscious one, on the individual juror's judgment."[23] As with previously discussed points, this factor—the unconscious effect of stricken testimony or evidence—will generally not be lost on the prosecutor who is in tune with the psychology of the jury.

The applicability of these studies to this analysis, then, is quite clear. Faced with a difficult case in which there may be a problem of proof, a prosecutor might be tempted to sway the jury by adverting to a matter which might be highly prejudicial. In this connection, another study[24] has suggested that the jury will more likely consider inadmissible evidence that favors the defendant rather than inadmissible evidence that favors conviction.[25]

Despite this factor of "defense favoritism," it is again evident that a prosecutor may find it rewarding to misconduct himself in the courtroom. Of course, a prosecutor who adopts the unethical norm and improperly allows jurors to hear inadmissible proof runs the risk of jeopardizing any resulting conviction. In a situation where the prosecutor feels there is a weak case, however, a subsequent reversal is not a particularly effective sanction when a conviction might have been difficult to achieve in the first place. Consequently, an unethical courtroom "trick" can be a very attractive idea to the prosecutor who feels he must win.[26] Additionally, there is always the possibility of

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[22] Sue, note 20 *supra*, at 351.

[23] Hastie, *Inside the Jury* 232 (1983).

[24] Thompson, "Inadmissible Evidence and Juror Verdicts," 40 J. Personality & Soc. Psychology 453 (1981).

[25] The author did note that the defendant in the test case was very sympathetic and that the results may have been different with a less sympathetic defendant.

[26] Of course, this begs the question: "Is there a prosecutor who would take a case

another conviction even after an appellate reversal. Indeed, while a large number of cases are dismissed following remand by an appellate court, nearly one half of reversals still result in some type of conviction.[27] Therefore, a prosecutor can still succeed in obtaining a conviction even after his misconduct led to a reversal.

An additional problem in the area of prosecutor-jury interaction is the prosecutor's prestige; since the prosecutor represents the "government," jurors are more likely to believe him.[28] Put simply, prosecutors "are the good guys of the legal system,"[29] and because they have such glamour, they often may be tempted to use this advantage in an unethical manner. This presents a problem for the prosecutor in that the "average citizen may often forgive, yea urge prosecutors on in ethical indiscretions, for the end, convictions of criminals certainly justifies in the public eye any means necessary."[30] Consequently, unless the prosecutor is a person of high integrity and is able to uphold the highest moral standards, the problem of courtroom misconduct will inevitably be tolerated by the public.

Moreover, when considering the problems facing the prosecutor, one also must consider the tremendous stress under which the prosecutor labors on a daily basis. Besides the stressful conditions faced by the ordinary courtroom litigator,[31] prosecuting attorneys, particularly those in large metropolitan

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to trial and then feel that he didn't have to win?" It is hoped that, in such a situation, trial would never be an option. Rather, one would hope for an early dismissal of the charges.

[27] Roper, "Does Procedural Due Process Make a Difference?" 65 Judicature 136 (1981). This article suggests that the rate of nearly 50 percent of acquitals following reversal is proof that due process is a viable means for legitimatizing the judiciary. While this is true, the fact remains that there is still a 50 percent conviction rate after reversal, thereby giving many prosecutors a second chance to convict after their original misconduct.

[28] See People v. McCoy, 220 N.W.2d 456 (Mich. 1974), where the prosecutor, in attempting to bolster his case, told the jury that "the Detroit Police Department, the detectives in the Homicide Bureau, these detectives you see in court today, and myself from the prosecutor's office, we don't bring cases unless we're sure, unless we're positive." *Id.* at 460.

[29] Emmons, "Morality and Ethics—A Prosecutor's View," Advanced Criminal Trial Tactics 393-407 (P.L.I. 1977).

[30] *Id.*

[31] For an interesting article on the topic, see Zimmerman, "Stress and the Trial Lawyer," 9 Litigation 4, 37-42 (1983).

areas, are faced with huge and very demanding case loads. As a result of case volume and time demands, prosecutors may not be able to take advantage of opportunities to relax and recover from the constant onslaught their emotions face every day in the courtroom.[32]

Under these highly stressful conditions, it is understandable that a prosecutor occasionally may find it difficult to face these everyday pressures and to resist temptations to behave unethically. It is not unreasonable to suggest that the conditions under which the prosecutor works can have a profound effect on his attempt to maintain high moral and ethical standards. Having established this hypothesis, one can see yet another reason why courtroom misconduct may occur.

Why Misconduct Continues?

Having demonstrated that courtroom misconduct may, in many instances, be highly effective, the question arises as to why such practices continue in our judicial system. A number of reasons may account for this phenomenon. Perhaps the most significant reason for the continued presence of prosecutorial misconduct is the harmless error doctrine. Under this doctrine, an appellate court can affirm a conviction despite the presence of serious misconduct during the trial. As Justice Traynor once stated, the "practical objective of tests of harmless error is to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error."[33]

Although the definition advanced by Justice Traynor portrays the harmless error doctrine as having a most desirable consequence, this desirability is undermined when the prosecutor is able to misconduct himself without fear of sanction. Additionally, since every case is different, what constitutes harmless error in one case may be reversible error in another. Consequently, harmless error determinations do not offer any significant precedents by which prosecutors can judge the status of their behavior.

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[32] For example, the Zimmerman article suggests time off from work and "celebration" with family and friends in order to effectively induce relaxation.

[33] R. Traynor, *The Riddle of Harmless Error* 81 (1970).

By way of illustration, consider two cases in which the prosecutor implicitly told the jury of his personal belief in the defendant's guilt. In one case, the prosecutor stated, "I have never tried a case where the evidence was so clear and convincing."[34] In the other case, the prosecutor told the jury that he did not try cases unless he was sure of them.[35] In the first case the conviction was affirmed, while in the second case the conviction was reversed. Interestingly, the court in the first case affirmed the conviction despite its belief that the "prosecutor's remarks were totally out of order."[36] Accordingly, despite making comments which were "totally out of order," the prosecutor did not suffer any penalty.

Contrasting these two cases presents clear evidence of what is perhaps the worst derivative effect of the harmless error rule. The problem is that the stronger the prosecutor's case, the more misconduct he can commit without being reversed. Indeed, in the *Shields* case, the court stated that "the guilt of the defendant was clearly established not only beyond a reasonable doubt, but well beyond any conceivable doubt."[37] For purposes of our analysis, it is clear that by deciding as they do, courts often provide little discouragement to a prosecutor who believes, and rightly so, that he does not have to be as careful about his conduct when he has a strong case. The relation of this factor to the amount of courtroom misconduct cannot be ignored.

Neither can one ignore the essential absurdity of a harmless error determination. In order to apply the harmless error rule, appellate judges attempt to evaluate how various evidentiary items or instances of prosecutorial misconduct may have affected the jury's verdict. Although it may be relatively simple in some cases to determine whether improper conduct during a trial was harmless, there are many instances when such an analysis cannot properly be made, but nevertheless is made. For example, consider the situation when an appellate court is divided on whether or not a given error was harmless. In *United*

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[34] People v. Shields, 58 A.D.2d 94, 96 (N.Y.), *aff'd*, 46 N.Y.2d 764 (1977).

[35] People v. McCoy, 220 N.W.2d 456 (Mich. 1974).

[36] Shields, 58 A.D.2d at 97.

[37] *Id.* at 99.

States v. Antonelli Fireworks Co.,[38] two judges (including Judge Learned Hand) believed that the prosecutor's error was harmless. Yet, Judge Frank, the third judge sitting in the case, completely disagreed, writing a scathing dissent nearly three time the length of the majority opinion. One wonders how harmless error can be fairly applied when there is such a significant difference of opinion among highly respected members of a court as to the extent of harmfulness of trial errors. Perhaps even more interesting is the Supreme Court's reversal of the Court of Appeals for the Second Circuit's unanimous finding of harmless error in *United States v. Berger*.[39] As noted, *Berger* now represents the classic statement of the scope of the prosecutor's duties. Yet, in his majority opinion for the Second Circuit, Judge Learned Hand found the prosecutor's misconduct harmless.

The implications of these contradictory decisions are significant, for they demonstrate the utter failure of appellate courts to provide incentives for the prosecutor to control his behavior. If misconduct can be excused even when reasonable judges differ as to the extent of harm caused by such misbehavior, then very little guidance is given to a prosecutor to assist him in determining the propriety of his actions. Clearly, without such guidance, the potential for misconduct significantly increases.

The *Shields* case presents yet another factor which suggests why the prosecutor has only a limited incentive to avoid misconduct. In *Shields*, the court refused to review certain "potentially inflammatory statements" made by the prosecutor because of the failure of the defense to object.[40] Although this approch has not been uniformly applied by all courts, the implications of this technique to reject a defendant's claim are considerable. Most important, it encourages prosecutors to make remarks that they know are objectionable in the hope that defense counsel will not object. This situation recalls the previous discussion which dealt with the effect of inadmissible evidence on jurors. Defense counsel here is in a difficult predica-

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[38] 155 F.2d 631 (2d Cir. 1946).

[39] 73 F.2d 278 (1934), *rev'd*, 295 U.S. 78 (1935).

[40] Shields, 58 A.D.2d at 97.

ment. If he does not object, he ordinarily waives any appealable issue in the event of conviction. If he does object, he highlights to the jury the fact that the prosecutor has just done something which, some jurors may feel, is so damaging to the defendant that the defense does not want it brought out.

The dilemma of the defense attorney in this situation is confirmed by a Duke University study.[41] In that study, jurors learned of various pieces of evidence which were ruled inadmissible. The study found that when the judge admonished the jury to disregard the evidence, the bias created by that evidence was not significantly reduced.[42] Consequently, when a prejudicial remark is made by the prosecutor, defense counsel must act carefully to avoid damaging his client's case. In short, the prosecutor has yet another weapon, in this instance an arguably unfair aspect of the appellate process, which requires preservation of an appealable issue.[43]

A final point when analyzing why prosecutorial misconduct persists is the unavailability or inadequacy of penalties visited upon the prosecutor personally in the event of misconduct. Punishment in our legal system comes in varying degrees. An appellate court can punish a prosecutor by simply cautioning him not to act in the same manner again, reversing his case, or, in some cases, identifying by name the prosecutor who misconducted himself.[44] Even these punishments, however, may not be sufficient to dissuade prosecutors from acting improperly. One noteworthy case[45] describes a prosecutor who appeared

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[41] Wolf, "Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors," 7 J. Applied Soc. Psychology 205 (1977).

[42] Additionally of note is the fact that if the judge rules the evidence and did not admonish the jury, then the biasing effect of the evidence was eliminated. The authors of the study concluded that by being told not to consider certain evidence, the jurors felt a loss of freedom and that in order to retain their freedom, they considered it anyway. The psychological term for this effect is called reactance.

[43] Of course, this does not mean that appeals should always be allowed, even in the absence of an appealable issue. Rather, one should confine the availability of these appeals to the narrow circumstances discussed.

[44] See United States v. Burse, 531 F.2d 1151 (2d Cir. 1976), where the court named the prosecutor in the body of its opinion.

[45] United States v. Drummond, 481 F.2d 62 (2d Cir. 1973).

before the appellate court on a misconduct issue for the third time, each instance in a different case.

Perhaps the ultimate reason for the ineffectiveness of the judicial system in curbing prosecutorial misconduct is that prosecutors are not personally liable for their misconduct. In *Imbler v. Pachtman*,[46] the Supreme Court held that "in initiating a prosecution and in presenting the state's case, the prosecutor is immune from a civil suit for damages under Section 1983."[47] Furthermore, prosecutors have absolute, rather than a more limited, qualified, immunity. Thus, during the course of a trial, the prosecutor is absolutely shielded from any civil liability which might arise due to his misconduct, even if that misconduct was performed with malice.

There is clearly a need for some level of immunity to be accorded all government officials. Without such immunity, much of what is normally done by officials in authority might not be performed out of fear that their practices are later deemed harmful or improper. Granting prosecutors a certain level of immunity is reasonable. Allowing prosecutors to be completely shielded from civil liability in the event of misconduct, however, provides no deterrent to courtroom misconduct.

Conclusion

This analysis was undertaken to determine why the issue of misconduct seems so prevalent in the criminal trial. For the prosecutor, the temptation to cross over the allowable ethical limit must often be irresistible because of the distinct advantages that such misconduct creates in assisting the prosecutor to win his case by effectively influencing the jury. Most prosecutors must inevitably be subject to this temptation. It takes a constant effort on the part of every prosecutor to maintain the high moral standards which are necessary to avoid such temptations.

Despite the frequent occurrences of courtroom misconduct, appellate courts have not provided significant incentives, to the prosecutor to avoid misconduct. It is not until the courts decide

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[46] 424 U.S. 409 (1976).

[47] *Id.* at 431. 42 U.S.C. § 1983 authorizes civil actions against state officials who violate civil rights "under color of state law."

to take a stricter, more consistent approach to this problem, that inroads will be made in the effort to end it. One solution might be to impose civil liability on the prosecutor who misconducts himself with malice. Although this will not solve the problem, it might be a step in the right direction.